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The Scottish Parliament

Economy, Energy and Tourism Committee

5th Report, 2009 (Session 3)

Stage 1 report on the Arbitration (Scotland) Bill

Published by the Scottish Parliament on 18 June 2009

The Scottish Parliament

Economy, Energy and Tourism Committee

5th Report, 2009 (Session 3)

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The Scottish Parliament

Economy, Energy and Tourism Committee

Remit and membership

Remit:

To consider and report on the Scottish economy, enterprise, energy, tourism and all other matters falling within the responsibility of the Cabinet Secretary for Finance and Sustainable Growth apart from those covered by the remits of the Transport, Infrastructure and Climate Change and the Local Government and Communities Committees.

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The Scottish Parliament

Economy, Energy and Tourism Committee

5th Report, 2009 (Session 3)

Stage 1 report on the Arbitration (Scotland) Bill

The Committee reports to the Parliament as follows—

1. The Arbitration (Scotland) Bill (SP Bill 19) ("the Bill") was introduced by Kenny MacAskill MSP, Cabinet Secretary for Justice, to the Scottish Parliament on 29 January 2009. The Bill was accompanied by Explanatory Notes (SP Bill 19 EN) - including a financial memorandum, a Scottish Government Statement on legislative competence and the Presiding Officer's Statement on legislative competence – and by a Policy Memorandum (SP Bill 19 PM).

2. On the recommendation of the Parliamentary Bureau, Parliament designated the Economy, Energy and Tourism Committee as lead committee to consider the Bill at Stage 1, on 25 February 2009. On 10 March 2009, the Bureau agreed to recommend to the Parliament that the Stage 1 consideration of the Bill should be completed by 26 June 2009. This was agreed to by the Parliament on the 11 March, 2009.

3. The Economy, Energy and Tourism Committee issued a call for written evidence on the Arbitration (Scotland) Bill on 20 March 2009, with a deadline of 15 May 2009. The responses received can be found in annexe D of this report.

4. The Committee heard oral evidence at three meetings—

20 May 2009

Graham Fisher, Solicitor, Hamish Goodall, Bill Team Manager, and Alison Dewar, Bill Team, Scottish Government

27 May 2009

Hew R. Dundas FCIArb, Chartered Arbitrator, President, Chartered Institute of Arbitrators (2007);

John Campbell QC FCIArb, President, Chartered Institute of Arbitrators 2009;

Neil Kelly, Representative of the Law Society of Scotland;

Robert Howie QC, and Garry Borland, Advocate, Faculty of Advocates;

Richard N.M. Anderson, Arbitrator;

Professor Fraser Davidson, Professor of Law, University of Stirling;

Brian Reeves, Dispute Resolution professional member representing the Royal Institution of Chartered Surveyors Scotland.

3 June 2009

Jim Mather MSP, Minister for Enterprise, Energy and Tourism, Hamish Goodall, Bill Team Manager, and Graham Fisher, Solicitor, Scottish Government.

5. The provisions of the Bill that confer powers to make subordinate legislation were referred to the Subordinate Legislation Committee under Rule 9.6.2 in order that the latter could report to the Economy, Energy and Tourism Committee as lead committee. In addition, the Committee received evidence submitted to the Finance Committee as part of its consideration of the Financial Memorandum. The Subordinate Legislation Committee report is attached at annexe A.

BACKGROUND TO THE BILL

The initial development of arbitration legislation

6. The evolution of the current Bill can be traced back to the 1980s. In 1986, the then Lord Advocate established a committee to consider the reform of the law, particularly given the recognition that the United Nations Commission on International Trade Law (UNCITRAL) Model Law was being accorded by those conducting or involved in international arbitrations. The outcome was the adoption of the Model Law into Scots Law for international arbitration in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990. The Lord Advocate's committee subsequently also produced a draft Bill in 1996 for domestic arbitration. An additional, more comprehensive Bill, was then developed by a working group chaired by Lord Dervaird in 2002.

7. The Scottish Government's Policy Memorandum indicates that the current Bill "has drawn from the available models of the Model Law, the UK Arbitration Act 1996 and the work done in the 2002 draft Bill."[1]

The consultation process

8. The current Scottish Government has chosen to take forward some of the reforms proposed and launched a consultation paper, which included a draft Bill, in June 2008. Only twenty nine responses were received to the consultation, a fact which the Scottish Government thought could be attributed to the specialised nature of the consultation and the lack of stakeholders engaged in arbitration. The

[1] Arbitration (Scotland) Bill. Policy Memorandum, paragraph 57. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.

Scottish Government also engaged directly with stakeholders and held two focus group meetings during the consultation period.

9. **The Committee is of the view that the Scottish Government conducted a transparent and accessible consultation and recognises, from its own experience in seeking evidence on the Bill, that interest in arbitration is restricted to a relatively small group, the majority of whom are involved in the legal profession in some capacity. It is satisfied that the Scottish Government has sought to engage with as many stakeholders as possible in developing the Bill with the caveat that the Minister must deliver on the commitment that he made to the Committee to hold further meetings with members of the legal profession and with consumer groups and trade bodies that manage existing small-scale arbitration schemes (see also paragraph 129 of this report)**.[2]

THE GENERAL PRINCIPLES OF THE BILL

10. This part of the report addresses the general principles of the Bill. It includes an initial, descriptive section on the primary objectives and the provisions of the Bill. It distinguishes between the objectives of the Bill and the detailed provision, looking at each of these areas in considerable detail.

What is arbitration?

11. Lord Hope of Craighead describes arbitration as "the method of procedure by which parties who are in dispute with each other agree to submit their dispute to the decision of one or more persons, described as 'arbiters', rather than resort to the courts of law."[3] The Scottish Government Bill team provided a more extensive definition, stating that "arbitration is a private form of dispute resolution, outside the public civil courts, in which one of more arbitrators give a binding ruling on a dispute that the parties to the dispute have agreed to refer for decision."[4] The Policy Memorandum notes that a potentially advantageous consequence of the Bill might be the reduction of pressure on the courts.[5]

12. Arbitration has a particular advantage over other forms of dispute resolution, such as mediation, in that the outcome is binding and within countries that have ratified the Geneva or New York conventions on the recognition and enforcement of arbitral awards, there is no need for further review of the issues once an award has been made.

13. Evidence to the Committee testifies to arbitration having been a historically popular form of dispute resolution in Scotland, notably in the nineteenth and early

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[2] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009,* Cols 2249-2250.
[3] Lord Hope of Craighead (1999) *Arbitration*, *The Laws of Scotland, Stair Memorial Encyclopaedia*, Edinburgh: The Law Society of Scotland, Butterworths, p.2.
[4] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 20 May 2009,* Col 2122.
[5] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 4. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.

twentieth centuries, but one that has since declined as a result of the patchy and outdated state of the current law and the development of adjudication in the construction sector as an alternative means of dispute resolution. The evidence provided to the Committee reflects a consensus that well-drafted arbitration legislation which codifies and consolidates the existing law could provide the basis for arbitration again becoming a popular form of dispute resolution in Scotland.

The objectives and provisions of the Bill

The Bill's objectives

14. At the most simple level, this Bill makes provision about arbitration. The Policy Memorandum sets out the following primary objectives of the Bill:

- Clarifies and consolidates Scottish arbitration law, filling in gaps where these exist;
- Provides a statutory framework for arbitrations which will operate in the absence of agreement to the contrary;
- Ensures fairness and impartiality in the process; and
- Minimises expense and ensures that the process is efficient.[6]

15. Domestic Scots arbitration law is currently derived primarily from case law and is not codified in statute. The Bill aims to bring both the common law and the existing statutory provisions into a single statute which also includes a set of principles and rules to govern arbitrations (the Scottish Arbitration Rules). The Bill is informed by the principles of the United Nations Commission on International Trade Law (UNICITRAL) Model Law provisions for domestic arbitration in Scotland.

16. The Bill sets out procedures, both in the sections and in the rules contained in the schedule, that are designed to provide an effective and efficient framework for conducting arbitrations. These provisions will be considered in more detail below.

17. The written evidence submitted by the Chartered Institute of Arbitrators (CIArb) Scottish Branch provides compelling evidence of the need to reform the law in order to have a consolidated and codified statutory Scots arbitration law that can be used for both domestic and international arbitrations. CIArb identify nine key shortcomings in relation to the existing law, some of which result from the difficulty in actually determining what the law is in some areas.[7]

18. The case for consolidating and codifying the law was uniformly recognised by those that gave evidence to the Committee. The Law Society of Scotland indicated that it supported the object of the Bill "in helping to promote arbitration, both from within and outwith Scotland, by effecting procedural changes to cure long-standing

[6] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 26. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.

[7] The Chartered Institute of Arbitrators (CIArb) Scottish Branch. Written submission to the Economy, Energy and Tourism Committee.

weaknesses in the common law powers of the arbitrator and to make improvements to eliminate other perceived defects."[8]

19. Consumer Focus Scotland recognised the potential public benefit that could derive from the Bill, pointing out that people generally preferred to avoid becoming involved in legal and court processes. While Consumer Focus Scotland had focused primarily on the benefits of mediation, it expressed the belief that "the increased availability of a variety of alternative methods of dispute resolution, including arbitration, would be an important step towards achieving better access to justice for consumers in Scotland.[9]

20. A further argument supporting the case for consolidating and codifying the law in relation to arbitration is that premised on the potential that an up-to-date and effective law can have in making Scotland a location that can compete with other countries in attracting international arbitrations. The Policy Memorandum notes that "Scotland is one of only a few developed countries that lacks a statutory basis for its law of arbitration."[10] This point was reinforced by the Scottish Government Bill team in evidence to the Committee. A member of that team argued that "if the Bill is not enacted, arbitration in Scotland may die out completely, at a time when the use of arbitration in other parts of the world is increasing – dramatically so in some places."[11]

21. **The Committee recognises the need to reform the law and the potential that a consolidated and codified law can offer in making Scotland a "player" on the international stage in terms of attracting international arbitrations. Nevertheless, it also considers that the Bill must be structured and drafted in such a way that ensures that arbitration law does not need to be revisited in the near future. In this context, the Committee is particularly concerned by the supplementary evidence submitted by the Faculty of Advocates, which identifies a number of substantive considerations in relation to the Bill, as well as points relating to the drafting. Thus, while recognising and accepting the need for legislation relating to arbitration, the Committee also considers that there is a need to ensure that this legislation does not have unintended consequences that may result in a need to revisit the legislation in the future.**

22. In addition to the primary objective of consolidating and codifying arbitration law, there is also a strong economic objective. The Policy Memorandum expresses a hope that "the Bill – once enacted – will encourage the use of arbitration domestically and will attract international arbitration business to Scotland".[12] In addition to attracting more international arbitrations, it is also hoped

[8] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.
[9] Consumer Focus Scotland. Written submission to the Economy, Energy and Tourism Committee.
[10] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 8. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.
[11] Scottish Parliament. Economy, Energy and Tourism Committee. *Official Report, 20 May 2009*, Col 2126.
[12] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 28. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.

that the provisions relating to domestic arbitration will facilitate the establishment of low-cost arbitration schemes by industries, trades and professions and extend its use in relation to commercial leases and other disputes linked to property maintenance and management.

23. In oral evidence to the Committee, Scottish Government officials stressed that the Bill supported the Scottish Government's key priority of enhancing sustainable economic growth in Scotland, arguing that—

> "In the interests of continuing and increasing economic growth, Scotland needs the means to facilitate the speedy and effective resolution of those disputes at a cost that is economically viable. Arbitration is one of those methods."[13]

24. The issue of the potential economic benefit to Scotland that could accrue from the Arbitration (Scotland) Bill once it had passed through the parliamentary scrutiny process and been enacted was discussed at some length in oral evidence.

25. The Bill team articulated the position that any economic benefit would be contingent on attracting arbitrations to Scotland. As such, a Scottish Government official stated "Ministers cannot guarantee that simply reforming the law on arbitration in Scotland will have the effect of increasing the domestic use of arbitration or attracting international arbitration business to Scotland, because that is largely up to arbitration practitioners and those who see benefits in using arbitration as a method of commercial dispute resolution."[14]

26. Nevertheless, in his evidence to the Committee, the Minister for Enterprise, Energy and Tourism stated—

> "As disputes are inevitable in business, efficient, cost-effective methods of dispute resolution are required. Arbitration is one of those, as it can be tailored to the circumstances of the dispute. In that vital function, it delivers another benefit—that of preserving the business relationship between the parties. To add to the economic benefit, there is potential for tourism. If international arbitration is attracted to Scotland, hotels, restaurants, transport, retail and so on will benefit."[15]

27. The Chartered Institute of Arbitrators Scottish Branch submitted somewhat more ambitiously that "Scotland has the almost unique combination of a pleasant place, expert lawyers, reasonable hourly rates [much lower than London or New

[13] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 20 May 2009*, Col 2122.
[14] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 20 May 2009*, Col 2126.
[15] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 3 June 2009*, Col 2236.

York], good venues and, above all, [once the Bill becomes law] a thoroughly up-to-date set of Arbitral Rules."[16]

28. Both the Policy Memorandum and the Financial Memorandum contain the estimate that the City of London attracts around £3 billion worth of arbitration business annually, the majority of which is international arbitration. The Policy Memorandum states that "if even a small fraction of that business could be attracted to Scotland, this would provide a significant boost to the Scottish economy."[17] In evidence to the Committee however, the Bill team quoted a lower figure of £250 million of arbitration work being carried out annually in London. CIArb also used the figure of £250 million in its evidence to the Finance Committee.

29. CIArb attempted to quantify the potential economic benefits "within a reasonably short time after the Bill has come into force." These benefits were divided between those arising out of a reduced number of court cases (estimated at 8,250 fewer court hours and lower costs for legal representation) and those arising from an increase in the number of international arbitrations conducted in Scotland. CIArb calculated that if Scotland could attract 10% of value of arbitrations currently conducted in London (the 10% calculation is based on the size of the Scottish population in proportion to England), then this would represent a potential £25 million of new business to Scotland, although lower legal costs in Scotland meant that a minimum of £15 million represented a more realistic figure.[18]

30. The basis for the calculation of the additional economic benefit deriving from an increased number of international arbitrations being located in Scotland was interrogated by the Committee. CIArb defended its position, arguing—

> "In its submission, the Chartered Institute of Arbitrators tried as far as it could to differentiate between domestic and international arbitrations; to quantify the value of that work to London; and then to apply a pro rata reduction to reflect the fact that professional fees in Scotland are lower. The figures that we came up with are set out on pages 4 and 5 of our submission. Since we made the submission, we have tested the figures—privately, of course—with our colleagues and have sought their rigorous criticism. As no one has demurred materially from the figures, I am reasonably satisfied that they are fairly robust and can be relied on."[19]

31. In discussions during Committee meetings, Robert Howie QC of the Faculty of Advocates said that the Parliament needed "to be a little cautious about

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[16] The Chartered Institute of Arbitrators Scottish Branch, written submission to the Economy, Energy and Tourism Committee.
[17] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 41. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.
[18] The Chartered Institute of Arbitrators Scottish Branch. Written submission to the Economy, Energy and Tourism Committee.
[19] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 27 May 2009*, Cols 2158-2159.

making assumptions of the commercial and financial benefits that would accrue from changing the legislation."[20] He further stated that—

> "The brute fact is that, if you are competing with London, you are competing with one of the major international centres that will always tend to sweep up the big and highly profitable work that would bring in money and invisible earnings of the variety that you are talking about. It is true that costs are lower here, but there has to be a degree of caution about saying, "Costs are lower here, so that will encourage work to come in, if we but change the law." I suspect that it may prove to be not quite so simple."[21]

32. **Whilst the Committee applauds any attempt to reduce the pressure on the Scottish Courts, it is cautious in considering that this will result automatically from the provisions of the Bill, if enacted. It supports the intent of the Scottish Government in this respect, but remains to be convinced that there will be a significant savings of court time.**

33. **The Committee does not believe that it is possible to quantify the value of the potential arbitration business that may be attracted to Scotland by the provisions in the Bill. It considers that there are too many independent, and often intangible, variables that will affect any increase in arbitration business in Scotland. While it recognises that the marketing efforts of the Chartered Institute of Arbitrators in Scotland may help to attract business to Scotland, it does not foresee that any immediate or significant gains can be predicted in the near future, however valuable this would be to the economy. The Committee cautions the Scottish Government not to overstate the economic benefits of this Bill in terms of attracting high net-worth individuals to Scotland for international arbitration cases.**

34. **The Committee believes that the economic benefits of this Bill if enacted will depend upon the efforts made by the various bodies to promote and market Scotland as a destination for arbitration. In this respects, it questions the view of the Scottish Government that it would be inappropriate for the Scottish Government to market arbitration[22].**

35. It is also anticipated that the provisions in the Bill could promote more small-scale arbitrations in Scotland. This was presented as an opportunity, particularly for smaller businesses, to pursue bad debt, which the Scottish Government argued that they were dissuaded from doing due to the time and expense of pursuing a case through the courts. The Scottish Government Bill team also stated that "Ministers hope that the bill may encourage industries and professions to set up their own low-cost arbitration schemes, such as those operated by the

[20] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 27 May 2009*, Col 2164.
[21] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 27 May 2009*, Col 2165.
[22] Scottish Parliament Economy, Energy and Tourism Committee, *Official Report 20 May 2009*, Col 2147.

Association of British Travel Agents, the Scottish Motor Trade association and the Institute of Chartered Accountants in Scotland."[23]

36. Despite inviting and actively encouraging representatives of trade associations to give evidence on the Bill, the Committee was unable to garner any substantive evidence from the business community on the potential of the Bill to either provide a more effective means of dispute-resolution than the courts or to provide a basis for the development of arbitrations schemes by trade associations or professional bodies.

37. The Committee noted that under the New Car Code scheme run by the Motor Manufacturers and Traders Ltd., the majority of disputes were resolved by conciliation, with very few going to arbitration.[24] In 2008, it dealt with 527 conciliation cases under its New Car Code, as opposed to only 16 arbitration cases.

38. Consumer Focus Scotland welcomed the introduction of an additional means of dispute resolution as an important step for consumers but did not respond in detail on the provisions contained within the Bill as it perceived that "the Bill's main focus is on dealing with commercial disputes, rather than those involving consumers."[25]

39. **The Committee is of the view that any attempt to develop cheaper, faster and more accessible means of dispute resolution is laudable. However, the Committee considers that it is not proven as to whether the provisions in the Bill will result in significantly more businesses pursuing the resolution of a dispute by means of arbitration and of the adoption of codes and schemes based on the framework for arbitration established by the Bill.**

40. **In relation to the objectives of the Bill, the Committee recognises the compelling arguments for the primary objective of codifying and consolidating arbitration law. It also concurs with the Scottish Government's view that without doing this, it would not be possible for arbitration to be an effective means of dispute resolution going forward.**

41. **The Committee believes that the objective of increasing international and domestic arbitrations is commendable, but is less convinced by the arguments presented as to the extent to which this is probable. Part of the success in attracting arbitration to Scotland and increasing its use domestically will depend on the legislation itself, as well as other factors linked to marketing and the development or an arbitration industry in Scotland.**

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[23] Scottish Parliament Economy, Energy and Tourism Committee, *Official Report 20 May 2009*, Col 2125.

[24] The Society of Motor Manufacturers and Traders Ltd. Written submission to the Economy, Energy and Tourism Committee.

[25] Consumer Focus Scotland. Written submission to the Economy, Energy and Tourism Committee.

The provisions of the Bill

42. The evidence provided to the Committee ranged from that which commended the spirit and purpose of the Bill to that which made more critical comment on some of the provisions within the Bill. Whilst, as noted above, there was a broad consensus behind the need to consolidate and codify the law, views on how the Bill proposes to do this varied.

43. Richard N. M. Anderson, an arbitrator, applauded the aims of the Bill in consolidating existing arbitration law, improving the use of arbitration domestically and attracting international arbitration to Scotland, but stated that "the real issue is whether this Bill adequately meets those aims and objectives and whether or not this Bill should be brought into law in its current form."[26] In his written evidence he set out a number of reasons why he considered that the Bill should not be brought into law.

44. The Faculty of Advocates warned against the potential for litigation resulting from poor drafting—

> "Drafting of legislation – and, in particular, drafting of poor quality – is important. It not only lowers the regard in which legislation is held if it reads poorly or is bestrewn with infelicities and ambiguities (a factor which is not insignificant in itself where – as here – the legislation is in effect competing in an international market place), but it also induces disputes about legislation, with the cost and diversion of resources from the real subject matter of the legislation that that entails. An iron law of court practice is that poor drafting breeds litigations."[27]

45. The following section explores and comments on some of the issues raised in evidence to the Committee.

Scottish Arbitration Rules

46. The Bill is structured in a manner that the sections primarily address the codification and consolidation of arbitration law with the mandatory and default rules set out in a schedule, thereby providing a framework for the arbitrator and the parties to go through in conducting the arbitration. The Policy Memorandum states that the Bill "is designed to be useful, relatively self-standing legislation for the use of those involved in an arbitration which will give answers to most, if not all, of the questions likely to arise as parties and arbitrators move through the arbitration process."[28]

47. Section 6 states that the Scottish Arbitration Rules set out in schedule 1 are to govern every arbitration seated in Scotland, unless in the case of the default rules, the parties agree otherwise. Section 7 lists the mandatory rules and provides that they cannot be modified or disapplied. Section 8 provides for parties

[26] Richard N.M. Anderson, F.CIArb. Written submission to the Economy, Energy and Tourism Committee.
[27] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.
[28] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 58. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm..

to make their own arrangements and vary any or all of the default rules or disapply them, by agreement. When there is no such agreement, the default rules apply .

48. The objective in setting out the "Scottish Arbitration Rules" in a schedule was to establish a single, accessible code for those using the legislation. The Policy Memorandum stated that the "intention is that the rules will guide the parties and the arbitrator through the various stages of the arbitral process."[29] The Scottish Government stated that this approach had largely been welcomed in the consultation on the Bill. However, the Policy Memorandum attempts to assuage concerns that the rules will not form part of the general law as they are contained within a schedule to the Bill. It emphasises that sections 6 to 8 of the Bill clearly establish that both the main part of the eventual Act and the rules will, as primary legislation, constitute the law in relation to arbitration in Scotland.[30]

49. The Commercial Judges of the Court of Session expressed a concern about this as the provisions giving powers to the court are included in the rules rather than in sections of the Bill and suggest that section 11 should be to preclude the potential for any doubt about this issue.

UNCITRAL model law

50. In codifying and consolidating arbitration law, the Scottish Government has taken the fundamental decision to remove the dual arbitration regime that is currently in place in Scotland under which only international arbitrations are conducted in accordance with the Model Law. The Model Law is thereby replaced by a single code based on the principles of the Model Law.

51. The Scottish Government argues that the Model Law has not attracted any significant number of arbitrations to Scotland and that the use of the Model Law does not appear to be a significant factor in attracting international arbitrations, as evidenced by the thriving environment for arbitration in certain jurisdictions that do not use the Model Law.

52. The Scottish Council for International Arbitration (SCIA) expressed serious concerns about the repeal of the Model Law and the potential impact of this on Scotland's capacity to attract international arbitrations. It stressed that "the members of the Council are convinced that the Bill in its present form will not achieve at least one of the objectives which they consider vitally important and which, it is understood, the government also regards as of major significance, that is to equip Scotland with a system of arbitration law which is capable of attracting international arbitration business and playing a part in presenting Scotland as a modern environment for international business generally."[31]

53. SCIA argues that the Model Law provides a code for the conduct of international arbitrations, which "has been adopted in more than sixty jurisdictions

[29] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 78. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.
[30] The Arbitration (Scotland) Bill. Policy Memorandum, paragraph 80. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.
[31] The Scottish Council for International Arbitration. Written submission to the Economy, Energy and Tourism Committee.

worldwide, and will be familiar to anyone involved in international commerce."[32] Whilst it is cognisant of the argument that the adoption of one set of rules will promote simplicity and avoid confusion, it argues that the affect of the repeal of the Model Law and the introduction of a single codified set of rules will "discourage international business from coming to Scotland."[33]

54. In its supplementary evidence to the Committee, the Law Society stated that "The case for repeal of the use of the UNCITRAL Model Law has not been persuasively made out."[34]

55. On the issue of the repeal of the UNCITRAL Model Law, CIArb highlights the fact that the principles, as well as much of the drafting, have been incorporated into the Bill. CIArb also points out that there is currently hardly any international arbitration being conducted in Scotland and that there is "no causal connection between a country's adoption of the Model and its success as an international arbitral venue."[35]

56. The Minister's view was that—

> "I note what the Law Society says, but the pretty widespread view seems to be that the model law has been a relative failure in Scotland since 1990, with an estimate of only 10 to 15-plus cases in that period. The view is widely held that the model law is incomplete and that there are many crucial gaps in it. There is also a view that it is wrong in principle to expect the parties involved, by their own efforts, to cover deficiencies in the law. We have to look to what is happening commercially in non-model law jurisdictions such as London, Paris, Stockholm, Geneva and New York, which are thriving and doing much more international arbitration business."[36]

57. However, by way of conclusion, the Law Society stated in its evidence that "The observations of CIArb do not contain a proper reason for the repeal of the legislation which incorporated the UNCITRAL Model Law into Scots law for international arbitrations."[37]

58. **The Committee is concerned that the key representative body for international arbitrations in Scotland, the Scottish Council for International Arbitration, is of the view that the UNCITRAL Model Law should still apply for international arbitrations and that the Law Society of Scotland feels that**

[32] The Scottish Council for International Arbitration. Written submission to the Economy, Energy and Tourism Committee.
[33] The Scottish Council for International Arbitration. Written submission to the Economy, Energy and Tourism Committee.
[34] The Law Society of Scotland. Supplementary evidence to the Economy, Energy and Tourism Committee.
[35] The Chartered Institution of Arbitrators Scottish Branch. Written submission to the Economy, Energy and Tourism Committee.
[36] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009*, Col. 2239.
[37] The Law Society of Scotland. Supplementary evidence to the Economy, Energy and Tourism Committee.

the case for repeal has not been made. However, the Committee recognises the strongly held views by others for repeal.

59. **The Committee seeks an assurance from the Minister that the Bill fully incorporates the Model Law and confirmation that it will still be possible for parties to adopt the Model Law in preference to the rules in the Bill, subject to the important mandatory rules that it contains.**

60. **The Committee recommends that the Minister ensures that he fully addresses the concerns expressed by the Scottish Council for International Arbitration and others during the stage 1 debate (RECOMMENDATION 1).**

Retrospective law and commencement

61. In evidence to the Committee, a concern was expressed about the retrospective implementation of the Act. The Faculty of Advocates raised a concern that section 33 of the Bill "would appear to be capable of operating in a manner which is in effect retrospective, in that, on the new legislation coming into force it could conceivably apply to all arbitrations and all agreements to submit to arbitration to arbitration then extant."[38] Thus, the terms upon which a party agreed to when taking the decision to agree to go to arbitration are effectively being changed *ex post facto*.

62. The Law Society of Scotland shared these concerns and stated that the provisions in section 33 "should only apply to agreements to arbitrate entered into after the coming into force of the Act, which would allow parties to have the choice of whether or not to arbitrate based on the new regime."[39] The Law Society points out that many construction contracts contain arbitration clauses which will apply in the event of a dispute, which might happen a number of years in the future. This would mean the legislation could be challenged.

63. In oral evidence to the Committee, a Scottish Government solicitor agreed that they would "have to consider carefully how the bill will apply to future contracts" and that they would "have to consider the detailed arrangements carefully" as the bill progresses.[40]

64. The Minister's view, in general, was that "The general principle is that the bill is looking forward more than trying to be retrospective or to do anything retroactive."[41]

65. In supplementary evidence to the Committee, the Scottish Government confirmed that the Bill will not "be applied to arbitrations which have actually begun before it comes into force."[42]

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[38] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.
[39] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.
[40] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 20 May 2009*, Col 2139.
[41] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 3 June 2009*, Cols 2247-2248.
[42] The Scottish Government. Supplementary written evidence to the Economy, Energy and Tourism Committee.

66. The Scottish Government also indicated that it was "at present inclined to think" that the Bill should apply along the same lines as clause 84(2) of the UK Arbitration Act 1996 "to make clear the legislation applies to all arbitrations begun after the date of commencement under an arbitration agreement "whenever made"."[43]

67. **The Committee is concerned by the lack of clarity on whether or not section 33 has retrospective effect in relation to arbitrations that had already started and in relation to contracts with clauses based on the previous law. The Committee calls on the Scottish Government to revisit this issue with a view to amending the Bill at stage 2 to include a provision similar to that contained in the consultation draft on the Bill which clarified the relationship between the Act and arbitrations that had already been initiated (RECOMMENDATION 2)**.

Is the Bill better than the Arbitration Act 1996?

68. In codifying and consolidating arbitration law, the Bill seeks to give Scotland a comprehensible and accessible arbitration law in terms of the principles and rules governing the law of arbitration. The Committee explored the extent to which the Bill would give Scotland a competitive advantage over other countries - notably England - in terms of the quality of the legislation or whether it was merely bringing Scots law into line with that south of the border.

69. The Scottish Government Bill team emphasised that the purpose of the Bill was to bring Scotland into line with modern arbitral practice. However, it also indicated that "the bill is superior in a number of respects to the 1996 Act that applies south of the border", notably by introducing a statutory rule on confidentiality, by introducing arbitral appointment referees, by covering oral as well as written agreements, by allowing the legislation to be updated in response to changes in the Model Law and by placing prospective and post-appointment arbitrators under a continuing disclosure requirement concerning conflicts of interest.[44]

70. **The Committee notes the comments in evidence that the Bill provides Scotland with an opportunity to "leap-frog" legislation south of the border[45]. However, given the number of concerns raised in relation to some of the provisions within the Bill, as well as to the drafting, the Committee believes that the Bill should be considered as work in progress and that significant amendments are still needed if the Scottish Government is to have achieved its objective of designing modern, accessible, attractive and legally sound legislation that will be successful in providing the basis for promoting both domestic and international arbitration**.

71. **The Committee recommends that the Scottish Government clarifies its position in relation to the clauses in the Arbitration Act 1996 that will**

[43] The Scottish Government. Supplementary written evidence to the Economy, Energy and Tourism Committee.
[44] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 20 May 2009*, Col 2132.
[45] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 27 May 2009*, Col 2166.

continue to apply to Scotland and the potential for these to be re-enacted, or, if possible, at least restated in the current Bill (RECOMMENDATION 3). These relate to the provisions in the 1996 Act covering consumer protection and other reserved matters that the Scottish Government indicated could be extended to Scotland through a change to the Scotland Act.

Time limits

72. One of the key objectives of the Bill in codifying and consolidating Scottish arbitration law is to make the arbitration process more efficient and therefore offer a faster means of dispute resolution than that available through the courts. *Rule 24 General duty of the parties* is a mandatory rule and places a duty on the parties to ensure that the arbitration is conducted without unnecessary delay and without incurring unnecessary expense. In addition, parties to an arbitration are also free to agree explicit time limits in their arbitration agreements and consumer arbitration schemes may set a time limit for reaching a decision or an award.

73. The Scottish Government Bill team indicated that there were a number of provisions in the Bill that would help to speed up the arbitration process, but that Rule 24 was the key means to ensuring this—

> "Recourse to the courts will be reduced as much as possible—there will be only very limited circumstances in which parties will be able to delay matters by taking issues to the courts. However, the main way in which we hope that the bill will make arbitration faster is by placing the arbitrator and the parties specifically under mandatory duties to conduct the arbitration without unnecessary delay and expense."[46]

74. The Scottish Government Bill team acknowledged that consideration had been given by the Minister to "imposing time limits in the bill but decided against that approach because, as soon as time limits are imposed, a provision must automatically be included to allow for some appeal to extend the time limit."[47] It was considered that such a provision would result in the courts becoming "chock-a-block with people".[48]

75. In his evidence to the Committee, Richard Anderson said that—

> "I am firmly of the view that there should be a compulsory time limit. The present trend in England is that adjudication, which is a successful interim dispute resolution procedure, happens within 28 days, with a slight extension in most cases. That is regarded as being inappropriate for larger cases involving amounts of the order of £4 million or £5 million. At present, a voluntary 100-day limit for arbitration is in place. I believe that, if that was enshrined as a primary legislative requirement for an option that parties

[46] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 20 May 2009*, Col 2129.
[47] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 20 May 2009*, Col 2129.
[48] Scottish Parliament Economy, Energy and Tourism Committee. *Official Repor*t, *20 May 2009*, Col 2129.

> could choose, in a large number of cases, it would be an attractive option."[49]

76. His view was rejected by Hew Dundas of CIArb who said that a "fixed-time-limit proposition is utterly unworkable."[50] His point was supported by Neil Kelly of the Law Society who said "… a one-size-fits-all approach in legislation will not work, given that it is trying to cover so many different types of arbitration, from relatively small to very large arbitrations as well as international arbitrations."[51]

77. In his evidence to the Committee, the Minister said—

> "Parties can, of course, decide on time limits for the arbitration, but the bill gives the arbitrator the power to set and enforce time limits, under rules 27, 30 and 38. In addition, arbitrators, for the first time, are placed under a specific, mandatory duty to conduct arbitrations without unnecessary delay or cost."[52]

78. The Minister concluded that "Time limits might present as many problems as they would solve".[53]

79. **The Committee recognises the arguments against the inclusion of time limits for arbitrations to be contained in the Bill, but is not convinced that the mandatory duty to conduct arbitration without unnecessary delay and expense on its own will result in arbitration becoming significantly faster in Scotland. It has particular concerns about how this duty can be enforced in practice.**

80. The issue of a reducing the cost of arbitrations is also contingent on reducing the time taken to conduct consultations. The Scottish Government Bill team argued that the provision allowing parties to choose their own arbitrator, who – in theory – can organise the arbitration "to make it efficient and effective, so it should be much cheaper than going to court."[54] The Bill team reiterated that if the Bill's provisions could expedite arbitrations then this should result in savings for parties and that the provision for taxation of the expenses by the auditor of the Court of Session should make a difference.

81. **The Committee considers that any significant savings in the cost of conducting arbitrations will be contingent on the arbitration process being expedited more generally by the provisions within the Bill. It does not consider that the use of arbitration rather than the courts equates with an**

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[49] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 27 May 2009*, Col 2167.
[50] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 27 May 2009,* Col 2168.
[51] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report*, *27 May 2009*, Col 2168.
[52] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009*, Col 2236.
[53] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report*, *3 June 2009*, Col 2254.
[54] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report*, *20 May 2009*, Col 2131.

automatic saving, given that arbitration requires the remunerated services of an arbitrator while there is clearly no direct cost for judicial time in the courts (although there are of course court fees for raising civil court actions).

Rules 45 and 46: default rules on damages and interest

82. Rule 45 sets out the remedies available to a tribunal in terms of its award and Rule 46 gives the tribunal detailed powers to award interest. Both of these Rules are default rules, meaning that they could be disapplied with the agreement of the parties.

83. The Law Society identified that Rule 45 presented an opportunity to rectify one of the major deficiencies in the current common law by allowing an arbitrator the power to assess and award damages. However, as it is a default rule, a party with a negotiating advantage might seek to remove it "if there is any perceived tactical or commercial reason to do so."[55]

84. This was a point supported by Garry Borland of the Faculty of Advocates. He said that the ability of a main contractor to insist that any arbitration rules relating to damages and costs are deleted from a contract—

> "… is consistent with my experience in construction-related work, in which main contractors have considerable bargaining power over subcontractors. The point is realistic."[56]

85. In supplementary written evidence, the Scottish Government defended the decision to make Rule 45 a default rule. It stressed that as not all remedies may include the award of damages then it was not appropriate to make this a default rule as it might constrict the parties' freedom to agree on how they wanted a dispute to be resolved. The Scottish Government further points out that a default rule can only be overridden with the agreement of both parties, otherwise it applies as a matter of law.

86. In written evidence to the Committee, the Law Society expressed a concern that Rule 46 is a default rule and suggested that either the existing rule, or a revised version of it should be mandatory as this "would allow the arbitrator always to award some interest from an appropriate date *before* the date of the decree arbitral (the date the sum was due), until the date of the payment."[57] The Law Society draws attention to the difficulties that the common law or arbitration has led to in Scotland in relation to assessing and awarding damages and calls for this rule to be made mandatory.

87. In relation to Rule 46, the Scottish Government pointed out in supplementary written evidence to the Committee that "parties may decide for their own reasons, for example, that the arbitrator should not have power to award interest at all or

[55] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.
[56] Scottish Parliament Economy Energy and Tourism Committee. *Official Report, 27 May 20*09, Col 2179.
[57] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.

should only do so at a certain fixed rate or should only award simple and not compound interest."[58] An additional reason for making Rule 46 a default rule was to ensure that Muslims were not unable to use arbitration in Scotland on the basis that interest was being charged.

88. In his evidence to the Committee, the Minister conceded that he would be prepared to have further dialogue on the issues raised in relation to rules 45 and 46 but that he was convinced that the Bill as drafted was the appropriate way to proceed.[59]

89. **The Committee believes that the Bill as drafted in respect of rules 45 and 46 opens the possibility of one party to a commercial contract having unfair bargaining powers to decide whether to include the clauses on interest and damages before letting a contract.**

90. **In reflecting on the evidence we heard, the Committee believes that there is a strong case to be made for the Scottish Government to rethink these particular rules and whether they should be made mandatory and recommends that the Minister addresses this point during the stage 1 debate (RECOMMENDATION 4).**

Sisting

91. Section 9 of the Bill of the Bill relates to the suspension (sisting) of legal proceedings. A court must suspend legal proceedings when a party to the applications has made a valid application for a suspension and the matter in dispute is the subject of a valid agreement to arbitrate. Where the court is satisfied that the arbitration agreement is void, unenforceable or incapable of being performed it need not sist the legal proceedings. Subsection 9(4) provides that arbitration agreements cannot prevent parties from bringing legal proceedings in relation to matters which the court refuses to sist, except where they are statutory arbitrations. Thus, the Bill effectively narrows the reasons for refusing a sist.

92. The Commercial Judges of the Court of Session raised a concern about the desirability of sisting legal proceedings in certain situations, for example in construction disputes where there are a number of interrelated contracts and disputes. The Scottish Government stated that "a mandatory sist might prevent the conjoining of the disputes in the court to avoid duplication of expense."[60]

93. The Faculty of Advocates referred to the potential for the "right to arbitration" to be "invoked as a delaying tactic where there is in truth no defence to the claim".[61] It considered that Scots law has, until now, been "hostile to such stratagems" and suggested that this should continue. The Faculty therefore suggested that a provision against delaying tactics should be added to the list of circumstances in which a sist might be refused.

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[58] The Scottish Government. Supplementary written evidence to the Economy, Energy and Tourism Committee.

[59] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009*, Cols 2246-2247.

[60] The Commercial Judges of the Court of Session. Written submission to the Economy, Energy and Tourism Committee.

[61] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.

94. In his response, a Scottish Government solicitor said that—

> "We were not sure that the commercial judges had fully realised that section 86 of the 1996 Act, which applies in the rest of the United Kingdom, had not come into force. For the rest of the UK, there is no discretion for domestic arbitration—to sist or not to sist."[62]

95. The Faculty of Advocates also raises the issue of a potential error in section 9(3)(b), pointing out that it does not make sense in the context of the Scottish pleading system as "acknowledgement of service does not exist in Scotland."[63]

96. **The Committee is concerned that the sisting of legal proceedings may be used as a delaying tactic and suggests that the Scottish Government revisits this matter in light of the Faculty of Advocate's comments that it does not make sense in the Scottish context (RECOMMENDATION 5).**

97. **The Committee further notes the point raised by the Faculty of Advocates in relation to section 9(3)(b) of the Bill and invites the Scottish Government to reconsider this issue in light of the Faculty's comments (RECOMMENDATION 6).**

Anonymity and confidentiality

98. Section 13 of the Bill provides for anonymity should an arbitration be the subject of legal proceedings. The identity of a party must not be disclosed outwith the court and any disclosure in a report of the proceedings is to be treated as a breach of obligation of confidence except if one of the exemptions set out in subsection 13(2) applies. It should be noted that this applies only to the identity of the party, and not the contents of a court judgement.

99. The Commercial Judges of the Court of Session questioned whether the apparent requirement to keep private Opinions issued in respect of an arbitration challenge was intended for all cases. The Commercial Judges argued that "although this regularly occurs for good reason in, for example, children cases, in other cases it would appear to conflict with the principles of open justice to which the courts now strive to adhere."[64] The Faculty of Advocates shared this view, stating "we have doubts about clause [section] 13 of the Bill which seems to be either a dead letter or a substantial (and, we consider, unjustifiable) interference with the right to publicity of what proceeds in the Queen's Courts."[65] The Faculty also questioned whether section 13 would "pass unchallenged as a disproportionate interference with press freedom."

100. The practicalities of implementing this provision were raised in both written and oral evidence, notably in relation to disputes the subject of which was in the public domain. The Commercial Judges of the Court of Session questioned "whether it is realistic in the commercial world to suppose that the identity of the

[62] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 20 May 2009*, column 2138.
[63] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.
[64] The Commercial Judges of the Court of Session. Written submission to the Economy, Energy and Tourism Committee.
[65] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.

parties to a dispute will not be gleaned, by those interested, from the facts of the case narrated in an opinion, even where the parties are not named."[66] The Scottish Government recognised that in some cases the identity of those going to court might become known, but that there was a point to trying to preserve it where possible.

101. The Faculty of Advocates questioned how a breach of confidence would be enforced, "other than by another action in which the litigant will of course need to be named."[67] The Law Society, whilst agreeing with the terms of section 13, was also of the view that the "question of anonymity needs to be further considered in relation to enforcement proceedings."[68]

102. **Whilst the Committee recognises that confidentiality is a key factor in attracting parties to arbitration as a means of dispute resolution, it has a number of concerns in relation to section 13 of the Bill as currently drafted. These relate both to the practicality of preserving anonymity when an arbitration is the subject of legal proceedings and to the principles of openness in relation to court proceedings and freedom of the press. It also has doubts how the provisions in section 13 could be enforced in practice. The Committee therefore calls on the Scottish Government to reconsider the provisions within section 13 with a view to addressing the concerns raised in evidence to the Committee (RECOMMENDATION 7).**

Rule 40 – referrals on a point of law

103. Rule 40 provides for a party to refer a point of law arising from an arbitration to the Court before decree arbitral. The Law Society of Scotland recognised that there was a need for a mechanism to allow challenge of a decision based on legal error, but was concerned that this might encourage reference to the Court on points of law, resulting in an increase in pressure on the Courts and allowing the possibility of parallel processes of arbitration and Court proceedings. The Law Society stated that "arbitrators should deal with all legal questions in the first instance, to avoid undermining the arbitration process."[69]

104. **The Committee recognises the concern raised by the Law Society of Scotland and calls on the Scottish Government to review Rule 40 at stage 2 to reduce the potential for the Courts to be overburdened by referrals on points of law and prevent the risk of parallel consideration of arbitrations (RECOMMENDATION 8).**

Arbitral appointments referee

105. Section 22 of the Bill gives the power to Ministers, by order, to authorise persons or types of person who may act as an arbitral appointments referee for the purposes of the Scottish Arbitration Rules. The Policy Memorandum indicates that "these bodies (for example the chair of a recognised arbitration body such as

[66] The Commercial Judges of the Court of Session. Written submission to the Economy, Energy and Tourism Committee.
[67] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.
[68] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.
[69] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.

the Chartered Institute of Arbitrators (CIArb), the Scottish Council on International Arbitration, or the Royal Institution of Chartered Surveyors (RICS)) will have a default role on the breakdown of any appointment procedure agreed by the parties."[70] The Policy Memorandum indicates that any appointee under section 22 will have to demonstrate a track record of supplying arbitrators, the provision of suitable and appropriate training courses, and the provision of discipline procedures in order to ensure that the quality of arbitrators is maintained.

106. The Faculty of Advocates articulated a concern that this would "in practice exclude the Dean of Faculty [of Advocates] from a role he has traditionally occupied, under standard form contracts and individually drafted ones, of appointing arbiters."[71] The Faculty also expressed a concern that the provisions in section 22 "might convey to the outside reader that arbitration in Scotland is in the hands of "closed shops" where appointment depends upon membership of the appropriate body".[72] The Faculty noted that the provisions in section 22 appeared to exclude individuals in practice and implied that a referee must only appoint members of its own body. For example, the Faculty of Advocates argued that a person appointed by the Chartered Institute of Arbitrators (CIArb) acting as the arbitral appointments referee would not be able to be disciplined if s/he was not also a member of that body.

107. This point was not accepted by the Scottish Government's Bill team. One of its members said that "I do not think that there is anything in the bill that requires an arbitral appointments referee to appoint from within his or her profession."[73]

108. **The Committee is very concerned by the points raised by the Faculty of Advocates in relation to section 22 of the Bill. The Committee recognises the need for professional regulation and standards, but shares the view of the Faculty that there may be an appearance of the Bill protecting the interests of the professional arbitrations bodies in Scotland. The Committee therefore calls on the Minister to revisit the drafting of section 22 of the Bill to take account of the concerns raised in evidence. (RECOMMENDATION 9)**

Rules 50 and 51 (provisional and part award) and the powers of arbiters more generally

109. The Scottish Arbitration Rules contained in schedule 1 to the Bill provide for a range of powers to be given to arbitrators. The Faculty of Advocates expressed significant concerns about the extent of these powers, particularly those provided by Rules 50 and 51 relating to provisional or part awards. The Faculty stated that it was "particularly doubtful about the wisdom of according arbiters powers to grant interdicts, orders for specific implement, orders for rectification, or to pronounce decrees of reduction."[74] It noted that decrees of reduction and orders for specific implement *ad interim* cannot be granted by sheriffs in Scotland, only by the Court of Session. It questioned, therefore, whether it was appropriate to give these

[70] Arbitration (Scotland) Bill. Policy Memorandum, paragraph 109. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.
[71] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.
[72] The Faculty of Advocates, Written submission to the Economy, Energy and Tourism Committee.
[73] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009*, Col 2249.
[74] The Faculty of Advocates. Written submission to the Economy, Energy and Tourism Committee.

powers to arbitrators. It specifically highlighted the fact that "breach of interdict involves, potentially, criminal sanctions."

110. The Minister argued that these powers were needed by arbiters and that it was simply to "do with effectiveness".[75] One of his officials elaborated—

> "When parties agree to go to arbitration, in effect they agree to go to a private judge rather than to the public courts. Usually, they will want their private judge to have the same powers as judges in the public courts. In other jurisdictions, it is quite common for arbitrators to be given such powers. In fact, I understand that there may be some authority to suggest that in Scotland that is possible under the common law. We therefore do not think that arbitrators are being given an exceptional power—provided that the parties are happy to go along with it. It is, of course, a default rule."[76]

111. **The Committee is concerned by the powers being accorded to arbitrators where comparable powers are not available to sheriffs. It calls on the Scottish Government to review this provision in order to ensure that the powers provided to arbitrators are proportionate with their role (RECOMMENDATION 10).**

112. In addition to this issue, the Law Society of Scotland questioned the current designation in the Bill of Rules 50 and 51. It stated that it believed that the Bill should be amended (Rule 50) so that provisional awards come under the default, rather than mandatory rules. It further stated that Rule 51 should be amended so that the power to make part awards in appropriate circumstances is included in the mandatory rules, rather than in the default rules.[77]

113. In its evidence, the Chartered Institute of Arbitrators said that it believed that in relation to Rules 50 and 51 "the designation of the two rules is back to front" and that "the M, for mandatory, and the D, for default, were put in the wrong places when the bill was printed."[78]

114. However, in response, a member of the Bill team said that "the designation is intended to be that way round" and that—

> "Rule 50 is intended to be a mandatory rule because, in a situation in which a small company pursued a debt against a larger company, rule 50 would allow the arbitrator to make a provisional award to the smaller company that might prevent it from going into insolvency. If rule 50 were not mandatory,

[75] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 3 June 2009*, Col 2255.
[76] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report 3 June 2009*, Col 2255.
[77] The Law Society of Scotland. Written submission to the Economy, Energy and Tourism Committee.
[78] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 27 May 2009*, Col 2184.

> the larger company might seek to get the smaller company to agree that that rule would not apply."[79]

115. He said, in relation to Rule 51 however, that "The designation of rule 51 is perhaps something to which we could return."[80]

116. **The Committee recommends that the Scottish Government reconsiders the designations attributed to Rules 50 and 51 (RECOMMENDATION 11).**

SUBORDINATE LEGISLATION COMMITTEE REPORT

117. In accordance with Rule 9.6.2, the Subordinate Legislation Committee considered the delegated powers and provisions in the Arbitration (Scotland) Bill as introduced and reported to the Economy, Energy and Tourism Committee as lead committee. The Subordinate Legislation Committee considered the provision under section 24 for the Scottish Minister to modify, by order, the Arbitration Rules, any other provision of the Act and any enactment which provides for statutory arbitration in consequence of any amendment to the UNCITRAL Model Law on arbitration or to the New York Convention on the recognition and enforcement of arbitral awards.

118. The Subordinate Legislation Committee considered the proposed power to be acceptable in principle in so far as it permits modifications to be made in consequence of amendments to the New York Convention and that affirmative procedure is the appropriate level of scrutiny.

119. The Subordinate Legislation Committee sought further clarification from the Scottish Government on the justification for a power to amend Scots law in consequence of an amendment to the Model Law. It accepted the Scottish Government's response that the Bill is based on the principles of the UNCITRAL model law and the provision will allow the law to be updated to respond to these changes.

120. **The Committee notes the Subordinate Legislation Committee's report.**

FINANCE COMMITTEE

121. The Finance Committee adopted a 'level 1' approach to scrutiny of the Financial Memorandum for the Arbitration (Scotland) Bill and did not, therefore, take oral evidence on the Bill or produce a report. A letter from the Convener of the Finance Committee with a copy of the evidence received is attached in Annexe B of this report.

122. In his letter to the Committee, the Convener of the Finance Committee draws the Committee's attention to the response from the Chartered Institute of Arbitration (CIArb) Scottish Branch in relation to the Financial Memorandum. CIArb acknowledges that "the figure of £3 billion, taken from a reputable source, has

[79] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009*, Col 2249.
[80] Scottish Parliament Economy, Energy and Tourism Committee. *Official Report, 3 June 2009*, Col 2249.

proved to have been calculated on a wrong assumption" and that a more accurate estimate is that of £250 million as being the annual value of international arbitration to London.[81]

123. In oral evidence to the Committee, the Bill Team also made reference to the figure of £250 million as being the value of the international arbitration in London. However, the Financial Memorandum retains the reference to the estimated value of arbitration in the City of London being worth £3 billion, the great majority of which is international arbitration.[82]

124. **The Committee finds it unsatisfactory that the Financial Memorandum includes a factual inaccuracy in relation to the estimated value of arbitration in the City of London but is otherwise content with the Financial Memorandum.**

POLICY MEMORANDUM

125. **The Committee is content with the Policy Memorandum that accompanied the Bill.**

GENERAL PRINCIPLES OF THE BILL

126. In relation to the main objectives of the Bill, the Committee recognises the compelling arguments for the primary objective of codifying and consolidating arbitration law. It also concurs with the Scottish Government's view that without doing this, it would not be possible for arbitration to be an effective means of dispute resolution going forward. Without such reforms, the Committee agrees that arbitration will not offer a cheaper, faster and more efficient alternative to litigation.

127. The Committee further believes that the objective of increasing international and domestic arbitration is commendable, but is less convinced by the arguments presented as to the extent to which this is probable. Part of the success in attracting arbitration to Scotland and increasing its use domestically will depend on the legislation itself, as well as other factors linked to marketing and the development of an arbitration industry in Scotland.

128. The Committee believes that this Bill, as it stands, is not yet fit for purpose and that further amendments will be needed if this legislation is to achieve the laudable objectives set out for it and to stand the test of time. Nevertheless, the Committee believes that the Bill can be amended and that it should proceed to the next stage of Parliamentary scrutiny. [83]

129. Before it does so, the Committee reminds the Minister of his commitment to hold a meeting in August 2009 with bodies such as a the Law Society of Scotland,

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[81] Chartered Institute of Arbitrators' Scottish Branch. Written submission to the Finance Committee.
[82] Arbitration (Scotland) Bill, Explanatory Notes, paragraph 244. Available at: http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm.
[83] An amendment to this paragraph was disagreed to by division. The result was: For 3 (Stuart MacMillan, Rob Gibson, Nigel Don), Against 4 (Lewis Macdonald, Marilyn Livingstone, Wendy Alexander and Gavin Brown), Abstention 1.

the Faculty of Advocates and the Chartered Institute of Arbitrators on how best to ensure consensus on how to amend the Bill at stage 2. The Committee also calls on the Minister to consult consumer groups and trade bodies that use arbitration on the Bill. The Committee requests that the Minister reports back to the Committee after the conclusion of these discussions.

130. **With these caveats, the Committee supports the general principles of the Bill and recommends to the Parliament that they be approved**.

ANNEXE A: REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

Subordinate Legislation Committee

Arbitration (Scotland) Bill

The Committee reports to the lead committee as follows—

Introduction

At its meetings on 10 and 24 March 2009, the Subordinate Legislation Committee considered the delegated powers provisions in the Arbitration (Scotland) Bill at Stage 1. The Committee submits this report to the Economy, Energy and Tourism Committee as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill [84].

Delegated Powers Provisions

The Committee approves without comment the delegated powers in this Bill at sections 15, 16(3), 22, 23(2), 30 and 33.

Section 24 – Amendments to UNCITRAL Model Law or New York Convention

Section 24 provides that the Scottish Ministers may by order modify the Arbitration Rules, any other provision of the Act and any enactment which provides for statutory arbitration in consequence of any amendment to the UNCITRAL Model Law on arbitration or to the New York Convention on the recognition and enforcement of foreign arbitral awards. The only justification given for this power in the Delegated Powers Memorandum was that it would permit Scottish arbitration law to be amended to keep it up to date with international arbitral practice.

At its meeting on 10 March, the Committee considered the proposed power acceptable in principle in so far as it permits modifications to be made in consequence of amendments to the New York Convention and that affirmative procedure is the appropriate level of scrutiny for the exercise of the power in those circumstances.

Given that the Model Law is to be repealed and will no longer form part of the Scottish law on arbitration, the Committee considered it appropriate to ask the Scottish Government for further justification for a power to amend Scots law in consequence of any amendment made to the Model Law. The question and the Scottish Government's response are reproduced in Annex 1.

The response provides more information than was contained in the Delegated Powers Memorandum. It provides useful background information on the Model Law, in particular in the context of Scots arbitration law and the Bill's proposals.

[84] Delegated Powers Provisions

Paragraph 6 of the response refers to other reasons why it was considered that the Model Law should be repealed. These are reproduced in Annex 2.

The answer to the Committee's question is contained in paragraph 7 of the response and was considered at the Committee's meeting on 24 March. The Bill's provisions are based on Model Law principles (albeit that the Model Law will no longer be part of Scots Law). In the context set out in the response, the Committee acknowledges that a need may arise from time to time to change Scots arbitration law to reflect changes in the Model Law. In the light of the further information and explanation received, the Committee is satisfied that the justification for the power has been adequately demonstrated. Given that this is a Henry VIII power, the Committee considers that affirmative procedure is the appropriate level of scrutiny.

The Committee therefore considers the proposed power to modify the Arbitration Rules, the Act and other enactments concerning statutory arbitration in consequence of amendments to the UNCITRAL Model Law or amendments to the New York Convention acceptable in principle and that affirmative procedure is appropriate.

ANNEX 1

Response from Scottish Government

Arbitration (Scotland) Bill at stage 1

Section 24 – Amendments to UNCITRAL Model Law or New York Convention

On 11 March 2009 the Committee asked:

Given that the Model Law is to be repealed and will no longer form part of the Scottish law on arbitration, what is the justification for a power to amend Scots law in consequence of any amendment made to the Model Law?

The Scottish Government responds as follows:

The UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration was drafted so far as possible to provide a core framework for international commercial arbitration. Its aim was to harmonize the application of different States' arbitration regimes and offer a model – of the best international commercial arbitration practice at the time – in particular for countries with underdeveloped arbitration regimes.

The Model Law has since then been updated and modernised, most recently in 2006 (adopting, for example, provisions recognising electronic communications). It still represents a valuable baseline standard for the important international and commercial aspect of arbitral practice. The Arbitration (Scotland) Bill is based on the principles of the Model Law, as is the UK Arbitration Act 1996.

The Bill nonetheless proposes that the Model Law should be repealed as the default standard for international commercial arbitrations under Scots arbitration law. This is partly because the Model Law, as a consensus standard, is incomplete and contains important gaps (for example, no powers are given to an arbitrator to award damages, expenses or interest).

These gaps are a result of the attempt in the Model Law to accommodate different practices and beliefs in different jurisdictions. For example, Moslem countries may be unable to agree to provisions which would allow for the payment of interest, since such payments are prohibited under Islam.

The Model Law does not therefore provide a comprehensive arbitration regime and has to be supplemented by domestic law. The Bill, like the UK Arbitration Act 1996, is based on Model Law principles, but it will provide a comprehensive framework for arbitration in Scotland.

Other reasons why it is considered that the Model Law should be repealed are listed in Annex 2.

In many other respects, however, where the UNCITRAL Model Law does make provision for the conduct of arbitral proceedings, it represents what is recognised

as best modern arbitral practice and that is why the Bill is based on its principles. The Scottish Government accordingly believes that Ministers should, with the approval of the Scottish Parliament, have the ability to react to future changes, augmentations and improvements which may be adopted into the Model Law in the future. This will add flexibility to allow the Scots arbitration law measures consolidated in the Bill to be updated quickly in order to keep pace with any such international business developments which are considered valuable going forward.

ANNEX 2

Further reasons why the Model Law is to be repealed in Scotland

- The Model Law has not attracted a significant amount of international arbitration business for Scotland since 1990.

- Non-Model Law venues such as London, Paris, Stockholm, Geneva/Zurich and New York are thriving.

- Model law jurisdictions such as Germany, Australia, New Zealand, Norway and Denmark are not successful as a result and therefore the Model Law alone cannot be considered to be a panacea for attracting international arbitration business.

- There are Model Law jurisdictions which are successful, such as Singapore, Hong Kong and Vienna, but we are told that these are successful for other reasons, not simply because they have the Model Law. Hong Kong benefits from business from the People's Republic of China, where Hong Kong awards can be enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Vienna is the venue of choice for central and eastern Europe, including Russia. Vienna is also seen as neutral (which is also the case with Geneva/Zurich). (It has been suggested Scotland might also be seen as a neutral venue by, for example, a foreign party in dispute with an English company.)

- Even if the Model Law is repealed, it will still be possible for parties to adopt the Model Law for their arbitration if they so wish (apart from those procedural rules which will be mandatory under Scots law).

- The model of the 1996 Act may be more familiar to other parties in the UK who may consider using Scotland as the seat of their arbitration.

- If the Model Law is not repealed, this will perpetuate the position where there are two arbitration laws in Scotland, one for domestic arbitration and one for international commercial arbitrations. It may lead to discrimination claims in EC law, in relation to other Member States – analogous case law in the Court of Appeal in England and Wales suggests at least some elements of a discriminatory regime may breach EC law, depending on any justification advanced for discriminating between the regimes.

ANNEXE B: LETTER FROM THE FINANCE COMMITTEE

Dear Iain

ARBITRATION (SCOTLAND) BILL – FINANCIAL MEMORANDUM

The Finance Committee considered its approach to the Financial Memorandum of the above bill and agreed to adopt level 1 scrutiny.

This level of scrutiny is applied where there appears to be minimal additional costs as a result of the legislation. Applying this level of scrutiny means that the Committee will not take oral evidence, nor will it produce a report. It will, however, seek written comments from relevant organisations through its agreed questionnaire, and then pass these comments to your committee.

The Committee received submissions from—

- Chartered institute of Arbitrators;
- Institute of Chartered Accountants of Scotland; and
- Traprain Consultants Ltd.

All submissions received are enclosed with this letter.

The response from the Chartered institute of Arbitrators refers (under the heading 'other comments') to the Clerk's approach paper, which was published as a public paper for the Committee's meeting on 10 February 2009. All the remarks, except for the last one seem to be in agreement with the statements in the paper which were taken from the FM. The final remark, however, questions the accuracy of the FM's estimation that arbitration in the City of London is worth £3b per year. The approach paper is attached separately for your information.

Please contact Allan Campbell, Assistant Clerk to the Committee, if you have any questions about the Committee's consideration of the Financial Memorandum.

Yours sincerely

Andrew Welsh MSP
Convener

SUBMISSION FROM THE CHARTERED INSTITUTE OF ARBITRATORS' SCOTTISH BRANCH

Consultation

1. **Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?**

   (1) Yes; the Chartered Institute of Arbitrators (CIArb) Scottish Branch (SB) circulated its membership of >500 and submitted a consolidated response. We had no comment to make on the financial assumptions; however, please see below some comments on the Clerk's Note to the Finance Committee.

   (2) Note that the CIArb (founded in 1915) is a registered charity and a self-regulating professional institution; it is the world's premier body of its type, with approx 12,000 members in approx 105 countries around the world. The CIArb's primary function is the promotion of private dispute resolution (PDR) in all its forms, not only arbitration. As at Westminster, Scots have dominated with an Honorary President (2002-05) and Presidents (2007 and 2009) in the last five years.

   (3) While the CIArb head office in London has approximately 40 staff servicing its worldwide work, the overwhelming majority of work at branch level is done by unpaid volunteers. SB itself has no permanent staff and, other than a part-time consultant Development Officer, no paid staff at all. SB has put several hundred professional hours (representing a huge resource of experience) into the Bill at no cost to itself or to the public purse.

2. **Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

   N/A – see (1) above

3. **Did you have sufficient time to contribute to the consultation exercise?**

   Yes

Costs

4. **If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

   (1) The Bill will have a financial implication, albeit minor, in that all relevant CIArb members will require to retrain (at the individual's expense) to take account of the provisions of the Bill in order to continue their practice as arbitrators and dispute resolvers. However, the CIArb already imposes Continuing Professional Development (CPD)

requirements on its members i.e. they are obliged to undergo appropriate training on a continuing basis so any training required because of the Bill will fall under those CPD requirements.

(2) SB envisages that the Bill will impose no incremental costs on itself; however, SB has (of its own volition) expended monies in promoting the Bill since that is a direct consequence of CIArb's primary function – see 1(2) above

(3) One of the CIArb's primary functions is the provision of arbitration (and other dispute resolution) training, and the CIArb is the worldwide leader in the provision of arbitration training, doing so in approximately. 40 countries around the world in the past year or so. SB will prepare and market training courses/seminars etc to bring the Bill to other professional bodies, to industry and commerce and to other interested parties; this will earn revenues for SB which will be ploughed back into promoting PDR.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Yes. In particular, SB cannot envisage any call for expenditure from the public purse in respect of its own or its members' costs.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

N/A

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

SB sees the Bill as part of a wider policy of improving access to justice in civil cases and delivering more effective (faster, cheaper, more user-friendly) dispute resolution. We do not see any costs associated with this but we can envisage savings, potentially significant, of court time (i.e. funded out of the public purse) where disputes are taken to arbitration rather than to court.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

SB envisages no such future costs. It will develop its internal professional Practice Guidelines to take account of the Bill but that work will be done by its cadre of unpaid volunteers (see 1(3) above).

Policy on treatment of written evidence by subject and mandatory committees

SB hereby grants consents for its submissions go on the public record.

Other Comments

SB has read with interest the Clerk's Briefing Note to the Finance Committee reference F1/S3/09/4/4 and offers the following comments by way of assistance to the Committee. We have retained the Clerk's paragraph numbering for ease of reference. In addition, SB's letter to the Energy, Economic and Tourism Committee (EETC) dated 25th February 2009 remains relevant (copy available on request).

3. This refers to a "model law for Scotland" but this use of terminology is capable of being confused with the UNCITRAL Model Law on International Commercial Arbitration (1985), presently the law of Scotland for international commercial arbitration pursuant to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (section 66 and Schedule 7). Said section 66 and Schedule 7 will be repealed by the Bill.

6. SB not only sees no adverse impact on the public purse but sees a positive effect in that every case taken to arbitration is one less case handled by the courts and publicly funded. In its letter to EETC dated 25th February 2009, SB made a provisional, order-of-magnitude, estimate of 8,250 hours of court time freed up.

7. SB stresses (i) that these costs are to be borne by the parties, not by the public purse (ii) that arbitration has the potential (and the Bill is strongly geared to this) to deliver civil justice at lower cost to the parties than the cost of going to court.

8. SB respectfully agrees; there will be cases where arbitration will suit the Scottish Government (or other public body) and other cases where it will not. An example of the latter would be a case where it was desirable to obtain a legal precedent to apply in future similar cases. Arbitration, being private, does not do so.

9. While the setting of judicial priorities and allocation of judicial time is a matter for the Lord President and/or Lord Justice Clerk, SB respectfully considers it inconceivable that, absent exceptional circumstances, he/they would release judges to sit as commercial arbitrators if that had an adverse effect on effectiveness of the judicial system. SB is fully aware of English judges sitting as arbitrators in a small number of cases (approximately 15-20 cases/year) and is aware of one case where the judge had to do so in his vacation time. SB respectfully suggests that there will be no backfill cost.

   One example of "exceptional circumstances" was a Scottish arbitration in the 1980s where a Court of Session judge sat as sole arbitrator; one of the factors leading to this appointment was that the subject-matter of the arbitration related to National Security. Other examples (in England) include cases where the Judge appointed as arbitrator was an acknowledged expert in the relevant area of law, so that his arbitral award carried some precedential value.

It should be noted that the Rules of the Court of Session already make provision for the appointment of a judge as arbitrator, at the parties' cost, so the Bill does not in fact change the position, merely clarifies (following English experience) how it will operate whereas the present law does not.

10. See (8) above

12. We respectfully agree.

13. See (6) above.

14. CIArb SB has attempted to quantify this albeit that our estimate can be regarded as no more than order-of-magnitude; we can take the estimated 8,250 hours of court time (see (6) above) and apply both (a) likely savings in rates (parties require an Advocate or Solicitor-Advocate in court (and may also require a Solicitor in attendance) whereas in an arbitration they can represent themselves or be represented by a non-lawyer) and (b) likely savings in time to take us easily into the £millions of savings of the parties costs.

15. The figure of £3 billion, taken from a reputable source, has proved to have been calculated on a wrong assumption; SB has calculated (and had the calculation reviewed) a figure of £250 million/year as being the value of international arbitration to London. This covers tribunal (i.e. arbitrators') costs, institutional costs and the parties' legal and other costs. This is economic turnover, in real money, generated by arbitration practitioners in London.

    Taking the population ratio as between England and Scotland, this suggests a potential for up to £25 million in new business in Scotland, but that would be at London's legal rates; applying a 40% discount to convert London to Edinburgh rates brings us back to a potential for at least £15 million of new international arbitration business.

SUBMISSION FROM THE INSTITUTE OF CHARTERED ACCOUNTANTS IN SCOTLAND

Consultations

We provided informal feedback during the consultation period via the Regulatory Review Group and the Business Experts and Law Forum. However, due to our need to prioritise our workload in relation to members' interests we did not formally respond to the consultation last year.

Costs and wider issues

Analysing the financial impact of the Arbitration (Scotland) Bill may differ from other legislation because using arbitration procedures is a voluntary arrangement, and between two private parties. Ultimately, the real measure of its costs and benefits will be how much it is used; so potential users need to be asked for their estimate of that. In due course, it will be interesting to measure estimated use against actual.

CHARLOTTE M BARBOUR
Assistant Director, Business Policy

SUBMISSION FROM TRAPRAIN CONSULTANTS

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes, and we made some comments on financial assumptions

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Yes

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

We do not consider that the Bill will have any adverse financial implications for our organisation. Arbitration is a voluntary process, and parties will only use it if it makes sense in all areas, including financial. We do consider that there should be positive implications, based on the possibility of increased arbitration or arbitration support work within Scotland.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

As stated, we do not consider there will be any such costs for our organisation

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

The figures quoted are necessarily both estimates and (in relation to costs of cases) averages. We believe the figures to be realistic on this basis, and there is not really any better way to present the information. We cannot comment on the figure given for arbitration in London (presumably the whole of London, not just the City), as we are not aware of the figure, but are aware that it is substantial.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We are not aware that it is part of such an initiative

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

There should not be a need for further legislation. While it might be open to the Government to promote arbitration, this is not seen as essential, with the Government's role being as facilitator by providing the legislative framework. Any further costs would have to be justified on a case-by-case basis, and the Bill itself should not make further expenditure necessary.

ANNEXE C: EXTRACTS FROM THE MINUTES OF THE ECONOMY, ENERGY AND TOURISM COMMITTEE

10th Meeting, 2009 (Session 3), Wednesday 18 March 2009

Arbitration (Scotland) Bill: The Committee considered and agreed its approach to the scrutiny of the Bill at Stage 1.

16th Meeting, 2009 (Session 3), Wednesday 20 May 2009

Arbitration (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Graham Fisher, Solicitor, Hamish Goodall, Bill Team Manager, and Alison Dewar, Bill Team, Scottish Government.

17th Meeting, 2009 (Session 3), Wednesday 27 May 2009

Arbitration (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Hew R. Dundas FCIArb, Chartered Arbitrator, President, Chartered Institute of Arbitrators (2007);
John Campbell QC FCIArb, President, Chartered Institute of Arbitrators 2009;
Neil Kelly, Representative of the Law Society of Scotland;
Robert Howie QC, and Garry Borland, Advocate, Faculty of Advocates;
Richard N.M. Anderson, Arbitrator;
Professor Fraser Davidson, Professor of Law, University of Stirling;
Brian Reeves, Dispute Resolution professional member representing the Royal Institution of Chartered Surveyors Scotland.

18th Meeting, 2009 (Session 3), Wednesday 3 June 2009

Arbitration (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Jim Mather, Minister for Enterprise, Energy and Tourism, Hamish Goodall, Bill Team Manager, and Graham Fisher, Solicitor, Scottish Government.

19th Meeting, 2009 (Session 3), Wednesday 10 June 2009

3. **Decision on taking business in private:** The Committee decided to take item 4 and the discussion with its adviser on the review of the tourism inquiry at its next meeting in private.

4. **Arbitration (Scotland) Bill:** The Committee considered an issues paper for its Stage 1 report.

20th Meeting, 2009 (Session 3), Wednesday 17 June 2009

2. **Arbitration (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. Various changes were agreed to (one by division), the report was agreed to.

ANNEXE D: ORAL EVIDENCE

16th Meeting, 2009 (Session 3), Wednesday 20 May 2009

Oral Evidence

Graham Fisher, Solicitor, Scottish Government;
Hamish Goodall, Bill Team Manager, Scottish Government;
Alison Dewar, Bill Team, Scottish Government.

Supplementary Evidence

The Scottish Government.

17th Meeting, 2009 (Session 3), Wednesday 27 May 2009

Written Evidence

The Chartered Institute of Arbitrators (CIArb) Scottish Branch.

Oral Evidence

Hew R. Dundas FCIArb, Chartered Arbitrator, President, Chartered Institute of Arbitrators (2007);
John Campbell QC FCIArb, President, Chartered Institute of Arbitrators 2009;
Neil Kelly, Representative of the Law Society of Scotland;
Robert Howie QC, and Garry Borland, Advocate, Faculty of Advocates;
Richard N.M. Anderson, Arbitrator;
Professor Fraser Davidson, Professor of Law, University of Stirling;
Brian Reeves, Dispute Resolution professional member representing the Royal Institution of Chartered Surveyors Scotland.

Supplementary Evidence

The Faculty of Advocates;
The Law Society of Scotland;
The Scottish Government

18th Meeting, 2009 (Session 3), Wednesday 3 June 2009

Oral Evidence

Jim Mather, Minister for Enterprise, Energy and Tourism;
Graham Fisher, Solicitor, Scottish Government;
Hamish Goodall, Bill Team Manager, Scottish Government.

Supplementary Evidence

The Scottish Government

ANNEXE E: LIST OF WRITTEN EVIDENCE

SUBMISSION FROM ACAS

1. I refer to your letter dated 23rd March 2009 and thank you for asking Acas to submit evidence in relation to Stage 1 of the Arbitration (Scotland) Bill.

2. Acas is renowned for its experience and skill in dispute resolution and has been active in this sphere of activity since 1975.

3. The dispute resolution service provided by Acas is aimed solely at the resolution of workplace disputes either of an individual or collective nature. Acas arbitration was established under the TULRA 1992 legislation [s212 and s263(6)]. These sections indicate that the Arbitration Act 1950 does not apply to Acas arbitrations or CAC decisions.

4. Acas offers a range of ADR services which include: conciliation in individual rights issues; collective conciliation in workplace disputes; arbitration and collective mediation in workplace disputes and individual mediation to resolve workplace issues. The aim of all of these services is to resolve workplace issues without the need for litigation. Acas deliver arbitration and other ADR in a variety of workplace situations. Acas collective conciliation and arbitration is sometimes specifically written into workforce agreements as the final stage in the dispute procedure.

5. Acas arbitration is morally but not legally binding. Parties have historically accepted this stricture and have implemented the arbitration awards.

6. One exception to the morally binding nature of Acas arbitration exists in Scotland. Acas is charged with resolving all collective disputes in the Scottish Prison Service. Arbitrations undertaken under this provision is contractually binding on prison officers.

7. Acas supports and delivers arbitration it is always our aim to resolve workplace issues without the need to resort to arbitration. When a request for arbitration is made Acas always first engages with the parties in collective conciliation. When discussing the issues in collective conciliation Acas has a twofold aim. Firstly to try to resolve the dispute at this stage and secondly, failing resolution, to establish agreed terms of reference for the arbitration. Engaging in this process facilitates agreement between the parties in the majority of cases and therefore arbitration is not necessary.

8. Acas would be happy to share our experience of workplace dispute resolution with the Committee should it feel our input would be of value.

9. Acas understanding is that the Arbitration (Scotland Bill) is being introduced to put the majority of general Scots law of arbitration into a single statute but that this relates to arbitration that might arise in civil legal proceedings, commercial disputes, international disputes and in domestic circumstances. It will therefore not impact on the work of Acas in the dispute resolution arena.

Frank Blair, Director, 20 May 2009

SUBMISSION FROM RICHARD N.M. ANDERSON F.C.I.Arb

INTRODUCTION.

1. This Bill, which the Sponsors have persuaded the Ministers to adopt and which has now been assigned to the Economy, Energy and Tourism Committee, has as its stated aims and objectives:- (1) the consolidation of existing arbitration case law; (2) an improvement in the use of domestic arbitration in Scotland; and (3) the attraction of international arbitration to Scotland. These are laudable aims and objectives and in my view the real issue is whether this Bill adequately meets those aims and objectives and whether or not this Bill should be brought into law in its current form. In my view, for the reasons set out below, it should not be.

IMPLEMENTATION

2. A leading international practitioner in arbitration recently said to me "Why should I put forward Scottish Arbitration as a recommendation to my clients when I do not know what that involves and I have heard no reports as to its efficacy". That would appear to be an entirely understandable approach but it does underline what I take to be a fact of life in international arbitration which is that a country really only gets one chance at 'making its name' on the international arbitration scene. Accordingly, it is my view that it is vital that we "get it right" with this Bill. If the general view is that this Bill will do that job then the Bill could be implemented. If, however, there are some doubts about that then in my view the Bill should be postponed until it is in a condition whereby we are likely to "get it right". It would be a bed, probably fatal, tactic in my view to introduce this Bill and then incessantly 'tweak' the legislation in an attempt to 'get it right'. It is my view, for the reasons set out below, this Bill should be postponed for a brief period.

THE "CHAIN" EFFECT

3. It also appears to me, as a practitioner in arbitration in both Scotland, England and abroad, that there is a 'chain' or 'link' effect here in the sense that if arbitration can be seen to be very effective domestically in Scotland then that of itself is likely to attract international arbitration. I now turn, therefore, to consider the extent to which this Bill is likely to improve the use of domestic arbitration in Scotland. I do so by reference to an example.

DOMESTIC ARBITRATION IN SCOTLAND

4. I propose here to take the example of a company which undertakes to carry out a substantial body of work for another company. For their contract, they use a Standard Form which contains an arbitration clause (although the objective of the Bill, of course, is that, even without that, in the event of a dispute the Parties would chose arbitration over litigation). This particular contract represents virtually the entire turnover of the company involved. So far as the company placing the contract is concerned, their relationship with their Client alters from a fixed price to a cost plus basis and they decide to

take back the work in order to make a greater profit from it. The company affected – now financially stretched in that virtually a whole year's turnover has been expended on this job - raises a court action alleging repudiation of their contract. Because of the arbitration clause, the court action is sisted (paused) to allow an arbitration to take place (again, the objective of the Bill would be to create a situation where the Parties would have chosen this in any event).

5. From the point of view of the disinterested bystander (and society as a whole), this dispute should not have taken long to resolve. It was referred by a Court to an Arbiter who ought simply to speedily arrive at his determination which, if necessary, could be reported back to the court. From the point of view of the company placing the work, they are presumably interested primarily in obtaining natural justice and a fair decision as to whether or not they have repudiated the contract. From the point of view of the company given the work, however, this arbitration is more serious – a successful outcome would allow the company (some 50 employees) to recover its losses and continue in business. An unsuccessful outcome in the arbitration, they would have to accept, would mean the end of the business and the company. For all concerned, the objectives of this arbitration (and, through it, any international arbitration attracted) must be a reasonable procedure; a reasonable timescale; and at a reasonable cost.

How, then – using that example - are these issues to be addressed in arbitration to-day and as a result of the introduction of this Bill in its present form?

PROCEDURE

6. Believe it or believe it not, but when arbitration underwent a resurgence in the last century, it was regarded as a speedy method of dispute resolution which was far better than the cumbersome method of litigation. As the century developed, however, it was arbitration which became much more cumbersome to the point where arbitration became worse than litigation and in drawing up contracts for clients many lawyers preferred litigation in the commercial court to arbitration and struck out arbitration as a choice.

7. The reason for this, I believe, is to be found in a book recently written by J Mariott QC, a leading practitioner in arbitration in England in which he states: "There is strong anecdotal evidence to suggest that the standards in domestic arbitration in England, particularly in the construction industry, declined during the 1980's. Despite pleas to the contrary by very distinguished judges and frequent public pronouncements to the same effect by other leading figures, Arbitrators continued to conduct proceedings slavishly following High Court procedures." Similar pronouncements have been made by leading Judges in Scotland to no effect.

8. The fact of the matter appears to be that while litigation tends to involve something of a learning curve for all involved until the dispute is worked into a form suitable for decision, increased specialisation in the areas subject to

arbitration allows for unlimited 'nitpicking' as to the contents of the reference to arbitration.

9. In the example given here, the Arbitrator was unable to resist adopting the mantle of a Court of Session Judge. He insisted upon detailed written pleadings in the arbitration and then pronounced those pleadings to be inadequate before throwing the whole arbitration out without a single word of evidence being heard. To some extent, situations such as this could be improved by better training of Arbiters but in my view the real solution – if international arbitration is to be attracted – is to address this problem in the legislation.

10. My own personal view is that the Arbitration (Scotland) Bill in its present form has not been well drafted. Amongst other things, I am of the view that the Arbitration Rules should be in an Act and not in a Schedule. This Bill, in my view, is a pale shadow of the excellent Arbitration Act to be found in England.
However, the point is that even with that excellent Act in England, my experience in England – supported by strong anecdotal evidence – is that there is virtually no domestic arbitration taking place in England.

11. What is required here, therefore, is for the Scottish Bill to 'leapfrog' the English Act. The Scottish Bill must go 'one better' and provide the solution to this problem which will allow domestic arbitration to take off in Scotland and to be a success there. This Bill simply does not do that. There is no shame in that, in my view. Over the 20 years of attempted reform some 'reform fatigue' appears to have set in. In England, the combined efforts of the best brains at the English Bar and the best Parliamentary Draftsmen in the Westminster Parliament took about six attempts before they got their Act through. It is unlikely that Scotland could achieve this in 'one go'. This Bill, in my view, should be the subject of wider consultation and a redraft

TIME

12. A major consideration in arbitration is the time it takes. Adopting procedures such as those outlined above tends to drag matters out. In the example given – through no fault of the Claimant who has pursued his Claim as hard as he could – the matter has so far taken 16 years.

13. The best solution here, in my view, is for the legislation to specify the time involved. As a general principle, arbitration should be consensual and if the parties wish to go down the traditional route and leave the arbitration open-ended so far as time is concerned then that should be their choice. However, it is my view that for domestic arbitration to work in Scotland (and for international arbitration to be attracted to Scotland) there must be a procedure introduced within an Act itself which allows the Parties to choose a framework as regards time. It will not do, in my view, to suggest that there will later be some other regulations drafted which can be attached to this Bill. In my view, this aspect must be a 'mainplank' of this legislation and has to be found within the very body of any Act. This Bill, in my view, should be the subject of wider consultation and a redraft.

COSTS

14. Another major consideration in arbitration is the cost involved. Arbitration is not a free service and professional representatives require to be paid. There is nothing wrong with the principle that expenses should follow success in the outcome of the arbitration at the end of the day. However, if arbitration is to be attractive – both domestically and internationally – then the costs of arbitration must not be allowed to run away with themselves. In the example giver, the Arbiter made an award of expenses for a Minute of Amendment to the Pleadings (which did not alter the legal case made in any way and was simply a 'tidying up' exercise) which the Arbiter allowed to be taxed and which produced a bill of £196,000 which required to be paid before the arbitration could proceed.

15. In its present form the Bill appears to simply make the rather clumsy provision that "expenses will be taxed by the Auditor of the Court Of Session". Why should that always be the case? Why should that high scale always be used? Why should an Arbiter not have the option to use the lower Sheriff Court scale or even employ a Cost Accountant and arrive at his own determination of costs (capped if necessary). In my view, in order to make arbitration attractive both domestically and internationally, this aspect of cost requires to be addressed. This Bill, in my view, should be the subject of wider consultation and a redraft

SUMMARY AND CONCLUSIONS

16. As noted above, the aims and objectives of this Bill are very worthwhile and the exercise should not be lost sight of. The simple fact of the matter, in my view, is that the Bill in its present form will not achieve the declared aims and objectives [bar aim or objective (1)]. In my view, it would be a major tactical error to try to introduce this Bill and then try to amend it later. The Bill itself, in my view, represents a good foundation and with further consultation and redrafting – which could perhaps be achieved in as little as six months – offers the potential for achieving its declared aims and objectives which would benefit Scotland.

Richard N.M. Anderson F.C.I.Arb
Advocate, barrister and Attorney (NY)
14 May 2009

SUBMISSION FROM JAMES M. ARNOTT

THE OBJECT OF THE BILL

1. To attract arbitration work from within and outwith Scotland by effecting procedural changes to cure long standing weaknesses in the common law powers of the arbitrator and to make improvements to eliminate other perceived defects.

THE INVITATION TO MAKE SUBMISSIONS

2. The five points identified by the Committee in its call for written evidence are a helpful statement of some outcomes and methods of curing the long standing weaknesses and defects, but in themselves do not fulfill the object which I assume has to be the only object of the bill, unless an element of compulsion is agreed as being necessary.

THE BASIC NATURE OF ARBITRATION

3. Arbitration is a consensual process of dispute disposal entered into voluntarily or not at all. Upon that hypothesis work will only come to arbitration in Scotland if it is made attractive to the customer. Otherwise, the Bill (the eventual Act) will not be used. It will not attract new work unless its provisions reflect the interests of the customer in a recognizable manner or if statutory compulsion to use it is introduced as an alternative to other forms of dispute disposal. I have referred in my letter of 14 November 2008 to Alison Dewar (attached) to the success of adjudication in the construction industry as a paradigm, and I have suggested that the reasons for its success are carefully considered. Construction arbitrations were notorious for their prolixity, complications and very heavy expense particularly in hospital contracts. A dispute disposal process such as adjudication—you can call it what you like e.g. new, scheme or code arbitration—would, under a new scheme, be a right exercisable by the parties but not a mandatory requirement and would give the necessary lead using the metaphoric combination of the carrot and the stick.

THE PERCEIVED WEAKNESSES AND DEFECTS OF ARBITRATION AT PRESENT

4. Arbitration at the present time is considered as being

- Slow
- Complicated
- And Expensive.
- The decision is not final.
- It is not a one-stop shop.
- Money does not change hands immediately upon the issue of the decision and expenses keep mounting and can run for years and any net recovery can be derisory, particularly if there is inflation—as it is predicted there will be in the medium term—and a challenge of the arbitrator's decision goes to court, where crime has to come first.

In brief, the current arbitration system does not meet the customer's cash flow needs—which are a vital consideration.

THE PRESENT CHOICES

- The courts
- Mediation
- Private negotiation
- Arbitration

THE EXISTING BARRIERS

5. The thought of arbitration repels, instead of attracts, users. As it is a voluntary process, which is now little used, any new initiatives have to overcome ingrained opposition. Unless an impetus is injected by the Bill and followed through, that opposition will not be overcome.

DISPUTE DISPOSAL

6. For the customer, arbitration is rather like going to the dentist, only when strictly necessary and in great pain but the sooner you go the better. However that is the point at which the analogy breaks down, because there is no guarantee that arbitration will end the financial pain. The patient is not in control of the proceedings and relies upon the skill of the dentist. So it is with dispute disposal, but the arbitrator's role ceases to be comparable with the dentist because there is another party who typically has to be dragged along. His consent is somewhat qualified by obvious reluctance or by less than full co-operation. The arbitrator has to be careful. He cannot readily assume that he is dealing with a recalcitrant respondent (for fear of challenges). Arbitration only works if there is genuine co-operation or, if, in place of the present arbitration system, a new system is put in place to which both parties will sign up, and in which it is accepted that a dispute disposal process fails unless it is dynamic.

COMPULSION

7. There has to be some degree of compulsion if a dispute disposal system is to work properly. By this, I mean eradicating the perceived defects of the present arbitration system. How can this be achieved in the interests of both parties, the arbitrator and the process itself thus restoring the reputation of arbitration?

THE REFORMS NEEDED

8. The arbitrator has to be given not just powers but obligations.

9. The parties must also be subjected to strict disciplines.

10. The parties have to accept the decision of the arbitrator.

11. Money has to change hands immediately upon the issue of the decision.

12. The parties have to accept at the outset that the arbitrator may get it wrong (as might a judge) on both the facts and the law, and that they have submitted to the process in the overriding interest of getting a decision quickly and cheaply. If that is not their real purpose, they have failed to understand the disadvantages of more

traditional systems or, more seriously, they are intent upon dilatory tactics. If the parties want justice from on high i.e. after full scrutiny of the facts and the law using the law of evidence and procedure and a full opinion and judgment, they can go to court and take their turn in the queue, bearing in mind the chance of appeals, the very significant expense and delays, with much of the expense irrecoverable, even if the court action is won.

13. The Bill does not contain a self-contained code (see below) but the Government sees the advantages of having a self-contained code in the interests of accessibility and simplicity. It would be a framework binding not only the parties but also the arbitrator. I make no apology for again drawing upon the example of adjudication as a useful paradigm. As to why I see clear advantages in having a code, and why the Bill does not contain a recognizable code, see below.

14. After the money has changed hands, a challenge- on any ground- of the decision can be mounted in court as in construction adjudication which has now been up and running for over ten years and where, at least according to anecdotal evidence, the decisions of adjudicators (although not always perfect and fully acceptable) have kept the wheels turning and have proved a lot better than a long legal battle. Upon this hypothesis, neither an appeal on a point of law nor a challenge upon the blunt shortly stated grounds in the 1695 Articles of Regulation or the somewhat wider and less precise serious irregularity ground would be necessary, as the re-run in court would cover both grounds.

15. The rules upon expenses in adjudications should apply. Each party should meet its own expenses and the arbitrator should decide which party should pay his expenses in full or in part. This incentivises the parties to keep their own expenses down and reduces point-scoring procedural arguments.

16. In the 1960's,the view was held that, at common law, the arbiter (as he was called) was obliged to deliver his final award within a year and a day or within such shorter period as had been agreed, and that otherwise his remit fell, on the ground that he had not exhausted it. It seems likely that a year and a day was regarded as being long enough in practice and it seems probable that the same view would hold to-day. However, subsequent to the 1960's that view was departed from. In my experience the point was never raised and in practice the arbitration just went on. It is highly possible that this is one reason why arbitration got a bad name and has fallen by the wayside. On that assumption, there would be a strong case for a statutory maximum period upon the expiry of which the remit of the arbitrator would drop, the arbitrator would have no right to payment, and the parties would have to dispose of their dispute by other means. The point is reinforced, in my view, by the use of 28 and 42 day periods in adjudication only, unless both parties and the adjudicator jointly agree upon an extension prior to the expiry of the statutory periods. Arguably, that is too weak and old bad practices will revive. Much depends upon the arbitrator but it might protect and constrain him from too much pressure if provision was made that extensions outwith the statutory periods should only be agreed in exceptional circumstances with some definition of 'exceptional'.

17. If the parties want to see the arbitrator's reasons for his decision, he may deliver them after issuing his decision, as in adjudication.

HOW TO ACHIEVE THIS REFORM

18. For domestic arbitrations, reform could be achieved

19. By introducing a new scheme which supersedes and replaces:-

(i) All existing statutes from the 1695 Articles of Regulation
(ii) All existing common law falling within its ambit.
(iii) Apply the lessons learned from the past, and the refreshing lessons learned for adjudication.

20. By persuading potential users (customers) of its merits by introducing it to trade, industry, commercial and professional organisations in the first instance.

21. By emphasizing the recognition by Government of the crying need to introduce a system designed to meet the customer's requirements and, obviously, to listen to their response.

22. By emphasizing that the scheme does not insist upon being used; it confers a right to do so which need not be exercised, as is the case in construction adjudication.

23. By setting limits on the application of the scheme.

24. Old-style arbitration cannot be banished, because it rests on the consent of the parties to settle their dispute privately. Use mandatory rules to tidy it up.

For international arbitrations, reform could be achieved

By providing an obvious gateway in the Bill, for the reasons which I give below.

THE COMMITTEE'S FIVE POINTS

Q1. The need for, and value of, a consolidated and codified statutory Scots arbitration law for domestic and international arbitrations

25. The Bill does not re-state and does not replace the common law which is still to be found in old case law and old text books, old with the exception of the article by The Rt. Hon. Lord Hope in The Stair Memorial Encyclopedia. Classically, the Bill as it presently stands may come to be described as a statutory intrusion and not a scheme or code, and certainly not as a self-contained all-embracing scheme. I assume that introducing such a scheme is the aim of the Scottish Government in achieving accessibility and simplicity.

26. Unfortunately, the Bill confuses procedural with substantive law. The court may competently decide points of foreign law just as an arbitrator may. See Rule 40(1) in schedule 1, part 5.

27. The Bill omits to make good the recognized long standing weaknesses in the arbitrator's powers in a satisfactory manner. In relation to interest, the arbitrator

interprets and applies the terms and conditions of the underlying contract and calculates the interest due but he cannot award the sum so calculated because at common law he does not have power to do so. He needs statutory powers to do so. What the court has power to do is beside the point and, in any event, referring to the court at this stage buries the point in obscurity rather than expiscates the law. (Rule 47)

28. As regards damages (Rule 45(b)), an arbitrator may, at common law, find that a party is in breach of contract but he has no common law power to do the next thing, namely, calculate and award the damages. He needs a statutory power to do so.

29. As regards interim decrees, the arbitrator has no power to award them based on the common law hypothesis that the parties have appointed him to exhaust his remit, which is to decide finally all the issues submitted to him for a decision in a final award. Part awards encounter the same difficulty.

30. Provisional awards are not part of Scottish arbitration law although the same may not be true of England, and to introduce English terminology, particularly without any definitions, is to introduce a new dimension and source of debate. The introduction of any English procedure is likewise.

Q2 The economic benefits that will derive from a single statute incorporating a set of principles and rules to govern both domestic and international arbitrations

31. Statistical evidence of the economic benefits to the main centers of arbitration exists e.g. London. Professor Sir Alan Peacock delivered a paper 'The Market for Commercial Litigation' at a conference in Edinburgh organized by The Scottish Council for International Arbitration upon 'International Arbitration and the Role of the UNCITRAL Model Law' in 1993.

32. The aim is clearly desirable but is it achievable? I have felt from the start (see also my letter of 14 November 2008) that it is wise to respect the fact that that there are differences in the law and practice throughout the world, and not to lump domestic and international arbitration together. That is likely to be interpreted as a lack of openness and respect for the foreign party i.e. "If you are coming here, you will do it our way or not at all." As I see it, all the foreign party wants to know is that the contract into which he has entered will be interpreted soundly using the legal principles of the system the parties have agreed should apply, and that the arbitrator, having done that (in accordance with rules settled upon by them and the international appointing authority, e.g. the I.C.C) and reached a decision, the local courts will support that decision. The international bodies such as the I.C.C. have their own rules which govern the procedure from A to Z and they seek assurance that their rules will be followed by the parties and that the process and decision will not be endangered by interference or worse from the local courts or organisations, so that any arbitration is not only a one stop shop but also an expeditious and final disposal.

33. On the other hand, do we really want to introduce into our domestic law a new ground of challenge, namely 'serious irregularity' which would now seem to be the mantra internationally? Plainly, in my view, that would be a mistake because that would open the door to challenges in court and defeat the object.

Q3. The principle of developing a set of rules based on the United Nations Commission on International Law (UNICITRAL) Model Law for arbitrations in Scotland

34. The UNCITRAL Model law on Arbitration was introduced because of a profound distrust, if not a fearful apprehension, that the local courts in a foreign jurisdiction in which the arbitration had its seat would support the home team, who would possibly be the state or an offshoot. If Scotland wants international work, so the argument runs, it has to show that it is not such a jurisdiction and that demonstrably politics and the judiciary are kept well apart. I have no objection to attracting non-Uncitral arbitrations from abroad but it has to be shown positively what Scotland offers.

35. This not just a matter of presentation but also a matter of essential, demonstrable simplicity and compatibility, which means eschewing the old Scots common law on arbitration and not introducing incompatible statutory provisions if there is any chance of them conflicting with the rules of the London Court of International Arbitration, International Chamber of Commerce, American Bar Association, or International Bar Association—as well as the UNCITRAL model law itself.

Q4 The appropriateness of the designation of the Scottish Arbitration Rules contained in Schedule 1 as either "mandatory" or "default"

36. I do not like the use of both default and mandatory rules, nor the present selection of mandatory and default rules as set out in the bill, primarily because there may be unintended consequences which produces uncertainty and delays in securing a clean appointment. When so many bodies have their own rules, why introduce rules on an optional basis? Arguably, discussions on rules do not necessarily lead to a clear outcome. It is reasonably foreseeable that such discussions could get in the road of the appointing authority, the arbitrator and the parties, both at the outset and later.

37. My instinctive view is that the only rules should be mandatory rules, but I am content to hear submissions to the contrary to try and understand the other side of the argument.

38. For a new system with minimal rules which has apparently worked very well for the construction industry, see adjudication.

Q5. The extent to which the provisions in the Bill, particularly the Scottish Arbitration Rules, will ensure fairness and impartiality in the arbitration process, minimise the expenses of an arbitration and promote efficiency in the arbitration process

39. Existing Scots law is redolent with legal authority but the process chosen dictates what is or is not fair in the given circumstances. In the interests of efficiency, sacrifices have to be made and the parties have to understand and accept this.

40. Impartiality (and independence) can be preached but it is down to all concerned to play their part.

41. There is room for a practice manual.

CONCLUSIONS

42. Having spent many years seeking a Bill, I am delighted there is one. My personal views reflect my 40+ years of experience and now that I have fully retired and have no axe to grind, I hope my views are dispassionate and objective. The uninitiated customer is not well placed to know what is best and he will take advice, which will vary, but above all he will look for simplicity, certainty, speed and cheapness. I respectfully submit that the responsibility presently shouldered by the Scottish legislature is best discharged by facing up to the defects which I have described, by cutting through the tangled undergrowth and by introducing a new, fully fledged simple system for domestic arbitrations for Scotland where most disputes are about modest sums and where parties cannot possibly bear the costs of an old fashioned arbitration. Such a system could be honestly marketed as being to the obvious economic advantage of all concerned.

43. The market for international arbitrations as I hope I have already made clear is quite different and requires separate treatment. The reference to an appointments referee makes me wary that there is a public sector agenda and an alert foreign party might be apprehensive and turn away, thus killing the goose which lays the golden eggs.

James M. Arnott T.D.,B.L.,W.S.
5 May 2009

SUBMISSION FROM CHARTERED INSTITUTE of ARBITRATORS (CIArb) SCOTTISH BRANCH

Introduction

1. The Committee has sought written evidence on the *general principles* of the Bill and this is the CIArb's response. We strongly believe that the Bill is an important and worthwhile measure inherently designed to bring positive economic benefit to Scotland.

The CIArb has approximately 12,000 members in more than 100 countries across the world and CIArb members and/or branches have been closely involved in preparing new arbitration legislation in (among many others) England, Ireland, UAE, Malaysia and Bermuda. In addition, since the CIArb moved to a system of electing its President, two of the first five elected Presidents have been Scots.

The CIArb not only responded to the June 2008 Consultation Questionnaire, but also provided very extensive and detailed drafting and other comments covering the entire Bill. A 3-person, highly-experienced drafting sub-committee was formed and was assisted by valuable contributions from members of the Branch Committee and others. These submissions were discussed in detail with the Justice Department team in October 2008 and thereafter excellent progress was made; as a result the published Bill incorporates a great deal of the CIArb's substantial worldwide arbitral expertise and the CIArb has already commenced the process of "selling" the Bill to domestic and international parties.

The following submission addresses, first, the five issues raised by the Committee, then other matters.

The need for, and value of, a consolidated and codified statutory Scots arbitration law for domestic and international arbitrations.

2. Scottish arbitration law suffers from numerous inherent problems, not the least of which is the difficulty of ascertaining what the law in fact is in some respects, given the antiquity of the precedents. Some Scots arbiters sit with a solicitor as Clerk to advise on the law, a process unknown in England and elsewhere.

Typical of the many shortcomings of the present law are the following[1]: (i) the internationally-accepted principle that an arbiter can determine his own jurisdiction including the validity of a referral to arbitration is expressly rejected in Scotland[2]; (ii) contrary to international norms, there is no inherent power in Scots law for an arbiter to award any of damages, expenses (costs) or interest; (iii) it is unclear in Scots law whether an arbiter has immunity from suit (as Judges do) as is the norm in most common law, and some civil law, countries; (iv) there is no legal presumption in Scots law that an arbiter may make a part (partial) or interim award[3]; (v) it is unclear whether an arbitration agreement is, as is the international norm, treated as a separate contract from its container contract, as recently confirmed in a landmark English case in the House of Lords; (vi) a party or his agent can be appointed sole arbiter[4]; (vii) the position regarding privacy or confidentiality of arbitration is unclear;

1 An article in the CIArb's Journal "ARBITRATION" Vol. 70/2 details the many shortcomings, some serious (e.g. in that they cannot be contracted out of), in Scottish arbitration law (with full citations and references) so we submit only a selection here.

2 In a decision in 1872 !

3 Typically, the relevant precedents date from the early 19th century.

4 This astonishing legal proposition derives from two cases in the late 18th century.

(viii) whether not court rules of evidence must be applied is uncertain[5]; (ix) the currently-in-force (and almost universally unpopular) Stated Case Procedure is an anachronism[6].

It follows, we submit, that these (and other) anomalies must be cleared up and that the law of arbitration be collected in one place, readily accessible by commercial parties and individuals. All the weaknesses, omissions and anomalies of the present domestic law have been dealt with in this Bill by modern provisions drawing on the most relevant and/or effective features of the Dervaird Bill (2002), the UNCITRAL Model Law, the UNCITRAL Rules, the UK Arbitration Act 1996 and other sources. The provisions of the Bill reflect, wherever possible, international norms in arbitration. However, importantly and as with the 1996 Act, the Bill rests on three founding principles which govern its operation, one of which is (as is the international norm) the minimisation of the role of the Court.

The Bill establishes a single regime covering both domestic and international arbitration. While some jurisdictions have separate domestic and international arbitration laws, we see no advantage and some disadvantage in this; legal advice to HMG at the time of drafting the 1996 Act[7] was that to have different domestic/international regimes could infringe the UK's obligations under the Treaty of Rome, so England has a unified regime[8]. In those jurisdictions with split regimes, difficulties can arise as to which one applies: for example, Daimler Benz AG is clearly German so an international regime would apply, but what about Daimler Benz (Scotland) Ltd or a Scottish-resident trading branch of Daimler Benz AG ? The far-preferable solution is, as in the Bill, to have a unified regime with a comprehensive yet flexible set of Rules allowing (for example) each of Daimler Benz AG and a private individual to choose the form of arbitration best suited to their specific individual needs.

Should Scotland not adopt the Model Law across-the-board rather than enact this Bill? The clear answer is "no": (i) the principles of the Model Law are central to the Bill and there is nothing in the Bill which contradicts those principles; (ii) there are omissions in the Model Law requiring additional legislation to cover over[9]; (iv) the Model Law has been a notable non-success in its 19 years on the Scottish statute book[10]; (v) an informal survey of leading international arbitrators led to an 8-point list of the key features that a successful arbitration jurisdiction should have; the Model Law did not feature on this list and there is no evident causal link between application of the Model Law and the success of an arbitral venue. London, Stockholm, Geneva/Zurich and New York are all successful arbitral venues but have not adopted the Model Law; Singapore, Hong Kong, Vienna and Bermuda (all Model Law) are successful for other reasons. Germany, Australia, New Zealand, Malaysia, Denmark, India and Cyprus are all Model Law countries but see little international arbitration.

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5 The international norm is that the parties can agree what rules to apply, failing which the arbitrators will decide.

6 It was expressly removed in England by the Arbitration Act 1979

7 It should be noted that the Arbitration Act 1996 applies in full in Northern Ireland.

8 ss.85-88 create a separate domestic regime but these sections were never brought into force and now never will be.

9 The Singapore Act needs 7,000 words, New Zealand 11,000, of additional bolted-on language necessary to make the Model Law work in practice in a common law jurisdiction.

10 Arbitration being private, there are no public statistics; as best CIArb can establish (from anecdotal evidence) there have been <20 cases in the 19 years since 1990.

The economic benefits that will derive from a single statute incorporating a set of principles and rules to govern both domestic and international arbitrations.

3. Refer above concerning the Bill's unified regime covering both domestic and international arbitration.

Engaging in disputes is essentially a non-economic activity; while monies might well be spent on fees and other costs, no dispute is a worthwhile or productive activity for commercial enterprises. At best, a party recovers monies to which it was entitled anyway, at worst the fruits of economic activity are lost even before the legal bills arrive. Further, for small and medium enterprises (SMEs) substantial management time, otherwise assumed to be economically productive, is wasted on conducting the dispute. It follows, we submit, that efficient, cost-effective dispute resolution processes are essential to minimise such wastage, and, therefore that one of the fundamental foundation stones of a sound economy is the availability of effective dispute resolution processes, which provide civil justice between disputing parties in the most efficient manner possible[11].

In almost all countries of the world, civil justice is primarily dispensed by the courts but, equally, and since time immemorial[12], all civil justice systems (and, in modern times, ECHR jurisprudence) recognise the right of disputing parties to resolve their disputes privately in a manner of their own choosing. Arbitration is the principal alternative to the courts, and the main method of choice for commercial people across the world, being widely practised, for example, in commerce, landlord and tenant disagreements, agricultural, construction and consumer disputes. Arbitration is often preferable to litigation for many reasons, including the privacy of proceedings, the confidentiality both of matters raised and of documents, cost-effectiveness, time-effectiveness, freedom from the often restrictive rules of the courts, the ability to appoint an arbitrator with subject-matter expertise, the ability to agree efficient, tailored procedures, and the ability to agree the most convenient place for arbitral hearings etc to be conducted[13]. This is as true for domestic cases as it is for international ones. Furthermore, when arbitrations take place, such cases are removed from the Court, freeing up Court time and therefore reducing pressure on the public purse.

In addition, and critical for international trade, arbitral awards are enforceable in 144 foreign jurisdictions whereas court judgments are, with a few exceptions (e.g. within the EU), not enforceable cross-border. Even between Scotland and England, more so within the EU, enforcement of judgements can be a difficult, time-consuming[14] and expensive matter.

This Bill has two principal aspects: first, it will permit domestic parties to choose to resolve their disputes privately, away from the glare of the public eye, under agreed procedures (e.g. giving short timescales and limited costs) with a chosen arbitrator. The Bill will also enable international parties to choose Scotland as an arbitral forum. Jurisdictions such as Singapore aggressively seek international arbitration business to boost their invisible earnings and the local economy. Scotland has the almost unique combination of a pleasant place, expert lawyers, reasonable hourly rates (much lower

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11 In addition, access to civil justice is guaranteed by Article 6 ECHR.

12 In Scotland, an Act of 1598 reinforced the freedom to choose.

13 For example, in a hypothetical arbitration concerning an extension to a private residence, the arbitration could be conducted in the new extension, in a shirtsleeve environment (no wigs and gowns !) with all the evidence immediately to hand. Similarly, an agricultural arbitration can be conducted at the farm, an oil refinery one at the refinery, etc.

14 Taking 10 years or more in certain EU countries.

than London or New York), good venues and, above all, (once the Bill becomes law) a thoroughly up-to-date set of Arbitral Rules. Experience elsewhere suggests that with an appropriate and attractive legal infrastructure, Scotland could become a highly attractive place for international dispute resolution business. An authoritative survey[15] has reported that adopting new arbitration legislation or significantly revising one's regime leads to a very significant increase in arbitrations being held in a country[16].

In addition to the general principles outlined above, arbitration has two main areas of economic benefit, one relating to domestic arbitrations, the other to international ones. For economic purposes, there is a critical distinction explained below.

Domestic Arbitrations

4. In a very recent and very typical court case in England[17], the economic necessity for efficient dispute resolution was very clearly demonstrated. Mead was a small but growing building contractor driven into a Creditors' Voluntary Arrangement (CVA), and to the brink of insolvency, by its client's non-payment of bills. Had Mead folded, jobs would have been lost (with a consequent imposition on the public purse by way of unemployment and other benefits), both income and corporate tax revenues would have decreased, and a piece of the national economy obliterated. With an efficient dispute resolution process such as arbitration, cases such as Mead's can be resolved quickly and cost-effectively and the supplier or sub-contractor paid with no threat of CVA or insolvency and therefore no threat to its contribution to the national economy. Court time in Scotland is severely limited; proofs or trials are commonly set a year ahead whereas an arbitration could start next Monday.

Similarly, in the early 1990s, the UK's construction industry was close to collapse because cash was not moving down the contractual chain (client to main contractor, main to sub-contractor etc) and, in 2009, we can envisage much the same happening in commerce in general in the present economic climate. Unless suppliers and sub-contractors are paid, they will be very likely to go out of business, thereby not only depriving the economy of the fruits of their activities (production, taxes, the multiplier effect), but also increasing unemployment and the burden on the State.

In all such cases, it is not only the loss through insolvency of a single supplier or a sub-contractor which matters, but also (the "multiplier effect") the loss of the economic benefits that company creates by purchasing (and by its employees purchasing) goods and services from others.

It follows that rapid, cost-efficient, effective means of dispute resolution are essential to economic well-being.

There is another way in which we can consider the economic benefits of arbitration: at present we believe that there are approximately +/-300 arbitrations in Scotland annually, comprising +/-50 commercial disputes, and +/- 250 consumer ones. We cannot establish a precise number since, by definition, arbitration is private and there are no comprehensive reported statistics. We can reasonably envisage (based on

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15 Drahozal, *Regulatory Competition and the Location of International Arbitral Proceedings;* (2004) 24 International Review of Law and Economics 371

16 The SPICe Briefing cites an article (Anderson) suggesting that the 1996 Act made little difference to the volume of arbitration business in England; that article misunderstands (i) the position of the 1996 Act in the sequence of legislation 1950/1979/1996 (ii) the significant effect on the volume of arbitration business of the Housing Grants, Construction and Regeneration Act 1996 which diverted a large number of construction arbitrations (the mainstay of UK domestic arbitration) into a different dispute resolution process called adjudication.

17 *Mead General Building Ltd (In Creditors' Voluntary Liquidation) vs Dartmoor Properties Ltd*; (2009) EWHC 2000 (TCC); judgment given 4th February 2009.

levels in England) a starting point, within a reasonably short time after the Bill has come into force, of 200 commercial cases, 250 small business cases and 500 consumer cases. If we assume five days in arbitration for a commercial case, two for a small business case and half a day for a consumer case, that gives 1,750 days of arbitrations compared to the existing 375, an increase of 1,375 days over present volumes. That would mean an additional 6 x 1,375 hours of court time freed up, i.e. 8,250 hours. In fact this figure should be greater, since a well-managed arbitration can be inherently more time-efficient than the court, so every arbitral hour should save >1 court hour.

Further, the cost to the parties of a day in court is very approximately 8 hours x £300 for an Advocate, 8 hours x £200 for a Solicitor, or a total of £4,000; we can reasonably suppose that in many arbitrations Advocates will not be required and the daily cost therefore immediately drops to £1,600; many arbitrations (particularly construction ones) are done with Quantity Surveyors or Engineers representing the parties at (say) £100-150/hour or +/-£1,000/day. We can therefore see a saving of between £1,000 and £3,000/day compared with court. Further, arbitrations will take less time when the arbitrator acts proactively, as the Bill encourages (and see below).

We have, therefore, 1,375 days of arbitration time (court time should be longer) with a daily saving to each party of at least £1,000/day, or more, over court costs, requiring to be factored up to take account of the fact that arbitration should be more flexible and tailored to the circumstances. This is why CIArb press releases referred to savings by disputing parties of millions of pounds in costs.

Further, empowered by the Bill and the forthcoming short-form Rules (see below), any appropriately-qualified person (whether lawyer, engineer, QS, architect or other) will be able to set up an arbitration practice in his/her own area. This means that the spread of new business in Scotland need not be confined to the larger cities. Disputes readily lending themselves to arbitration will arise in Brora, Ullapool, Fort William, Lerwick and Dumfries just as they will in Edinburgh or Glasgow. The CIArb's marketing strategy and member support infrastructure (training, technical updates, quality control) will support this.

International Arbitration

5. Imagine a German main contractor with a South Korean sub-contractor engaged on an infrastructure construction project in Lesotho; if they fall into dispute, where do they go to resolve it? The courts of Lesotho? No, not least because no judgement by any such court is enforceable outside Africa (and may have very limited enforceability even within Africa). The German courts? No, say the South Koreans (who might see this as far worse than an away football game). No, say the Germans too; we cannot enforce any judgement outside the EU[18].

International Arbitration? "Yes", say both: we can agree on all the main features of the arbitration including (i) venue (ii) language of proceedings (iii) the tribunal (iv) the arbitral law (v) the arbitral rules etc. Most importantly of all, an arbitral award[19] rendered in any one of the 144 countries party to the New York Convention[20] can

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18 The South Koreans would also take this view since any US dollar bank account held by the Germans in New York would be untouchable.

19 The equivalent of a court judgment.

20 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; this includes almost all relevant trading countries of the word; the few non-parties include Angola, Chad, Iraq, Namibia, Nauru, North Korea, Myanmar, Tajikistan, Tanzania, and Yemen. The Convention has been widely and frequently described, particularly last year around the time of its 50th Anniversary, as the most important trade treaty ever created by the United Nations

easily be enforced (with minimal grounds for challenge) in any other of the 144 countries.

Can they arbitrate in Scotland? Yes, they will be able to do so under the 2009 Act. The UK is party to the New York Convention and the Act is already seen as modern, progressive, user-friendly legislation. Why should they arbitrate in Scotland instead of London? Three main reasons: (i) legal and related costs in Scotland are approximately 40% lower than in London; (ii) the Act has some innovative features not included in the (English) 1996 Act; and (iii) Scotland has many advantages over London, including better hotels, spectacular scenery, golf, whisky, bagpipes, friendly people, good lawyers, and world-class venues for the Hearings. Scotland is accessible, user-friendly, with a good, modern court system if it is needed, and a practical, hands-on reputation for 'getting the job done'[21].

As stated above, since arbitration is a private dispute resolution process, precise data on volumes are hard to find. We have calculated a figure of £250 million/year as being the value of international arbitration to London[22]. This covers tribunal costs, institutional costs and the parties' legal and other costs. This is economic turnover, in real money, generated by arbitration practitioners in London.

Taking the population ratio as between England and Scotland, this suggests a potential for up to £25 million in new business in Scotland, but that would be at London's legal rates; applying a 40% discount to convert London to Edinburgh/Glasgow rates brings us back to a potential for at least £15 million of new international arbitration business. Of course this will not happen overnight: international competition for this business is fierce, most notably the aggressive competition of recent years between Singapore, Hong Kong and Kuala Lumpur.

This new business opportunity for Scotland requires zero investment by the Scottish Government or taxpayer.

The principle of developing a set of rules based on the United Nations Commission on International Law (UNCITRAL) Model Law for arbitrations in Scotland.

6. As stated above, the principles, and much of the drafting, of the UNCITRAL Model Law have been incorporated into the Bill, much as into the 1996 Act. However the Bill will repeal the Model Law as it presently applies to international arbitration in Scotland, a decision which might appear controversial. In particular it might be argued that repeal will drive international arbitration business away from Scotland. We submit quite the contrary, because (i) there is almost no international arbitral business at present anyway, perhaps only 1 case/year (ii) there is no causal connection between a country's adoption of the Model Law and its success as an international arbitral venue (see above) and (iii) international parties will respond positively (some have expressed interest already) to the availability of an effective arbitral venue with a sophisticated modern arbitration law and rules.

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since, without the enforceability of arbitral awards, international trade would be massively more risky, complex and expensive. There is a strong analogy here with the position in Scotland.

[21] It might seem odd to insert a touristic element here, but place yourself in the position of a party to an arbitration faced with a choice of four weeks in Edinburgh, Glasgow or Aberdeen (on the one hand) or four weeks in Lagos, Riyadh, Düsseldorf or Moscow (on the other); which would you choose ?

[22] In 1978 the Commercial Court Committee believed that international arbitration generated hundreds of millions of pounds for the English economy - see its *Report on Arbitration* (1978) Cmnd 7284, para 18.

The appropriateness of the designation of the Scottish Arbitration Rules (SAR) contained in Schedule 1 as either "mandatory" or "default".

7. Arbitration is, as stated above, an inherently flexible process offering the significant advantage of procedures being tailored to the requirements of each case. However, there are certain fundamental principles (e.g. those which flow from 'natural justice' or from ECHR Art.6 which cannot be ignored and, as a matter of public policy, are necessarily mandatory and this is common across the world. It follows that there must be mandatory and non-mandatory (i.e. "default") rules, the latter to apply in the absence of agreement to the contrary by the parties, so that if the parties agree nothing or do nothing, they will still acquire a complete and comprehensive set of rules for the conduct of their case. However, if the parties have already agreed something else (except as to the mandatory rules) either by express agreement or by adoption of some other set of rules (e.g. ICC, LCIA or the Scottish Arbitration Code 2007), then that agreement will, where applicable, supersede the default rules in the SAR.

The division mandatory/non-mandatory derives from the UNCITRAL Model Law and is replicated worldwide e.g. in England, Hong Kong, New Zealand and Ireland.

The CIArb will shortly submit any revisions it recommends concerning which rules should be mandatory and which should be default rules.

The extent to which the provisions in the Bill, particularly the Scottish Arbitration Rules, will ensure fairness and impartiality in the arbitration process, minimise the expenses of an arbitration and promote efficiency in the arbitration process.

8. The Bill has numerous provisions in this regard, in part flowing from Section 1 which states clearly: " The founding principles of this Act are (a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense, ...". Examples of the application of these principles include the following rules (all mandatory)

8(2) An individual to whom this rule applies must, without delay, disclose to the parties any circumstances known to the individual (or which become known to the individual before the arbitration ends) which might reasonably be considered relevant when considering whether the individual is impartial and independent.

12 The Outer House (of the Court of Session) may remove an arbitrator if satisfied on the application by any party (a) that the arbitrator is not impartial and independent[23], (b) that the arbitrator has not treated the parties fairly, ...

23(1) The tribunal must (a) be impartial and independent (b) treat the parties fairly, and (c) conduct the arbitration (i) without unnecessary delay, and (ii) without incurring unnecessary expense.

24 The parties must ensure that the arbitration is conducted (a) without unnecessary delay, and (b) without incurring unnecessary expense.

Extensive experience around the world, particularly in England, has put much flesh on these bones and, for example, CIArb training programmes hammer home these key messages. Further, the CIArb's "gold standard" worldwide qualification, "Chartered Arbitrator", not only guarantees the effective and proper conduct of arbitrations but reinforces that by rigorous quality control, complaint and disciplinary procedures.

[23] Rule 74 defines "independence"

Other Issues Not Addressed Above

CIArb Short-Form Rules

9. The Bill covers the entire spectrum of arbitrations and, at first sight, might seem unfriendly to small businesses and consumers. It is, of course, essential that the Bill benefit the entire community at all levels and be seen as a user-friendly process, both domestically and internationally. The CIArb Scottish Branch has begun drafting new Short-Form Rules to cover smaller arbitrations, and these will be launched in parallel with the Bill and will form a key element of the benefits the Bill will bring the whole community in Scotland.

Comparison to Arbitration Act 1996

10. The Bill has a number of features which, we believe, improve on the 1996 Act; these include:

(i) Under the Bill Ministers may by order make any provision which they consider appropriate for the purposes of giving full effect (subject to due parliamentary process) to any provision of the Bill. This is intended to preclude the need for primary legislation to rectify any minor problems (including transitional matters and obvious absurdities or inconsistencies) that may come to light, thereby permitting a rapid response.

(ii) Section 18 of the 1996 Act brings in the Court to deal with any failure of the appointment process but the question may be asked - with respect, what experience does the Judiciary have of appointing arbitrators? Would it not be more logical to have an experienced arbitral appointing body sort out such failures? Section 22 of the Bill creates "Arbitral Appointments Referees" (AARs) who will resolve such failures.

(iii) Consistent with ECHR Article 6, the Model Law, the UNCITRAL Rules and extensive recent international developments, the Bill requires arbitrators to be independent as well as impartial; further, prospective arbitrators and arbitrators post-appointment are placed under a clear and continuing disclosure requirement concerning conflicts of interest.

(iv) The Bill is fully consistent with the Model Law; further, the Scottish Arbitration Rules (SAR) are intended to be both "cutting edge" and consistent, as far as practicable, with the UNCITRAL Rules. To preserve these consistencies, section 24 of the Bill provides that Ministers may by order modify (a) the SAR or (b) any other provision of the Act, in such manner as they consider appropriate in consequence of any amendment made to the UNCITRAL Model Law; it is proposed that the final draft of the Bill will add reference to the UNCITRAL Rules here since they are under revision at present.

(v) Rule 25 provides an express confidentiality/privacy obligation as a default rule (i.e. from which the parties can opt out), as is given in England by case law; the draftsmen of the 1996 Act considered this area too difficult to draft; the proposed Scottish solution is novel and has been seen and warmly approved by international colleagues.

These (particularly (v)) and other such features have already been noticed by the international community

Conclusions

11. Significant benefits to the Scottish Economy can be achieved for no outlay from the public purse.

At a time when our Courts and the public purse are under so much pressure, the time is right for this Bill to take its place in the armoury of dispute resolution tools available to commercial people, public authorities and consumers.

At the same time, the Bill brings the law in a key area of economic activity right up to date (in world terms), applies to both domestic and international disputes, saves time and money (both private and public) in the Courts and will enhance the image of Scotland in the developed world. This Bill contains the very best of modern international practice and will be much imitated.

The CIArb is confident that the Committee will see the force of these arguments.

CHARTERED INSTITUTE of ARBITRATORS (CIArb)
SCOTTISH BRANCH
6th May 2009

SUBMISSION FROM THE COMMERCIAL JUDGES OF THE COURT OF SESSION

1. The Commercial Judges submitted a detailed Response to the Consultation on a draft of the Bill. Some of the points we made have been taken up in the Bill as introduced into the Scottish Parliament. For example, some of the language has been made more accessible (e.g. the dropping of the word "oversman") and the Bill now makes it clear in section 11 (which was not the case with the earlier draft) that there is no right to raise legal proceedings otherwise than in accordance with the Act. We welcome this. Other points have not been accepted. For example the Bill retains the proposal that "Arbitral appointments referees", rather than the court, should make arbitral appointments in default of agreement between the parties, despite our concern that it would simply add a layer of unnecessary expense to the process. It also does not take up our suggestion (at pp.3-4 of out Response) that some discretion whether or not to sist proceedings should be retained in the case of domestic arbitration[1]. Such matters reflect a deliberate policy choice by the sponsors of the Bill in light of other representations, and we do not think that we should seek to address this point further.

2. We remain enthusiastic in our support of the Bill, which should put arbitration in Scotland on a more secure and up-to-date footing and provide the framework within which arbitration in Scotland could flourish. That said, as the proposers of the Bill recognise, the Bill alone will not increase the use of arbitration in Scotland either by domestic users or by parties who presently arbitrate elsewhere.

3. Notwithstanding the above, there are some provisions of the Bill which we consider call for comment. We list them below:

4. One of the aims of the Bill, as is said in para.27 of the Policy Memorandum accompanying publication of the Bill, is to

> "put the vast majority of the general Scots law of arbitration into a single statute. … replace most of the few existing statutory provisions relative to arbitration in Scotland and codify and aim to improve the existing law, both common law and statutory. In future anyone in Scotland, or seeking to do business in Scotland, should be able to access relatively easily the principles and rules governing the law of arbitration in Scotland in language which can be readily understood."
>
> This is clearly to be welcomed. However, para.75 of the Policy Memorandum states (as is the case) that sections 85-87 of the UK Arbitration Act 1996 continue to apply to arbitration in Scotland. These are the only sections of that

[1] We suggested that "there may be something to be said for giving the court some discretion in the case of domestic arbitration. We can think of a number of situations in which it might be undesirable to sist a cause. For example, in construction disputes there are frequently a number of interrelated contracts and disputes. If the disputes are raised in court, they are often conveniently conjoined or at least heard together, to avoid duplication of expense and the risk of inconsistent fact findings. However, it may be that only one of the contracts contains an arbitration clause. A mandatory sist in the case of a claim under that contract would prevent this efficient disposal of the whole dispute. There may be other situations where it might be argued that a sist is undesirable, for example where it is clear that arbitration is being insisted upon solely for purposes of delay. We note that for England and Wales, s.86 of the Arbitration Act 1996 reserves to the court discretion to refuse to stay an action for domestic arbitration if there are "sufficient grounds for not requiring the parties to abide by the arbitration agreement". Examples are given in s.86(3). Although ultimately the matter is one of policy, we think it should be for consideration whether a similar distinction between international and domestic arbitration should be made in Scotland."

Act which have any application to Scotland and may well be overlooked by persons seeking to know the law relating to arbitration in Scotland. We consider that greater clarity would be achieved by re-enacting them as part of the new Arbitration (Scotland) Bill.

5. We expressed some concerns in our earlier Response about the legislative technique in section 6 of the Bill, which says that the Scottish Arbitration Rules "are to govern every arbitration seated in Scotland". This is followed by the identification of Mandatory and Default rules in sections 7 and 8. We were concerned that this wording did not make it clear that the rules operated as part of the general domestic law, rather than (as had been suggested in para.17 of the Consultation paper) as implied terms of the arbitration agreement. This matters, because many of the provisions giving powers to the court are included in the rules rather than in sections of the Bill. Para.80 of the Policy Memorandum says that in the view of the proposers the wording used in sections 6-8 is sufficient to make the rules part of the substantive law, but we have our doubts. Our concern is addressed to some extent by section 11, which is new, but any doubt on the matter could easily be resolved by altering s.11(1) so that it provides:

> "(1) ... Legal proceedings are competent in respect of
>
> (a) …
>
> (b) …
>
> to the extent that they are provided for in the Scottish Arbitration Rules (in so far as they apply to that arbitration) or in any other provision of this Act, but not otherwise."

6. Section 13 of the Bill is new. It provides for anonymity in legal proceedings. Subsection (1) states:

> "Where an arbitration is the subject of legal proceedings, the identity of a party in the arbitration must not be disclosed outwith the court—
>
> (a) by the court, or
>
> (b) in any report of the proceedings."

There are qualifications to (b) in subsection (2), but no qualifications to the prohibition on disclosure by the court. This would appear to mean that any Opinion issued in respect of an arbitration challenge would have to be anonymised (i.e. "X against Y"). Can this really have been intended for all cases? Although this regularly occurs for good reason in, for example, children cases, in other cases it would appear to conflict with principles of open justice to which the courts now strive to adhere. We are aware that, in the English courts, judgments on arbitration appeals name the parties and are reported under the names of the parties. We would also question whether it is realistic in the commercial world to suppose that the identity of the parties to a dispute will not be gleaned, by those interested, from the facts of the case narrated in an Opinion, even where the parties are not named. Further, in so far as the prohibition applies to any report of the proceedings, this would appear to apply to a Law Report in Session Cases or the SLT, SCCR etc. and to raise the same difficulties. We would suggest that the position be re-considered and/or clarified.

7. Section 14 of the Bill applies to statutory arbitrations. These are defined in section 14(1). Section 14(4) provides that "every statutory arbitration is to be taken to be seated in Scotland". The consequence is that, unless excluded or

inconsistent, the Scottish Arbitration Rules apply. On the face of it the provisions of clause 14(4) appear to apply to every statutory arbitration, including, for example, one held in England between English parties and wholly unrelated to Scotland. We do not think that this can have been intended. We would suggest that either the definition of "statutory arbitration" in section 14(1), or the terms of section 14(4), be amended so as to make it clear that the section and the Rules apply only to statutory arbitrations held in Scotland or held under the provisions of enactments relating to Scotland.

8. We are troubled by the concept, referred to in Rules 9 and 10 of the Scottish Arbitration Rules, of the tribunal revoking the appointment of an arbitrator. On the face of it, in a three arbitrator case, party A could apply to the tribunal objecting to the arbitrator appointed by party B. This might be either before or after the two of them had appointed a third arbitrator. In the case of such a challenge before they had appointed a third arbitrator, the tribunal might find itself split and therefore unable to reach a decision. In such a case, in terms of Rule 10(4), the appointment of B's arbitrator would be revoked. There is scope for mischief in these provisions. Further, it is surely invidious to ask another member of the tribunal to remove a co-appointee for bias or unfairness. Surely the proper course would be to leave these matters to the court, which has the default power in any event under Rules 12-14.

9. Rule 29 of the Scottish Arbitration Rules attempts to address the question of what is to happen where the tribunal cannot reach a decision by unanimity or by a majority. Rule 29(2)(a) provides for the decision to be made by the arbitrator nominated to chair the tribunal. Rule 29(2)(b) deals with the case where no person has been nominated to chair the tribunal. In that case the decision is to be made by an umpire appointed by the tribunal (if they can agree) or by an arbitral appointments referee (if they cannot). This does not seem sensible or cost effective. Why bring another person in, who might have to acquaint himself with all the facts of the case, rehear submissions, etc.? Will the umpire, once appointed, withdraw when the decision has been made, or will he remain in place, though "in the wings"? Surely the more sensible course is to stipulate that in the absence of agreement as to who is to chair the tribunal, it shall be the arbitrator last appointed – in the case of a tribunal of three, which is likely to be the norm, if the tribunal goes beyond a single arbitrator, that is the natural choice, since that will be the arbitrator appointed by the two party-appointed arbitrators. That would avoid the need for the introduction of an umpire.

10. Rule 46(2) allows the tribunal to award compound interest. Rule 47, however, states that the tribunal's award may not grant a remedy or award interest which the Court of Session would be unable to grant in deciding the same dispute in the same way. If Rule 46 is intended to refer to compound interest permitted by the contract, the provision is unnecessary. If it is intended to give the tribunal additional powers as regards interest apart from those conferred by the contract, it does not seem to succeed, since the Court of Session has no power (apart form where the contract so provides) to award compound interest. We consider that these provisions require clarification.

11. We have no other specific comments on the Act or proposals for evidence before the Parliamentary Committee at Stage 1

12. Our views have also been sought on one additional matter raised in a letter from Hamish Goodall of the Scottish Government dated 30 March 2009. He asks this:

> "We understand that at present a stated or special case on a decision of an arbiter can be made to the Court of Session on a point of foreign law. The Bill as drafted adopts the approach of restricting appeals for error of law to Scots law in line with the Bill policy of keeping appeal opportunities limited, but we would welcome the views of the Lord President and the Court more widely."

13. We were not aware that at present a stated or special case can be made to the Court of Session on a point of foreign law. Section 3 of the Administration of Justice (Scotland) Act 1972 allows the tribunal to state a case for the opinion of the court "on any question of law arising in the arbitration". Foreign law is treated as a question of fact in the Scottish Courts and would therefore not give rise to a question of law: see, as regards the identical point in England under the Arbitration Act then in force, *SAIL v. Hind Metals* [1984] 1 Lloyd's Rep. 405, at 408 col.1 and 409 col.2. We would not have thought that there should be a right of appeal under the new Act, when it comes into force, on points of foreign law.

14. Our only qualification is this, and it is really a matter on which a policy decision has to be taken. One of the stated aims of the Bill is to encourage people to come to Scotland to arbitrate, who might otherwise arbitrate in London or elsewhere. It is envisaged that parties to an English law contract might, if the new Act is a success, wish to arbitrate in Scotland. They can do so confident in the knowledge that on contractual matters Scottish and English law is very similar. But would they wish to come to arbitrate in Scotland under an English law contract if their rights of appeal were constrained by the fact that any question of law was technically one of English law and therefore not susceptible of the same rights of appeal as they might have enjoyed had the arbitration taken place in London? We do not know the answer to this. If it were thought that that was a material consideration, it might be possible to stipulate that, for the purpose of the provisions of the Bill providing for a right of appeal to the court for error of law, all questions of English law should be treated as questions of law, not fact. But we are not much attracted to this idea.

15. The Lord President has seen this submission and approves of and supports the views expressed herein.

Lord President, Commercial Judges
Court of Session
13 May 2009

SUBMISSION FROM CONSUMER FOCUS SCOTLAND

1. Consumer Focus Scotland started work on 1 October 2008. Consumer Focus Scotland was formed through the merger of three organisations – the Scottish Consumer Council, energywatch Scotland, and Postwatch Scotland.

2. We work to secure a fair deal for consumers in both private markets and public services, by promoting fairer markets, greater value for money, and improved customer service. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or shoppers in a supermarket.

3. We have a commitment to work on behalf of vulnerable consumers, particularly in the energy and post sectors, and a duty to work on issues of sustainable development.

4. The Scottish Consumer Council (SCC), one of Consumer Focus Scotland's predecessor bodies, had a longstanding interest in ensuring that consumers who become involved in disputes have access to appropriate and affordable means of resolving them, and we continue to work towards this aim. We are particularly interested in the potential benefits to consumers of alternative dispute resolution, including mediation and arbitration. While most people agree that the courts are an important way for people to enforce their rights, on the whole those involved in disputes are more interested in finding a resolution to their problem or obtaining compensation for harm or loss than enforcing their legal rights.[1] We also know that people would generally prefer to avoid becoming involved in legal and court processes.

5. They are apprehensive about involvement with lawyers and also the potential costs, formality, delay and trauma they associate with legal processes.[2]

6. While our main focus to date has been on the benefits of mediation, we believe that the increased availability of a variety of alternative methods of dispute resolution, including arbitration, would be an important step towards achieving better access to justice for consumers in Scotland.

7. We welcome the Arbitration (Scotland) Bill, which will clarify and codify the law of Scotland in this area, bringing it into line with that in England and Wales, encouraging Scottish businesses to have their disputes arbitrated in Scotland rather than in other jurisdictions, and reducing the costs involved. We do not, however, intend to respond in detail to the provisions contained within the Bill, as the Bill's main focus is on dealing with commercial disputes, rather than those involving consumers.

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[1] *Paths to Justice Scotland: what people in Scotland do and think about going to law*, Hazel Genn and Alan Paterson, Oxford University Press, 2001

[2] See Note 1

8. We understand that the Bill does not expressly encompass consumer arbitration schemes because consumer protection is reserved to the UK parliament. Such schemes have an important contribution to make to the civil justice system in Scotland, however, and we are keen to see existing consumer arbitration schemes used by Scottish consumers more than at present. The Chartered Institute of Arbitrators, through its Independent Dispute Resolution Services, provides a wide range of arbitration and adjudication services for business to consumer (including small business) disputes, which cover the whole of the UK. These are largely sector-specific, such as the ABTA scheme for package holidays, the Motor Industry Code of Practice and Repair scheme and the scheme governing disputes between surveyors and their clients.

9. While it may not always be the best option - it may be less flexible than mediation in terms of the outcomes it can achieve, for example, and some schemes can be relatively expensive – arbitration can offer an accessible, quick and low cost means of dispute resolution to consumers in appropriate cases.

10. It is important that any scheme aimed at consumers is as straightforward, quick and low cost as possible. We welcome the Bill's recognition that such principles are also important in commercial litigation. Most of the existing consumer schemes are provided free of charge or at low cost to the consumer. These schemes are mainly used by people in England and Wales at present. It is thought that consumer awareness of these schemes is generally low in Scotland, and the Chartered Institute of Arbitrators is looking at ways of raising awareness in Scotland, which we support. In our response to the Scottish Government consultation, we suggested that the Scottish Government should consider how consumers in Scotland might be encouraged to use consumer arbitration schemes to resolve their disputes, and we would be happy to be involved in any discussions on this. It is critical, however, that current protections, such as those contained in sections 89 to 91 of the Arbitration Act 1996 and the Unfair Terms in Consumer Contract Regulations 1999 protecting consumers against low-value consumer arbitration clauses, be maintained.

11. While the main focus of the Bill is on commercial disputes, we very much welcome it as an important step towards a culture within which the courts are viewed as a last resort, as recommended by the SCC's Civil Justice Advisory Group chaired by Lord Coulsfield in its 2006 report.[3]

I hope that these comments are helpful.
Martyn Evans

Director
14 May 2009

[3] *The Civil Justice System in Scotland – a case for review?: the final report of the Civil Justice Advisory Group*, published by the Scottish Consumer Council, November 2005.

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

1. The Law Society of Scotland welcomes the introduction of the Arbitration (Scotland) Bill, which is a progressive step towards very welcome reform of the current law of arbitration in Scotland.

2. The Society fully supports the object of the Bill in helping to promote arbitration, both from within and outwith Scotland, by effecting procedural changes to cure long-standing weaknesses in the common law powers of the arbitrator and to make improvements to eliminate other perceived defects. We wish to make the following comments and suggestions and may wish to submit amendments at a later stage.

General Comments

3. The Society approves of the approach of the Bill to include founding principles provisions about Arbitration Agreements and the Scottish Arbitration Rules. The Society believes that the Bill would be enhanced if it introduced a self-contained, all-embracing code of arbitration. This would achieve accessibility and simplicity. However, a number of issues remain and these are addressed below.

Section 13 Anonymity in legal proceedings

4. The Society agrees with the terms of section 13. It is appropriate that, in arbitrations, privacy is respected. Section 13 (2) states that disclosure is to be "treated as a breach of an obligation of confidence". The Society is of the view that any such breach should be expressly actionable. It is suggested that the question of anonymity needs to be further considered in relation to enforcement proceedings.

Sections 15 Power to adapt enactments providing for statutory arbitration; 22 Arbitral appointments referee; and 24 Amendments to UNCITRAL Model Law or New York Convention

5. These provisions provide powers for Ministers to make certain orders. The Society suggests that the Bill should be amended to include an obligation to consult with interested parties in creating such orders.

Section 17 – Recognition and enforcement of New York Convention awards

6. This section demonstrates that the Bill is dealing with separate markets for arbitration – domestic arbitrations (predominantly in the construction industry); and international arbitration. The Society welcomes the focus which this provision gives to international arbitration and the capacity of the Scottish Legal System to respond to the needs of the international business community for arbitrations. The Society believes that rules for international arbitration must demonstrate simplicity and compatibility.

Section 27 (and Schedule 2) – Repeals

7. In its response to the Scottish Government's consultation on the Arbitration (Scotland) Bill, the Society expressed concerns about removing the internationally recognised UNCITRAL Model Law, which was enacted in Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The Law Society believes that parties to arbitration should be permitted the option of applying the UNCITRAL Model Law if they so wish.

Section 33 – Commencement – Retrospective Effect

8. The Society is concerned that the Bill may have retrospective effect by applying to arbitrations under contracts which contain arbitration clauses where those contracts were entered into prior to commencement of the Act.

9. The Society believes that the provisions should only apply to agreements to arbitrate entered into after the coming into force of the Act, which would allow parties to have the choice of whether or not to arbitrate based on the new regime and this should be made clear in the Bill. There has to be clarity about ongoing arbitrations and the application of the Bill to them. Transitional provisions may be necessary.

10. The principal reason for the concern about retrospective effect is that it is common for many contracts such as construction contracts to contain arbitration clauses which will apply in the event that a dispute arises under those contracts *at some point in the future*. Disputes may of course arise many years after the parties have concluded such a contract. Many such contracts will exist at present. Legislation with retrospective effect may be challenged in certain circumstances and the potential for this should be avoided.

11. The Society suggests that the Bill should be amended to clearly indicate that the provisions would apply only to agreements to arbitrate entered into after the coming into force of the Act. It should, however, be available to parties who made an agreement to arbitrate prior to commencement, to *opt in* to the new rules. This would better preserve the current nature of arbitration as an option parties may choose in the mediation of their disputes.

Rule 40 – Referral of point of law

12. It has always been the case that Scottish arbiters (arbitrators) deal with questions of law and fact. Rule 40 allows for any points of Scots law arising during the arbitration in the arbitration to be referred to the Court before the decree arbitral. Whilst the Society agrees that a mechanism must be in place to allow challenge of a decision based on legal error, as below, the correct approach is for the arbitrator to deal with all legal questions in the first instance, to avoid undermining the arbitration process. Rule 40 will encourage reference to Court on points of law, which will (a) increase pressure on the

Courts and (b) allow the possibility of undesirable parallel processes of arbitration and Court proceedings.

Rule 45 – Remedies available to tribunal

13. The Society believes that these provisions are an opportunity to rectify one of the major deficiencies in the current common law, but that further amendment is required in order to achieve this.

14. The Scots common law of arbitration traditionally does not allow an arbitrator to have the power to assess and award damages. This means that, where there is no express power in an arbitration agreement for an arbitrator to award damages, the claiming party will have to go to Court to make a claim in damages. The defending party can force the claiming party to arbitrate the other claims that are not for damages and deny an alternative claim in damages in the arbitration. This can lead to an undesirable multiplicity of proceedings.

15. Rule 45 potentially confers appropriate powers on the arbitrator to avoid this. Rule 45 is, however, a default rule, which will apply unless the contracting parties remove it. In practice, it is often the case that one party has a commercial negotiating advantage and may seek to delete the power to award damages, if there is any perceived tactical or commercial reason to do so.

16. The Society therefore suggests that there is a need for a clear and express power on the part of the arbitrator to assess and award damages, and that this should not be left to default rules that can be altered. Given the significant difficulties to which the common law rule has given rise in Scotland, in our view, this matter is important enough to be included in the mandatory rules and the Bill should be amended accordingly.

Rule 46 – Interest

17. Under Scots common law, an arbitrator has no power to award interest from a date before the date of the decree arbitral. The Society suggests that this does not meet modern commercial needs. Rule 46 seeks to address this by allowing the arbitrator to award interest, however it is a default rule and could be deleted for similar reasons to those cited above in relation to damages.

18. The Society therefore suggests that Rule 46 or a revised version of it should be a mandatory, rather than a default rule, which would allow the arbitrator always to award some interest from an appropriate date *before* the date of the decree arbitral (the date the sum was due), until the date of payment.

Rule 50 – Provisional awards

19. The Society believes that the term in the Bill, "provisional awards", appears to cover, among other things, what are currently known as 'interim awards'.

20. Interim awards are one of the most controversial areas in dispute resolution, where the Courts have developed very complex rules to ensure that they are granted only in appropriate circumstances before the final award. The Bill does not contain equivalent rules and the Society believes that the legislation must be made clearer in this regard, drawing clear distinctions between interim, part and terminating awards. The Society believes that unless this is addressed it will prove to be a major disincentive for many possible users of arbitration.

21. The Society suggests amending the Bill so that provisional awards come under the default, rather than mandatory rules.

Rule 51 – Part awards

22. Part awards can be used to deal with some of the matters in a dispute on a final basis – in some cases this can lead to a speedier, fairer and final determination of unconnected elements of a dispute.

23. The Society suggests that the Bill should be amended so that the power to make part awards in appropriate circumstances is included in the mandatory rules, rather than in the default rules.

Rule 67 – Challenging an award: legal error

24. The Society accepts the need for judicial control to avoid this process being abused in inappropriate circumstances but it believes that the mechanism for challenging an award on grounds of legal error should be made clearer and simpler. The Society believes that unless this is addressed it will lead to difficulties and it will prove to be a major disincentive for many possible users of arbitration.

25. We suggest that on the rare occasions when a party might seek to challenge an award based on legal error, the Bill should be amended to include a simpler rule, under which, where the Court is satisfied that there is a real issue, an error of law can be referred to a judge of the Commercial Court in the Outer House of the Court of Session. The matter could be dealt with under the expedited procedure available there, with an appeal only to the Inner House at the discretion of the judge concerned.

The Law Society of Scotland
19 May 2009

SUBMISSION FROM THE ROYAL INSTITUTION OF CHARTERED SURVEYORS (RICS)

1. A global organisation, the Royal Institution of Chartered Surveyors (RICS) is the principal body representing professionals employed in the land, property and construction sectors. In Scotland, we represent over 10,000 members comprising chartered surveyors (MRICS or FRICS), technical surveyors (AssocRICS), trainees and students. Our members practise in sixteen land, property and construction markets and are employed in private practice, central and local government, public agencies, academic institutions, business organisations and non-governmental organisations.

2. As part of its Royal Charter, RICS has a commitment to provide advice to the government[s] of the day and, in doing so, has an obligation to bear in mind the public interest as well as the interests of its members. RICS Scotland is therefore in a unique position to provide a balanced, apolitical perspective on issues of importance to the land, property and construction sectors.

3. RICS Scotland's Dispute Resolution Service (DRS) retains information on specialist problem-solvers around the country, and is able to respond to enquiries concerning all types of dispute involving property (both residential and commercial).

4. Arbitration is used by chartered surveyors to settle disputes with regard to the rent review values of commercial properties in Scotland and to settle legal, technical and commercial disputes within the construction industry. Currently RICS Scotland process around 500 applications for rent review arbitration in a year and is the biggest appointing body in Scotland.

5. RICS Scotland recently attended the 'conversation' meeting with the Minister, Jim Mather, and we found this to be a beneficial way to interact with the government and to debate more fully the fundamentals of the proposed bill.

6. On the whole, RICS Scotland is broadly supportive of the bill and we wish to make no further additional comments.

Sarah J Speirs
Head of Communications
RICS
14 May 2009

SUBMISSION FROM THE SCOTTISH COUNCIL FOR INTERNATIONAL ARBITRATION

1. The Scottish Council for International Arbitration has been urging reform of the Scottish law of arbitration many years, and has welcomed the decision of the present government to introduce an Arbitration Bill. The Council participated in the consultation process which preceded the introduction of the present Bill, and has had the opportunity, for which it is grateful, to meet with Mr. Fergus Ewing and others who have been concerned in the preparation of the bill from the government side. Regrettably, however, the members of the Council are convinced that the Bill in its present form will not achieve at least one of the objectives which they consider vitally important and which, it is understood, the government also regards as of major significance, that is to equip Scotland with a system of arbitration law which is capable of attracting international arbitration business and playing a part in presenting Scotland as a modern environment for international business generally. The Council would therefore request an opportunity to give oral evidence to the Committee considering the Bill in order to explain its anxieties.

2. Very briefly, the principal reason for anxiety is as follows. The Law Reform (Miscellaneous Provisions) Act 1990 adopted the Model Law on International Commercial Arbitration, known as UNCITRAL, as the law of Scotland applying to international arbitrations. The Model Law was prepared under the auspices of the UN and, as its name implies, provides a code for the conduct of international arbitrations. This code has been adopted in more than sixty jurisdictions worldwide, and will be familiar to anyone involved in international commerce. Since 1990, it has provided the framework for international arbitrations in Scotland. The Bill, however, proposes to repeal the relevant part of the 1990 Act, the effect of which will be that the provisions which the Bill makes for Scottish arbitrations will apply also to international arbitrations under Scots law. The only positive reason suggested for this change is to achieve simplicity and avoid confusion. There is, however, no reason whatever to think that the existence of special provision for international arbitrations has caused the slightest confusion or difficulty for anyone, whether concerned in international or in Scottish arbitrations. If the law is changed in the way proposed, the result will be to discourage international business from coming to Scotland. It must be understood that the international environment is very competitive indeed. Many jurisdictions have set up arbitration centres, often extensively funded by governments, and are anxious to advertise their expertise. Any parties who might consider arbitrating in Scotland are much more likely to do so if they can be assured that the rules which will be applied are those with which they are already familiar, and that they do not have to come to terms with new rules, even if those rules might in themselves be acceptable. The repeal of the Model Law will therefore be really damaging to the prospects of success in one major objective of the Bill, and the Council hopes that it may be permitted to elaborate on this disadvantage in oral evidence.

3. The Council has also a number of suggestions for technical improvements in the provisions of the Bill, which will be submitted in writing, and would be prepared to deal with any other aspect of the Bill on which the Committee might invite comments.

Peter Anderson
Secretary
15 May 2009

SUBMISSION FROM THE SOCIETY OF MOTOR MANUFACTURERS AND TRADERS LTD

1. Our subsidiary, Motor Codes Ltd, incorporates arbitration within our self regulatory process to support and facilitate the resolution of disputes between consumers and businesses, under our New Car Code and the motor industry's Service & Repair Code. The arbitration offered is in accordance with the Arbitration Act 1996.

2. Details of our Codes and how arbitration is used are available at http://www.motorindustrycodes.co.uk

3. Therefore we would support the introduction of equivalent legislation to facilitate the development of low cost qualitative dispute resolution in Scotland.

4. You may be interested in these statistics:

New Car Code Statistics

	Total Contracts 2006	Total Contracts 2007	Total Contracts 2008
Total Contacts (Calls: Letters, Emails)	4315	3871	4038
Conciliation Cases	353	342	527
Arbitration Cases	4	9	16

2006 Arbitration Cases

Outcome	2 of the 4 Claimants Successful
Rewards	£1,330.00
	£5,500.00

2007 Arbitration Cases

Outcome	2 of the 9 Claimants Successful
Rewards	£1,944.70
	£375.00

2008 Arbitration Cases

Outcome	3 of the 16 Claimants Successful – Cases still ongoing
Outcome	£523.34
	£1,680.00
	£1,495.00

5. This Code launched in August 2008 and has two active cases referred for arbitration (in March) as yet undecided.

Seftton Samuels, Company Secretary & Head of Legal, 13 May 2009

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