



The Scottish Parliament

Subordinate Legislation Committee

Arbitration (Scotland) Bill

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The Committee reports to the lead committee as follows—

Introduction

1. 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.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill¹.

Delegated Powers Provisions

3. 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

4. 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.
5. 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.

¹ [Delegated Powers Provisions](#)

6. Given that the Model Law is to be repealed and will no longer form part of the Scottish law on arbitration, the Committee considered it appropriate to ask the Scottish Government for further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.

7. 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. 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.

8. 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.

9. 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.

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).

4. 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.

5. 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.

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 Other reasons why it is considered that the Model Law should be repealed are listed in Annex 2.

7. 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.

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.