

ARBITRATION (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Arbitration (Scotland) Bill introduced in the Scottish Parliament on 29 January 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 19–EN.

BACKGROUND

2. The essence of arbitration is that it is a procedure whereby parties agree to submit a dispute between them to a third party, who often has special expertise or knowledge, and who will act as a private tribunal to produce a final and binding determination of the dispute. By agreeing to go to arbitration, the parties voluntarily deny themselves recourse to the courts or to another method of alternative dispute resolution. The agreement to go to arbitration is often, perhaps usually, contained in a contract concluded between the parties possibly years before they come into dispute.

3. The advantage of arbitration is that the arbitrator's decision or "award" is final and binding without further court hearing of the issues. An award may be enforced like a court decree. Within countries which have ratified the Geneva or New York Conventions on recognition and enforcement of arbitral awards, agreements to arbitrate and awards made in other countries will be recognised with no need – in the case of awards – for further review of the issues. Thus arbitration offers major advantages to those engaged in international or cross-border trade. The binding nature of the outcome may offer attractions over other forms of alternative dispute resolution such as mediation.

4. Arbitration is also a private means of dispute resolution. This is another major advantage to commercial parties who may not wish the nature of their dispute or sensitive commercial information debated openly in the courts. The parties can choose their arbitrator which is not possible in the courts. If a technical expert is appointed as arbitrator, this may reduce the need to lead technical evidence so that arbitration may be quick, cost effective and efficient. The arbitration process can provide flexible procedures (as it is privately funded and initiated) and because it is within the parties' control, the location, timing and other arrangements can be planned to suit their particular needs. If arbitration can be reformed so as to be attractive to use instead of use of the formal court system, that would also be a helpful development in reducing pressure on the courts.

Current law

5. Domestic Scots arbitration law derives primarily from case law and has not been codified into statute. The law is often not clear or readily accessible, nor does it reflect modern practice on arbitration. The Arbitration (Scotland) Act 1894 contains some limited provisions on the appointment of arbiters and oversmen, while the Arbitration Act 1950 contains some provisions applying to Scotland regarding the enforcement of certain foreign awards. The Arbitration Act 1975 provides for the sisting (or putting on hold) of court proceedings where an arbitration agreement is invoked and also gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

6. Section 66 of, and Schedule 7 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”) adopted the UNCITRAL (United Nations Commission on International Trade Law) Model Law (“the Model Law”) on arbitration for international (but not domestic) arbitration into Scots law, ie for commercial arbitration where one of the parties is not domiciled in Scotland. The Model Law is widely recognised within the world of international arbitration.

7. There are therefore two sets of arbitration laws in place in Scotland, one for domestic arbitrations and one for international commercial arbitrations.

Problems with current Scots law

8. Scotland is one of only a few developed nations that lacks a statutory basis for its law of arbitration. As a result of gaps in the law and difficulties in establishing exactly what the law is, particularly compared to other jurisdictions where it has been codified, Scotland is not considered an attractive venue within which to conduct arbitration. For arbitration to work effectively and efficiently, arbitrators require powers to manage and decide cases. These powers can be derived from the parties’ agreement or from existing law. As the existing law in Scotland is nearly all un-codified common law and difficult to access, the powers and duties of an arbitrator in any particular case may not be clear, unless they have previously been set out in an arbitration agreement, and/or until they are set down in a separate agreement among the parties and the arbitrator, known as a submission to arbitration.

9. By contrast codes or legislation in many other countries provide clear frameworks to allow arbitrations to be commenced efficiently and without delay or undue expense. For instance, the Arbitration Act 1996 (“the 1996 Act”) which lays down the arbitration regime for England, Wales and Northern Ireland sets out in modern form the powers and duties of an arbitrator.

10. The Scottish courts have been supportive of arbitration, but their role is not as clear as in some other jurisdictions. Modern legislation in other jurisdictions sets out how courts may support the arbitration process by recognising arbitration agreements and halting court processes. They may assist by ordering the attendance of witnesses, or arbitrators may be given powers usually vested in courts to order disclosure of documents or to restrain the movement or use of assets. Courts may also recognise arbitration agreements or awards made under different legal systems.

11. The way for parties to overcome gaps in the law is for them to agree from the outset or when a dispute arises that arbitration will be conducted under an institutional code or set of rules. Various arbitration codes exist which can be used in Scotland. But these codes have no statutory backing and so will only apply if the parties adopt them when it is agreed that a dispute should be referred to arbitration. There are a number of different codes which have developed, leading to lack of consistency and potential confusion among practitioners.

12. Arbitration may also prove to be a very expensive option in Scotland at present. There are no explicit duties imposed on arbitrators in Scotland and, save for the possibility of stating a case to the Court of Session, the courts' powers of control are not explicitly set out in statute. There is little control over the fees an arbitrator may charge (or over his work quality or efficiency) and costs can quickly escalate beyond parties' control. The costs may rise further if a legally qualified "clerk" is appointed to assist the arbitrator, as is usually the case in commercial arbitrations. In contrast, other jurisdictions have laws allowing the taxation of arbitrator's costs upon the application of a party or parties.

13. Research has been carried out by the Analytical Services Division (ASD) of the Scottish Government into the usage of arbitration. 50% of respondents considered that the current state of arbitration law in Scotland was a major disadvantage. Concerns over the potential length of arbitrations were expressed by 43.8% of respondents and this also reflects the current state of the law which does not require arbitrators to act proactively.

History of proposed reforms

14. The possibility of legislation on arbitration in Scotland has been under consideration for at least 20 years. A committee was established in 1986 by the then Lord Advocate to consider the reform of the law, particularly in the light of the Model Law on arbitration, which is widely recognised within the world of international arbitration. The Committee recommended the adoption of the Model Law for international (but not domestic) arbitration into Scots law and this was subsequently effected by virtue of section 66 of, and Schedule 7 to, the 1990 Act. This has not, however, had the effect of attracting significant international arbitration business to Scotland.

15. The Committee continued work on the provisions of a modern arbitration law for domestic arbitration and produced a draft Bill in 1996. In the same year the Arbitration Act, which extended to England, Wales and Northern Ireland, was passed. Unlike the 1996 Act, however, which was very comprehensive, the draft Bill for Scotland would simply have dealt with certain specific issues, filling some gaps and making some improvements but leaving Scottish arbitration law uncodified.

16. Since then, many other countries have reformed their arbitration laws, both domestic and international, to make them more accessible and user-friendly. Many have moved towards using arbitration codes backed by statute which set out the various stages of an arbitration procedure.

17. The Scottish Council for International Arbitration and the Chartered Institute of Arbitrators (Scottish branch) developed the Scottish Arbitration Code in 1999. This sought to set out a general framework for arbitration and the rules under which arbitration should be

conducted. But this is only a voluntary code which requires all parties to agree to its adoption. Scotland is therefore at a disadvantage with other countries which have modernised, and mostly codified, arbitration systems set out in law. The Code was revised in 2007.

18. A further Bill, more comprehensive than the 1996 draft Bill, was developed by a working group of parties interested in the promotion of arbitration and chaired by Lord Dervaird in 2002. This was heavily influenced by legislative changes in other countries and in particular the experience in England following the 1996 Act. That legislation followed (in language if not in structure) the Model Law in order to make it as accessible as possible to arbitrators and parties from other jurisdictions.

CONSULTATION

19. The Scottish Government issued a consultation paper along with a draft Bill in June 2008. The paper identified 35 specific discussion points on which the views of consultees were specifically sought. Although the 12 week consultation period ended on 19 September, responses were accepted throughout October and into December. Around 800 copies of the paper (which included an initial Regulatory Impact Assessment) were distributed and 29 responses received. The small number of responses is thought to be indicative not only of the specialised nature of the consultation but also the dearth of arbitral activity in Scotland in recent years.

20. There was extensive engagement with stakeholders during the consultation period. The Minister for Community Safety met the Chartered Institute of Arbitrators (CI Arb) and the Scottish Council for International Arbitration. Officials held an all day meeting with the CI Arb to discuss their very detailed comments on the Bill and also met the Law Society of Scotland.

21. Two focus group meetings were held during the consultation process. These were attended by representatives of the CI Arb, the Law Society, the Royal Institution of Chartered Surveyors, the Faculty of Advocates, the Royal Bank of Scotland, Scottish Financial Enterprise, Edinburgh Chamber of Commerce, Professor Russel Griggs (chair of the Regulatory Review Group) and Professor Fraser Davidson, author of the Scottish Universities Law Institute textbook on arbitration law. Reaction to the Bill during these meetings was overwhelmingly positive.

22. Officials also undertook meetings around Scotland with six different firms to discuss the Bill in order to inform the Regulatory Impact Assessment and the Business Impact Assessment.

23. All the points raised in response to the consultation paper and in meetings with officials were considered and the observations made have informed the development of policy on the Bill, with the result that a considerable number of changes have been made to the final version.

24. A copy of the responses to the consultation (other than those given in confidence) has been made available on the Scottish Government website at www.scotland.gov.uk/publications along with a summary of those responses. Copies of these documents have also been placed in the Scottish Government library and further copies are in the Parliament's Information Centre.

25. Details of changes in response to the consultation (and alternative approaches considered) are mentioned later.

POLICY OBJECTIVES OF THE BILL

26. The primary objectives of the Bill are that it:

- 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.

27. The Bill will put the vast majority of the general Scots law of arbitration into a single statute. It will 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.

28. It is hoped that the Bill – once enacted – will encourage the use of arbitration domestically and will attract international arbitration business to Scotland. Different methods of dispute resolution are appropriate for different kinds of dispute and it is expected that arbitration will mainly be used in the commercial sphere. It is thought that there is a wide range of commercial disputes in the range between consumer disputes and high value cases involving large companies which may be arbitrable and which the parties may wish to arbitrate privately.

29. It is also hoped that the Bill may encourage industries, trades and professions to set up their own low cost arbitration schemes such as that operated by the Association of British Travel Agents (ABTA), the Scottish Motor Trade Association and the Institute of Chartered Accountants, so that consumers in dispute with members of such bodies are not faced with the stress and expense associated with going to court. We understand that the Chartered Institute of Arbitrators (CI Arb) is involved with 30 or 40 low cost consumer arbitration schemes.

30. In the case of ABTA, for example, a claim of up to £5000 may be raised for under £100 and claims up to £10,000 can be raised for £172. That is the full cost to the consumer, since the scheme is subsidised by the industry. The dispute is handled by a professional arbitrator who is independent of ABTA and who will make an award based on the documents presented to him – there is therefore no need to go to court.

31. Arbitration is often the method of dispute resolution of choice in property disputes and is often cited as the method in commercial leases. There may be scope for more use of arbitration in other areas such as the maintenance of property, the management of blocks of flats and service charges.

32. In addition to the benefits which will accrue to users of arbitration, if Scotland is successful in attracting international arbitration business then there will be spin-off benefits in providing hotel, restaurant and transport services to high net worth businessmen and women.

33. It cannot be guaranteed that simply reforming the law on arbitration in Scotland will have the effect of increasing the use of arbitration domestically or attracting international arbitration business to Scotland. To a very large extent that is up to arbitration practitioners and those who see the benefits of using arbitration as a method of commercial dispute resolution. If the law on arbitration in Scotland is not reformed and modernised, however, then the use of arbitration may die away here, at a time when usage of arbitration in other parts of the world appears to be increasing, and in some parts of the world dramatically so.

Potential benefits

34. Due to the confidential and private nature of arbitration, reliable and accurate data on usage of arbitration in Scotland is difficult to obtain. Estimates have been made in the past that there are around 300 arbitrations in Scotland per annum. A large proportion of these are likely to be low cost consumer arbitrations.

35. The research carried out by Analytical Services Division indicated that almost 60% of those who responded considered that arbitration is less expensive as a means of dispute resolution than going to court. 65% took the view that arbitration was quicker than going to court. This is compared to 26% who considered arbitration to be more expensive and 15% who considered that arbitration was more time-consuming than going to court. These impressions relate of course to arbitrations under the current law. It is virtually impossible to make an accurate comparison between the costs of arbitration and going to court since no statistics are held centrally, partly because the fees charged by solicitors and advocates are considered to be commercially confidential.

36. A number of stakeholders have commented that the main way in which the Bill may lead to lower costs for arbitrations in Scotland is if the process is quicker and the arbitrator conducts the arbitration more proactively. The Bill therefore places a duty on the arbitrator(s) to conduct an arbitration without unnecessary delay and without incurring unnecessary expense. Similar duties are placed on the parties to the dispute and the Bill seeks to limit the opportunities for seeking to delay the process by making unnecessary or spurious applications to a court. Arbitrators and parties are therefore required to drive the arbitral process forward without unnecessary delay. The Bill does not, however, set specific time limits for the duration of an arbitration since it is considered that if such limits were introduced, there would inevitably have to be provision for extending the time limits. We think that this would inevitably lead to endless applications for extensions. Some disputes will also simply not lend themselves to early resolution due to their complexity.

37. There are a number of other ways in which the Bill will contribute to the greater efficiency of arbitration in Scotland:

- An up-to-date, modern arbitration law which reflects the best of modern arbitral practice will increase the attraction of using arbitration as a method of dispute

resolution for parties to disputes in preference to going to court, with all of the cost, stress and possible delay that entails.

- If use of arbitration increases in the resolution of commercial and consumer disputes, this will reduce the pressure of business on the courts.
- The arbitral appointments referee procedure for appointing the arbitrator(s) where no procedure is agreed by the parties, or where that procedure fails, rather than parties routinely having to go to court.
- An arbitrator may decide to rule on a dispute on the basis of documents only rather than holding expensive hearings.
- The provision of a set of rules on a default basis (though some are mandatory) means that even if the parties have agreed nothing beyond a bare agreement to use arbitration as their method of dispute resolution, then those rules guide the arbitrator and the parties through the process. The arbitration can begin immediately with no protracted exchange of submissions as to which rules are to be followed.
- The rules are not too prescriptive: the arbitrator is obliged to adopt procedures which are appropriate to the circumstances of the case, bearing in mind his duty to conduct the arbitration without unnecessary delay. It is hoped that arbitrators will take a more dynamic, proactive role in procedural matters.
- A rule which permits arbitrators to rule on their own jurisdiction (i.e. to decide what they have been engaged to arbitrate on). In the past this may have required a decision by a court which would involve more time and expense and could be used as a delaying tactic by a reluctant party.
- In the past, clerks (usually solicitors) were often employed by non-lawyer arbitrators in Scotland to organise the arbitration, keep track of papers and advise on the law. Sometimes clerks were paid a higher hourly rate than the arbitrator. The use of clerks has declined in recent years and it is hoped that the rules in the Bill will reduce the need to employ clerks yet further (though provision is still made to cover the possibility).
- Strictly limited availability of recourse to the courts.

38. It is, however, impossible to accurately predict how much these factors will actually reduce the costs of arbitration in Scotland for commercial and other parties or how much of a benefit to the courts this will prove to be in terms of lower pressure of business.

39. We understand that one of the professional bodies for arbitrators in Scotland, the Scottish branch of the Chartered Institute of Arbitrators intends, in support of the Bill, to undertake a UK-wide marketing exercise to promote the availability of arbitral services in Scotland and the advantages of arbitration in Scotland as a method of dispute resolution. We also understand that they will be producing new “short form” rules based on the Bill which will be offered for use in smaller value disputes including consumer disputes and consumer arbitration schemes.

40. Although adjudication under the Housing Grants, Construction and Regeneration Act 1996 has become the main method of dispute resolution in the construction field, it is mainly

used for small, single issue, low value disputes since the 28 day time limit does not make it suitable for more complex disputes.

International arbitration

41. It is estimated that overall the City of London has around £3 billion worth of arbitration business annually, the majority of it international arbitration business. If even a small fraction of that business could be attracted to Scotland, this would provide a significant boost to the Scottish economy.

42. There has until now been little international arbitration business in Scotland. The ASD research suggests that this is in part due to the unsatisfactory nature of the underlying arbitration law and legal uncertainty. These factors will be addressed by the enactment of the Bill. The enactment of a new arbitration statute would appear to be an obvious time for those providing and marketing arbitration services here to stimulate interest in Scotland as an arbitral venue in an effort to attract international business here. There are a number of reasons why Scotland may be attractive as a venue for international arbitration after enactment of the Bill:

- It has been estimated that arbitration in Scotland could be around one third cheaper than in London. Senior counsel in Scotland may charge £240 per hour or more, but in London the figure is more likely to be of the order of £400 per hour or more.
- There is a mature legal system here and one which is distinctive from London: it has been suggested that a foreign company in dispute with an English body may be attracted to the idea that a Scottish arbitrator may be “neutral”.
- The fact that English is spoken in Scotland is another advantage since English is the common language of arbitration around the world.
- International arbitration tends to take place in more attractive cities around the world and the combination of high class legal services here combined with Scotland as a tourist destination may well prove to be an attractive option to parties looking for a venue in which to arbitrate.

43. By way of example, the following reasons have been cited to explain why Singapore is successful as a venue for international arbitration:

- (i) a good/effective arbitration law which leaves an arbitral tribunal to get on with matters, but gives court support when needed;
- (ii) good arbitration attitude by the courts which is supportive, but non-interfering;
- (iii) competent, honest arbitration-specialist judges who understand the difference between litigation and arbitration;
- (iv) an efficient, well-run arbitration/dispute resolution centre;
- (v) good business infrastructure (for example, availability of quality legal/accounting/engineering/others);
- (vi) a good living environment for business visitors with decent transport, hotels, food, telecommunications, flights and shopping;

- (vii) easy accessibility from the other arbitration centres where arbitration lawyers practice;
- (viii) cost-effective arbitration via lower institutional fees, lower rates for arbitrators/counsel and lower support costs.

There does not appear to be any reason why these factors cannot be replicated in Scotland to attract more international arbitration business.

44. It will, however, be difficult to attract international arbitration business away from London in particular. Often contracts, particularly between multi-national corporations, and particularly in international maritime cases, will specify the use of English law as that applicable in the event of disputes. While a dispute under English law could still be arbitrated in Scotland, it would not be an obvious choice of venue, though lower costs may attract some business. In the oil and gas industry, it is understood that all of the major players in the UK sector use contracts which specify not only English law but also the use of the English courts as the venue for dispute resolution.

45. While it may be expected that Scottish lawyers can be expected to specify Scots law as the law which will apply to arbitration agreements in contracts, lawyers in other parts of the UK, never mind other parts of the world, are unlikely to do so. To a large extent, the choice of Scotland as an international venue for dispute resolution will depend on the development of an efficient and effective arbitration culture which it is an aim of the Bill to promote.

46. If Scotland is going to attract international arbitrations, therefore, it is essential that it first has an effective, comprehensive, modern arbitration statute which will hopefully encourage the use of domestic arbitration. If Scotland can develop the domestic business then the lower costs of arbitration here, the use of the English language, the quality of available legal advice, the mature nature of the legal system and the physical safety, “neutrality” and attractiveness of the venue may prove to be an increasing attraction over time. It is, however, impossible at this stage to make a meaningful estimate of any future benefit to the Scottish economy.

Domestic and international arbitration

47. The policy is to remove the dual arbitration regime that currently applies in Scotland. The Bill provides a single codified set of rules that will in principle apply to domestic, cross-border (with other parts of the UK) and international arbitrations, where the Scottish courts have jurisdiction over an arbitration whose juridical seat or place is in Scotland. Accordingly, the separate treatment in Scotland of international commercial arbitrations under the Model Law will be replaced by a single code informed by the Model Law principles.

48. The Bill as published for consultation proposed that the Model Law should be repealed in Scotland. There are a number of reasons for this approach:

- The Model Law is incomplete and contains many crucial gaps (for example, no powers are given to the arbitrator to award damages, expenses or interest). It does not therefore provide a comprehensive arbitration regime and has to be supplemented by domestic law. The Bill, which (like the UK Arbitration Act 1996) is based on

Model Law principles, will, however, provide a comprehensive framework for arbitration in Scotland.

- The Model Law has not attracted any 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 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 believe 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 New York Convention of 1958. Vienna is the venue of choice for central and eastern Europe, including Russia. Vienna is also seen as neutral (also the case with Geneva/Zurich): as noted, 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 the procedural rules which will be mandatory under Scots law).
- 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.
- 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.

49. Among those parties who attended focus group meetings and the 29 responses to consultation received, only two, the Scottish Council for International Arbitration (SCIA) and the Law Society of Scotland, have argued that the Model Law should be retained, because they thought that repeal would act as a barrier to international arbitration business coming to Scotland. Those who advocated repeal included the CI Arb and the current judges in the Commercial Court of the Court of Session. One senior international arbitrator has commented that an informal survey of senior arbitrator colleagues around the world conducted by him failed to identify one jurisdiction which sees the Model Law as a main factor in its success as an international arbitral venue.

50. It may be worth also quoting the consultation response on this issue from Professor Fraser Davidson of Stirling University who is the author of the Scottish University Law Institute textbook on arbitration. He said that the Model Law “does not provide a comprehensive arbitration regime. It is thus much better to look to the example of states such as England which used the Model Law as the basis for the creation of a comprehensive, modern arbitration statute.

Little will be lost by Scotland ceasing to be known as a country which has adopted the Model Law. Its adoption has not seen significant numbers of international arbitrations attracted to Scotland.” He concluded: “If Scotland is going to attract international arbitrations....being able to boast an effective, comprehensive, modern arbitration statute is going to be more of an incentive than being one of a large number of states across the globe which has adopted the Model Law.”

51. Some detailed changes have, however, been made to the Bill which may help to more fully reflect the status of the Model Law and address the SCIA concerns. First, the Model Law arbitration rules are expressly recognised in section 8(4) (default rules) together with other sets of institutional rules which parties can opt to use to resolve their arbitration instead of the default rules in the Bill. Second, section 24 will allow the Scottish Ministers by order to amend the Bill to update Scots arbitration law to reflect future changes to the Model Law (and also the New York Convention). This will permit the arbitration law here to be amended more dynamically in future – subject to affirmative procedure in the Scottish Parliament – to keep it up-to-date with international arbitral practice. So Scotland will have an arbitration law which is based on Model Law principles and which can reflect future changes to the Model Law (and New York Convention).

Alternative approaches

52. Alternative approaches were considered. Instead of the repeal of section 66 and Schedule 7 to the 1990 Act, it might be possible to amend the 1990 Act to allow parties to continue to be able to opt in to the existing 1990 Act provisions (i.e. the Model Law as modified for Scotland), but no longer to apply the Model Law as an automatic default regime for international commercial arbitrations.

53. The Bill does not take this approach because it is considered that it would be confusing to allow the Model Law to remain on the statute book, as an alternate set of default provisions for international commercial cases. The Bill retains the principles behind the Model Law. Parties will be able in any event to use their arbitration agreements to adopt the Model Law as the basis for their arbitration in preference to the default Scottish Arbitration Rules in the Bill, subject to the mandatory rules in the Bill. Parties could also adopt the adaptation of the Model Law in the 1990 Act, again subject to the mandatory rules, even if it has been repealed.

54. In addition, it is clear from the consultation responses that there is strong support for filling the gaps in the Model Law, such as the lack of powers to award damages and interest. Any default regime which included those helpful powers to supplement the Model Law would be a departure from the Model Law. In that light, having different default codes in law is considered to be confusing. In addition, the mandatory rules which apply under the Bill are considered to be the minimum necessary to meet the aims of the Bill.

55. As a further alternative, an equivalent of the 1990 Act provisions could be set out in a schedule to the Bill. But again this could lead to confusion between provisions, as might for instance the inclusion of a non-statutory code such as the Scottish Arbitration Code.

56. The approach taken in the Bill is therefore that the Model Law will be repealed which will mean that there will be only one set of Scots law rules covering domestic and international

arbitration in Scotland, based on the principles in the Model Law but also similar to the UK Arbitration Act 1996.

THE BILL

Structure of the Bill

57. The 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. The Scots law approach to arbitration taken in the Bill aims to be consistent with that in the rest of the UK where that is appropriate. The Bill provides a model law for Scotland which is in line with generally accepted international standards and aims to capture the best of international practice.

58. 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. Schedule 1 to the Bill lays out a standard set or code of clauses (“the Scottish Arbitration Rules”) that can be adopted wholesale by parties and used by their arbitrator. That Schedule contains a number of mandatory rules which cannot be departed from even by agreement of the parties, but the majority of the Rules are default rules which will apply in the absence of any inconsistent agreement between the parties.

59. In reading the Bill and the Scottish Arbitration Rules, it should be kept in mind that for voluntary arbitrations, unlike arbitration under specific statutes, the parties have agreed to go to arbitration. Such arbitrations are principally private contractual arrangements. Any Scottish Arbitration Rule which is not mandatory will therefore not apply to the extent it is disapplied by or inconsistent with any agreement either before or after the dispute arises between the parties (section 8 of the Bill).

Terminology

60. In Scots law, while there is a technical difference between the term “arbiter” more commonly used, and the term “arbitrator”¹, “arbitrator” is employed in the Bill to follow modern international arbitral practice.

Summary of provisions in the Bill

61. A broad outline of the contents of the Bill is as follows:

- provisions about the extent of the Bill and to which arbitration agreements it will apply
- when the optional and mandatory rules in the Bill will apply
- suspension of court proceedings pending arbitration
- enforcement of arbitral awards

¹ Strictly, an arbiter decides in accordance with the law while an arbitrator can decide in terms of general equitable considerations (or “*ex aequo et bono*”). See also rule 44(2).

- provision to apply and adapt specific statutory arbitration procedures to reflect the Bill
- provision on the recognition and enforcement of New York Convention foreign arbitral awards
- provision on prescription and limitation and other miscellaneous provisions
- detailed rules to regulate arbitration (mostly optional, some compulsory), including:
 - commencement, appointment and challenge procedures
 - conduct of proceedings and the powers and duties of the arbitrator
 - duties of the parties
 - arbitral awards
 - intervention and control by the court
 - expenses
 - miscellaneous

COMMENTARY ON SECTIONS

Introductory

Founding principles

62. The Bill sets out founding principles to be applied by parties and arbitrators in using the provisions of the Bill, and by the court in any case in which it is called on to intervene or to interpret the legislation. These principles will assist in achieving the policy objectives and largely mirror those set out in the Arbitration Act 1996. The courts in England, Wales and Northern Ireland have been able to refer to the general principles in the 1996 Act in cases which have arisen since its passing. The Bill follows similar principles in Scotland and the courts here may also be able to make use of the case law that has already been built up under the 1996 Act.

63. An alternative approach was considered – whether or not the principles should be ranked in order of priority or importance. Conflicts could arise between the principles when a court has to apply them in practice, for instance setting parties’ wishes that proceedings should remain confidential against a potential injustice. Given the level of generality at which the principles apply, however, it is not considered that a hierarchy of principles would assist the courts.

Key terms

64. Section 2 sets out some of the main definitions. The Bill does not attempt to prescribe what type of dispute is to be arbitrable, although it widens what is considered a “dispute” in Scots law. It would be difficult to set out clearly in statute what is and what is not arbitrable, and matters such as public policy are constantly evolving. Moreover, what is arbitrable is linked to what can validly or legally be the subject-matter of a contract and so it is important that the law on arbitration remains in line with general contract law on this issue. Section 28 however ensures that matters not currently arbitrable, for reasons such as public policy, continue not to be capable of arbitration.

65. The Bill does not make provision for valuation (or expert determination). The view was expressed strongly by consultees that the Bill should not extend to valuations and expert determination, which are considered to be quite separate from arbitration and the Bill follows this policy.

Seat of arbitration

66. The seat (or place) of an arbitration is the legal seat from which the law of arbitration applying to a particular case is drawn (i.e. it is the legal jurisdiction which is to govern the arbitration procedure). Provision for the seat of an arbitration is common to most jurisdictions. Clearly this is of most importance in international arbitration, but it could also have significance for cross-border arbitration in the UK.

67. As arbitration law is used by parties who are already in dispute, it is obviously desirable to remove as many possibilities for additional dispute as possible. Making provision about how the seat of an arbitration is determined will avoid disputes developing over the law applicable to the procedures to be adopted and thus will help to allow arbitration to operate as an effective dispute resolution process.

68. The fact that an arbitration is seated in Scotland need not determine the substantive (as opposed to procedural) law to be used to decide the dispute. So, for example, it would be possible for an arbitration to be seated in Scotland but for English law to be used to decide the substance of the case. This may, particularly in the short term, when so many contracts will specify English law, attract more cross-border arbitration business to Scotland.

Arbitration agreements

69. The arbitration agreement between the parties is fundamental to arbitration. The agreement can either be in a past agreement between the parties or in a submission to the arbitrator when the dispute arises.

70. In practice, agreements to refer to arbitration, whether free-standing contracts or clauses which are part of a larger contract, are usually in writing. At present Scots law generally recognises both oral and written agreements to refer to arbitration.

71. The policy of the Bill is that arbitration agreements should continue to be recognised whether they are concluded orally or in writing so that all arbitrations in Scotland benefit from the provisions in the Bill (although the general law may require some arbitration agreements to be in writing). If oral agreements were not recognised, they would continue to be subject to the present unsatisfactory common law and would not benefit from the provisions in the Bill. While section 5 of the 1996 Act makes provision for arbitration agreements to be in writing, it also allows oral agreements by reference to terms in (or recorded in) writing.

72. It is accepted that oral agreements pose problems in terms of proof as to their actual existence and as to what the agreement covers. In practice it is expected that purely oral arbitration agreements will be very rare, because properly advised parties will be urged to

conclude a written agreement, but section 4 also makes it clear that agreements, including oral agreements, may trigger arbitration by incorporating arbitration rules set out in other documents.

73. The following example may illustrate this point. A disabled supertanker is heading for the rocks. A salvage tug appears and its captain radios the captain of the supertanker offering to take the tanker in tow if the tanker captain accepts Lloyd's Rules on Salvage which contain an agreement that any dispute will be resolved using arbitration. If the tanker captain replies orally over the radio that he or she accepts Lloyd's Rules that is then an agreement to arbitrate any subsequent dispute about the salvage.

74. There is accordingly no need to define written arbitration agreements because the Bill applies to both written and oral agreements so what constitutes a written agreement is irrelevant.

75. While there might be a danger of unsuspecting parties signing up to arbitration agreements inadvertently, sections 89 to 91 of the UK 1996 Act which apply to Scotland, along with the Unfair Terms in Consumer Contracts Regulations 1999, provide protections for those who might otherwise be caught by low-value consumer arbitration clauses.

Separability

76. Arbitration often concerns interpretation of defective or unclear contracts. On the other hand, a contract containing an agreement to use arbitration in the event of any dispute between the parties may have operated successfully for many years before an issue arises which causes the parties to invoke the arbitration clause. The question then arises as to whether an agreement to arbitrate a dispute can have effect notwithstanding that the contract of which it forms part is the subject of dispute and may have been breached.

77. Many other jurisdictions have provisions which make it clear that arbitration agreement clauses are separable from the contracts which contain them and can thus stand alone. Section 5 makes it clear that an agreement to arbitrate is distinct and separate from the contract or agreement of which it forms part and which may be the subject of dispute.

Scottish Arbitration Rules

78. An arbitration agreement will always have to be considered by the parties alongside the Bill. Accordingly, Scottish Arbitration Rules are set out in a single code in schedule 1 in order to try to make the rules accessible for the users of the legislation. The intention is that the rules will guide the parties and the arbitrator through the various stages of the arbitral process. In most cases they will be able to contract out of the rules if they want their arbitration to be conducted differently. Some of the rules will, however, be mandatory so as to ensure that the principle of fair and impartial dispute resolution is upheld and provide other important procedural rules to facilitate the process.

79. This framework for the new law was welcomed by the vast majority of consultees and the focus groups held to discuss the provisions of the Bill. Consultees commented favourably on the fact that the rules were set out separately from the main body of the Bill since this meant that they could be read as a relatively self-standing "code" which could be used as a guide by

practitioners and users and also compared easily with the rules of arbitral institutions, for example. It was pointed out that arbitrators would not have to search for the rules in the middle of the “legalese” of the main body of the legislation.

80. Some consultees commented that the Scottish Arbitration Rules in schedule 1 may not form part of the general law because they are not in the main body of the Bill. This is incorrect. Sections 6 to 8 make it clear that both the main body of the proposed Act and the rules will form part of the law of Scotland, i.e. as primary legislation. While they may for some purposes have that effect, they are not implied terms of arbitration agreements, but rather rules of statute. Default rules do not lose their statutory nature just because they apply only in certain circumstances (i.e. in the absence of contrary party agreement). There are many examples of statutory provisions which, in some way or another, apply in particular circumstances only.

81. Whether a provision is included in the body of the Act or the schedule is irrelevant to its status as part of statutory law. The placement of provisions in the Bill is dictated by whether they deal with part of the arbitral procedural process (the rules) or whether they have general effect outwith individual arbitrations.

Mandatory rules

82. The model of arbitration legislation which contains mainly default rules which apply only if the parties do not decide otherwise, together with a limited number of mandatory rules, is common in arbitration regimes around the world. The mandatory rules are those which should take precedence over any agreement between the parties which is inconsistent with them – in effect rendering any conflicting agreed provisions unenforceable. Sometimes this is for public policy reasons. In other cases, it is to ensure the fairness and impartiality of the process. Mandatory rules often govern areas where the parties may be tempted to disapply certain rules if they could.

83. The mandatory rules are provided in key areas of the process to ensure the smooth and efficient running of an arbitration and to reduce the prospect of delay. If an arbitration is not conducted in accordance with the rules which apply to it (including all mandatory rules), the arbitrator may, depending on the breach, lay himself or herself open to removal and any award may be liable to challenge.

84. Categorising the rules as mandatory (which cannot be contracted out of) and default (which the parties are free to agree to deviate from) avoids the need for each rule to provide explicitly whether the parties are to be free to agree to an alternative procedure.

85. A conscious effort has been made to keep the number of mandatory rules in the Bill to a minimum. This is to preserve the autonomy of the parties insofar as possible. An explanation of the mandatory nature of those rules has been added to the human rights section below (see paragraphs 227 to 242).

Default rules

86. One of the founding principles in section 1 is that parties to an arbitration should be free to agree how to resolve their dispute (subject only to such safeguards as are necessary in the public interest). This is one of the main attractions of arbitration. The parties and therefore the arbitrator can adopt procedures which are most appropriate to deal with the circumstances of the particular case, whereas cases which are dealt with by litigation are bound by the rules of the courts. Arbitration can therefore provide flexible procedures (as it is privately funded and initiated) and because it is within the parties' control, the location, timing and other arrangements can be planned to suit their particular needs.

87. The main advantage of the default rules is that if the parties do not or have not made any agreement as to how the arbitration is to proceed, then the default rules will apply. The parties may in fact have made no further agreement beyond a bare agreement to arbitrate any current or future dispute. They may, for example, have made no agreement as to who the arbitrator is to be or how that person is to be chosen and appointed.

88. In the absence of the default rules, the parties may have to spend time agreeing on a joint submission to an arbitrator setting out how the arbitration is to proceed. In view of the fact that the parties are already in dispute it may be difficult for them to agree on anything other than the fact that the dispute should be arbitrated (and since one of them will have invoked the arbitration agreement, the other may be rather more reluctant to proceed). Consultees have commented that the default rules eliminate all such problems since they will apply in the absence of agreement to the contrary. They provide a ready made framework for the arbitration and thus delays at the very start of the arbitral proceedings will be avoided.

Suspension of legal proceedings

89. The traditional approach of the Scottish courts is that a valid and binding arbitration agreement suspends the jurisdiction of the courts and commits the parties to arbitrate the dispute. This does not oust the jurisdiction of the court entirely, however. Should the arbitration prove abortive, the full jurisdiction of the court will revive, to the effect of enabling it to hear and determine the action upon its merits. The party who is seeking to enforce the arbitration agreement should apply to the court – at the earliest opportunity after the action is raised – asking that the action should be sisted (i.e. suspended) pending the determination of the dispute by arbitration. The court must of course satisfy itself that the subject of dispute is covered by the arbitration agreement.

90. In some jurisdictions, legal proceedings are dismissed completely since arbitration is seen as a complete alternative to court action. The policy in the Bill is that Scotland should not go down that road since, in circumstances where arbitration fails, it would be necessary to restart legal proceedings from scratch and this may involve yet more expense for the parties. A court might also prefer to have the papers from the sisted case to hand, for instance in subsequent enforcement proceedings following an award. If an arbitration agreement were to preclude access to the courts completely, this may dissuade some parties from using arbitration at all. Section 9 therefore maintains the existing law by providing that court proceedings should be suspended by arbitration, but not halted completely.

Enforcing and challenging arbitral awards etc.

91. The Bill provides the successful party with a number of options in the event that the unsuccessful party fails to comply with the terms of the arbitral award. However, access to the court is limited as one of the founding principles of the Bill is that the court should not intervene in arbitrations except as set out in the Bill

Persons who take no part in arbitral proceedings

92. Section 12 is designed to protect the rights of persons who dispute that they are properly part of arbitration proceedings or that the arbitrator has any jurisdiction in relation to them. It is considered that such persons should not be obliged to take part in arbitral proceedings, with all the cost that may imply, though by not doing so that party may find that the arbitrator has nevertheless held them to be a party to the proceedings in an award and indeed an enforceable award may have been made against them.

Anonymity in legal proceedings

93. One of the attractions of arbitrations as a method of dispute resolution is that it is usually confidential. This may be attractive to commercial concerns since the matters in dispute may be commercially sensitive. For this reason, section 13 provides that the identities of parties to an appeal must not be disclosed outwith court, with disclosure being treated as a breach of the obligation of confidence, subject to certain exceptions.

Statutory arbitration

Statutory arbitration: special provisions

94. Parliament has passed various pieces of legislation which provide procedures similar to common law arbitration for particular statutory purposes. Where a procedure called “arbitration” is established by legislation, the freedom of parties to a dispute to which the legislation applies is usually restricted to some extent. The law may for example lay down how, and from among what category of persons, the arbitrator is to be selected, how many arbitrators there are to be, how the proceedings are to be conducted, and in what form and within what period the award must be issued. Usually the law requires that disputes of a specified type are dealt with under the prescribed procedure and expressly or impliedly prohibits an arbitrator from entertaining any claims outside the specified categories.

95. There is no intention that the Bill should interfere in matters which have already been the subject of bespoke legislative provision. The policy of the Bill is that it will not conflict with existing legislation which has been put in place to provide arbitration procedures in certain specific circumstances or industries. On the other hand, parties should not be deprived of the benefit of the procedures set out in the new Bill if these augment and enhance the statutory provisions already in place.

Power to adapt enactments providing for statutory arbitration

96. The subordinate legislation powers in section 15 allow the Scottish Ministers to modify the rules (and other Bill provisions) as they apply to statutory arbitrations and to amend any enactment which provides for arbitration to satisfactorily apply the rules (or other Bill provisions) to arbitrations conducted under that specific legislation. Where the necessary adaptations are reserved, an order at Westminster under section 104 of the Scotland Act will be required.

Recognition and enforcement of New York Convention awards

New York Convention awards

97. The “New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958, as amended. The Arbitration Act 1975 provided for the enforcement of New York Convention awards in Scotland. Such awards are made in pursuance of an arbitration agreement in a territory or state (other than the UK) which is a party to the Convention.

98. The policy in sections 16 to 20 is to continue the position whereby New York Convention arbitral awards will be enforced in Scotland, but to explicitly cover recognition as well. It is possible that a party may wish to seek recognition of an award as opposed to straight enforcement. The award will be treated as made at the seat of the arbitration regardless of where it was signed, despatched or delivered to any of the parties. This is to avoid difficulties which have arisen in cases in the past where the seat of an arbitration was held to be where the award was signed. This is irrelevant and the place of signing should simply be a matter of convenience with no legal consequence, particularly for international arbitrators.

99. These sections provide a special procedure for the enforcement of New York Convention awards (over and above the discretion of the Scottish courts to enforce such awards under section 10).

100. Section 16(3) goes beyond section 7(2) of the 1975 Act by providing that a state may also be declared to be a party to the Convention in respect of any specified territory. This is intended to bring the Bill into line with Article XI of the Convention which allows an acceding state to declare that the Convention shall extend to all or any of the territories for the international relations of which it is responsible.

Recognition and enforcement of New York Convention awards

101. An award might have been made almost anywhere in the world, providing the arbitration agreement was made in a state which is a party to the New York Convention. Such an award should therefore be capable of being relied upon by those parties as a defence, set-off or in any other way in any legal proceedings in Scotland.

Refusal of recognition or enforcement

102. Section 5(1) to (3) of the 1975 Act set out circumstances in which enforcement of a New York Award may be refused. Section 18 follows the example of section 103 of the Arbitration Act 1996 to give equal weight to the objective of recognition of the award and its enforcement. There is no real change in effect, since under the existing law an award would have to be recognised before it was enforced. Although the policy of the Bill is that New York Convention awards should be recognised and enforceable by the courts in Scotland, it should be possible for the court to refuse to recognise or enforce the award in certain circumstances and these are set out in section 18(2) to (4).

103. The court should be able to exercise a certain amount of discretion in deciding to what extent it will recognise or enforce an award. If an award purports to decide matters which were not submitted to arbitration as well as those which were properly so submitted, the court should be able to recognise or enforce those parts which were properly submitted so long as these can be separated from those which exceeded the jurisdiction of the arbitrator. This is provided for in section 18(5).

104. Section 5(5) of the 1975 Act permits a court to adjourn a decision on the enforcement of an award that has been challenged in the courts of the country whose laws govern it. The party seeking to enforce the award may also apply to the court for an order requiring the other party to give suitable security for costs. This position is preserved in section 18(6) except that this will also be the case if the application is to recognise an award.

Evidence to be produced when seeking recognition or enforcement

105. There is then the question of what evidence has to be produced by a party seeking recognition or enforcement of a New York Convention award. Section 4 of the 1975 Act provided that such a party should be obliged to provide a duly authenticated original award and the original arbitration agreement, or duly certified copies thereof and section 19 preserves this position.

Supplementary

Prescription and limitation

106. In some jurisdictions, arbitration is promoted as a straight alternative to court action and the use of arbitration stops any court proceedings completely. The policy of the Bill is, however, that the possibility of court action should not be removed entirely since the arbitration may prove to be abortive. This leaves the question of what should happen regarding prescription and limitation.

107. The principal rules governing the effect of arbitration upon the running of periods of prescription are presently contained in sections 4 and 9 of the Prescription and Limitation (Scotland) Act 1973. Section 4 is concerned with positive and section 9 with negative prescription, but the latter incorporates the most important rules of the former. The Bill amends the 1973 Act to take into account rule 1 of the Scottish Arbitration Rules relating to when an arbitration is held to have commenced.

108. Currently, the running of the limitation period is not interrupted by arbitral proceedings. The Bill makes provision to alter the limitation rules so that limitation of actions is interrupted by recourse to arbitration.

Arbitral appointments referee

109. Section 22 would give Scottish Ministers the power to specify (by order) arbitral appointments referees. These bodies (for example, the chair of a recognised arbitration body such as the Chartered Institute of Arbitrators (CI Arb), 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. Where, however, a particular appointing or nominating body has been specified in the arbitration agreement then that body will be used instead.

110. Arbitral appointments referees will be designated in subordinate legislation, but in order to be appointed, under section 22, the bodies will have to demonstrate:

- A track record of supplying arbitrators;
- The provision of suitable and appropriate training courses; and
- The provision of discipline procedures.

111. In this way, the quality of arbitrators will be maintained. It is expected that the bodies which currently appoint or nominate arbitrators will already be able to satisfy these requirements, but any body which satisfies the requirements will be able to apply. Certain institutions have extensive experience in making arbitration appointments.

112. Some consultees argued that the courts should retain a role in appointing an arbitrator or arbitral tribunal, if the parties have failed to appoint. But in practice the court usually refers an application to a body like the Chartered Institute of Arbitrators which made over 2,000 appointments in the UK in 2007: the courts made only a handful directly. Others have contended that reference to the court for the appointment of arbitrators should be minimised. The evidence would appear to suggest that this is what happens in practice and the provision in the Bill regularises this by removing an unnecessary step. Other consultees overwhelmingly accepted the proposal for arbitral appointments referees.

113. There will however continue to be a role for the courts if the parties cannot agree on the identity of the arbitral appointments referee (for example if one party wants a surveyor as the arbitrator and the other wants an architect). It would appear that there is then a case for referral to the court to decide which appointments referee to choose. By the same token, there should also be a referral to the court if the arbitral appointments referee, for whatever reason, fails, refuses or declines to appoint an arbitrator.

Power of judge to act as arbitrator or umpire

114. Section 17 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 permits a Senator of the College of Justice (if he or she thinks fit and with the consent of the Lord President) to accept appointment as an arbitrator where the dispute appears to him or her to

be of a commercial character. Section 23 will retain the possibility of a judge acting as an arbitrator, but again only with the consent of the Lord President. That is a safeguard to ensure the public work of the Court of Session and the High Court does not suffer. Scottish Ministers are given power to prescribe that a fee is paid so as to ensure that the costs of using a judge are recovered for the benefit of the public purse, for instance to recover incidental and consequential costs, such as the employment of a temporary judge to cover some aspect of court business during the judge's absence.

115. It is understood that the current pressures on the Court of Session and the High Court are such that there would be no scope for the use of a judge at present. This may, however, change, particularly after the recommendations from Lord Gill's review of the civil courts are known, and so the possibility of a judge of the Court of Session acting as an arbitrator has not been excluded. It is believed that such a possibility would form a significantly positive aspect in the Scottish arbitration regime in comparison with other jurisdictions.

116. Neither a sheriff nor a sheriff principal may accept appointment to any other office by virtue of section 6 of the Sheriff Courts (Scotland) Act 1971.

Amendments to UNCITRAL Model Law or New York Convention

117. Section 24 will allow Scots arbitration law to be updated to reflect future changes to the Model Law or New York Convention. This will permit Scots arbitration law to be amended – subject to affirmative procedure in the Scottish Parliament – to keep it up-to-date with international arbitral practice. So Scotland will have an arbitration law which is based on Model Law principles and which will reflect future changes to the Model Law.

Amendment of Conveyancing (Scotland) Act 1924

118. Under rule 45 of the Scottish Arbitration Rules, an arbitrator will be able to order the rectification or reduction of any deed or other document. If an arbitrator makes such an order, reduction will be effected by the court under section 10 (enforcement). The consequential amendment in section 25 allows an award ordering a decree of reduction to be recorded in the Sasine Register. Such an award cannot be granted where a court could not grant the equivalent award, or so as to adversely affect the interests of third parties acting in good faith – see rules 47 and 54(2).

Repeals

119. The repeal of the Model Law is dealt with above. Most of the repeals reflect the consolidation and re-enactment of equivalent provisions in the Bill. The Arbitration Act 1950 which provided for the enforcement of the older Geneva Convention on the enforcement of foreign arbitral awards is repealed insofar as it continues to extend to Scotland. It is now superseded in practice by the New York Convention, and the provisions implementing that Convention in sections 16 to 19 – every contracting state to the Geneva Convention has ratified the New York Convention.

Stated case procedure

120. The ability to state a case on point of law at any stage of an arbitration under section 3 of the Administration of Justice (Scotland) Act 1972 is to be repealed.

121. Ease of access to the stated case procedure has caused parties to view arbitration in Scotland as a process where delays can occur frequently since it is thought to be too easy to identify possibly spurious points of law for referral, thus delaying the arbitral process. The costs of the stated case procedure have also led to concerns, involving as it does recourse to the Court of Session. Lord Hope, in *ERDC Construction Ltd v HM Love & Co Ltd (No 2)* (1997 SLT 175), gave the view that: “Excessive use of this procedure is liable to bring the whole process of arbitration into disrepute”. He went on: “If arbiters are to have the confidence which they require to simplify and accelerate procedure in such cases, they ought not to be exposed to the risk of challenge to their decisions by means of the cumbersome and time consuming procedure of a stated case”. A limited reference procedure on points of jurisdiction in rule 22 and on point of law in rule 40 and an appeal procedure to challenge an award for jurisdiction and error of law is proposed instead (see rules 66, 67 and 68).

SCHEDULE 1 – SCOTTISH ARBITRATION RULES

Part 1 – Commencement and constitution of tribunal etc.

Commencement of arbitration

122. In the normal course of events, and possibly after a number of years trading, one party may have a grievance which leads them to wish to invoke an arbitration agreement. It is necessary to provide for how that party should begin the arbitral proceedings. Alternatively, the parties may simply agree to the submission of a new dispute to arbitration. An arbitration will therefore commence on service of notice by one of the parties. This provision is deliberately simple: service of notice could be effected in a number of ways, for example, by asking an arbitral appointments referee to appoint an arbitrator.

123. Rule 1 has been amended to take into account the views of consultees to remove reference to “an intention to submit a dispute to arbitration”. This was felt to be open to argument over what constituted “an intention to submit”.

Appointment of tribunal

124. Arbitration agreements only take effect when a dispute arises. They rarely state a specific individual to act as arbitrator in the event of a dispute, though they often stipulate a nominating or appointing body. Once the parties are in dispute, it is essential that a system is in place to facilitate the swift appointment of a single arbitrator or an arbitral tribunal composed of several members to allow the arbitration to proceed quickly and efficiently.

125. Sections 2 and 3 of the Arbitration (Scotland) Act 1894 provide for the appointment of arbitrators by the court in certain circumstances. This is mainly where one party fails to do something to appoint a single arbitrator or where one party fails to appoint one of two arbitrators. These provisions have no effect, however, if both parties fail to act or if there is a necessity to

appoint more than one arbitrator. There are, therefore, no comprehensive default provisions, which means the commencement of an arbitration process is likely to be delayed until an arbitrator can be appointed by agreement or by application to the court. Moreover, the court may be unable to appoint if the arbitration clause is at present too general or uncertain. There is also provision in Article 11 of the Model Law for the appointment of arbitrators in international commercial arbitration where the place of arbitration is Scotland.

Failure of appointment procedure

126. Where there is a failure in the appointment procedure either party may refer the appointment of the arbitrator to an arbitral appointments referee who will direct the parties to appoint such eligible individuals as the arbitral appointments referee considers appropriate. This is in pursuance of the general policy of the Bill that application to the court should be minimised. It seems an unnecessary expense and delay to have to apply to the court for an appointment when the practice of the court has been to refer the matter to bodies who are now likely to apply for designation as arbitral appointments referees. The court however retains an oversight role where the procedure fails. Section 22 above specifies that Scottish Ministers may designate such bodies.

Duty to disclose any conflict of interests

127. An arbitrator (or umpire) must be impartial. Rule 8 is a default rule that an arbitrator (and any umpire) must disclose to the parties any circumstances which might reasonably be considered relevant to the member's impartiality or independence. If they fail to do so, the court can take that into account as regards their expenses in removing them (rule 16). The rule also applies to individuals who have been asked to act as an arbitrator but have yet to be appointed.

128. This rule has been amended to take into account the views of consultees that it also require disclosure as regards whether the individual is independent, as well as impartial. This reflects modern arbitration practice in other jurisdictions. The independence of the arbitrator is to be assessed in accordance with rule 74. Disclosure of a circumstance which might impact on the arbitrator's independence or impartiality does not preclude that person's ability to act as arbitrator. The parties may choose to ignore a trivial or casual factor and waive their rights to object. If they do so, they cannot subsequently challenge the arbitrator's appointment (see rule 73).

Removal of arbitrator by parties

129. At present, an arbitrator, having accepted office, must proceed to deal with the submission faithfully and honestly and cannot renounce office capriciously or without cause. It is accepted that once an arbitrator accepts appointment, he or she should not be permitted to lightly cast off this responsibility. If an arbitrator wishes to resign and the parties concur, there is no difficulty, but at common law an arbitrator who accepts office has no inherent right to withdraw, retire or resign, except where there is good cause, the validity of which the court may be asked to judge. It is not clear what the legal sanction is for this: it may have been considered contempt of court, but the only sanction now may be contractual. Rule 16(2) makes the sanction in future clear. The Bill provides both for the removal of a single arbitrator by the parties or the court or the dismissal of an arbitral tribunal by the court.

Removal of arbitrator by court

130. The policy is that it should be possible for a party to apply to the court to challenge the conduct of an arbitration during its course, without having to wait for the issuing of an award. There are various grounds from what is required of arbitrators under the Bill. Rule 12(e) will allow individual arbitrators to be challenged on the grounds of failure to conduct the arbitration in accordance with the arbitration agreement or the Scottish Arbitration Rules. This would, for example, cover where the arbitrator did not meet their obligations on confidentiality under rule 25. Such challenge will, however, only be possible if a test of “substantial injustice” is met.

131. The power of the court to dismiss the entire tribunal under rule 13 is also mandatory. The tribunal as a whole rather than just one member of the tribunal may not be conducting proceedings without incurring unnecessary delay or expense or in accordance with the parties’ wishes or agreed procedure, for example. This is, however, subject to the caveat that substantial injustice has been or will be caused to the aggrieved party – the same test of “substantial injustice” is applied as under rule 12.

Resignation of arbitrator

132. Rules 15 and 16 are mandatory rules. Rule 15 sets out the circumstances in which an arbitrator is permitted to resign. The court may authorise the resignation on the basis of what is reasonable. Rule 16 allows the Outer House to make such order as it thinks fit with respect to entitlement, if any, to fees or expenses, the repayment of any fees or expenses already paid or where an arbitrator has resigned, to grant relief from liability incurred or to impose liability. In the Bill as published for consultation, they were default rules. As they concern the parties’ agreement with the arbitrator and already take account of the parties’ consent and any other contractual right the arbitrator has to resign, they have been made mandatory.

133. A new express ground for resignation has been added since consultation. If an arbitrator has accepted appointment on the basis that he or she would be assisted by an expert during the course of the arbitration and the parties subsequently decide that they are not prepared to pay for such an expert, the arbitrator will be able to resign for this reason. It is considered that the arbitrator should not have to proceed with the arbitration in the absence of the expert advice that had been proposed.

Part 2 – Jurisdiction of tribunal

Power of tribunal to rule on own jurisdiction

134. The extent of an arbitrator’s jurisdiction and his or her power to decide his or her own jurisdiction is important in arbitration since it determines exactly what issues the arbitrator may decide. In general, the extent of the jurisdiction of an arbitrator is established by agreement of the parties but questions may arise during the arbitral process as to whether it is competent for the arbitrator to deal with a particular issue. This may lead to the arbitrator’s jurisdiction being challenged.

135. An arbitrator at present has the power to determine his or her own jurisdiction, but that power is limited to deciding the matter on a preliminary basis. The final decision on jurisdiction

lies with the court. Uncertainty about the extent to which an arbitrator can rule on his or her own jurisdiction has led arbitrators to be cautious for fear of not having immunity in relation to a decision on jurisdiction. In those circumstances arbitrators may decline to rule on their own jurisdiction, which may result in unnecessary referrals to the courts.

136. Rule 19 provides certainty and brings Scots common law into line with international arbitral practice by providing a clear power for the arbitrator to decide his or her own jurisdiction. As a mandatory provision it will not be possible for the parties to exclude the arbitrator from ruling on jurisdiction. Discussions with stakeholders suggest that they think that the ability of the tribunal to rule on its own jurisdiction is an important new power for arbitrators which will save a great deal of time and therefore expense.

Objections to a tribunal's jurisdiction

137. If a party considers that the tribunal does not have jurisdiction, the party may object to the tribunal. Rule 20 is mandatory to provide a means of dealing with objections to a decision on jurisdiction which does not require going to court. This is consistent with exhausting all arbitral processes and avenues of appeal before going to court. Making the rule mandatory avoids spurious delaying objections being made to the court (which under the Bill would only be able to be made after the final award or after the tribunal rules on the objection under this rule).

138. Consultees suggested that the tribunal should have the option of ruling on an objection to its jurisdiction (1) in an award as to jurisdiction or (2) to delay and rule in the award on the merits of the dispute. The effect of the latter is to allow the tribunal to ignore its general duty to conduct the arbitration without unnecessary delay and efficiently and to delay deciding on jurisdiction until it decides the dispute (unless the parties direct it to decide before then). This is provided for in rule 20(4). Where the tribunal does delay, any appeal will have to be made as a jurisdictional appeal against an award (under rule 65) rather than as an appeal against a decision on objection to jurisdiction.

Referral of point of jurisdiction

139. Rule 22 is a default rule which, unless the parties agree otherwise, allows a party to ask the court to determine a point of jurisdiction without detracting from the competence of the tribunal to deal with the matter. The provision was suggested by consultees and was considered useful as it recognises that there may be difficult issues of jurisdiction where the tribunal's ruling is almost certain to be challenged.

140. A party can only apply to the court in limited circumstances which preserves the integrity of the tribunal while at the same time allowing the parties with genuine reasons for doing so to apply to the court direct on a point of jurisdiction. An application can only be made if the other party has consented or if the tribunal has consented and the court is satisfied that determining the question is likely to produce substantial savings and there is a good reason why the question should be determined by the court. So in circumstances where the other party does not consent there is a high standard to be satisfied to discourage frivolous or delaying applications. There is another important safeguard which avoids delay to the arbitral process in that the tribunal may continue the arbitration pending determination of the application. There is no appeal of the decision of the Outer House on the referral or whether an application is valid.

Part 3 – General duties

General duty of the tribunal

141. Rule 23 in the Bill replaces rules 17 and 18 in the consultation print and has been redrafted to take into account the views of consultees.

142. The obligation of fairness is fundamental to the nature of arbitration and the courts have repeatedly reinforced this over the years. The parties cannot contract out of this mandatory obligation. However informal proceedings may be, they must be fair. The duty to treat the parties fairly does not necessarily mean treating them in the same way. The tribunal must also allow parties a reasonable opportunity to put their case and respond to the other party's case.

143. The proceedings must also be conducted in a manner which maintains confidence in their impartiality. The Bill now reflects the views of consultees that arbitrators should also be required to be independent. The meaning of independence for the purposes of the Bill is defined in rule 74.

144. Under the Bill, arbitrators have wide discretion regarding the conduct of proceedings subject to (1) agreement of the parties, in the arbitration agreement or otherwise, and (2) other duties under the Scottish Arbitration Rules. But rule 23 also imposes a mandatory duty on the tribunal to conduct the arbitration without unnecessary delay and without incurring unnecessary expense. This mandatory duty is intended to address complaints about arbitration that it takes too long and is subject to delays. The arbitrator(s) will now be under a statutory duty to progress an arbitration proactively. A failure by the arbitrator(s) to conduct the arbitration in this fashion will be a ground for challenge to an award under rule 66 (serious irregularity) if it has caused or will cause substantial injustice to the appellant.

145. The Bill does not, however, impose time limits for arbitration in the same way as adjudication under the Housing Grants, Construction and Regeneration Act 1996. Very few consultees argued in favour of time limits and it is considered that they may pose as many problems as they may solve. Complex disputes do not lend themselves to quick resolution (and it is worth bearing in mind that adjudication can only be used for single issues). If time limits were to be imposed, it is inevitable that provision would also have to be made for applications to the court to extend those time limits in cases where the dispute was not capable of resolution in the timeframe. It seems equally inevitable that the court would soon be in receipt of a constant stream of applications for extensions to a statutory time limit.

146. There is now no hierarchy of duties on the arbitrator (as there was in the consultation print) so that the duty to conduct the arbitration without unnecessary delay and without incurring unnecessary expense is equal to the duties to be impartial and independent and to treat the parties fairly. The use of “unnecessary” also allows the duty to conduct the arbitration proactively to be reconciled with the duties of fairness etc., so that, for example, the tribunal may not be required to act without unnecessary delay if, having regard to the duty of fairness, it would be unreasonable to do so.

General duty of the parties

147. Rule 24 is a mandatory rule imposing a general duty on the parties (identical to the general duty of the tribunal) to ensure that the arbitration is conducted as efficiently as possible. The intention is that the parties should be similarly bound along with the arbitrators for ensuring that the arbitration proceeds without unnecessary delay and without incurring unnecessary expense. The provision is intended to make it clear to parties that the new regime for arbitration in Scotland will not countenance deliberate delaying tactics by one or other of the parties.

148. The sanction on the parties if they do not comply with the general duty in rule 24 will be that the arbitrator will be able to take such non-compliance into account in assessing the parties' liability for expenses under rule 60.

Confidentiality

149. One of the attractions of arbitration as a method of dispute resolution is that it is usually confidential. This may be particularly attractive to commercial parties since the matters in dispute may be commercially sensitive. For example, an IT company whose products or services are the subject of a claim that they are inadequate will not want that allegation to become public knowledge since it could materially damage the commercial position of the company by affecting future sales.

150. The consultation version of the Bill proposed that the identity of the parties to an appeal to the court (which includes appeals on lack of jurisdiction of the arbitrator, serious irregularity or legal error) must not be disclosed. There was, however, nothing further in the Bill to provide for the confidentiality of the arbitral proceedings themselves, a fact which might be thought to be surprising considering that research by Queen Mary University London in 2008 has confirmed that confidentiality is the second most important factor which leads parties to arbitrate rather than litigate (enforceability of arbitral awards is the most important factor).

151. The question therefore arose as to whether the Bill should imply a confidentiality rule into the arbitration proceedings more generally where the parties have not explicitly agreed to do so. They may not have even considered the issue of confidentiality, though research by Analytical Services Division into recent arbitrations in Scotland revealed that all of those analysed were conducted on a confidential basis, irrespective of whether the case was commercially sensitive.

152. Scots law on arbitration and confidentiality is undeveloped and unclear on whether it implies confidentiality into an arbitration at present. The question may be a matter of interpretation of the arbitration agreement since it is usually left to the agreement of the parties. In England, although the Arbitration Act 1996 is silent on this issue, it has been accepted that confidentiality is implied into an arbitration agreement by common law and this has recently been confirmed in the case of *Emmott v Michael Wilson Partnership*. Although the Scottish courts might have been expected to consider the English precedent, they are of course not bound to follow it. It might be many years before the issue came before a Scottish court to clarify Scots law.

153. There would therefore be an obvious advantage in clarifying the law in Scotland because of the importance parties attach to confidentiality as a reason to choose arbitration over litigation. A narrow majority of consultees (11-7) who responded on the point disagreed with the proposal that the Bill should contain a statutory rule requiring the parties to respect the confidentiality of the arbitral process. Those who took this view preferred to leave the matter to the agreement of the parties. The CI Arb, however, favoured clarifying the law in the Bill to try to ensure that arbitration is private in Scotland and to move the law in the direction of that taken by the courts in England. They suggested that the rule should be default only, however, so that parties who do not wish to have their arbitration subject to a confidentiality rule can so agree and thus contract out of the rule. Stakeholders interviewed by officials after the consultation process were almost unanimously in favour of the introduction of a confidentiality rule.

154. There are difficulties in enforcing confidentiality and finding an adequate sanction to penalise breaches of confidentiality. Interdict might be available, but it will sometimes be too late if the disclosure has already taken place. As regards damages, it is necessary to show loss to recover damages and it can be difficult to prove loss and/or to quantify it. However, that said, a statutory rule, albeit a non-mandatory default rule, to make disclosing information about the arbitration a breach of confidence in Scots law would create an enforceable right of action in some circumstances.

155. It would of course, as noted above, bind some parties who had not anticipated that they would be bound, perhaps particularly in domestic arbitrations, if they did not appreciate that the law would effectively have this effect as regards their arbitration. There are though wide exemptions for the express or implied authorisation of disclosure by the parties, protection of the parties' lawful interests and where required by law or the interests of justice. This reflects Scottish Law Commission work on clarifying the Scots common law of confidentiality, and the English courts' approach in arbitration law, drawing on the general principles of banking law (from the case of *Tournier v National Provincial and Union Bank of England*). The new rule places the arbitrator under a duty to explain to the parties that the process will be confidential unless they agree otherwise.

156. Rule 25 makes it clear that Scotland recognises the principle of confidentiality and takes the issue seriously. The provision may indeed, as the CI Arb have suggested, provide a unique selling point for arbitration here.

157. The effect will be that a confidentiality clause will be effectively implied as a matter of law into an arbitration agreement unless the parties agree otherwise. If the matter is not agreed in advance of the arbitrator's appointment, then, once appointed, he or she will be obliged to advise the parties that the law states that proceedings are to be confidential unless they decide otherwise. Given the possibility to agree otherwise and the wide exemptions, this provision is compliant with Convention rights, as it recognises the benefits of confidentiality where parties have agreed to waive their rights to a fair trial by electing to go to arbitration and clarifies the legal position.

158. Although the parties will normally receive the tribunal's reasons for an award as part of that award, they should not be entitled to know what the deliberations of the tribunal are prior to the award, which should be confidential to its members (unless of course the tribunal shows the

parties a draft award prior to issuing the final award). This is the policy behind rule 26. The only exception to this is that it may be necessary to disclose an arbitrator's refusal to participate in the arbitration.

Part 4 – Arbitral proceedings

159. Arbitrators rely, at present, on the arbitration agreement and submission documents to identify their duties and the powers available to them. However, for the most part, submissions do not contain detailed provisions and arbitrators may find themselves with insufficient powers to allow them to manage proceedings properly.

160. If the agreement is silent, arbitrators will look to current domestic arbitration law under which the powers available are limited. For example, there are no powers to award damages, expenses or interest. This means that arbitrators may be unable to meet the needs of parties, as these are fundamental elements of any final award. There is also an absence of powers that allow arbitrators to ensure that proceedings move forward in an efficient manner. The Bill aims to remedy this. All of the rules in Part 4 are default to allow the parties and the arbitrator as much autonomy as possible. Only four require discussion here.

Procedure and evidence

161. Arbitral proceedings can take many different forms so the tribunal is given the power to determine procedure and evidence to move away from the idea that arbitrations should be conducted like court proceedings. See for example rule 27(2)(e) which allows arbitrators to take on a more inquisitorial role.

Power to appoint clerk, agents or employees etc.

162. Arbitrators in Scotland often appoint clerks to assist with the arbitration procedure. A clerk is usually a solicitor with experience of arbitration practice. Their duties will include the safe custody of written pleadings and other documents and the provision of advice to the arbitrator on procedure and the drafting of interlocutors and final awards. At hearings or other meetings, the clerk may perform the functions of a clerk to a tribunal. Whether or not the appointment of a clerk is justified financially will depend upon the arbitration, but rule 31 provides that an arbitrator can appoint a clerk (and others) to assist in the arbitration. However, the parties' consent will be required for the appointment of clerks and other staff if significant costs are likely to arise. This aims to ensure clerks and other staff are not appointed unnecessarily.

Powers relating to property

163. Rule 34 gives arbitrators default powers in relation to protective measures relating to property which may constitute evidence in the arbitration. One of the features of arbitration in Scotland will be an arbitrator's ability to make orders for the preservation etc. of property owned or possessed by a party as a protective measure pending the outcome of an arbitration and also for the purpose of being used as evidence during the proceedings. These are similar to the powers of a court. Rule 34 will promote the smooth running of the arbitral process because it will no longer be necessary for the parties to go to court to obtain orders not presently available

from arbitrators. The fact that the parties may not agree on the need for such a preservation order should not be able to restrict the power of an arbitrator to make such an order, because a party inclined to action which would frustrate the possible outcome of the arbitration is unlikely to agree (at least once the dispute has arisen) that the arbitrator should have power to make orders which would interfere with such action.

Failure to submit claim or defence timeously

164. The arbitrator has sanctions under rule 36 to deal with late submission of statements of claim, counterclaims and defences, which (in the case of a claim) could result in the termination of the arbitration or (in the case of a defence) could mean the arbitration proceeding in the absence of such defences. This provision is another which has the objective of driving forward the arbitral process without unnecessary delay on the part of the parties.

Failure to comply with tribunal direction or arbitration agreement

165. Rule 38 gives the arbitrators further powers to deal with failure on the part of the parties, this time in relation to failure to comply with an arbitrator's direction or the arbitration agreement itself. An arbitrator will be able to order a party to comply and will have a range of sanctions in the event of non-compliance. Crucially, the arbitrator will be able to take into account any element of non-compliance by a party when making an award under rule 60.

Part 5 – Powers of court in relation to arbitral proceedings

Referral of point of law

166. Rule 40 is a rule which has been added to the Bill in the light of comments from consultees. It has an equivalent in section 32 of the 1996 Act. It was argued that it would be useful to allow the court to determine a preliminary point of law.

167. This procedure will, however, only be available where all of the parties to the dispute and the arbitrator have consented, or the tribunal has consented and the court is satisfied that the determination is likely to produce substantial savings in expenses, that the application was made without delay and there is a good reason for the question to be determined by the court. The reason for this is that this procedure should not be able to be used as a delaying tactic in the same way that the stated case (which is being repealed by the Bill) was abused in the past.

Variation of time limits set by parties

168. In general, in Scots arbitration law there are no specific time limits which must be applied, although the arbitrator has the power to set time limits, but not to vary time limits set by the parties. The arbitrator can, as matters of general procedure, set time limits for the completion of particular stages of the tribunal, or a timetable for the whole arbitration.

169. The court is given the power under rule 41 to vary time limits where someone would suffer substantial injustice if no variation was made, and all arbitral processes for variation have been exhausted. Such provision is made because the arbitration would come to an end and the

arbitrator's authority terminate if the specified date expired without an award having been made, and there will be situations where this would not be appropriate.

Part 6 – Awards

Remedies available to tribunal

170. Rule 45 clarifies a number of powers that an arbitrator will have under Scots law and adds to available powers. They include giving the tribunal the power to award sums of money, including damages. Until now, arbitrations in Scotland have not had powers to award damages and this is a valuable addition to the powers of arbitrators. This is a default rule subject to the agreement of the parties.

Interest

171. Arbitrators in Scotland have also not previously had clear powers to award interest, but this is now included as a default power in rule 46.

Form of award

172. Rule 48 makes default provision for the form of a tribunal's award including that it must state where the arbitration is seated (which will always be Scotland). Were it not for this rule, the juridical seat of the arbitration might not be clear from the award. A different procedural law in relation to the arbitration might for instance be agreed by the parties. The simple approach is that the procedural law should always be the seat of the arbitration. But this has to be set against the fact that allowing the law, say of England, to be used in Scottish arbitrations may encourage the use of Scotland as an arbitral venue. The Bill provides more generally that parties should be able to opt for a procedural law on particular aspects of arbitral procedure that is not Scots law (i.e. in respect of the default as opposed to mandatory provisions).

Provisional awards

173. Rule 50 is a mandatory rule that an arbitrator is able to make provisional (known in Scots law until now as interim) awards for relief. It is considered that this may in practice protect the weaker party financially during the arbitration process. The term "provisional" is being used to follow international practice and to avoid using a term only used in Scotland. This accords with the recommendations of the Business Experts Law Forum.

Power to withhold award on non-payment of fees or expenses

174. There is no existing authority in Scots law which specifically allows arbitrators to withhold awards in cases where all the fees and expenses of the arbitration are not paid by the parties. Rule 53 makes mandatory provision that the tribunal may refuse to deliver an award to the parties unless all the fees and expenses of the tribunal have been paid in full. This is consistent with modern arbitral practice.

Award to be final and binding

175. It is understood that arbitrators usually stipulate time limits for compliance in awards based on the circumstances of the case. The Bill does not therefore seek to do this.

Arbitration to end on last award or early settlement

176. The common law position in Scotland is that where parties settle their dispute before the arbitration reaches an end, the arbitrator cannot issue an award which incorporates the terms of the settlement. This is out of step with modern arbitral practice and so rule 55 provides a default rule that an award may reflect the terms of the settlement of the dispute.

Correcting an award

177. Once a final or terminating award is made the powers of the arbitrator come to an end. This means at present that the arbitrator cannot correct any clerical errors or errors of calculation found in the award, although a court can allow some errors to be corrected. Rule 56 provides a default rule that arbitrators will have a power to correct certain defects in any final award they make. This rule applies to part awards and provisional awards as it applies to final awards. A procedure is provided for such corrections.

Part 7 – Arbitration expenses

178. The rules on the expenses of an arbitration are intended to clarify both how fees and expenses are determined and who will be responsible for paying them. They also make provision for liability for recoverable arbitration expenses to protect parties where there is inequality of arms. Arbitrators need specific powers to allow them to manage the arbitral process in an efficient manner. The absence of, or uncertainty about, an arbitrator's powers to make protective orders, etc. is a bar to the efficient management of an arbitration. Therefore the Bill provides that parties may also be required to lodge security for the expenses of a claim or counterclaim.

Arbitration expenses

179. "Arbitration expenses" are defined in rule 57. The provisions also apply to any arbitral appointments referee or other institution or person with powers given by the parties connected with the delivery of the award. References to the fees and expenses of the arbitrators should be construed as including the fees and expenses of that institution or person. References to arbitrators in provisions on expenses include an arbitrator who has ceased to act and an umpire (see rule 78).

Arbitrator's fees and expenses

180. Rule 58 is a default provision for the payment of such reasonable fees and expenses of the arbitrator (or umpire) as are appropriate in the circumstances, although in the first instance that is based on what is agreed between the parties and the arbitrator.

181. The parties to the arbitration are to be severally liable to the arbitrator(s) for payment of the fees and expenses. The fees and expenses are treated as a whole, so there is no question of the award being delivered to only one party on payment by that party of his or her “share” of the fees and expenses. The tribunal can apportion liability where the parties cannot agree how to do this, but regardless of liability among parties, tribunal members can recover the full amount of other fees and expenses from either party.

182. The Bill provides a right for any party or the arbitrator to apply for the fees and expenses to be fixed by the Auditor of the Court of Session. This will cover the situation where there has been no agreement as to the basis for payment of fees and expenses. The Auditor will have the power to order that the fees and expenses be adjusted on such terms as the Auditor may direct to reflect a reasonable commercial rate of charge and that, where the application is made after payment has been made, the Auditor may order repayment of any amount as is shown to be excessive. The purpose of this is to cover the situation where a party who has not agreed the level of fees with the tribunal, is unable to obtain delivery of the award without paying those fees in full because the tribunal refuses to deliver the award pending full payment and claims the tribunal’s demands are excessive. The tribunal also has the power to apply to the Auditor to cover the situation in which, for example, there has been simply no agreement on fees and expenses and parties refuse to pay what the tribunal demands.

183. Rule 58(4) ensures that only reasonable costs can be recovered as part of the arbitration process. This replicates the approach in the 1996 Act.

184. The contractual rights of an arbitrator to payment of his or her fees or expenses remain relevant to payment notwithstanding this provision.

Recoverable arbitration expenses

185. At present arbitrators have only an implied power to make awards of expenses, which means that an essential tool in the management of the arbitral process is not clear. Rule 59 is a default rule which remedies this.

186. The “other expenses” which are recoverable and which are determined by the tribunal or the Auditor of Court under rule 59(2) (i.e. other than those agreed or fixed under rule 58) are those listed in rule 57(c) i.e. the parties’ legal and other expenses.

187. Under rule 59(3), any doubt when determining the amount of other arbitration expenses which are recoverable must be resolved in favour of the person liable to pay the expenses.

Liability for recoverable arbitration expenses

188. Rule 60 follows the usual convention that expenses follow success. In making an award allocating the parties’ liability for expenses, the tribunal can take into account whether the parties have fulfilled their duties towards the arbitral process and whether, for example, they have been guilty of delay or obstruction.

Ban on pre-dispute agreements about liability for arbitration expenses

189. Rule 61 is mandatory. It is intended to prevent substantial abuse whereby a financially stronger party may prevail upon a weaker party to make an agreement that they should pay their own costs (or even to pay the costs of the other side as well) in any subsequent arbitration. This may mean that the weaker party may be prevented from ever starting an arbitration against the stronger party since they would have to pay their own costs, win or lose, and they would simply be unable to afford to do so. There is nothing to prevent an agreement of this kind after a dispute has arisen.

Security for expenses

190. Arbitrators need specific powers to allow them to manage the arbitral process in an efficient manner. The absence of, or uncertainty about, an arbitrator's powers to make protective orders, etc. is a bar to the efficient management of an arbitration. Rule 62 is a default rule that, in the absence of agreement to the contrary, an arbitrator has the power to order a claimant or counterclaimant to provide security for the expenses of the arbitration. Security should be at the arbitrator's discretion, exercised according to the general principles of the Bill. Residence outside the UK alone is not to be the only reason for granting security.

Limitation of recoverable arbitration expenses

191. Rule 63 gives the tribunal power to cap a party's liability for arbitration expenses – a power which could for instance be used if one of the parties has enough financial resources that they could take advantage of their financial position against another party with more limited resources. In this way, even if the expenses exceed the specified amount, the amount recoverable from that weaker party can be capped.

192. Section 65 of the 1996 Act gives the tribunal a direction making power in this regard. It is not clear, however, how that power would be enforced. It is for this reason that the power in rule 63 is an award-making power so that it is enforceable as an award.

193. A capping award obviously has to be made before the final award. The Bill already recognises that expenses awards may be separate from final awards and that some awards may be made in advance of the final awards. Rule 63 therefore makes reference to a capping award being a part award to make it clear that it has to be made well in advance of the final award.

Part 8 – Challenging awards

194. The extent to which it should be possible to challenge awards is one of the most difficult parts of the Bill. Arbitration, if it is to succeed as a method of dispute resolution, must be final and binding on the parties. The Bill therefore seeks to limit challenges to awards to assess where substantial injustice would otherwise be caused.

195. The Government did consider whether there should be no appeal or challenge to the court, as is the case in some jurisdictions. Consideration was also given to whether the parties should be allowed to agree that there should be no challenge to awards, but it was decided that it

was important to make some provisions for challenge and that parties should not be able to contract out of this other than as provided for in rule 67. It is inevitable that arbitrators will occasionally make mistakes and there must be some redress for parties. Not least supervision by the courts is an important safeguard ensuring that the whole process of arbitration, together with review by the courts, is compliant with Article 6 of the European Convention on Human Rights.

196. The Bill provides that all challenges are to be made to the Outer House of the Court of Session. The Government consider that the Commercial Court may play a valuable role here and the intention is to consider this further in detail with the Lord President of the Court of Session with a view to making court rules by Act of Sederunt making provision as to whether, and if so which, arbitration appeals and challenges should go to the Commercial Court. The Commercial Court is not a statutory creation and it is unnecessary to refer to it directly in the Bill.

197. Throughout these provisions an arbitration is to continue despite the bringing of an appeal.

Challenging an award: substantive jurisdiction

198. Rule 65 is a mandatory rule that a party can apply to the court to challenge the arbitrator's jurisdiction and gives the court powers in relation to the award made. The arbitrator may already have ruled on his or her own jurisdiction. The court may have ruled on an objection to the arbitrator's ruling. But rule 65 deals specifically with an allegation that the arbitrator did not have the jurisdiction to make an award.

199. Rules 19 to 21 should mean that a challenge under rule 65 will be rare, but there will always be cases where an award possibly deals with matters which a party is able to allege lay outside the arbitrator's jurisdiction, but the party had no means of knowing in advance that it was going to do so. It may be that the alleged lack of jurisdiction only came to light when the reasons for the arbitrator's decision are set out in the award.

Challenging an award: serious irregularity

200. Rule 66 is a mandatory rule. It sets out comprehensive grounds on which an award may be challenged for serious irregularity. Although the general policy of the Bill is that recourse to the courts should be minimised as much as possible, it is essential to provide a remedy for the parties if the arbitrator or umpire has failed in his or her duty towards them.

201. Rule 66 reflects the internationally accepted view that the court should be able to correct serious failure to comply with the due process of arbitral proceedings. Scotland would be out of step with modern international practice if this rule were a default rule. It seems highly unlikely that parties would want to deny themselves right of recourse to the courts if they think the arbitrator has mismanaged the arbitration.

Challenging the award: legal error

202. The Bill repeals section 3 of the Administration of Justice (Scotland) Act 1972 (the "stated case" procedure). Internationally some jurisdictions have no review by the courts on

points of law, although this is for instance seen as important in England, given the scope of English common law throughout the Commonwealth. Consideration was given to simply repealing the stated case procedure. Judicial review on the grounds of error of law is generally not competent at present. Rule 67 takes the approach of replacing the stated case procedure with a statutory appeal for error of Scots law, as opposed to on any question of law, to the Outer House, but only against a final award of the arbitrator on a question of law. The error of law jurisdiction of the court only extends to the law of Scotland. A final award is to include a part award.

203. The stated case procedure has fallen into disrepute since it has been used simply to delay the arbitral process and appeals have been made on questions which are really matters of fact rather than of law. An appeal will only be entertained by the Outer House if the court is satisfied on each of the conditions set out in rule 67(4) (as is the case with the appeal on any question of law under the Arbitration Act 1996 applicable in the rest of the UK). Rule 67 is subject to the limits set out in rule 68(2) and (4) (including the requirement to use any available arbitral process of review).

204. This rule appeared as a mandatory rule in the consultation print of the Bill, but consultees were overwhelmingly of the view that it should be a default rule. As a default rule it now allows the parties to exclude any right of appeal on an error of law which maintains the essence of arbitration that parties have chosen to submit determination of their dispute to an arbitral tribunal to make a final and binding award and so denying themselves recourse to the courts (except under rules 65 and 66)

Part 9 – Miscellaneous

Immunity of tribunal etc.

205. Arbitrators (including umpires) should be granted immunity from liability for damages while exercising their functions under the Bill. If arbitrators are not given such immunity, those with needed expertise may not be persuaded to act. This would mean the loss of one of the main advantages of arbitration – that it provides experts to judge specific forms of dispute. It can be said that arbitrators, when carrying out their functions as such, act in a judicial capacity, and in this respect, therefore, should effectively be treated as judges.

206. Lack of immunity is also likely to deter major international arbitrators from working in Scotland: other jurisdictions which do provide such immunity would be chosen instead.

207. There is the argument that arbitration is contractual and therefore immunity is not appropriate as arbitrators may be paid large fees for their expertise – and that much of the case law establishing immunity for arbitrators developed at a time when it was usual for arbitrators not to be paid. However, it is considered necessary to ensure that the role of arbitrators is not compromised by lack of immunity, and that actions for damages against arbitrators are not used as a way for a disgruntled party to the arbitration to challenge or re-open the arbitration itself.

Clerks etc.

208. An argument exists that as clerks are often lawyers who are paid full professional fees they should not have immunity from damages while carrying out their functions as clerk. However, the benefit of granting immunity to clerks is that it reduces the possibility of challenge and delay, which often necessitates closure of the arbitration process.

209. The Bill therefore also makes mandatory provision for the immunity of clerks and others who assist in the arbitration in the same way as for arbitrators.

Immunity of appointing arbitral institutions etc.

210. The principal difference between nominating and appointing bodies is that nominating bodies put forward the name of an arbitrator who is then appointed by the parties where appointing bodies themselves appoint the arbitrator.

211. In most cases the parties to a dispute will agree on the identity of the arbitrator, but there will be situations when this does not happen. The Bill makes mandatory provision that when either of the parties fails to comply with the appointment procedure, or when the parties have complied with procedures but are unable to agree on the identity of the arbitrator, a party will be able to apply to an arbitral appointments referee designated by Scottish Ministers who will be able to appoint an arbitrator.

212. Arbitral appointments referees and other third parties whom the parties ask to appoint or nominate an arbitrator should be immune from liability because this adds certainty to the process of arbitration by closing another possible avenue for challenge. Although some bodies carry out this function for free, others charge substantial fees and it has been argued that in those circumstances they should be liable for negligence. However, international institutions nominating or appointing arbitrators will be more likely to choose Scotland as a seat for arbitration if those appointing the arbitrators are immune. On balance immunity should be granted to encourage the use of Scotland as a seat for arbitrations and to close a ground for attacking awards and promote finality of arbitration.

Immunity of experts, witnesses and legal representatives

213. As arbitration is a private version of judicial proceedings, it seems right that experts, witnesses and legal representatives should be placed in no more vulnerable a position if they are taking part in arbitration proceedings than if they are taking part in civil court proceedings. If they did not have the same immunity from defamation for anything said in the course of arbitration proceedings as they would enjoy in civil proceedings they might be reluctant to take part.

214. With regard to expert witnesses, in civil proceedings they enjoy immunity against any action brought on the grounds that things said or done by the expert in the ordinary course of proceedings were said or done in bad faith or negligently. It is appropriate to have similar immunity for expert witnesses in arbitrations.

Loss of right to object

215. As a matter of effective, fair and efficient dispute resolution, an arbitration should not proceed if circumstances exist which compromise the arbitrator or the process. If this rule were to be made default, it would effectively mean that (if the parties agreed otherwise) a party could seek to delay or frustrate enforcement of a final arbitral award by raising a spurious late challenge on grounds of impartiality, jurisdiction, serious irregularity, etc. which could simply be for tactical advantage.

Independence of arbitrator

216. Rule 74 is mandatory and defines “independence” as meaning anything which gives rise to justifiable doubts as to the arbitrator’s impartiality. Questions over independence may arise because of an arbitrator’s relationship with any party and any financial or commercial interests he or she may have if the impression is that the tribunal may favour one party over another.

Formal communications

217. Many arbitrations involve a large amount of correspondence and difficulties may arise if any dispute emerges as to whether a written communication was properly delivered or received, or as to when it was received.

218. Rule 79 provides default rules for the means of intimating certain formal notices or documents under the arbitration agreement or in the course of arbitral proceedings. They also provide that the arbitrator can order how intimation should be made or dispensing with intimation.

Periods of time

219. As there are no general rules for how time periods set in or under an arbitration agreement are reckoned, rule 80 provides default provisions for calculating time periods in the absence of agreement between the parties.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

220. The Bill is intended to improve the law relating to the use of arbitration as a method of dispute resolution in Scotland. The identity of the parties to disputes which are arbitrated is irrelevant.

221. The Bill’s provisions are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. Copies of the Government’s consultation paper, including the draft Bill, were issued to Age Concern Scotland, Equality and Human Rights Commission, Equality Network, LGBT Youth Scotland, Stonewall Scotland, Muslim Arbitration Tribunal, Scottish-Islamic Foundation, Shakti Women’s Aid, Edinburgh, Islamic Shari’a Council, Church of Scotland, Bishops’ Conference of Scotland and Scottish Council of Jewish

Communities. Only the latter organisation responded (welcoming the Bill and suggesting minor technical amendments).

222. Scots (and English) law has long recognised many different types of tribunals as “arbitrations”. This includes (for example) the Beth Din, a Rabbinic court, governed by Jewish law. A Muslim Arbitration Tribunal, if it resolves a dispute that parties have agreed to refer to it, is no different to any other arbitral tribunal.

223. Decisions of arbitral proceedings properly constituted under a valid arbitration agreement are, and will be, enforceable by the Scottish courts and may be challenged or refused enforcement on a number of different grounds. Naturally, if any of the awards or decisions by these tribunals were illegal or contrary to public policy under Scots law, they would not be enforceable. Many issues are also not arbitrable according to Scots law, such as matters of public right or status in law, and section 28 of the Bill preserves that position.

224. Recent press reports suggested that the operation of the Arbitration Act 1996 in England had had the effect that the UK Government had “quietly sanctioned” the use of Sharia law by arbitral tribunals. No arbitral tribunal, however, including the Muslim Arbitration Tribunal, may apply Sharia law or any other law unless the disputing parties expressly so agree. The Bill will not change the current position in Scots law that Sharia law could only be considered at an arbitral tribunal if the parties so agree (and if it would be lawful under Scots law to arbitrate the dispute concerned). Sharia law itself has no jurisdiction in Scotland. Regardless of religious belief, all are equal before the law.

225. The Muslim Arbitration Tribunals, which were established in 2007 in order to provide an alternative route to resolve civil issues in accordance with Sharia principles, are not courts. There are no Sharia “courts” in the UK. Participation in them must be entirely voluntary and for a decision to be binding all parties must also agree to this. If a decision were to be in any conflict with Scots law then it would simply not be enforceable.

226. These bodies do not deal with any criminal matters whatsoever – there is no intention for this to change. Criminal proceedings will always be heard in Scots criminal courts. Nothing in Scots law prevents people abiding by Sharia principles if they wish, provided their actions do not conflict with Scots law. An arbitral tribunal cannot instruct the police or the procurator fiscal to discontinue a criminal investigation. It cannot prevent any parties from pursuing criminal proceedings and the police and the procurator fiscal would not be bound by any decision from such a tribunal (including those operating in accordance with Sharia principles).

Human rights

227. The Scottish Government is satisfied that the Bill is compatible with the requirements of the European Convention on Human Rights (“ECHR”).

Article 6 ECHR generally

228. Arbitration generally depends for compliance with the ECHR on the parties voluntarily waiving their Article 6 rights to a fair and public hearing by an independent and impartial tribunal established by law, and agreeing that it should be submitted to a private arbitrator.

229. The Strasbourg Court has held that such a waiver must be “unequivocal”², so any arbitration regime must comply with Article 6 to ensure the waiver is not abused. For instance the right to a public hearing inherent in Article 6 protection can be waived, tacitly or expressly³. The Court has however left open whether some aspects of the Article 6 protection, such as impartiality of the tribunal, or allowing a party a reasonable opportunity to make its case, may not be waived⁴. Waiver must also not infringe an “important public interest”.

230. The Bill sets up a regime, similar the UK Arbitration Act 1996, which provides safeguards to ensure that going to arbitration in Scotland is compliant with Article 6 in this way. Unequivocal waiver has been held to exist from the initial agreement to go to arbitration.

231. There are protections against parties being caught in arbitrations against their will. For instance low-value consumer arbitration clauses are struck at by the statutory protections in sections 89 to 91 of the 1996 Act. Certain matters, such as where public rights are in issue, matters of status or criminal law are simply not arbitrable; section 28 of the Bill ensures that this continues to be the case. In addition, there are important protections in general contract law which applies to arbitration agreements to prevent abuses, which would for instance to prevent arbitration where obtained through force and fear, to help to ensure that a party has voluntarily agreed to go to arbitration. In practice, this is supplemented by the safeguards in the Bill regime of mandatory grounds of challenge to arbitrators and awards for lack of jurisdiction and serious irregularity in proceedings. The regime reflected in the Bill and in the Scottish Arbitration Rules is considered as a whole to be compliant with Article 6.

232. In particular, some specific aspects include:

- Under Article 6, an arbitral tribunal may not be an “independent and impartial tribunal established by law” in its own right. In particular, it may not be “independent” in the sense of being independent of the parties who agree on its appointment. The Bill places on the arbitrators duties of impartiality, fairness and independence (rules 23 and 74). Rule 74 incorporates a reference to “independence”—defined as where the arbitrators’ relationship with any party, a financial interest or anything else gives rise to justifiable doubts as to impartiality. It is considered that these provisions of the Bill are compliant where the parties have agreed to go to arbitration. The Court of Appeal in England and Wales has also held that the UK Arbitration Act 1996, which contains no requirement of independence, complies with Article 6 as lack of independence will allow removal for lack of impartiality⁵.

² *Suovaniemi and others v Finland* (Appl. No. 31737/96), 23 February 1999.

³ *Axelsson and Others v Sweden*, (Appl. No.11960/86), Commission Decision, 13 July 1990.

⁴ *Pfeifer and Plankl v Austria* (1992) A227 14 EHRR 692.

⁵ *Stretford v Football Association* [2007] EWCA (Civ) 238.

- Rule 48 of the Bill requires the arbitral tribunal to give reasons for its awards, unless parties agree otherwise. Rule 67 allows challenge to an award for error of Scots law—also unless the parties agree otherwise. Rule 67(2) is a presumption that if an arbitration agreement dispenses with the need for reasons in the arbitrator’s award, court challenge to the award on this ground is excluded, following the UK Arbitration Act 1996. The justification is that if parties agree not to have reasons challenging that reasoning may allow a party to seek to frustrate an unfavourable award.

In other circumstances, excluding the jurisdiction of the court and the public from court hearings on review has led to a violation of Article 6⁶. However, as the parties must explicitly agree to dispense with reasons, the Bill is considered compliant with Article 6 to include the presumption. Waiver of a public hearing can be tacit without failing to be unequivocal,⁷ as the parties are free to agree to the contrary in light of the legal effect of agreeing no reasons. Court review on lack of jurisdiction and serious irregularity are available as mandatory to prevent abuses.

Mandatory rules

233. In particular, the mandatory provisions which the Bill and the Scottish Arbitration Rules impose on parties where they choose to arbitrate in Scotland, must be justifiable.

234. The mandatory Scottish Arbitration Rules require an arbitrator to be an individual, place a duty on arbitrators to disclose information about circumstances giving rise to doubts as to impartiality, include rights to object to and remove arbitrators in certain circumstances, the arbitral tribunal’s ability to decide on jurisdiction and for objections to jurisdiction, the general duties (including impartiality, fairness and independence) on the tribunal and the parties, supporting powers of the courts about witnesses and documents, the tribunal’s power to make provisional awards, provision for payment of the arbitrators’ fees and to withhold an award if expenses are not paid, the ban on parties agreeing liability for expenses before the dispute arises, the ability to challenge an award on grounds of serious irregularity or for lack of jurisdiction, and related provisions including the duty to raise an objection timeously, the immunity of arbitrators and others, and provision on the death of arbitrators and for the role of umpires.

235. The aim behind these provisions is protecting the rights of the parties (e.g. rule 66 allowing court challenge on serious irregularity), in some cases to protect the weaker party financially (e.g. the rule 50 ability to have provisional awards). Others are there to provide an effective arbitration dispute resolution mechanism, which can also be important for protecting the rights of parties and others (for instance the immunity of arbitrators under rule 70). Some rules – such as the mandatory duties of impartiality for the arbitral tribunal in rule 23 – are important for ensuring arbitration procedure is Article 6 compliant.

236. Equivalent rules in the 1996 Act are mandatory, with the exception of the ability of the arbitral tribunal to rule on its own jurisdiction, though that is mandatory at present in Scotland for international commercial arbitrations under the Model law. It is not considered that the imposition of any of the mandatory rules breach ECHR rights, as the parties have elected to go for arbitration rather than to go to the courts. The core rights of impartiality of the decision-

⁶ *Scarth v UK*, 22 July 1999, ECtHR.

⁷ *Axelsson and Others v Sweden*, (Appl. No.11960/86), Commission Decision, 13 July 1990.

maker required by Article 6 noted above are preserved in the mandatory rules, and subject to review by the courts (save as discussed above) where they explicitly agree otherwise in the arbitration agreement.

Statutory arbitrations

237. Sections 14 and 15 provide for how the Bill and Scottish Arbitration Rules will be applied to arbitration required under particular statutes. The general scheme of arbitration law in the Bill will be applied only where not inconsistent with those statutes and the Bill does not require anyone to go to arbitration under those statutes. Section 15 confers on the Scottish Ministers the power subject to affirmative resolution procedure in the Scottish Parliament to adapt those other statutes. Given the limitations on the Scottish Ministers' powers to legislate in breach of the ECHR by virtue of functions conferred on them under the Scotland Act 1998 and the Human Rights Act 1998, the Scottish Government will ensure that the application of the provisions of the Bill to statutory arbitrations complies with the ECHR.

Confidentiality

238. Rule 25 (confidentiality) implies an obligation of confidentiality between the parties and their arbitrator(s), unless the parties agree otherwise, engaging the Article 10 ECHR right to freedom of expression. Section 13 requires court reports to be anonymised unless the parties have consented or certain other exceptions apply. Article 10 is however subject to restrictions prescribed by law where necessary in a democratic society to protect the reputation or rights of others and the prevention of disclosure of information received in confidence.

239. Rule 25 is a default provision. If parties' arbitration agreement is inconsistent with rule 25, or if they modify or disapply that rule, it will not apply. Article 10 rights can be waived, but even if there is no clear waiver by a party, it is considered that the limited restrictions on freedom of expression are justifiable to establish a modern and efficient system of arbitration which protects the rights and reputation of those affected by the arbitration process. Rule 25 will also often serve the aim under Article 10(2) of preventing the disclosure of information received in confidence.

240. It is considered rule 25 is clearly proportionate and necessary to meet those aims – firstly, the default provisions can be disapplied. Secondly, the restriction is subject to a significant number of wide exemptions in rule 25(1), including as one of nine wide grounds where “needed to protect a parties' lawful interests”. For many cases it will also be relevant that the European Court of Human Rights has accepted that a number of factors may justify restrictions on speech which properly can be considered as commercial and provide a certain margin of appreciation⁸. Accordingly, it is considered that this provision clearly complies with Article 10.

241. The limited interference in requiring the identity of the parties not to be disclosed in court reports is also considered to be proportionate to these aims.

242. Rule 25 is also considered compliant with Article 6. The fact the parties may agree otherwise, the wide exemption and other safeguards available together with court supervisory

⁸ *Open Door Counselling and Dublin Well Women v Ireland (1992) A 246*

review contribute to the overall process being fair to the parties and Article 6 compliant. As noted, a public hearing is an aspect of Article 6 that can be waived, tacitly or expressly⁹ and an unequivocal waiver can exist from the agreement to go to arbitration¹⁰

Island communities

243. Arbitrators and those who use or may wish to use arbitration services in island communities will benefit from the reform of the law on arbitration in the same way as those in other parts of Scotland.

Local government

244. Local authorities may wish to consider using arbitration and other forms of dispute resolution such as mediation as an alternative to litigation. They may be expected to benefit from the reform of the law if they choose to use arbitration in the same way as other current and potential users.

Effects on sustainable development

245. There are likely to be positive economic benefits to the Bill. It supports the Purpose Target of Economic Growth and the National Outcome of making Scotland the most attractive place in Europe to do business. If the reforms achieve all that it hoped for them the rewards of having a modernised arbitration system should not be under-estimated. There is no guarantee that Scotland would immediately attract domestic and international arbitration business away from centres such as London, but reforming the law will put Scotland on an equal footing with other countries which have modernised, and mostly codified, arbitration systems.

246. Arbitration can potentially be used by any and all businesses including small businesses in Scotland to resolve a commercial dispute. The Bill provides scope for industries, trades and professions to set up their own consumer arbitration schemes which will save both the consumer and those businesses the cost, inconvenience and stress of a court action (providing a social benefit too). At the other end of the scale, parties may choose to arbitrate cross-border or international disputes due to the recognition of arbitral agreements and awards under the New York Convention. Between those extremes, there would seem to be scope for a great many commercial disputes to be arbitrated as an alternative to litigation, particularly in circumstances where commercial confidentiality may be of importance to the parties.

247. No significant environmental effects are expected.

⁹ *Axelsson and Others v Sweden*, (Appl. No.11960/86), Commission Decision, 13 July 1990.

¹⁰ *Stretford v Football Association* [2007] EWCA (Civ) 238. The Court of Appeal in England & Wales has recently implied similar confidentiality to rule 25 (*Emmott v Michael Wilson and Partners Ltd.* [2008] EWCA Civ 184).

This document relates to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 29 January 2009

ARBITRATION (SCOTLAND) BILL

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

ISBN 978-1-4061-4981-4



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