SUBMISSION FROM THE COMMERCIAL JUDGES OF THE COURT OF SESSION

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

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

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

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

> "put the vast majority of the general Scots law of arbitration into a single statute. … replace most of the few existing statutory provisions relative to arbitration in Scotland and codify and aim to improve the existing law, both common law and statutory. In future anyone in

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

Scotland, or seeking to do business in Scotland, should be able to access relatively easily the principles and rules governing the law of arbitration in Scotland in language which can be readily understood."

This is clearly to be welcomed. However, para.75 of the Policy Memorandum states (as is the case) that sections 85-87 of the UK Arbitration Act 1996 continue to apply to arbitration in Scotland. These are the only sections of that Act which have any application to Scotland and may well be overlooked by persons seeking to know the law relating to arbitration in Scotland. We consider that greater clarity would be achieved by re-enacting them as part of the new Arbitration (Scotland) Bill.

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

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

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

"Where an arbitration is the subject of legal proceedings, the identity of a party in the arbitration must not be disclosed outwith the court—

(a) by the court, or
(b) in any report of the proceedings."

There are qualifications to (b) in subsection (2), but no qualifications to the prohibition on disclosure by the court. This would appear to mean that any Opinion issued in respect of an arbitration challenge would have to be anonymised (i.e. "X against Y"). Can this really have been intended for all cases? Although this regularly occurs for good reason in, for example, children cases, in other cases it would appear to conflict with principles of open justice to which the courts now strive to adhere. We are aware that, in the English courts, judgments on arbitration appeals name the parties and are reported under the names of the parties. We would also question whether it is realistic in the commercial world to suppose that the identity

of the parties to a dispute will not be gleaned, by those interested, from the facts of the case narrated in an Opinion, even where the parties are not named. Further, in so far as the prohibition applies to any report of the proceedings, this would appear to apply to a Law Report in Session Cases or the SLT, SCCR etc. and to raise the same difficulties. We would suggest that the position be re-considered and/or clarified.

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

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

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

party-appointed arbitrators. That would avoid the need for the introduction of an umpire.

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

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

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

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

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

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

might be possible to stipulate that, for the purpose of the provisions of the Bill providing for a right of appeal to the court for error of law, all questions of English law should be treated as questions of law, not fact. But we are not much attracted to this idea.

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

Lord President, Commercial Judges
Court of Session
13 May 2009