

## SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

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

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

### General Comments

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

### Section 13 Anonymity in legal proceedings

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

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

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

### Section 17 – Recognition and enforcement of New York Convention awards

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

### Section 27 (and Schedule 2) – Repeals

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

### Section 33 – Commencement – Retrospective Effect

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

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

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

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

### Rule 40 – Referral of point of law

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

#### Rule 45 – Remedies available to tribunal

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

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

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

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

#### Rule 46 – Interest

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

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

#### Rule 50 – Provisional awards

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

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

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

#### Rule 51 – Part awards

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

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

#### Rule 67 – Challenging an award: legal error

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

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

The Law Society of Scotland  
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