SUPPLEMENTARY EVIDENCE FROM THE SCOTTISH GOVERNMENT

ARBITRATION (SCOTLAND) BILL

1. At the end of the Mr Mather's evidence to the Committee on 3 June, the Convenor invited the Bill team to provide supplementary evidence on issues raised by the Committee and any other matters arising from the submissions of witnesses.

UNCITRAL Model Law

2. We note that the Law Society has indicated it would drop its opposition to the repeal of the Model Law if the legislation made clear that the parties could choose to apply the Model Law to its dispute.

3. Section 8(4)(a)(ii) does make this clear, though the parties would still be subject to the Mandatory Rules, as set out in paragraph 51 of the Policy Memorandum. The Government will consider again the mandatory rules in the the Model Law specifically against those in the Bill in the light of the Society's clarification of its position.

4. The Committee will be aware that the Faculty of Advocates indicated in their supplementary evidence that they were disposed to support the proposal to repeal the Model Law. This was at least partly because they believe it will obviate an repetition of the situation which arose in one case "in which the existence of the separate UNCITRAL system led to judicial review proceedings and a week of evidence, at no little cost to the parties, about whether or not the UNCITRAL system truly applied to the arbitration in question".

5. It is worth repeating that at consultation on the Bill last year, the overwhelming body of opinion was that the Model Law should be repealed. Among those who took that view was the Royal Institution of Chartered Surveyors; the Chartered Institute of Arbitrators, who represent arbitrators around the world and are heavily involved in international arbitration; and the judges of the Commercial Court of the Court of Session, whose view was endorsed by the judges' legislation committee.

6. The reasons for repeal of the Model Law are set out in paragraphs 47 to 51 of the Policy Memorandum. This includes the view of Professor Fraser Davidson, who gave evidence to the Committee on 27 May.

Rules 9 and 10 – removal of arbitrator by rest of arbitral tribunal

7. The judges of the Commercial Court have expressed concerns about the ability of a party to challenge the appointment of an arbitrator and to have the appointment revoked by remaining members of the tribunal. We think this situation is likely to arise only rarely since most arbitrations will have only one arbitrator on grounds of cost.

8. The Government will consider the point raised by the judges, in particular their point concerning the operation of rule 10(4), but notes that challenging an appointment is only competent on grounds that the arbitrator is not impartial and independent, has not treated the parties fairly or does not have a qualification the parties require. The power for the tribunal to revoke the appointment of one of its members reflects modern arbitral practice and is another method of avoiding recourse to the courts on grounds of time and cost.

Section 11 – court intervention in arbitrations

9. The judges had previously expressed concerns that the wording of the Bill did not make clear that the rules in schedule 1 of the Bill operated as part of the general domestic law, rather than as implied terms of the arbitration agreement. They noted that the provisions giving powers to the court are included in the rules rather than in the main body of the Bill.

10. The fact that the rules – and the court procedures – are in a schedule does not mean that they are not as much part of the law as a provision in the main body of the Bill. We do have some remaining concerns that the alternative wording suggested by the judges in respect of rule 11 detracts from the main emphasis of the provision (to restrict court interventions) but we will seek to work with the judges to find alternative wording agreeable to all.

Rule 29 – tribunal decision by chair of the arbitral tribunal

11. Rule 29(2)(b) deals with the case where no person has been appointed to chair an arbitral tribunal so as to be able to make a decision of the tribunal where there is no majority. At present, unless the parties specifically agree otherwise, an “oversman” can be appointed by virtue of section 4 of the Arbitration (Scotland) Act 1894.

12. The judges of the Commercial Court have suggested that the proposal that the decision of the tribunal should be made by an umpire appointed by the tribunal (if they can agree) or an arbitral appointments referee (if they cannot) is not sensible or cost effective. They instead propose that the decision should be made by the arbitrator last appointed. In the case of a tribunal of three, that will for arbitrations following default rule 6(b)(ii) be the arbitrator appointed by the two party-appointed arbitrators. We can see advantages to the provision for that case. We are less clear how it will operate fairly in the case of a tribunal of two arbitrators (each appointed by an opposing party) although as the judges suggest, that is likely to be less common.

13. We appreciate that there is a cost implication and the appointment of an umpire may delay matters and the Government will therefore consider further this suggestion by the judges.

Rule 40 – referral on point of law

14. Rule 40 is intended to allow parties to apply jointly to ask the court to determine a **preliminary** point of law. It was suggested by consultees who considered that it could happen that a difficult point of law might arise on which even an experienced arbitrator would welcome the view of the court.

15. The Law Society's reference to Question 21 in the consultation paper relates to whether there should be an **appeal on an error in law** prior to the final award being made. This is now rule 67 (see below) rather than rule 40, which is more limited in scope.

16. The intention is that rule 40 will only be used for important, genuine cases of uncertainty in the law – hence the stringent limits on its use in rule 40(2) – consent of the other parties, or a test of no delay and substantial savings in expenses, together with a good reason why the court should decide the matter. The reason for this is that this procedure should not be used as a delaying tactic in the same way that the Stated Case procedure has been abused in the past.

17. The Faculty of Advocates have now also made some points on rule 40, which we are considering. We would, though, note that some of their comments do not appear to recognise that it is the Court – not the arbitrator – who must be satisfied of the test in rule 40(2)(b) before referral on a point of law would be available (again in the interests of time and cost).

Stated Case procedure

18. We were very surprised that the Faculty of Advocates refer in their comments on commencement to parties proceeding in the hope that Stated Case procedure under section 3 of the Administration of Justice (Scotland) Act 1972 would be available. This procedure has in the past been heavily criticised by, among others, the former Lord President of the Court of Session, Lord Hope, whose view is set out in paragraph 121 of the Policy Memorandum.

19. We have confirmed that the impact on existing contracts on commencement is being considered carefully, but we would note that parties' expectations would still be protected by the possibility of limited reference to the courts on points of jurisdiction (rule 22), on point of law (rule 40) and an appeal procedure to challenge an award on grounds of lack of jurisdiction, serious irregularity and error of law (rules 65, 66 and 67).

Rules 46(2) and 47 – compound interest

20. We are grateful to the judges of the Commercial Court for raising the interaction of these two rules on awarding compound interest and we will consider this further. As default rules under the scheme of the Bill, each of these rules will apply unless there is inconsistent provision for the subject-matter of that rule in the arbitration agreement.

Rules 50 and 51

21. The Committee asked for clarification if the designation of rules 50 and 51 as respectively mandatory and default rules was correct, in response to evidence from the Chartered Institute of Arbitrators. We can confirm that it is.

22. Rule 50 (provisional awards) is intended to protect smaller parties who may, for example, be claiming a debt from a larger party and may be close to insolvency. It would allow the arbitrator to make a provisional award on a provisional basis and thus possibly stave off insolvency of the company. The mandatory nature of this rule is intended to ensure that this possibility is not withdrawn from the economically weaker party. We acknowledge, however, that in this respect the Bill goes further than the UK 1996 Act and would intend to consider this rule again in light of the detailed examples provided by the Law Society.

23. As regards rule 51 (part awards), the Law Society has indicated it believes rule 51 should be revised to make clear that if it is made mandatory, as it has itself suggested, the rule will only expect part awards to be issued in appropriate circumstances. This suggests leaving the matter to the agreement of the parties and that the rule should remain default.

Rule 67 – challenge for error of law

24. The proposal to permit challenges to arbitral awards on grounds of error in law was approved by a large majority of consultees, though they suggested this should be a default rule so that parties should be able to agree to deny themselves an appeal on these grounds. The Bill was so amended following consultation. We note that the Law Society supports appeals on an error on a point of law which depends on the court deciding whether the arbitrator was correct on the law or not. This is the purpose of rule 67.

25. The Government would not use the terminology adopted by CIArb: “severely limiting the likelihood of any such appeal succeeding”, but does believe that the provisions on appeal for error of law do need to be limited to prevent delaying applications second-guessing the arbitrator unnecessarily. It would not meet the aims of the Bill to allow for a wider review on point of law than allowed in the rest of the UK.

26. The Faculty of Advocates also suggested removing the “leave of court” procedure in rule 67(4) altogether. We are aware that the procedure is unusual – although not unknown - in Scotland. However, this hurdle is of course considered absolutely crucial by the Chartered Institute of Arbitrators and other responses from consultation as a means of limiting appeals. The test was made even stricter in the light of consultation. (It may be added in response to the Faculty’s paragraph 28 objecting to limiting appeal to the Inner House that there is in fact a reason why a litigant should be deprived of the right to seek a further appeal – because the parties have opted to avoid the courts and refer the dispute between them to an arbitrator.)

27. It is worth bearing in mind in this context that many if not most arbitral jurisdictions internationally do not allow for appeal on point of law – the rest of the UK is perhaps anomalous in doing so given the importance of English common law in international arbitration (for instance in maritime work). Nor is error of law alone grounds for review of an award in Scotland at present.

28. The Government will consider the wording of rule 67 further in the light of the points of detail raised. It may though be worth noting at this stage that—

- On the issue the Law Society raises at pages 8-9 of their supplementary evidence, there is no doubt the Bill allows an arbitrator to take a view on a point of law, without hearing evidence where appropriate (rules 27 and 44). The fact that appeal is more restricted is a separate issue - and rule 67 was amended on consulation feedback from Scottish solicitors that an appeal should only be allowed on the basis of findings of fact in the award in the same way as under section 69 of the 1996 Act.
- As regards the Faculty's doubt over the "obviously wrong" test, it works in the courts in the rest of the UK, and the Scottish courts will be able - if they wish - to have regard to the detailed precedent built up in interpreting the UK Act.

Arbitral Appointments Referees

29. The Faculty of Advocates has expressed concern over how the provisions for Arbitral Appointments Referees will operate under section 22 of the Bill.

30. It is fundamental that the Bill does not affect the ability of the parties to agree who should appoint an arbitrator. The parties remain free to nominate the Dean of the Faculty of Advocates or any other individual to make an appointment if they wish. The parties can contract to refer the matter to an individual who is the titular head of an organisation to make appointments: other common examples are the President of the Law Society of Scotland or the Institution of Civil Engineers, or the Dean of the Faculty of Advocates. It is common for contracts to stipulate that in the event of dispute the matter will be referred for appointment of an arbitrator by an officeholder of an institution.

31. The use of Arbitral Appointments Referees will therefore only be necessary if the parties are unable to agree on the appointment of an arbitrator when they fall into dispute.

32. If that does happen, the intention is to eliminate unnecessary recourse to the courts for appointment of arbitrators (although we have take into account comments from consultees and retained the courts as a backstop in default rule 7). We understand that the courts in the vast majority of cases refer the matter to a body such as the Faculty, the Law Society, the Institution of Civil Engineers or the Royal Institution of Chartered Surveyors for appointment. This initiative will remove this unnecessary step and make the appointment of an arbitrator quicker and cheaper. Although appointing bodies will charge a fee for making an appointment, this is likely to be of the order of £320, which

is likely to be a fraction of the cost of making an application first to the court for appointment.

33. The rationale for this initiative is that bodies designated by the Scottish Ministers as Arbitral Appointments Referees should have a panel of members trained to work as arbitrators and be subject to disciplinary procedures operated by that body. The Referee will then appoint someone with experience of the particular type of dispute or the industry concerned. Under the Bill the Referee must be a "person" (a natural or legal person), though it is envisaged that appropriate organisations will be designated. It would of course be open to the organisation concerned to designate an official to undertake this role.

34. Strictly, nothing in the Bill expressly prevents the Dean of the Faculty (if designated as Referee) appointing someone from the panel of another Arbitral Appointments Referee, such as a solicitor who is a member of the Law Society of Scotland, in the knowledge that that person had been trained by that other organisation and was subject to its disciplinary procedures. However, that implication may arise from section 22 with the requirement for disciplinary procedures.

35. This is, however, considered appropriate in light of the fact that, as noted above, this does not stop parties from agreeing to allow appointment of individuals over which no control is exercisable. If, on the other hand, parties can't agree, the aim is to ensure an individual appointed by a referee is subject to an element of quality control. This would for instance be more important where parties don't agree and may encourage them to have faith in referee rather than object and take the matter to court under rule 7(5)(a).

Powers of arbitrators

36 The Faculty of Advocates queried some of the powers to be granted to arbitrators under rule 45. This is, however, a default rule, so the parties can contract out of any power which they do not want the arbitrator to have.

37. It should be borne in mind, however, that parties have chosen to go to an arbitrator, ie a private judge, in preference to the courts. But they may wish the arbitrator to have the same powers as would be available to the court and may regard it as unhelpful if their 'private' judge lacks certain of the powers a court would have. Other jurisdictions do so, and it would place Scotland at a commercial disadvantage if the possibility is closed off here. There is authority to suggest that arbitrators can be given such powers under Scots common law.

38. It should be noted that an arbitrator will not be able to enforce an interdict with criminal penalties. Only the court can enforce an interdict, and the court will provide a safeguard against any abuse of the position. The same position is clear from the equivalent position in the rest of the UK.

Anonymity in legal proceedings

39. The Faculty of Advocates have queried the proposal that where an arbitration is the subject of legal proceedings such as an appeal, the identity of the parties must not be disclosed in the court or the court record.

40. This rule is valuable because arbitral proceedings are usually confidential at present and unless the parties agree otherwise will be confidential in future under rule 25. Research has indicated that confidentiality is the second most important reason for parties using arbitration (after enforceability of arbitral awards).

41. It would, however, make the confidentiality of arbitral proceedings unworkable if the identity of the parties was to be disclosed simply because one of the parties wishes to revert to the court under one of the provisions of the Bill. It is common to have case reports anonymised – that is all that is required since the substance can be disclosed.

42. It is accepted that there are difficulties associated with dealing with a breach of an obligation of confidentiality, yet it is this characteristic of arbitration which makes it very attractive particularly to commercial bodies. The court of course will comply with the law without the provisions on breach of confidence applying to it, and we would intend to make a small modification of this section to confirm that the wide exemptions apply also to the court's duties under this provision.

Prescription - submitting disputes for arbitration

43. Rule 1 is a deliberately simple rule – the service of a formal notice submitting a dispute to arbitration in pursuance of an arbitration agreement could be effected in a number of ways, for example, by asking an arbitral appointments referee to appoint an arbitrator. The Government is, however, considering the Faculty's point about the implications of possible delay before submitting a statement of claim which follows.

Drafting of the Bill

44. In general terms the Faculty of Advocates alluded to the fact that it may have some comments on the drafting of the Bill, though they did not specify any actual examples. We are asking the Faculty, the Scottish Council on International Arbtiration and others who indicated they had detailed drafting comments provide them ahead of the meeting which the Minister for Enterprise, Energy and Tourism is intending to hold with stakeholders to discuss some of the legal technicalities in the Bill.

I hope this is helpful. Please let me know if the Committee requires any further information.

Hamish Goodall
Bill Team, Scottish Government
8 June