SUPPLEMENTARY EVIDENCE FOR THE CHARTERED INSTITUTE OF ARBITRATORS (CIArb) SCOTTISH BRANCH

1. Introduction

The Committee has sought written evidence on the *general principles* of the Bill and the CIArb has responded in detail to the Committee's questions. We repeat that we strongly believe that the Bill is an important and worthwhile measure inherently designed to bring positive economic benefit to Scotland. We stand by our earlier submission and will not repeat it here save as necessary.

The CIArb has carefully studied the other submissions made to the Committee and, with the greatest of respect to our colleagues, consider that some parts of some of those submissions are factually and/or legally inaccurate. The CIArb fully accepts that others are entitled to different opinions *provided that* such are based on objective facts and accurate legal analysis and we will be happy to debate these, or to clarify differences in opinion, for the benefit of the Committee. However, the CIArb respectfully submits that it would be a serious error for the Committee to make fundamental/far-reaching decisions based on inaccurate material.

Before addressing the various submissions in detail, we give one example indicative of the misinformation the Committee has been given. One submission states that there is anecdotal evidence that there is "virtually no domestic arbitration" in England but, in fact, easily available published data show that there are 5,000-6,000 arbitrations each year (the CIArb alone makes 2,500-3,000 appointments annually) and to that we must add the unknown number of wholly private arbitrations which never appear in any public statistics.

We comment on the submissions in alphabetical order; we have limited our comments to those matters we believe to be of high significance; we do not necessarily agree with or accept any part of any submission not commented upon hereunder. We use the paragraph numbering of each submission in turn

2. Submission by Mr Richard N.M. Anderson, Advocate, FCIArb

4 to 9 Mr Anderson presents a sorry, if unsurprising, example of arbitration under the *existing*, seriously inadequate/deficient, law but he does not address the fact that the provisions of the Bill fully deal with the problems he identifies (see also below).

Under the Bill, the arbitrator has a statutory obligation under Rule 23(1)(c) to "conduct the arbitration (i) without unnecessary delay and (ii) without incurring unnecessary expense" and, should the arbitrator fail in that, the disgruntled party can apply to the Court for his/her removal under Rule 12(e)(ii) or the removal of the entire tribunal under Rule 13(b). Rules 12, 13 and 23 are all mandatory. Further, Rule 11 (a default rule), if agreed by the parties to apply to the arbitration, enables the parties jointly to revoke the arbitrator's appointment.

Further, the parties themselves are under a statutory obligation (Rule 24, also mandatory) to ensure that the arbitration is conducted (a) without unnecessary delay and (b) without incurring unnecessary expense.

10. Mr Anderson states "My own personal view is that the Arbitration (Scotland) Bill in its present form has not been well drafted" but he gives no example of any poor drafting. We disagree strongly with his assertion and cite Rule 25 as one example of outstanding drafting skill.

He also states "This Bill, in my view, is a pale shadow of the excellent Arbitration Act to be found in England" but provides no substance to support his statement; as identified in the CIArb's submission (and there are numerous additional examples) the Bill represents an improvement on the 1996 Act. In particular, the

draftsmen of the 1996 Act considered confidentiality to be a matter too difficult to draft, but the Bill does so, very succinctly and very elegantly, at Rule 25. Further, the Bill is approximately 20% shorter than the 1996 Act.

Mr Anderson also states "my experience in England – supported by strong anecdotal evidence – is that there is virtually no domestic arbitration taking place in England". As we have said above, publicly available data show that there are 5,000-6,000 arbitrations each year, and to that we must add the unknown number of wholly private arbitrations which never appear in any published statistics.

11. Mr Anderson states "The Bill must allow domestic arbitration to take off in Scotland and to be a success there. This Bill simply does not do that." He does not substantiate this assertion which we strongly reject.

13. Mr Anderson states that "there must be a procedure introduced within an Act itself which allows the Parties to choose a framework as regards time." It is not clear what he is seeking since there already exists, in Rule 27(2)(a) which allows the parties to agree a time frame and, should they not do so, allows the arbitrator to impose one. Further both the arbitrator (under Rule 23 (mandatory)) and the parties under Rule 24 (also mandatory) are under a statutory obligation to progress the arbitration without unnecessary delay (or expense). In addition, failures in this respect are covered by sanctions (in Rules 12(e)(ii) and (iii) and 16 – removal of arbitrator; and order in relation to fees) and Rules 30 and 36 to 38. These provisions provide an answer to Mr Anderson's concerns regarding delay.

15. Concerning expenses, Mr Anderson asks "Why should an Arbiter not have the option to ... arrive at his own determination of costs ..."; the Bill provides precisely this at Rule 59(2)(a).

3. Submission by Mr James Arnott

13. Mr Arnott states "The Bill does not contain a self-contained code ...": this is, with respect, a misunderstanding – the Bill does indeed provide such a code, namely the Scottish Arbitration Rules, in Schedule 1.

18/19 Mr Arnott states "For domestic arbitrations, reform could be achieved ... By introducing a new scheme which supersedes and replaces:- (i) All existing statutes from the 1695 Articles of Regulation (ii) All existing common law falling within its ambit ..." The Bill does precisely this: (a) section 27 and Schedule 2 repeal all existing statutes and (b) the Bill displaces and replaces the common law.

In this last regard, we respectfully submit that Mr Arnott's submission is based on a fundamental misconception that the common law continues to apply even after the enactment of the Bill. This is, quite simply, not the case. As a general principle of law, where a matter is dealt with by statutory provisions, those provisions supersede and displace the common law.

24. Mr Arnott states "Old-style arbitration cannot be banished, because it rests on the consent of the parties to settle their dispute privately. Use mandatory rules to tidy it up." The Bill does precisely that, most particularly in Rules 23 and 24, both mandatory.

25. Mr Arnott states "The Bill does not re-state and does not replace the common law ...". As a general principle of law, where a matter is dealt with by statutory provisions, those provisions supersede and displace the common law.

27. Mr Arnott assets that the Bill does not remedy "the recognized long standing weaknesses in the arbitrator's powers in a satisfactory manner" and refers, inter alia, to interest. Rule 46 deals with interest in a comprehensive manner which is

known, from 12 years experience in England of the equivalent section 49 of the 1996 Act, to work without any significant difficulties or complications.

Mr Arnott also states that the arbitrator needs statutory powers to award interest; the Bill gives the arbitrator such power in sections 6-8 and Rule 46, subject to the fact that the parties can agree some different approach to interest. For example, Moslem parties will presumably opt (as the Bill allows) to disapply Rule 46 since it conflicts with Shari'a Law.

28. See 25 above; the Bill gives the arbitrator the statutory power (Rule 45(b)) unless the parties agree to the contrary.

29. See 25 above; the Bill gives the arbitrator the statutory power (Rules 50/51) unless the parties agree to the contrary.

30. Mr Arnott states "Provisional awards are not part of Scottish arbitration law"; this is presently correct but the Bill introduces them as Rule 50.

Mr Arnott also states "to introduce English terminology, particularly without any definitions ..."; first, the terminology is fully defined in the Bill and, second, the terminology is international, not solely English.

32. Mr Arnott criticises the "lump[ing of] domestic and international arbitration together" and states "That is likely to be interpreted as a lack of openness and respect for the foreign party." This last assertion is contradicted by the simple fact that many countries around the world (e.g. England, Sweden, Switzerland, and Germany) have unified systems combining domestic and international arbitration and, for example, Hong Kong is presently in the process of merging its separate systems in a new Arbitration Ordinance.

Further, the 1996 Act includes provisions (which were never brought into force and now never will be) which would have separated domestic and international arbitration in England, but legal advice was that such a distinction would be in breach of the Treaty of Rome and of other EU obligations.

33. Mr Arnott states that the introduction into Scots law of a new ground of challenge, 'serious irregularity' would be a mistake because it would open the door to challenges in court and defeat the object of private arbitration. This assertion is misconceived for four reasons:

(i) "serious irregularity" includes, for example the tribunal failing to conduct the arbitration in accordance with the arbitration agreement or acting outwith its powers, the award being contrary to public policy, or obtained by fraud or in a way which is contrary to public policy, and an arbitrator having not been impartial and independent.

Mr Arnott's assertion means that there should be no ground of appeal in such circumstances. With respect, that position is not only wholly untenable on any rational basis, it is incompatible with ECHR Article 6.

(ii) the above grounds already exist in the common law; Rule 66 substantially codifies "serious irregularity" challenges;

(iii) the list of matters which constitute "serious irregularity" is exhaustive and precisely defined; it is not an "open door" to challenges on any ground whatsoever;

(iv) "serious irregularity" only occurs if the irregularity (see (i) above) has caused substantial injustice to the aggrieved party;

(v) The English judiciary have shown how to interpret these provisions robustly; the Scottish judiciary are very well aware of this, as can be seen in the Commercial Judges' submission.

36. Mr Arnott dislikes both "the use of both default and mandatory rules"; both the Model Law and the 1996 Act (and numerous other arbitration laws around the world) are based on use of default and mandatory rules, so, with respect, there is no objective justification for his view.

He also asks "When so many bodies have their own rules, why introduce rules on an optional basis ?" First, this is precisely what both the Model Law, 1996 Act and others do; second, if the parties have agreed on other Rules (e.g. ICC/LCIA or Scottish Arbitration Code 2007)) then the default rules in the Bill are displaced to the extent covered by the agreed rules; third, if the parties have not agreed on a set of rules (which is, in fact, often the case), the Bill provides them so the parties do not have to take any other action. This works perfectly satisfactorily around the world and Mr Arnott's concerns are allayed by the facts.

42. Mr Arnott states "I respectfully submit that the responsibility presently shouldered by the Scottish legislature is best discharged ... by introducing a new, fully fledged simple system for domestic arbitrations for Scotland ...." The CIArb is delighted to agree with these sentiments but observes that its forthcoming Short Form Rules will address any additional such concerns.

43. Mr Arnott states that "the reference to an appointments referee makes me wary that there is a public sector agenda and an alert foreign party might be apprehensive and turn away, thus killing the goose which lays the golden eggs." First, the AAR acts in respect of certain administrative issues with a view to avoiding unnecessary court applications, and this is a step that will be popular with international users; second, Rule 7(5)(c) allows the parties, by agreement, to bypass the AAR and go straight to court anyway if that is what they prefer. Mr Arnott's concerns are therefore allayed.

4. Submission by the Commercial Judges Of The Court Of Session (the "Judiciary")

It is, of course, with respect and some trepidation that the CIArb responds to the Judiciary's submission

4. It is a universally-accepted principle in arbitration law that court proceedings be sisted (stayed) in the face of an arbitration agreement (with limited exceptions); Article 8(1) of the Model Law and Article II(3) of the New York Convention 1958 refer (it is noteworthy that Article II is not qualified by reference to international arbitration).

Section 86 of the 1996 Act represents the position that the Judiciary now propose for Scotland; however, section 86 was never brought into force in England and now never will be, legal advice to HMG being that to do so would put the UK into breach of its obligations under the Treaty of Rome and other EU law.

The Judiciary propose incorporating ss.89-91 of the 1996 Act into the Bill; we entirely agree (and proposed this ourselves) but we are advised that this is a Reserved Matter.

8. This is reasonably common international practice and the mechanism tracks, for example, Article 13(2) of the Model Law.

9. We respectfully agree that this needs to be revisited.

10. We respectfully agree that this needs to be revisited.

14. We have been approached by the representative of a party who will consider arbitrating in Scotland because English law is foreign law and therefore could not be subject to a legal error appeal while this may be a unique occurrence, it certainly causes some thought.

5. Submission by the Law Society of Scotland

6. Sections 16-19 of the Bill refer: there is a fundamental difference between (i) the recognition and enforcement of foreign arbitral awards (which Scotland is obliged to do under international treaty obligations (the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) to which the UK is party and which applies in Scotland pursuant to the Arbitration Act 1975 (a UK Act)) and (ii) international arbitration held in Scotland. Sections 16-19 merely re-enact the 1975 Act and have nothing to do with international arbitration in Scotland.

7. The CIArb has already shown (in summary form) why the repeal of the UNCITRAL Model Law (section 66 and Schedule 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) is the correct way forward and we will gladly provide more detail if required. In brief:

   (i) the principles of the Model Law are central to the Bill and there is nothing in the Bill which contradicts those principles; it has been confirmed to us privately by senior UNCITRAL staff and a leading Model Law academic that this is acceptable;

   (ii) there are significant omissions in the Model Law requiring additional legislation to cover over: the Singapore Act needs 7,000 words, New Zealand 11,000, of additional bolted-on language necessary to make the Model Law work in practice in a common law jurisdiction;

   (iv) the Model Law has demonstrably been a failure in its 19 years on the Scottish statute book, in part because the 1990 enactment was flawed in failing to deal with all the known defects in the then law;

   (v) the Model Law does not feature among the key attributes that international practitioners agree that a successful arbitration jurisdiction must have (and see (vi) below);

   (vi) there is no evidence of any causal link between application of the Model Law and the success of an arbitral venue. London, Paris, Stockholm, Geneva/Zurich and New York are all major and successful arbitral venues but none have adopted the Model Law; Singapore, Hong Kong, Vienna and Bermuda (all Model Law jurisdictions) are successful for other reasons. Germany, Australia, New Zealand, Malaysia, Denmark, India and Cyprus are all Model Law countries but see little international arbitration.

8-10 We have a strongly-held different opinion and consider the Law Society's suggestion both misconceived and seriously wrong.

   (i) Inter alia, it means the survival of the seriously deficient "old law" for many years, even decades, to come, so that Scotland will have two laws in force in parallel; this is, with respect, counter-productive, inter alia since such would undermine the effectiveness of the Bill.

   (ii) It is standard practice (see section 84(2) of the 1996 Act) that the new legislation will apply to all arbitrations commenced after a stated date;

   (iii) Contracting parties often have to deal with changes in the law which occur after the execution of a contract, particularly when it is for a longer duration (e.g. taxation, land law, oil & gas/energy etc.). Rules of Court are frequently enacted with sometimes significant changes in dispute resolution procedure. Parties have to live with these changes and it is common commercial practice to agree in contracts language such as "Arbitration in accordance with the Arbitration Act 1996 *or any statutory amendments, modifications or re-enactments thereof*" i.e. it is very common that parties envisage that

arbitrations may eventually be conducted under a law different from that originally contemplated by the parties;

(iv) where, for example, parties agree to arbitrate future disputes under the LCIA Rules, the latter provide that "Where any agreement ... provides ... for arbitration under [LCIA Rules] the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules ("the Rules") *or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration*." This is standard international practice.

(v) The Law Society's fear of challenges is misplaced; the CIArb is unaware of any such challenges reported in respect of the 1996 Act.

12. The Law Society's concerns over Rule 40 are overstated, for the following three reasons

(i) Rule 40 is a default Rule so the parties have the options of either (a) disapplying it or (b) adopting some alternative;

(ii) an application to the Court may be made under Rule 40 ***only if*** (a) the other party has consented to it being made, or (b) the tribunal has consented to it being made ***and*** the court is satisfied (i) that determining the question is likely to produce substantial savings in expenses and (ii) ... and (iii) that there is a good reason why the question should be determined by the court.

(iii) the English experience (to which the Law Society makes no reference) is that there have been only three (3) reported cases in 12 years (the first did not occur until 2006) under the equivalent section 45 of the 1996 Act;

Arbitration is a consensual process, by definition; if the parties agree to make a Rule 40 application, why should that be denied them? If they do not agree to do so, then one party has to convince first the tribunal and then the Court that the application has merit.

14-16 We disagree; this is a matter for the parties to agree.

17-18 We disagree; this is a matter for the parties to agree.

19 The Law Society's concerns are overstated:

(i) the system of provisional awards works perfectly satisfactorily in England and elsewhere;

(ii) decisions in construction disputes by Adjudicators under the Housing Grants, Construction and Regeneration Act 1996 are equivalent to provisional awards, since they are binding only until superseded by an arbitral award or court decision or by agreement; it is estimated that there are 3,000-5,000 or so such cases annually and this system has worked well for over a decade;

(iii) the Law Society criticises the terminology but fails to propose any improvement; in our view, the terminology is wholly clear.

We agree with the Law Society that Rule 50 should be a default Rule.

22 We agree with the Law Society that Rule 51 should be a mandatory Rule.

24 Rule 67 follows the very well-tried and tested model applicable in England under section 69 of the 1996 Act. That model was approved by a substantial majority of commercial users in the 10-Year Survey of the working of the 1996 Act conducted in 2006. The Bill's draftsmen chose to follow this well-established, widely-approved model which severely limits the opportunity for parties to appeal and, in addition, severely limits the likelihood of any such appeal succeeding. Further, the history and development of section 69 shows clearly why the simplified approach

the Law Society suggests will not be effective; the additional "complications" are necessary to prevent the opening of floodgates.

6. Submission by the Scottish Council for International Arbitration

2. We have already explained in our earlier submission, summarised above (refer Law Society §7), why the option of retaining the Model Law in Scotland is inappropriate and the wrong approach.

   The SCIA's main argument is that international business will be driven away by repeal of the Model Law; this is demonstrated to be a wholly fallacious and unsound argument by the very obvious fact that London, Paris, Stockholm, Geneva/Zurich and New York are among the world's major centres of international arbitration but the Model Law applies in none of them.

Chartered Institute of Arbitrators (CIArb) Scottish Branch
15 May 2009