SUPPLEMENTARY EVIDENCE FORM THE FACULTY OF ADVOCATES

Introduction

1. The Faculty of Advocates (the "Faculty") is grateful for the opportunity afforded to it to submit evidence to the Scottish Parliament on the Arbitration (Scotland) Bill (the "Bill") presently under consideration. There are, in our opinion, a number of points which might be raised about the drafting of the Bill, but without wishing to belittle the importance of securing good drafting in the Bill, we do not understand the present interest to be in the minutiae of the drafting, but rather in broader issues. Accordingly, we do not canvass here a catalogue of objections to the drafting of the Bill as it now stands. That, we trust, is for another day. In what follows, we seek to deal with a number of broader substantive considerations.

2. That said, we should stress that it would be unwise to overlook the issue of the precise terms in which the Bill (as enacted) is to be drawn. Drafting of legislation – and, in particular, drafting of poor quality – is important. It not only lowers the regard in which legislation is held if it reads poorly or is bestrewn with infelicities and ambiguities (a factor which is not insignificant in itself where – as here – the legislation is in effect competing in an international market place), but it also induces disputes about the legislation, with the cost and diversion of resources from the real subject matter of the legislation that that entails. An iron law of court practice is that poor drafting breeds litigation. We would therefore commend the drafting of the Bill to the careful scrutiny of the Parliament at the appropriate point.

The manner in which the Bill is to come into force

3. A matter which we consider to be important, and which affects the operation of the whole Bill, is the manner in which it is proposed to come into force.

4. Clause 33 of the Bill would appear to be capable of operating in a manner which is in effect retrospective, in that, on the new legislation coming into force it could conceivably apply to all arbitrations and all agreements to submit to arbitration then extant. Thus, parties who had undertaken to go to arbitration in the belief, for example, that the stated case procedure (provided for by section 3 of the Administration of Justice (Scotland) Act 1972) was available to correct or head off errors in law of the arbiter, with judicial review protecting against more egregious errors, would find instead that matters could be sent in different circumstances only to a single judge with no appeal process being available. In short, the terms upon which they took the decision to agree to go to arbitration are being changed *ex post facto*.

5. It would seem to us to be wrong that such changes should be made. A party deciding whether or not to agree to go to the expense of arbitration ought to be able to obtain advice in advance about what that will entail, the circumstances in which the Court can be resorted to and so forth, and be

able to rely on that advice in taking his decision without running the risk that that advice is later invalidated by legislation once he is committed to proceeding down the arbitration route. The objection is even more pointed when clause 21 of the Bill and arguments about prescription are considered.

6. It would seem to us to be preferable that the legislation should be declared - in clear terms - to apply only in relation to arbitration agreements entered into after the date on which the Bill comes into force.

Sist of proceedings

7. Clause 9 of the Bill dealing with the sist of proceedings in Court gives us some pause. We offer two observations. First, it is not unknown for the “right to arbitration” to be invoked as a delaying tactic where there is in truth no defence to the claim: for example, summary decree is sought to be fended off by pleading the arbitration clause in the knowledge that some well timed delay can pay dividends. Scots law, by contrast to English law, has been hostile to such stratagems, and we would suggest should continue to be so. The Court lately had occasion to uphold the tradition by refusing to sist for arbitration - and, indeed, granting summary decree - where it was satisfied that there was no genuine dispute and arbitration was a delaying tactic: see *Norwest Holst Ltd v Carfin Developments Ltd*, [2009] BLR 167. We think it would be unfortunate if that bulwark against delaying tactics were lost, and would urge its addition to the list of circumstances in which a sist might be refused.

8. Secondly, and on the other side of that coin, we wonder if errors have crept into clause 9(3(b) of the Bill, which does not make sense in the context of the Scottish pleading system. We suspect that this provision may have been lifted from another jurisdiction (namely, England), in which it is doubtless unexceptionable, but if applied in Scotland as it now stands, it would be pointless: acknowledgement of service does not exist in Scotland.

International disputes

9. We entertain some concerns, too, about the manner in which some clauses of the Bill, if enacted, would operate in the admittedly infrequently encountered (but perhaps in the future, more frequent) truly international disputes. We are disposed to support the proposal to do away with the separate UNCITRAL scheme for international arbitrations, if only because that will obviate any repetition of the situation which arose in *The Fennica*, in which the existence of the separate UNCITRAL system led to judicial review proceedings, and, ultimately, a week of evidence, at no little cost and delay to the parties, about whether or not the UNCITRAL scheme truly applied to the arbitration in question.

10. We are less persuaded of the benefit of applying the restriction in clause 9 of the Bill to arbitrations wherever in the world they may be situated. While we

accept that this is probably the present state of the law, we wonder if there might not be advantage in limiting the ambit of sub-clause 9(5) or providing an additional provision in clause 9(2) so as to allow the Court to decide to sist proceedings where, in the case of arbitrations which do not have their seat in Scotland (or somewhere else in the EU), the Court is satisfied that the arbitration in question is unlikely to achieve the results set out in the founding principles enunciated in clause 1(a) of the Bill. We consider it optimistic to assume that all arbitration systems in the world will always meet these objectives, and it would be unfortunate if a party could be baulked of his rights, otherwise capable of being vindicated in the Scottish Courts, because his opponent could rely on delays in an foreign arbitration which the Court would regard as unacceptable were they to occur here.

11. Furthermore, we do not consider that the concern which we understand to have been expressed about the ability of the Court of Session to opine on a question of foreign law (cf rule 67(1) in schedule 1 to the Bill) is a real one. Foreign law is a matter of fact, and is presumed to be identical to Scots law until the contrary is proved in evidence, and so it would not fall within the purview of an appeal on a point of law (see *Stuart v Potter Choate & Partners*, (1911) 1 SLT 377). This issue will arise only if, as has been mooted, European legislation puts Scottish courts and arbiters under an obligation to establish the actual content of foreign law for themselves, and in such an event, the provisions made in European law will doubtless govern the matter.

Anonymity in legal proceedings

12. We have doubts about clause 13 of the Bill which seems to be either a dead letter or a substantial (and, we consider, unjustifiable) interference with the right to publicity of what proceeds in the Queen's Courts. The importance of that right has recently been reiterated by the Inner House of the Court of Session: see *Jackson v Hughes Dowdall*, [2008] CSIH 41.

13. We wonder how a breach of an obligation of confidence is to be enforced – other than by another action in which the litigant will of course need to be named. We wonder, too, how any action is to be raised against the Court itself (if the judge's recording of the argument is a "report of the proceedings"), and how, for example, it could interdict itself. Moreover, since any member of the public is entitled to hear the names of the parties in Court, and the opinions of the judges are published on the internet (www.scotcourts.gov.uk), it must follow that, by litigating, the parties impliedly authorise disclosure of their identities as parties to the arbitration.
14. If, on the other hand, it is intended to have a blanket bar on identification in cases about arbitrations, we would be inclined to question whether clause 13 if enacted would pass unchallenged as a disproportionate interference with press freedom.

15. If the assertion is made that clause 13 has its origin in England, we are unimpressed with that. There is a danger in seeking to transplant - unthinkingly - into Scots law provisions from England which are quite unexceptionable there, but which may be inappropriate in Scotland.

Prescription

16. Clause 21 of the Bill refers the reader to rule 1 in the schedule for a delimitation of the circumstances in which an arbitration will serve to interrupt prescription. Prescription operates as a method of cutting off the rights of litigants and so it is very important that the circumstances in which it occurs are clear. As matters now stand, rule 1 does not achieve that clarity. At best, the reference in rule 1 to “submitting” disputes is ambiguous. Does it mean service of a notice to demand arbitration of disputes, or the date of execution of a submission to arbitration, or the service of the actual statement of claim? Such room for difference is unfortunate, for weeks could elapse between a notice demanding arbitration and the service of a statement of claim, weeks in which a prescriptive quinquennium could elapse. It would be an improvement to the Bill if that ambiguity were eliminated.

Arbitral appointments referee

17. The Faculty has a concern that the proposed “arbitral appointments referee” system will in practice exclude the Dean of Faculty from a role he has traditionally occupied, under standard form contracts and individually drafted ones, of appointing arbiters.

18. The requirement of clause 22(2)(b), on one view, appears to exclude individuals in practice and to be designed to secure that the referees in question are bodies such as the Chartered Institute of Arbitrators (e.g., is the Dean required personally to provide training in order to fall within the clause?). Moreover, the implication of this clause is that the referee must only appoint members of its own body – otherwise it cannot operate a disciplinary procedure designed to ensure that the arbiter in question conducts himself correctly, because he is not subject to the disciplinary jurisdiction of that body. This is no theoretical objection: a number of members of Faculty have been appointed as arbiters in the past by the Law Society of Scotland (and we are aware of other “cross-over” appointments made by other bodies) when it has been thought best to appoint such a person. That course would now seem to be excluded. The impression which this might convey to the outside reader that arbitration in Scotland is in the hands of “closed shops” where appointment depends upon membership of the appropriate body would be unfortunate, particularly if that impression were to be accompanied by the observation that the payment of arbiters’ fees as a precondition of his performing his primary function of deciding the dispute is to be a mandatory requirement out of which the parties cannot contract (see rule 53(1)).
19. Were the impression to get abroad that Scottish arbitration law seems to be conceived in the interests of the professional bodies the members of which

provide their services as arbiters - that it "looks after its own", as it were – that is apt to engender a cynicism unlikely to inure to the benefit of Scottish arbitration as a dispute resolution system.

20. Further, we consider that rule 53 is capable of resulting in injustice. Take the example of an individual consumer pursuing, in arbitral proceedings, a claim against a large company. If the individual is unable, perhaps even on account of temporary financial embarrassment, to pay in full the fees for which he is liable, the tribunal is entitled, by virtue of clause 53(1), to withhold the issuance of a decision (which could be in the claimant's favour). This hardly seems fair. Changing the focus, what if the defending company refuses to pay the relevant fees with a view to delaying the issuance of a decision which it fears will be adverse to it?

Powers of arbiters

21. We have significant concerns about the width of the powers given to arbiters in the rules contained in the schedule to the Bill, particularly as these powers are associated with provisions about what are referred to as "provisional" and "part" awards. We are particularly doubtful about the wisdom of according arbiters powers to grant interdicts, orders for specific implement, orders for rectification, or to pronounce decrees of reduction. Decrees of reduction and orders for specific implement *ad interim* cannot even by granted by sheriffs in Scotland; they fall within the exclusive province of the Court of Session. If such matters are accounted too delicate and important to be entrusted to the junior tier of professional, legally qualified judges, it would seem incongruous at the least that they should be allowed to part-time and probably legally unqualified arbiters reliant for advice on their clerks. Rectification is a matter which can affect the rights of third parties, and so ought not to be decided by a private arbitral tribunal (notwithstanding the attempt at safeguarding third parties in rule 54(2)). Nor should it be overlooked that interdicts frequently call for a speed of response which it is often quite impracticable for a tribunal to provide, and that the enforcement of Court orders in these areas is often easier than that of arbitral tribunals. A further point is that breach of interdict involves, potentially, criminal sanctions. The implications of this appear to have been overlooked in the Bill. Our suggestion would be that all these areas should be withdrawn from the purview of the arbiter, and left to the Courts alone.

Applications to the Court

22. We wish to make some observations on the proposals for applications to the Court which appear in rules 40 and 65-67 in schedule 1 to the Bill.

23. It appears to us that the conditions for application to the Court at the behest of a party who has the consent of the arbiter to seek determination of a point of law are somewhat curious, and apt to prove self-defeating. If the arbiter is allowed to continue with the arbitration pending the determination of the relevant issue by the Court (as rule 40(3) seems to envisage), he will do so

on a particular basis, one presumes. The risk therefore is that, if the Court should decide contrary to his view, a significant quantity of time and effort will be wasted in the meantime pursuing what the Court thereafter holds to be a legally flawed course. If the Court should decide against the applicant, and in favour of the arbiter's view, it follows that the extrajudicial cost will be run up in the litigation by the successful party.

24. On either view, if the arbiter chooses to proceed, the application cannot be held "valid" if the arbiter has ruled in favour of the relevancy of some point and proposes to proceed. But this leads to the conclusion that, as *ex hypothesi* the arbiter wishes the matter to be determined by the Court, he must logically exercise his discretion against proceeding, for if he were to do otherwise he would sabotage that to which he consented. The problem might perhaps resolved by giving the arbiter power to proceed *ad interim* on any matter in the arbitration which is <u>not</u> the subject of the application to the court.

25. There is a second oddity about the test set in rule 40(2)(b)(iii). In what circumstances is it conceived that the arbiter could consent to the application if there were <u>not</u> good reason for the Court to decide the matter? If it were not that he was persuaded that such a reason existed, he would not grant consent in the first place.

26. Furthermore, why is his view, on this essentially procedural matter, to be subject, in effect, to appeal to the Court (as appears to be envisaged by rules 40(2)(b) and 40(4))?

27. The point can be expanded to cover the other two heads of rule 40(2)(b) as well.

28. In rules 65-67 there is a restriction on appeal to the Inner House of the Court of Session. The requirement for leave to appeal at the end of a case is unusual in Scotland, and we do not see why it should apply here. Unlike the case where the progress of the arbitration may be held up, there is no such risk in the case of the final appeal. The Outer House is no more or less likely to be correct in its view than it is in any other case, merely because the case arises in the context of an arbitration, and there is no reason why the litigant should be deprived of his right to seek the judgment of the plurality of judges available in the Inner House on the point he raises merely because his case has as its origin an arbitration.

29. We are also inclined to question the framework for application under rules 65, 66 and 67. The differences between rules 65 and 66, on the one hand, and 67, on the other – in particular, in relation to the ability to bring applications as of right in the former case but only after the rule 67(4) barrier has been passed in the latter – causes us to suspect that there will be room for dispute

about whether an error of law said to give rise to jurisdictional or "irregularity" consequences is to be viewed as being in one category or the other. This seems to us to be a not unlikely possibility, but of questionable benefit to the law of arbitration. We wonder if it would not be better to remove the rule 67(4) hurdle and delete rules 67(5) and (6) in consequence.

30. We are reinforced in that view by what would seem to be the curiosity of sub-paragraph 67(4)(c)(i). If the Court is persuaded that the arbiter's decision on a legal point is "obviously wrong", so as to allow the appeal to proceed, what purpose does the appeal serve? Is it fore-ordained to success (especially if the first decision followed a contested hearing) in which case it will only pile up additional cost, or is it conceived that a second judge might so far disagree with the first judge as to uphold the "obviously wrong" decision? That would seem to come perilously close to appealing from one Lord Ordinary to another, and would at the least seem to provide "compelling reason" for appeal to the Inner House under rule 67(9).

31. One wonders, too, how it could be other than right for the Court under rule 67(4)(a) to correct an "obviously wrong" arbitral decision on law if it will "substantially affect a party's rights".

32. Rule 67(4)(b) raises doubts as well: since sub-paragraph (c) shows that the tribunal must have decided the point in question, it necessarily either decided the point *ex proprio motu* or head (b) is necessarily established. But why is an error, "obviously wrong" and substantially affecting a party's rights, not to be corrected merely because the tribunal decided the matter on a point not argued? *Prima facie*, that falls into "irregularity". In sum, it seems to us that the proposed procedure to decide if an error of law appeal is to proceed is best abandoned as a costly and unnecessary proceeding.

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