SUPPLEMENTARY EVIDENCE FROM THE SCOTTISH GOVERNMENT

1. I am writing to address the issues on which we undertook to write to the Committee when the Bill team gave evidence on 20 May.

The Committee raised a number of issues.

Application of Scottish Arbitration Rules to existing arbitration schemes

2. Gavin Brown MSP asked for further explanation of how the Scottish Arbitration Rules in schedule 1 to the Bill ("the Rules") would impact on existing rules in existing arbitration schemes. Section 1 of the Bill establishes the principle of party autonomy so that parties are free to agree how to resolve disputes, subject only to such safeguards as are necessary in the public interest. For this reason, most of the rules in the Bill are default: they will apply as a matter of law, but only if the parties have not agreed on something else which is inconsistent or contrary. Section 8(2) provides that a default rule will apply only in so far as the parties do not agree to modify or disapply that rule (or any part of it).

3. The Rules will impact in a broadly similar way on arbitration agreements between private parties, consumer arbitration schemes and statutory arbitration schemes in other pieces of legislation. An existing agreement or scheme which contains a provision or procedures that is inconsistent or contrary to the Rules will continue to apply to arbitration under that agreement or scheme. If the Rules make more comprehensive provision then the "extra" provisions may apply beyond what has been agreed between the parties (unless they are inconsistent with what has been agreed). The general provisions in the Bill also give way to the rules of specific statutory schemes.

4. The exception to this is the mandatory rules in the Bill. It is considered that in order to ensure that arbitrations are fair and impartial, some rules must be mandatory and the parties should be unable to contract out of them. In order to preserve the principle of party autonomy, however, the number of mandatory rules has been kept to a minimum. Clearly there is a balance to be struck between ensuring the fairness and impartiality of the process and the principle of party autonomy.

5. The mandatory rules in the Bill may (without further saving or transitional arrangements on commencement) apply to existing arbitration agreements and schemes even if the parties have made alternative provision. However, many mandatory rules replace important common law rules that apply mandatorily at present (e.g. rules 65 and 66 replacing judicial review of the arbitrator for excess of jurisdiction and the other common law grounds of reduction). Also, the repeal of other laws which apply mandatorily in the present law may be welcomed by the parties, for example the stated case procedure in section 3 of the Administration of Justice (Scotland) Act 1972 – discussed at paragraph 121 of the Policy Memorandum.

6. Clearly the Government will ensure that those who bodies (including UK bodies) who have such arbitration schemes are made aware of the position before the Bill comes into force.

Application on commencement

7. The Law Society proposes that the Bill should only apply to agreements to arbitrate entered into after it comes into force. This was the position on consultation, and we agree there are some arguments which favour this approach. (The Bill will not in any event be applied to arbitrations which have actually begun before it comes into force.)

8. However, adopting this proposal would mean that the existing discredited mixture of obscure common law and minimal statutory provision would continue for many years into the future, for arbitrations under agreements made before the Bill comes into force. Scotland would have two arbitration laws and parties to existing arbitration agreements would not benefit from the modernised arbitration regime provided by the Bill.

9. An alternate model is section 84(2) of the UK Arbitration Act 1996 to make clear the legislation applies to all arbitrations begun after the date of commencement under an arbitration agreement "whenever made". It is common commercial practice to agree in contracts that arbitration will be in accordance with a particular set of rules or amendments, or modifications of those rules. Commercial parties often accept that contractual provisions fall to be interpreted in relation to revised statutory provisions, and arbitral proceedings may be conducted under rules or a law different from that which applied when the original contractual agreement was made.

10. The Government is at present inclined to think that the Bill should apply along these lines, avoiding two regimes applying on an ongoing basis. Although we agree that the impact of the legislation on those with existing contracts has to be carefully considered, as noted the Government do not consider the provision contained in the mandatory rules will adversely affect existing arbitration agreements in practice.

Rules 45 and 46: default rules on damages and interest

11. The discussion on default and mandatory rules above leads on to why rules 45 and 46 are default rather than mandatory.

12. In relation to rule 45, the remedy sought by the parties (once an arbitration agreement has been invoked) may be another remedy, for example one of the others available under that rule. For their own reasons, the parties may not wish an award of damages to be open to the arbitrator, for example they may only wish an award from the arbitrator which declares the legal position between the parties. It should be borne in mind that a default rule is only overridden with the agreement of **both** parties. Otherwise it will apply as a matter of law. In most cases, however, once parties have fallen into dispute and an arbitration agreement has been invoked, the parties are unlikely to be able to agree on the detail of the arbitral process, so sensible powers should be provided for the arbitration by default.

13. As regards rule 46, parties may decide for their own reasons, for example, that the arbitrator should not have power to award interest at all or should only do so at a certain fixed rate or should only award simple and not compound interest. Again, both parties require to agree the default rule is not to apply. It is considered that rule 46 in particular should be a default rule as Moslems otherwise may be unable to use arbitration in Scotland as Islam prohibits the charging of interest.

14. It may also be worth noting that the equivalent provisions of the Arbitration Act 1996 (sections 48(4) and 49) are default rules, in order to allow parties to an arbitration freedom to agree on how they wish the dispute to be resolved.

Sisting under section 9 of the Bill

15. Gavin Brown MSP also raised the concerns of the judges of the Commercial Court of the Court of Session about the sisting of legal proceedings under section 9 of the Bill. The judges suggested that it might be undesirable to sist cases in some situations, for domestic arbitrations, for example in construction disputes, where there are frequently a number of

inter-related contracts and disputes, only one of which might contain an arbitration clause. A mandatory sist might prevent the conjoining of the disputes in the court to avoid duplication of expense.

16. Amongst their other points the judges cite section 86 of the UK Arbitration Act 1996 which in terms reserves to the courts in the rest of the UK discretion to refuse to stay, ie suspend or sist, an action for domestic arbitration where there are "sufficient grounds for not requiring the parties to abide by the arbitration agreement". This provision was, however, never in fact brought into force by the UK Government due to EC law concerns. The same concerns are noted in the Policy Memorandum in relation to why the Bill proposes a single regime for both domestic and international arbitrations. Accordingly, the law in the rest of the UK does not allow the court discretion to refuse to sist an action for domestic arbitration. The Government will, however, consider further whether there are grounds to allow this.

Consumer arbitration schemes

17. Wendy Alexander MSP sought a more detailed explanation of consumer arbitrations, including their nature, and whether they might lend themselves to the setting of time limits.

18. A list of consumer arbitration schemes currently applicable in Scotland is attached at **Annex A**. The defining characteristics or nature of the consumer schemes, are:

- affordability (to consumer and business). Increasingly, they are free to the consumer. Typically the cost to users will be less than £500 and in some cases such as the scheme operated by the Association of British Travel Agents, considerably less (in the region of £70 to £174);
- ease of access and use. There is no need for a legal adviser or representative. The scheme must be accessible to those with disadvantages, so if it is based on documents, assistance on form filling, etc must be made available;
- simple and clear language in rules and procedures as well as in awards/decisions. They must not be "legalistic". Many new sets are endorsed with the Crystal Mark;
- timeliness (quick response and speedy resolution);
- independence in decision-making, the conduct of procedure and scheme governance;
- they must essentially be valid and attractive alternatives to small claims procedures in the sheriff court

19. Typical upper limits of claim are between £5,000 to £10,000 (although one or two top out at £25,000). One, the genetic testing scheme, has no upper limit of claim and, although it is suggested that claimants are represented, it is also free to use for the consumer.

20. Provision cannot be made in the Bill to regulate the sale and supply of goods and services, and liability for services, to consumers, given the consumer protection reservation, which reserves these matters to the United Kingdom Parliament. It might be possible for other types of arbitration, where the legislative purpose is not consumer protection, to make particular provision for that particular type of arbitration in a devolved field.

21. However, the Government do not believe it is appropriate to seek to stipulate time limits for such consumer arbitration schemes in a general arbitration statute like the Bill which would impose particular mandatory rules in the context of schemes set up on a voluntary basis or under a scheme of regulation specific to a particular field.

22. The modern consumer arbitration schemes listed have a time limit for completion (i.e. the issue of the award or decision), which varies between 6 and 14 weeks from receipt of an application. Time limits in most instances are agreed with the sponsor organisation, but occasionally are stipulated by a regulator. They are not however stipulated by Act of Parliament. Indeed it is preferable that time limits are set by those involved with the industry to take into account the particular circumstances of disputes which arise within that industry.

Time limits

23. The Committee also asked for a more general response on the issue of time limits. Paragraph 145 of the Policy Memorandum on the Bill notes:

> "The Bill does not, however, impose time limits for arbitration in the same way as adjudication under the Housing Grants, Construction and Regeneration Act 1996. Very few consultees argued in favour of time limits and it is considered that they may pose as many problems as they may solve. Complex disputes do not lend themselves to quick resolution (and it is worth bearing in mind that adjudication can only be used for single issues). If time limits were to be imposed, it is inevitable that provision would also have to be made for applications to the court to extend those time limits in cases where the dispute was not capable of resolution in the timeframe. It seems equally inevitable that the court would soon be in receipt of a constant stream of applications for extensions to a statutory time limit."

24. As reflected in the evidence of six of the witnesses who gave evidence to the Committee last Wednesday who argued against the use of time limits, the Government is opposed to fixed time limits for the reasons noted in the Policy Memorandum.

25. We would add that parties are free to agree explicit time limits in their arbitration agreements. Moreover, during the conduct of the proceedings, arbitrators are given clear powers under the Bill are set and enforce time limits over the parties (see rules 27, 30, and 38) in addition to the general duties in rules 23 and 24 to conduct the arbitration without unnecessary delay.

Advantages over the Arbitration Act 1996

26. The Convenor asked us to send the list of reasons why the Government believes this Bill is an improvement on the Arbitration Act 1996. In many respects the Bill is similar to the 1996 Act and indeed the policy behind the Bill is to adopt the best of arbitral practice in other jurisdictions. But Ministers do believe that in places the Bill represents an advance on the 1996 Act and is at the cutting edge of modern arbitral practice. A list of areas where the Bill is considered to give Scotland an advantage is shown at **Annex B**.

Research on usage of arbitration

27. Finally, Mr Smith also asked about the number of responses to the research carried out by the Analytical Services Division on the current usage of arbitration. The research was carried out among those who had actually conducted an arbitration only within the past year. It is a measure of the low ebb to which arbitration has sunk in Scotland that only 20 responses were received.

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

Hamish Goodall
Bill Team Manager
29 May 2009

ANNEX A

Consumer Arbitration Schemes (applicable in Scotland)

E-commerce services

Pay as You Click Webmaster (time limit)

Pay as You Click (time limit)

Safebuy (time limit)

Funeral Services

Estate Planning Arbitration Scheme (time limit)

Funeral Planning Authority (time limit)

National Association of Funeral Directors (time limit)

Financial Services

Finance & Leasing Association (time limit)

Housing, Housing Services & Repairs

British Association of Removers (time limit)

Building Guarantee Scheme

Glass & Glazing Federation

Heating & Ventilation Contractors Association

Kitemark Scheme for Electrical Installation work in Dwellings (time limit)

Kitemark Scheme for Replacement of windows, roof lights, roof windows or doors in dwellings (time limit)

National House Building Council Homeowner

Network VEKA

Medical / Insurance

Denplan

Genetic Tests Arbitration Scheme

Retail Motor Industry

BSI Kitemark Scheme for Automotive Services (time limit)

Federation of Engine Re-Manufacturers (time limit)

Motor Industry Code of Practice – Service and Repairs (time limit)

Motor Industry Code of Practice – New Cars (time limit)

Vehicle Builders & Repairers Association (time limit)

Travel

Arbitration Scheme for the Travel Industry (time limit)

Consumer Adjudication Schemes (applicable in Scotland)

Communication and Internet Services Adjudication Scheme (regulated by Ofcom) (time limit)

Postal Services Redress Scheme (regulated by Postcomm) (time limit)

Angus Reputable Traders Scheme (Scotland only) (time limit)

ANNEX B

Why is the Bill an improvement on the Arbitration Act 1996?

- placing all procedural arbitral rules together in a schedule should make the law more user-friendly for non-lawyers involved in arbitrations.

- The default confidentiality rule (25) puts explicitly into statute an issue which is governed by case law in England.

- Arbitral appointments referees will resolve failures in the appointment process for arbitrators reducing recourse to the courts. The 1996 Act provides that it is a role for the Court. The Bill misses out this unnecessary step, but retains the court as a backstop in the event of disputes.

- Oral as well as written arbitration agreements are recognised by the Bill and covered by the Scottish Arbitration Rules. Oral agreements are excluded by the 1996 Act. If oral agreements were not covered, then they would remain subject to the old common law.

- Scottish Ministers are given the power, subject to affirmative resolution procedure, to amend and update the Act or provision in consequence of changes to the Model law or New York Convention

- Scottish Ministers may by order make ancillary provision which they consider appropriate for the purposes of giving full effect to any provision of the Bill

- Reflecting the principles behind ECHR Article 6 and modern arbitral practice, the Bill requires arbitrators to be independent as well as impartial.

- Prospective and post-appointment arbitrators are placed under an explicit continuing disclosure requirement concerning conflicts of interest.

- It is clear in the Bill that experts, witnesses or legal representatives have the same immunity in respect of acts or omissions as if the arbitration were civil proceedings

- Provision for the resignation of the arbitrator. The 1996 Act does not provide for the process of resignation.

- The Court is given the power to grant interim measures given only the existence of an arbitration agreement and where a relevant dispute might arise.

- To reduce the role of the court, the Bill limits appeals from the Outer House. There is no appeal to House of Lords.

- Where a correction of an award has a consequential effect on another part of the corrected award or any other award, whether on some part of the substance of the dispute, or on expenses or interest, the tribunal may make consequential correction of that award.