

## MEMORANDUM

The draft Bill on Arbitration put forward has been under consideration for a long period. From about 1986 a Committee set up by the then Lord Advocate considered the reform of arbitration law in Scotland particularly in light of the UNCITRAL Model Law on arbitration approved by the United Nations. It recommended that adoption of the Model Law for international arbitration and it became part of the law of Scotland by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The Committee continued work on the provisions of a modern arbitration law for domestic arbitration and after wide consultation produced in 1996 a draft Arbitration Bill.

That Bill was not then enacted and with the advent of devolution no progress took place. Meantime, many other countries have been reforming or restoring their arbitration laws, both international and domestic, to bring them up to date and make them accessible and user friendly. Particular reference must be made to England and to the Republic of Ireland in this respect, both of which have since 1996 enacted entirely new legislation covering all aspects of arbitration, but the same applies to the major European and Commonwealth countries. This puts Scotland at a particular disadvantage with other countries. While the evidence is anecdotal, there is quite sufficient to justify the claim that Scotland is currently seen as a legal backwater in this respect, and that parties doing business in Scotland are arranging to have their disputes arbitrated elsewhere and under different legal systems.

Conscious of these problems and the difficulty of securing legislative time, The Scottish Council for International Arbitration and the Chartered Institute of Arbitrators (Scottish branch) developed the Scottish Arbitration Code, published in 1999. This sought to set out clearly the general framework of arbitration and the rules under which arbitration in Scotland should be conducted. It has been widely welcomed and has been recommended by major institutions for use in arbitration. But it is only a voluntary code requiring all parties to agree to its adoption. Nor can it deal adequately with many matters which can only be done by statute. It is fair to say that

the Code was regarded by its framers as a stopgap pending the introduction of legislation.

A committee from the two organisations has continued work on an arbitration bill, drawing heavily on the work of the previous committee, and also having regard to legislative changes in many other countries, in particular experience in England with the Arbitration Act 1996. In addition it has consulted widely on its proposals.

The result is this new bill which seeks to put virtually the whole of arbitration law in Scotland into a single statute. The aim is that in future anyone in Scotland, or seeking to do business in Scotland, will be able to find in one place the principles governing the law of arbitration in Scotland in language which can be readily understood. In certain respects, such as the powers of arbitral tribunals to award interest and damages the Act will produce much needed reforms. In other respects it provides in statutory terms what is at present part of the common law and not easily available without research.

## THE STRUCTURE OF THE ACT

Part I of the Act deals with arbitration generally pursuant to an arbitration agreement. It makes plain (like the English Act of 1996) the principles governing it, in particular that arbitration seeks to obtain speedy and fair resolution of disputes by an impartial arbitrator and that parties should be free to agree on how disputes should be resolved. While the Act is of course designed for arbitration in Scotland, the Scottish courts are given certain powers to assist arbitrations taking place elsewhere. As agreement to go to arbitration is fundamental, and for many purposes such as an agreement must be in writing, there is an extended and up to date definition of writing to take account of modern techniques of transacting.

Arbitrators will be obliged to disclose any circumstances giving rise to justified doubts as to their impartiality and procedures for challenge and removal are set out. The Arbitrator will be immune from liability for his acts or omissions as such, save

when there has been deliberate wrongdoing. Subject to what parties may agree, the arbitrator has wide powers to afford remedies to the parties.

The parties to the arbitration and the Arbitrator are all required to take appropriate steps for the dispute to be determined without delay. The arbitrator, always subject to his overriding duty to treat the parties fairly and impartially, has wide powers to deal with the case even if parties are obstructive.

The assistance of the courts is provided for in a number of respects – to enforce orders by the arbitrator, or to use its power to order sale or security. While no general appeal to the courts is available, a limited right of appeal on points of law to the courts is provided in cases where substantial injustice would otherwise be done. And an award is subject to challenge when the arbitrator has exceeded his jurisdiction or acted in a seriously irregular manner to the prejudice of a party. Provision is made for parties' expenses of an arbitration and for fees and expenses of the arbitrator.

Special statutory schemes for arbitration exist in various circumstances and these are left generally unaffected. Particular provision is made to ensure consumer protection under existing regulations.

For international commercial arbitrations the UNCITRAL Model Law continues in force and is contained in a Schedule to the Act.

The opportunity is taken to re-enact the provisions of the New York Convention of 1958 providing for foreign arbitration awards and agreements, replacing the former UK legislation.

A series of schedules indicate the statutes to be repealed or amended as well as the UNCITRAL Model Law. A further Schedule contains the text of the Scottish Arbitration Code which contains detailed rules which supplement the main provision in the Bill and which will apply to the conduct of every arbitration unless parties choose not to apply them.

It is thus hoped that the Bill contains all the existing statutory provisions relative to arbitration and restates and improves the existing law both common law and statutory, so that for the first time in Scotland the businessman will have easy access to the whole law relating to arbitration, thus bringing Scotland into line with the rest of Western Europe and the major commercial countries of the rest of the world.