

# **ARBITRATION (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Scottish Parliament's Standing Orders.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.
3. This Memorandum describes each of the provisions of the Arbitration (Scotland) Bill which confer power to make subordinate legislation. It sets out:
  - the purpose of each power to make subordinate legislation,
  - the persons upon whom, or the body upon which, power to make subordinate legislation is conferred and the form in which the power is to be exercised,
  - why it is considered appropriate to delegate the power to subordinate legislation, and
  - the Parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject and why it is considered appropriate to make it subject to that procedure.
4. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### **OUTLINE AND SCOPE OF BILL**

5. The purpose of the Bill is to modernise and codify the law of arbitration in Scotland. It establishes a statutory regime governing all arbitration under Scots law. It:
  - clarifies and consolidates Scottish arbitration law, filling in gaps where these exist,
  - provides a statutory framework for arbitrations,
  - ensures fairness and impartiality in the process, and
  - minimises costs and ensures that the process is efficient.

6. Schedule 1 to the Bill lays out a standard set or code of rules (“the Scottish Arbitration Rules”) that can be adopted wholesale by parties and used by their arbitrator. A number of the rules are mandatory and cannot be departed from even by agreement of the parties, but the majority are default rules which will apply in the absence of any inconsistent agreement between the parties.

## **DELEGATED POWERS**

7. The Bill confers power on the Scottish Ministers to make orders in relation to a number of matters. It also provides for a declaration by Her Majesty by Order in Council.

8. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered which matters of overall structure and policy require detailed scrutiny through the full Parliamentary process against the need to:

- ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation, and
- allow detailed consequential amendments to be made or kept up-to-date within the basic structures and principles set out in the primary legislation.

9. When deciding whether negative or affirmative resolution procedure is appropriate, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is required for the orders, balancing the need for an appropriate level of scrutiny with the need to avoid using Parliamentary time unnecessarily.

## **DESCRIPTION OF DELEGATED POWERS**

### **Section 15 - Adaption of enactments providing for statutory arbitration**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Affirmative/ negative resolution of the Scottish Parliament

10. There are a number of statutes which provide for disputes to be submitted to arbitration and contain procedures similar to common law arbitration. Section 14 applies the Scottish Arbitration Rules and other Bill provisions to statutory arbitrations except to the extent that they are excluded by or inconsistent with other legislation which governs those specific statutory arbitrations. The Bill will not prevail over existing legislative provision for statutory arbitrations. On the other hand, the policy is that parties to statutory arbitrations should not be deprived of the benefit of the provisions in the Bill if these augment and enhance the statutory provisions already in place.

11. Section 15 gives the Scottish Ministers a power, by order, to (a) modify any of the Rules or other provisions of the Bill in so far as they apply to statutory arbitrations (or to particular statutory arbitrations), and (b) make such modifications of enactments which provide for

disputes to be submitted to arbitration as they consider appropriate in consequence of, or in order to give full effect to, any of the Rules or other provisions of the Bill.

12. Modifications of the Rules and provisions of the Bill as they will apply to statutory arbitrations and amendment of the relevant statutes to give effect to the Bill will be of a detailed technical nature consequential only on the general provision made in the Bill. It is not thought appropriate or necessary to prescribe these amendments in primary legislation.

13. Where the section 15 power is exercised to amend primary legislation it will be subject to affirmative Parliamentary procedure. Orders which do not amend primary legislation are subject to negative procedure. These procedures are considered appropriate for this power because although consequential modification of the application of the Bill to statutory arbitrations raises technical issues around the detailed application of the general Bill regime, and so appropriate for negative resolution procedure, interference with the express provisions of the specific statutory mechanisms can raise more material policy issues of detail and should be subject separately to Parliamentary approval by affirmative resolution procedure.

14. Where the necessary adaptations are reserved, an order at Westminster under section 104 of the Scotland Act will in some cases be required.

#### **Section 16 - New York Convention awards**

**Power conferred on: Her Majesty in Council**

**Power exercisable by: Order in Council**

**Parliamentary procedure: Negative resolution of the Scottish Parliament**

15. Section 17 of the Bill provides for recognition of New York Convention awards<sup>1</sup>. Such awards are made in pursuance of an arbitration agreement in a territory or state (other than the UK) which is a party to the Convention.

16. Under section 16(3) of the Bill, a declaration by Her Majesty by Order in Council that a state is party to the New York Convention is conclusive evidence of that fact.

17. It is submitted that this is an appropriate matter for subordinate legislation since such an Order in Council will only be made when a particular State accedes to the New York Convention. Given that such an order will be uncontroversial and administrative in nature, negative resolution procedure is considered sufficient and allows for the proper use of Parliamentary time for something of this nature. Section 17 is a consolidation, with minor adaptations, of the power in section 7(2) of the Arbitration Act 1975 (c.3), under which it attracted no Parliamentary procedure.

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<sup>1</sup> The "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958, as amended.

## **Section 22 - Arbitral Appointments Referee**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

18. Section 22(1) gives Scottish Ministers the power to authorise, by order, persons or types of persons who may act as an arbitral appointments referee. A Referee appoints an arbitrator in default of the parties agreeing who the arbitrator should be, or failure of the procedure they agree.

19. It is submitted that the authorisation of arbitral appointments referees is an appropriate matter for subordinate legislation because authorisation is an administrative matter in specifying individual institutions and such delegation also gives the flexibility to make fresh authorisations as required from time to time. Given that such an order will be uncontroversial and administrative in nature, negative resolution procedure is considered appropriate.

## **Section 23 - Power of judge to act as arbitrator or umpire**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

20. Section 23 of the Bill provides that a judge of the Court of Session may act as an arbitrator in disputes of a commercial character and where authorised by the Lord President. Section 23(2) provides that a fee of such amount as Ministers may, by order, prescribe is payable for the services of a judge acting as arbitrator.

21. It is considered appropriate that Scottish Ministers should have the power to prescribe the fees payable to ensure that the costs of using a judge as an arbitrator are recovered for the benefit of the public purse, for instance to recover incidental and consequential costs, such as the employment of a temporary judge to cover some aspect of court business during the judge's absence. It is submitted that this is an appropriate matter for subordinate legislation, particularly since the level of the fee payable for the services of a judge will have to be increased from time to time. Since such an order will be uncontroversial and administrative in nature, it is suggested that negative resolution procedure, as is common for fees orders, is appropriate. Section 23 is a consolidation of the power in section 17(2)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55), under which it attracts negative resolution procedure.

## **Section 24 - Amendments to UNCITRAL Model Law or New York Convention**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

22. Section 24 of the Bill gives the Ministers an order making power to modify the Scottish Arbitration Rules, any other provision of the enacted Bill or any enactment which provides for

disputes to be resolved by arbitration to reflect amendments to the UNCITRAL Model Law<sup>2</sup> or the New York Convention. This will permit Scots arbitration law to be amended to keep it up-to-date with international arbitral practice.

23. As this power will only be used when an amendment is made to either the UNCITRAL Model Law or the New York Convention, the flexibility of subordinate legislation is appropriate. As this is a power to amend primary legislation it is appropriate that the order be subject to affirmative procedure.

### **Section 30 - Ancillary provision**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Order made by Statutory Instrument**

**Parliamentary procedure: Affirmative/negative resolution of the Scottish Parliament**

24. Section 30(1) provides that Scottish Ministers may by order make freestanding ancillary provision, namely supplementary, incidental, consequential, transitional, transitory or savings provisions which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill. Subsection (2) provides that such an order may modify any enactment, instrument or document (including the Bill).

25. This provision is necessary for ensuring a smooth transition from the current law on arbitration to that in the enacted Bill, for example, to ensure that existing cases straddling the old and new regimes are dealt with in an appropriate manner. It is difficult to predict the precise transition and other arrangements that will be needed over time.

26. It would not be an effective use of Parliament's time or the Government's resources to deal with such matters through subsequent primary legislation. It is considered that such matters can be best addressed and fleshed out through subordinate legislation. The power is restricted in that it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Act, and such orders are strictly construed and subject to affirmative Parliamentary scrutiny.

27. An order under this section is subject to negative resolution procedure except where it adds to, replaces or omits any part of the text of an Act, in which case the order is subject to affirmative procedure. These procedures provide the necessary safeguards with regard to the type of legislation which can be made.

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<sup>2</sup> "UNCITRAL Model Law" means the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

### **Section 33 - Commencement**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by Statutory Instrument  
**Parliamentary procedure:** No procedure

28. Section 33(1) of the Bill provides for sections 2, 29 to 32, 33 and 34 to come into force on Royal Assent, and section 33(2) provides that other operative provisions of the Bill come into force on the day Ministers by order appoint. This is a standard order-making power. As is usual for commencement orders, no provision is made for laying the order in Parliament as the power is to commence provisions Parliament has already scrutinised together with any necessary consequential and transitional arrangements. Whilst the order is not subject to Parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.



*This document relates to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 29 January 2009*

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