FROM THE OFFICE OF THE JUSTICE MINISTER

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FROM: **DAVID GRAHAM**

DATE: **3 MAY 2024**

TO: **CAROLINE PERRY**

ARBITRATION BILL: LEGISLATIVE CONSENT MEMORANDUM

Summary

Business area: Civil Justice and Judicial Policy Division.

Issue: To inform the Committee of the Minister's intention to lay a legislative consent memorandum before the Assembly, subject to Executive approval.

Action required: The Committee is asked to note the content of this written briefing.

INTRODUCTION

1. The Arbitration Bill ("the Bill"), was introduced to the House of Lords on 21 November 2023, and extends to England and Wales and Northern Ireland. Following the return of the Assembly, Lord Bellamy KC, Parliamentary Under-Secretary of State in the Ministry of Justice, wrote to the Minister in correspondence dated 26 March 2024 to ascertain whether she now wishes to progress a Legislative Consent Motion (LCM). This was the first engagement by the Ministry of Justice (including engagement at official level) with the Department since the Bill was introduced.

2. Following a period of engagement with MoJ officials on options as to how best to proceed within a challenging legislative timeframe, the Minister has responded to Lord Bellamy KC, indicating her intent to lay a legislative consent memorandum before the Assembly, subject to Executive approval however noting the considerable time constraints.

BACKGROUND TO THE BILL

3. The Arbitration Act 1996 ("the Act") is the main statutory framework for arbitration in England & Wales and Northern Ireland.

4. Arbitration is a form of dispute resolution that allows parties to appoint a third party, or a panel, to resolve a dispute where they cannot do so themselves. This is an alternative to going to court for the resolution of domestic and international disputes on a wide range of matters, such as rent reviews, shipping, international commercial contracts and investor claims against states. It may be a voluntary arrangement, or in many cases, parties may enter into a contract with a clause stipulating that disputes arising from the contract are to be settled by arbitration rather than by litigation.

5. In March 2021, the MoJ asked the Law Commission in England and Wales to review the Arbitration Act 1996. The Law Commission began its review in January 2022 and published two public consultation papers in September 2022 and March 2023. A final report and draft Bill were published in September 2023.

6. The final report reflected the general view of stakeholders and practitioners that the Act generally works well, and that significant reform is not required. The recommendations made by the Law Commission were more targeted reforms of the Act and took account of some uncertainties caused by caselaw. MoJ agreed to implement those recommendations in their entirety through the Arbitration Bill.

PROVISIONS WHICH EXTEND AND APPLY TO NORTHERN IRELAND

7. A full overview of the clauses contained in the Bill are attached in **Annex A.** All clauses in the Bill extend to Northern Ireland.

8. The key initiatives in the Bill include:
    - codifying the law on arbitrators' duty to disclose conflicts of interest and retaining current duties on impartiality to maintain the integrity of arbitration as a system of dispute resolution;
    - strengthening arbitrators' immunity to ensure arbitrator neutrality and robust decision-making;
    - introducing provisions for arbitrators to summarily dismiss legal claims that lack merit to allow for the efficient and fair resolution of disputes;
    - clarifying the power of the courts to support arbitration proceedings and emergency arbitrators;
    - improving the framework for challenging arbitrators' decisions on the basis that the arbitrators lacked jurisdiction; and,
    - creating new rules for deciding which laws govern an arbitration agreement to introduce simplicity in proceedings.

9. There are also a number of minor amendments relating to making appeals available from an application to stay, or halt, legal proceedings; simplifying preliminary applications to court on jurisdiction and points of law; clarifying time limits for challenging awards; and, repealing unused provisions on domestic arbitration agreements.

KEY ISSUES

10. The Bill was introduced to the House of Lords on 21 November 2023 and had its Second Reading on 17 January 2024. As it emanated from the Law Commission of England and Wales, the Bill was also committed to a Special Public Bill Committee which is empowered to take written and oral evidence. The Committee completed its consideration on 27 March 2024 and is awaiting the Reporting Stage.

11. The normal procedure when considering the merits of extending Westminster legislation which touches on transferred matters within the legislative competence of

the Assembly, is that the Department would initially consult with the Committee (and seek Executive approval) on the policy content of the provisions of the Bill, and on the principle of these provisions being carried in Westminster legislation. This was, unfortunately, not possible prior to the introduction of the Bill due to the absence of Ministers and a functioning Assembly.

12. The normal deadline for Assembly agreement to an LCM is the last day for tabling amendments for the final reading stage in the House in which a Bill was introduced which, in this case, is the Third Reading in the House of Lords. MoJ has advised that the Third Reading Stage is anticipated to take place early this month. Therefore, progressing an LCM within the usual timescales is not practical.

13. However, following discussion with MoJ officials, it has been agreed that, in this instance, a pragmatic solution is to extend the normal deadline for Assembly agreement until the final amending stage in the House of Commons. Confirmation of this was only provided by MoJ officials on 26 April.

14. While it is not possible to provide a definitive timeframe for the final amending stage in the House of Commons, MoJ officials have suggested that the Department should aim for before the Parliamentary summer recess (23 July). As the Assembly's recess begins on 6 July, this is undoubtedly a very challenging timeframe. Our understanding is that, given the rather technical nature of the Bill, and the robust scrutiny in the House of Lords, the Bill is likely to proceed quickly through the House of Commons.

15. With the tight timeframe to obtain an LCM, it may become apparent at a later stage that it is simply not going to be possible to obtain one. In that scenario, there is an alternative option whereby the Minister could lay a memorandum before the Assembly explaining why an LCM is not being sought, as per paragraph (4)(b) of Standing Order 42A.

16. In the first instance however, the Minister prefers to try and obtain the endorsement of the Assembly through an LCM, following engagement with Executive colleagues

and the Committee. Where it becomes clear that obtaining an LCM is simply not possible within the indicated timeframe, hopefully the Minister might still be able to write to Lord Bellamy again to indicate general support for the extension of the Bill to Northern Ireland.

OTHER JURISDICTIONS

17. The Arbitration Act 1996 extends to England, Wales and Northern Ireland and is intended to provide a common framework in relation to the law and practice of arbitration across both jurisdictions. Our understanding is that there is no appetite for divergence here from practice from England and Wales and that common practice and procedure is a positive feature, particularly for businesses that operate in both jurisdictions. There are also no specific Northern Ireland issues that required consideration beyond the differing processes for making amendments to court rules. The Department's concern is that, if Northern Ireland was not included in the Bill, it would operate a different arbitral framework which would not be of advantage to businesses here.

18. Scotland has its own separate arbitration legislation – the Arbitration (Scotland) Act 2010.

NEXT STEPS

19. Given the anticipated Parliamentary timescales for the Bill, as noted above, subject to the agreement of Executive colleagues, the Minister intends to lay a legislative consent memorandum as soon as possible. A draft Executive Committee paper has been circulated in parallel to writing to the Committee.

20. While the Department has taken the lead on this issue, we consider that a number of clauses concern matters of substantive civil law reform and therefore touch on the responsibilities of the Department of Finance. The Department for the Economy may also have an interest given the importance of arbitration for businesses and indeed, we understand that the then Department for Employment and Learning made

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regulations in respect of arbitration and labour relations in consequence of the Arbitration Act 1996.

21. Once the legislative consent memorandum has been laid in the Assembly, the Committee the matter will be formally referred to the Committee for consideration of the Bill and report to the Assembly. Officials will, of course, by happy to assist with any queries the Committee may have on the Bill, either prior to or during the Committee reporting stage.

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Annex A

THE ARBITRATION BILL

The Arbitration Bill would give effect to the recommendations of the Law Commission to reform the Arbitration Act 1996 as it applies in England and Wales, and in Northern Ireland subject to devolved consent. It comprises 18 clauses.

Clause 1 replaces the current common law position with a statutory rule that the law governing an arbitration agreement would be the law expressly chosen by the parties to an agreement, or in default, to be the law of the chosen seat.

This generally applies to situations where there is an international dimension to a contact between parties and the agreement to arbitrate, with the parties operating in different jurisdictions but agreeing to resolve the dispute by way of arbitration in England, Wales or Northern Ireland. In this scenario, it is common that there may be an express choice of seat for an arbitration (for example, London), but no choice of law to govern the agreement to arbitrate. Clause 1 clarifies the law in this regard.

Clause 2 also codifies the common law duty for arbitrators to disclose circumstances that might give rise to justifiable doubts as to their impartiality. This applies prior to their appointment, and as a continuing duty following appointment.

Clauses 3 and 4 concern issues regarding immunity of arbitrators where there is a resignation or an application for removal by one of the arbitral parties. Section 29 of the Arbitration Act 1996 provides that an arbitrator is not liable for anything done or omitted in the discharge of their functions, unless the act or omission is shown to have been in bad faith. This supports arbitrators to make impartial decisions without fear that a party will express their disappointment by suing the arbitrator, and it supports the finality of the dispute resolution process by preventing the party who lost the arbitration from bringing proceedings against the arbitrator.

Immunity can be lost in two ways: either where an arbitrator resigns, or where a party applies to the court for the arbitrator's removal.

The Law Commission identified caselaw which suggests that arbitrators can be personally liable for the costs of applications for their removal, even where that application is unsuccessful. **Clause 3** rectifies this position, providing that an arbitrator would not be liable for the costs of an application to court for their removal unless the arbitrator has acted in bad faith or where there are justifiable doubts as to their impartiality. **Clause 4** outlines that an arbitrator will no longer be liable for resignation unless the resignation is shown by a complainant to be unreasonable. The onus is on one or both of the arbitral parties to demonstrate unreasonableness rather than the existing position which requires the arbitrator to prove it was reasonable.

Clauses 5 and 6 relates to the jurisdiction of arbitral tribunals. A tribunal is a body of one or more arbitrators chosen by the parties involved in the dispute, or appointed according to a predetermined process outlined in the arbitration agreement. The tribunal is responsible for issuing a binding decision known as an arbitral award.

Under the 1996 Act an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, if the tribunal is properly constituted, and in respect of matters which have been submitted to arbitration in accordance with the arbitration agreement. However, a participating party may object that the arbitral tribunal lacks jurisdiction.

The 1996 Act allows the tribunal to decide, in the first instance, whether it has jurisdiction (section 30). The court can also be asked to rule on whether the tribunal has jurisdiction, either as a preliminary point (section 32), or once a tribunal has issued its ruling (section 67).

Clause 5 amends the 1996 Act to make it clear that the mechanism to allow a court to decide whether a tribunal has jurisdiction as a preliminary point (section 32) can only be

invoked instead of a tribunal ruling on its jurisdiction. If a tribunal had already ruled, then any challenge would have to be brought through section 67.

Clause 6 relates to the award of costs in circumstances where the arbitral tribunal or the court might rule that the tribunal has no jurisdiction to resolve a particular dispute. In this case, the arbitration proceedings must come to an end. Clause 6 provides that, in those circumstances, the tribunal can nevertheless award the costs of the arbitration proceedings up until that point.

Clause 7 confers express power on arbitrators to make an award on a summary basis to dispose of an issue where one of the parties has no real prospect of succeeding on that issue. This will not be mandatory as parties can agree to disapply it. The amendment also outlines that arbitrators can exercise the power to make an award on a summary basis only upon an application by one of the arbitrating parties. The expedited procedure for summary disposal is not specifically prescribed but will be decided on a case-by-case basis and the tribunal must give the parties a reasonable opportunity to make representations about the procedure itself.

Clause 8 relates to the powers of emergency arbitrators. There may be circumstances where institutional arbitral rules provide for the appointment of an emergency arbitrator who is appointed on an interim basis, pending appointment of a full arbitral tribunal. The emergency arbitrator may be required to make orders on urgent matters, for example for the preservation of evidence. Once constituted, the full tribunal can usually review the orders of the emergency arbitrator.

The Arbitration Act 1996 has no provisions addressing emergency arbitrators because the introduction of this practice generally post-dates the Act. The Law Commission considered whether the Act should be amended to provide for a scheme of emergency arbitrators to be administered by the court (as opposed to those managed by arbitral institutions), and whether the Act should apply to emergency arbitrators as it applies to normal arbitrators. While no reform recommendations were made on these issues, it was

recommended that the 1996 Act be amended to align the powers of emergency arbitrators with normal arbitrators where a party has failed to comply with an order.

Clause 8 allows an emergency arbitrator to issue a peremptory order where a party has failed to comply with an order (section 41) and if there is no compliance with that order, an application can be made to court for the court to order compliance with the arbitrator's order (section 42). Where the issue is not urgent, an application can be made directly to the court with the permission of the emergency arbitrator for it to make its own order (section 44).

Clause 9 relates to the power of the point to make orders against third parties. Section 44 of the Arbitration Act 1996 provides that the court has the power to make orders in support of arbitral proceedings. These relate to taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver.

The Law Commission identified uncertainly in caselaw as to whether section 44 (which relates to taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver), applies to third parties. Clause 9 brings legislative certainty by aligning the position in arbitration proceedings with the position in domestic court proceedings so that these orders were available against third parties where, for example, third parties hold relevant evidence, or banks which hold relevant funds. Clause 9 also provides that third parties will not require the leave of the court to bring an appeal against an order made under section 44, thereby giving third parties the full rights of appeal usually available in court proceedings.

Clause 10 brings greater consistency in the remedies available where the award made by a tribunal is challenged by one of the parties.

An arbitral tribunal can issue an award on whether it has jurisdiction, and it can issue an award on the merits of the dispute. Either type of award can be challenged in the court

under section 67 of the 1996 Act on the basis that the arbitral tribunal did not have jurisdiction. The remedies available are that the court may confirm the award, vary, or set aside the award in whole or in part.

Section 68 also allows for awards to be challenged for serious irregularity where the remedies are to remit the award to the tribunal for reconsideration, to vary, or set aside the award.

Section 69 allows for awards to be appealed on a point of law, where the remedies are to confirm, vary, remit for reconsideration, or set aside the award. In both sections there is a proviso that an award will not be set aside unless it is inappropriate to remit the award to the tribunal.

Clause 10 amends section 67 to provide the remedies of remittance for reconsideration and setting aside any type of award.

Clause 11 relates to court procedure on challenges under section 67 of the 1996 Act where one of the parties disputes that the arbitral tribunal has jurisdiction.

As noted, an arbitral tribunal has jurisdiction if there is a valid arbitration agreement, if the tribunal is properly constituted, and in respect of matters which have been submitted to arbitration in accordance with the arbitration agreement.

A party who participates in the arbitration proceedings might object that the arbitral tribunal lacks jurisdiction. The tribunal itself is usually empowered to decide, in the first instance, whether it has jurisdiction (section 30). Once the tribunal has issued an award, either on its jurisdiction or also on the merits of the dispute, a party can challenge that award before the court under section 67 on the basis that the tribunal did not have jurisdiction.

Case law has suggested that, even where the question of the tribunal's jurisdiction has been fully debated before the tribunal, any ruling by the tribunal does not bind the court, and that a challenge to the court under section 67 would require a full rehearing.

Clause 11 amends section 67 to confer power for rules of court to clarify procedures in such circumstances. Where an application is made under section 67 by a party who took part in the arbitration proceedings and which relates to an objection on which the tribunal has already ruled, then there will generally be no full rehearing before the court. Rules of court will be able to provide that there should be no new grounds of objection, and no new evidence, before the court, unless it was not reasonably possible to put these before the tribunal; and evidence should not be reheard by the court, unless necessary in the interests of justice.

In England and Wales this would require amendment to Civil Procedure Rules by the Civil Procedure Rule Committee by way of statutory instrument under the authority of the Civil Procedure Act 1997. In Northern Ireland it would require amendment to Order 73 of the Rules of the Court of Judicature (Northern Ireland) 1980, made by the Court of Judicature Rules Committee. The Rules are subject to allowance by the DoJ.

Clause 12 deals with circumstances where an award is challenged before the courts. As discussed, an arbitral award can be challenged before the courts on the basis that the tribunal lacked jurisdiction (section 67), or on the basis of serious irregularity (section 68), or the award can be appealed on a point of law (section 69). In all cases, the challenge must comply with the further requirements of section 70.

Before applying to the court, applicants must first exhaust any arbitral process of appeal or review, and recourse for the tribunal to correct the award or issue an additional award (section 57). An application to the court must be made within 28 days. Clause 12 amends section 70 to clarify that this time limit begins to run after any arbitral appeal or any application under section 57. In any other case, it begins to run from the date of the award.

Clauses 13 to 15 contain a number of miscellaneous minor amendments.

Section 9 of the 1996 Act allows a party to an arbitration agreement to apply to court to stay legal proceedings. This section does not state expressly that a party can appeal a decision of the High Court under section 9 to the Court of Appeal. Other sections of the Arbitration Act 1996 do provide expressly for appeal. **Clause 13** amends section 9 to expressly state that a right of appeal is available.

Clause 14 amends section 32 and section 45 of the 1996 Act which relate to applications to the court to determine either a preliminary point of jurisdiction or point of law. This would specify that an application would require either the agreement of the parties or the permission of the tribunal. It removes the further requirement to satisfy the court on a list of matters which relate to the need to demonstrate that the question is likely to produce substantial savings in costs; that it is made without delay; and, in regard section 32, that there is good reason why the matter should be decided by the court

Clause 15 would repeal provisions relating to domestic arbitration that have not been brought into force. Sections 85 to 88 of the 1996 Act concern domestic arbitration agreements, which is when all the parties are from the UK and the arbitration is also seated in the UK. Sections 85 to 87 have never been brought into force. Section 88 was brought into force, but only grants the Secretary of State the power to repeal sections 85 to 87. Clause 15 repeals all these unused sections.

Clauses 16 to 18 concern the bill's extent, commencement and short title respectively. These clauses would come into force on the bill receiving royal assent. Clauses 1 to 15 would be brought into force by regulations. Clause 11 would be subject to negative resolution in parliament and requires amendments by the Civil Procedure Rules by the Civil Procedure Rule Committee.