FROM THE OFFICE OF THE JUSTICE MINISTER

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17 May 24

Dear Caroline,

THE ARBITRATION BILL - LEGISLATIVE CONSENT MOTION

Thank for you for your correspondence dated 10 May in relation to the Westminster Arbitration Bill. I note your request for further information on the provision related to improving the framework for challenging arbitrators' decisions and whether this is likely to make challenges easier or more difficult, and on the Department's proposed course of action in the event it becomes clear that it will not be possible to obtain a Legislative Consent Motion due to time constraints.

Framework for challenging arbitrators' decisions

Under the Arbitration Act 1996, an arbitral decision can be challenged and appealed through a court in England, Wales or Northern Ireland, but only on limited grounds. These are that the arbitrator tribunal lacked substantive jurisdiction (section 67); that there was serious irregularity that has caused, or will cause, substantial injustice to the applicant (section 68); or there is an appeal on a point of law (section 69).

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The Law Commission's recommendations in its review of the Arbitration Act 1996, which have been taken forward in the Arbitration Bill ("the Bill"), were focused on the framework for challenging decisions on the basis that the arbitrator lacks jurisdiction and addressing concerns arising as a result of the current process.

Under the 1996 Act, where one of the arbitral parties disputes the jurisdiction of the tribunal, this can be challenged in a number of ways: the tribunal itself can decide, whether it has jurisdiction (section 30), or a party, or parties, may apply to a court to rule on whether the tribunal has jurisdiction. This can either be taken forward as a preliminary point, which requires the agreement of the other parties, with permission of the tribunal (section 32), or after a tribunal has issued its ruling (section 67).

Clause 11 of the Bill addresses a decision of the Supreme Court in respect of procedure under section 67 of the 1996 Act, which held a challenge to a court under this provision is a full rehearing. The Law Commission expressed a concern that full rehearings had the potential to cause delay and increase costs through repetition of proceedings. It also noted that rehearings may allow a party to raise a challenge before the tribunal, and obtain a ruling, which will set out the deficiencies in its evidence and argument. This may allow the losing party to obtain new evidence and further develop legal arguments, for another hearing before the court. This means that, in some circumstance, hearings before a tribunal as to its own jurisdiction may become little more than a dress rehearsal for future litigation.

The Bill, therefore, provides that where a party has already objected to the jurisdiction of a tribunal, and a tribunal has already ruled on its own jurisdiction, then a subsequent challenge to the court will not be a full rehearing, unless certain criteria are met. These criteria will be outlined in Civil Procedure Rules in England and Wales and would require amendment to Rules of the Court of Judicature (Northern Ireland) 1980 here. The criteria would provide that the court should not entertain any new grounds of objection, or new evidence, unless it was not reasonably possible to put these before the tribunal, and that evidence should not be reheard by the court, unless necessary in the interests of justice.

Clause 5 of the Bill clarifies that section 32, which allows a court to decide whether a tribunal has jurisdiction as a preliminary point, is to be considered as an alternative to the tribunal ruling on its jurisdiction (section 30). If a tribunal has already ruled, then further challenge to a court could only be made under section 67.

Clause 10 of the Bill relates to the remedies available on a challenge to a court under section 67 and supplements these with remedies (remittance for reconsideration and setting aside) already available where challenges are made for serious irregularity (section 68), or on a point of law (section 69). This is intended to bring consistency of approach to the remedies available.

Finally, clause 6 of the Bill provides that, where a tribunal rules that it does not have jurisdiction to decide on the merits of a dispute, it may award the costs of the arbitration proceedings up to that point. This ensures that a party that wrongly initiated arbitration proceedings and progressed them to the point of dismissal cannot walk away free of any financial consequences.

Potential Use of Standing Order 42A(b)

The reference to paragraph (4)(b) of Standing Order 42A and possible correspondence to Lord Bellamy KC in the previous written briefing, was intended to cover the potential position where, despite the best efforts by the Department to obtain the endorsement of the Assembly to the provisions of the Bill extending to Northern Ireland, it proves impossible to do so before the Bill completes the final amending stage in the House of Commons (the second House in this process). The Minister would then lay a memorandum before the Assembly explaining that an LCM is not being sought due to the time constraints i.e. that when the Bill was introduced, there was no Executive, and subsequent to the restoration of the Assembly, it has not been possible to obtain consent within the required timescale.

However, as the views of the Executive and the Committee will be sought in the course of progressing the steps for a LCM, subject to the outcome of that engagement, this may

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make it possible for the Minister to write to Lord Bellamy to explain that while Assembly consent has not proved possible for reasons of timing, there is some political support that the provisions should extend to Northern Ireland. The latter obviously could not be, and would not be intended to be, a substitute for consent of the Assembly. However, having regard to the potential difficulties that could arise from having different arbitral processes in place in Northern Ireland to those in England and Wales, it may inform a decision by the Ministry of Justice as to whether to proceed with the extension of the Bill to Northern Ireland in the circumstances. Officials have engaged with the MoJ on this potential eventuality, though they are unable to provide any definitive view at this point given both parties' preference to obtain an LCM. Ultimately, it is a matter for Parliament to decide whether to legislate for Northern Ireland in the absence of legislative consent from the Assembly.

The Department wishes to emphasise that this is very much a reserve option should time run out, and the preference remains progressing an LCM. Either way, the Minister is keen to ensure that the Assembly is given the respect it is due when considering Westminster legislation that applies to Northern Ireland devolved matters.

Best Regards,

[redacted]

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10 May 2024

Dear David

The Arbitration Bill – Legislative Consent Memorandum

At its meeting held on 9 May, the Committee for Justice considered a written paper on the proposed Legislative Consent Memorandum on Northern Ireland-related provisions in the Arbitration Bill.

The Committee agreed to write to the Department to request further information on improving the framework for challenging arbitrators' decisions, and whether this is likely to make challenges easier or more difficult.

Standing Order 42A(b) states that the Minister shall lay a memorandum before the Assembly explaining why a Legislative Consent Motion is not being sought. The Committee would appreciate clarity on the proposal outlined in the paper to write to Lord Bellamy KC to '*indicate general support for the extension of the Bill to Northern Ireland'* where the consent of the Assembly has not been sought.

The Committee is seeking an urgent response and would appreciate this information before its next meeting on 16 May 2024.

Yours sincerely

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