THE LAW SOCIETY OF NORTHERN IRELAND

Law Society of Northern Ireland

Response to the Committee for Justice's request for views on a proposed legislative consent memorandum on Northern Ireland related provisions in the Westminster Arbitration Bill

1. INTRODUCTION AND BACKGROUND:

Alternative Dispute Resolution (ADR) is a range of dispute techniques that disputing parties may use to settle differences by using a third party. There is rising popularity of ADR due to the increased backlogs in the court system creating unacceptable delays and increasing costs. ADR includes the following categories - mediation, arbitration, adjudication, conciliation and early neutral evaluation.

Arbitration involves the disputing parties meeting with an agreed or appointed arbitrator who is neutral and conflict free. The arbitrator in effect acts as a private judge to decide the dispute. An arbitrator like a judge will listen to each side of the dispute, consider all the facts and then make a final decision. An arbitration being similar to a court case, means that the parties are usually legally represented. Once an arbitrator decides it is difficult to appeal against that decision (or award) except on narrow grounds.

Most commonly arbitration will occur as the result of an arbitration clause inserted in a contract or commercial agreement to deal with future disputes between the parties under the terms of the contract.

There are a number of reasons why parties in dispute might prefer to use ADR rather than having a case heard in court. These include:

- Privacy: the meetings involved in arbitration, mediation or other ADR methods take place in private rather than in open court.
- Cost: with the exception of arbitration, the cost involved in all other forms of ADR are usually only a fraction of the cost that would be involved in litigation.

- Speed: the parties involved in a dispute have more control over the process and are in a position to ensure that their dispute is dealt with promptly.

The Arbitration Act 1996 (the Act) governs arbitration arrangements in this jurisdiction as well as England and Wales. It is now 28 years old and is under review to ensure it is in keeping with modern day practice. In order for the legislation proposed in the Bill to be effective in Northern Ireland a decision in the devolved administration in Northern Ireland is required. The Law Commission reviewed the Act resulting in a Report and draft Bill in September 2023. The Commission's Report confirmed that the current Act operates well, and a complete overhaul is not required. However, several recommendations for reform were identified and incorporated in the draft Bill.

2. ARBITRATION BILL: Recommendations.

The Law Society of Northern Ireland (The Society) supports modernisation of arbitration and the Arbitration Bill (the Bill) updates and refines arbitration law. Such reviews will be required in coming years to deal with new situations and developing technologies. The Bill is not a wide-ranging reform of the Act but aims to revise and update it with domestic and global changes. The Bill makes particular and important changes to the law around arbitrator conflicts, the enforcement of emergency arbitrator orders and the applicable law. The detailed explanatory notes produced for the Bill set out clearly what are the changes proposed and the rationale for those changes. The Law Society has considered those notes and agrees with them and with the proposed adjustments to the 1996 Act.

2.1 Codifying the law and arbitrator conflicts.

The Bill aims to codify the law on an arbitrator's duty to disclose conflicts of interest and retain a duty of impartiality so that the integrity of arbitration may be maintained. The Society agrees that arbitrators should have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. It is also acceptable that an express duty would provide useful clarification in this area. A duty '*to make reasonable enquiries*' would be consistent with duties required of other professionals. The question of the state of knowledge required of an arbitrators' duty of disclosure is best left to the courts. The Society therefore supports clarification in this respect and codification of the law.

2.2 Strengthening arbitrator's immunity.

An arbitrator's immunity is very significant as it will support the making of robust and impartial decisions without fear of a challenge from one of the disputing parties who may be disappointed by the outcome. Immunity will also support the finality of the resolution process by preventing further proceedings against the arbitrator or panel of arbitrators in a dispute.

It should be noted that the disputing parties will retain a right to apply to court to remove an arbitrator, or indeed they may simply revoke his/her authority should they disagree with the approach taken.

Should an arbitrator resign then they risk the possibility of incurring liability. There should not be a list of circumstances of when resignation might be unreasonable as this will vary according to the circumstances and resignation should only give rise to liability if it is unreasonable. The burden of proving unreasonableness should rest with the complainant.

2.3 Introducing provisions to dismiss legal claims that lack merit.

In court proceedings, a court may decide a claim or issue without a trial, and this is known as a summary judgement. Such circumstances will arise when the court considers a party has no real prospect of succeeding on an issue and there is no other compelling reason why the issue should be disposed of at trial as this would not improve a party's weak prospects of success. This results in time and costs savings. The Act does not provide for summary disposals (or judgements) although there may be implicit power to do so e.g. section 33 allows for a duty to adopt procedures to avoid delay and expense. But the latter must be balanced with the duty to give each party a reasonable opportunity to put their case. The Law Commission recommended that the revised Bill should allow for an arbitral tribunal, on the application of a party, to issue an award/decision by way of a summary judgement. The Society agrees that this should be permitted where there is no real prospect of success. Such a summary disposal will allow for more efficiency, and ought to be available on the application of a party to the dispute and not at the arbitrator's instigation. The threshold for summary disposal of a dispute should be set at a level which acknowledges the early stage of the proceedings and the abbreviated nature of the evidence to be offered. However, the Society would emphasise that summary judgements should be limited to the fair and efficient resolution of disputes, and not become an additional interim procedural step which could be invoked disingenuously to delay the process or add costs.

2.4 Clarifying the powers of the courts.

The Bill introduces provisions to clarify the powers of the Courts to support arbitration proceedings and emergency arbitrators. Such changes need to be carefully worded and tailored so as not to allow for unintended or negative consequences arising from a general application in an emergency arbitration.

Currently if a party fails to comply the arbitrator may issue a peremptory order and if ignored then an application may be made to a court for a compliance order. A court can be expected to support arbitral decisions unless there is an abuse of process or a misapplication of law. Alternatively, an application may be made directly to the court for its own order. It is therefore important to define the relationship between a court and an arbitral tribunal so that the role of the court continues to be one of support to arbitration.

2.5 Improving the framework to challenge arbitrator's decisions.

The Society agrees that such a framework be developed for clarity and fairness. Rules of court could effectively deal with such a framework as opposed to legislation and will efficiently tidy up procedural matters for challenge situations.

Currently a party can appeal an arbitral award to court on a point of law (Section 69), following agreement of the parties or the court's permission. The current Act does allow the parties to agree to opt-out of such an appeal on a point of law. The Society would recommend that the current provisions in the Act relating to appeals on a point of law remain as is as they are an acceptable compromise between the finality of the arbitration procedure and correcting errors of law.

2.6 Creating new rules to decide which laws govern an arbitration agreement.

The current law on which country's law will govern an arbitration agreement is contained in the Supreme Court decision of Enka – v – Chubb which states that the law to govern the agreement will be chosen by the parties otherwise it will be governed by the law with which it is most closely associated with – usually the 'law of the seat' which is the place where the arbitration is deemed to occur as a matter of law. The Society considers that this can give rise to preliminary issues and challenges which could result in delays and increased costs. This is especially so in circumstances where the original contract containing the arbitration clause generates from a foreign jurisdiction.

To prevent uncertainty and delays by exploring matters of jurisdiction, there is now an opportunity to include in the Bill express rules on which law will govern an arbitration

agreement. The parties could agree explicitly which law is to be applied to an arbitration agreement, or, if no agreement then the law where the arbitration is carried out will govern. A default position, to use the law where the arbitration occurs, would deliver certainty and simplicity for disputing parties and save time and money without the necessity to commence preliminary applications.

3. SUMMARY

The Society supports the Arbitration Bill and welcomes the opportunity to submit views on the proposed legislation. We trust our contribution is constructive and we are happy to meet to discuss any of the issues raised in our paper.

The development of new technologies such as AI may significantly impact on the way that arbitration takes place. Whilst it is too soon to legislate on AI in this regard it is something that requires observation going forward. The Society would welcome engagement between policy makers and the legal profession to ensure that opportunities are grasped and to mitigate against risks.

Law Society of Northern Ireland

24 May 2024

Northern Ireland Assembly
Committee for Justice

[redacted]
The Law Society of Northern Ireland
96 Victoria Street
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[redacted]

10 May 2024

Dear [redacted]

Arbitration Bill – Legislative Consent Memorandum

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

The Bill was introduced in the House of Lords on 21 November 2023. All clauses in the Bill would extend to Northern Ireland. 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.

The Committee agreed to write to the Law Society to seek your views on the proposed legislation. Due to the extremely tight legislative timeframe of the bill, with a Legislative Consent Memorandum likely to be laid in the coming weeks, the Committee would very much appreciate it if you could provide this information as

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soon as possible. We apologise for the short time frame and the Committee greatly appreciates your input.

Yours sincerely

Caroline Perry

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