LEGISLATIVE CONSENT MEMORANDUM

THE ARBITRATION BILL

Draft Legislative Consent Motion

1. The draft motion, which will be tabled by the Minister of Justice, is:

> ***"That this Assembly endorses the principle of the extension to Northern Ireland of the provisions in the Arbitration Bill"***

Background

2. This memorandum has been laid before the Assembly by the Minister of Justice in accordance with Standing Order 42A(2). The Arbitration Bill ("the Bill") was introduced to the House of Lords on 18 July 2024. The latest version of the Bill can be found at: https://publications.parliament.uk/pa/bills/cbill/59-01/0057/240057.pdf

Summary of the Bill and its policy objectives

3. The Bill amends the Arbitration Act 1996 ("the Act"), the main statutory framework governing arbitration in England, Wales and Northern Ireland.

4. Arbitration is a form of dispute resolution that allows parties to appoint a third party to resolve a dispute privately. This is an alternative to going to court for the resolution of domestic and international disputes on a wide range of matters, particularly in relation to shipping and commercial contracts. It may be a voluntary arrangement, or 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 Ministry of Justice ("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 works effectively, and that significant reform is not required. The recommendations made by the Law Commission were therefore targeted reforms to modernize the legislative framework. The previous Government agreed to implement those recommendations in their entirety through the Arbitration Bill.

7. A Bill was introduced by the Conservative Government in the House of Lords on 21 November 2023 and had its Second Reading in that House on 17 January 2024. As it emanated from the Law Commission of England and Wales, the Bill was 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, but the Bill fell when Parliament was dissolved for the General Election.

8. An Arbitration Bill was introduced by the new Government on 18 July in the House of Lords, where had its Second Reading on 30 July, completed Committee Stage on 11 September, Report Stage on 30 October and Third Reading on 6 November. The Bill has transferred to the House of Commons and had its first reading on 6 November. Given the progress of the Bill to date, the Ministry of Justice has agreed to the time by which legislative consent must be obtained being extended to the final amending stage in the Commons.

Provisions which deal with a Devolution Matter

9. The Bill extends to Northern Ireland, reflecting the extent of the 1996 Act, which was intended to provide a common framework in relation to the law and practice of arbitration in England, Wales and Northern Ireland. Scotland has its own separate arbitration legislation (the Arbitration (Scotland) Act 2010) but this shares a number of common features with the 1996 Act.

10. **Clause 1** relates to the law applicable to arbitration agreements. It replaces the common law position (under which an arbitration agreement will often be governed by the law governing the contract between the parties ie. a foreign law) with a statutory rule so that the law governing an arbitration agreement will be that expressly chosen by the parties, or in default be the law of the chosen seat. This does not, however, apply to arbitration agreements derived from standing offers to arbitrate disputes which may be contained in international treaties or any foreign investment legislation which is not already subject to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

11. **Clause 2** would codify the common law position that arbitrators have a duty 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. The new statutory provision also clarifies that the duty is based on what an arbitrator ought reasonably to have known.

12. **Clause 3** reinforces arbitrator impartiality by providing that an arbitrator will not be liable for the costs of an application to court for their removal unless

the arbitrator has acted in bad faith (reversing the position under case law).

13. **Clause 4** provides that an arbitrator will incur no liability for resignation unless the resignation is shown to have been unreasonable (also reversing the position under case law).

14. **Clause 5** clarifies that a court can only be asked to rule on whether the tribunal has jurisdiction as a preliminary point (under section 32 of the 1996 Act) as an alternative to the tribunal doing so. If the tribunal has already made a ruling on its jurisdiction, then an application to a court challenging the tribunal's jurisdiction can only be made (under section 67 of the 1996 Act) after the tribunal has made an award.

15. **Clause 6** relates to the award of costs in the circumstances where the arbitral tribunal, or a court, rules that the tribunal has no jurisdiction to resolve a particular dispute (section 61). In this case, the arbitration proceedings must come to an end, but the clause clarifies that the tribunal can still award the costs of the arbitration proceedings up until that point.

16. **Clause 7** confers an express power on arbitrators to make an award on a summary basis where it considers that one of the parties has no real prospect of succeeding on that issue. This encourages disputes to be settled without unnecessary delay and expense. The clause also outlines that arbitrators will only be able to make an award on a summary basis following an application by one of the arbitrating parties. The 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.

17. **Clause 8** is concerned with the powers of emergency arbitrators. This may arise where parties have agreed to arbitration, but the arbitral tribunal is not yet fully constituted and there is an urgent issue which requires an order, such as the preservation of evidence. The Arbitration Act 1996 has no provision in relation to emergency arbitrators because the introduction of this practice generally post-dates the Act. This clause aligns the powers of emergency

18. **Clause 9** aligns the position in relation to arbitration proceedings with the position in court proceedings by clarifying that courts can make orders against third parties, such as taking of witness evidence, preservation of evidence, orders relating to relevant property, sale of goods, interim injunctions, and the appointment of a receiver. It also outlines that third parties will not require the leave of the court to bring an appeal against such an order, thereby giving third parties the full rights of appeal usually available in court proceedings.

19. **Clause 10** aligns the remedies available where the award made by a tribunal is challenged by one of the parties on the basis that it did not have jurisdiction (section 67), with those available where challenges are made against a tribunal award for serious irregularity (under section 68 of the 1996 Act), or on a point of law (under section 69 of the 1996 Act) namely, the remedies of remittance for reconsideration and setting aside of an award.

20. **Clause 11** relates to procedure where one of the parties makes an application to the court challenging the jurisdiction of the arbitral tribunal (under section 67 of the 1996 Act). Under case law, even where the question of the tribunal's jurisdiction has been fully debated before the tribunal (under section 30) the tribunal's ruling on the matter is not binding on the court and there will be a full rehearing before the court. This clause reverses that position by providing that where 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 to be prescribed in court rules are met. 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.

21. **Clause 12** clarifies that the current time limit of 28 days for parties to challenge a tribunal's award before the courts only begins to run after any arbitral process of appeal or review, or where an application has been made to the tribunal to correct the award or issue an additional award. In any other case, the time limit begins to run from the date of the award.

22. **Clause 13** will amend the 1996 Act (section 9) to expressly state that a party has a right of appeal to the Court of Appeal against a decision of the High Court to stay or halt legal proceedings.

23. **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 clarifies the conditions to be met for the court to consider such applications, namely, that it will 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 to section 32, that there is good reason why the matter should be decided by the court.

24. **Clause 15** repeals 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.

25. **Clauses 16 to 18** concern the bill's extent, commencement and short title respectively.

Reasons for making the provisions

26. The Arbitration Act 1996 is now over 25 years old, and the review carried out by the Law Commission of England and Wales was to ensure that it remains fit for purpose, and that the UK has a modern arbitral framework, so that it remains an attractive seat of arbitration for both domestic and international businesses. The Law Commission estimated that there are at least 5,000 domestic and international arbitrations in England and Wales every year, potentially worth at least £2.5 billion to the economy. The general view of stakeholders and practitioners was that the Act generally works well, and that significant reform is not required. The recommendations made by the Law Commission, which have been included in the Arbitration Bill, are therefore limited to targeted reforms of the 1996 Act to update the legislative framework.

Reasons for utilizing the Bill rather than an Act of the Assembly

27. The Department's current legislative programme means that it would not be possible to bring forward equivalent legislation via an Assembly Bill before the next Mandate at the earliest. The Bill's provisions are relatively technical in nature and therefore, it is more efficient to deal with these in the Westminster Bill. Any delay in legislating for Northern Ireland would result in arbitrations in Northern Ireland operating under a legislative framework that has not been updated, and one which is in some respects different to England and Wales, contrary to the original legislative intent of the Arbitration Act 1996, which was designed to provide a framework in domestic law for arbitration in both jurisdictions.

28. A legislative consent motion, is, therefore, considered to be the most timely, reasonable and proportionate way forward in the circumstances.

Consultation

29. There has been no separate public consultation on the Bill in Northern Ireland. However, the Bill resulted from a comprehensive review of the Arbitration Act by the Law Commission of England and Wales, with two

public consultation papers in September 2022 and March 2023 and stakeholder engagement including some key stakeholders in Northern Ireland.

30. Further a Northern Ireland view to the consultation was provided by Mr Justice Scoffield in his role as Chair of the Northern Ireland Law Commission. This noted that:
    - The Arbitration Act 1996 already extends to Northern Ireland and is intended to provide a common framework in relation to the law and practice of arbitration across both jurisdictions. Any amendments to the Act should extend to Northern Ireland with no, or little extra work being required.
    - There is no appetite for divergence from practice from England and Wales and that common practice and procedure was positive, particularly for businesses that operate in both jurisdictions.
    - There are no specific Northern Ireland issues that required consideration beyond differing processes for making amendments to court rules.

Human Rights and Equality

31. It is the Department's assessment that there are no adverse equality or good relations impacts associated with the provisions in the Bill. Insofar as Convention Rights may be engaged, it is considered that the Bill's provisions are compatible with the ECHR.

Financial Implications

32. There are no cost implications in terms of public expenditure arising from the Bill.

Summary of Regulatory Impact

33. An analysis carried out by MoJ of the impact of the Bill noted that alternatives to regulation would be inappropriate given the core policy objective of the Bill is to update the legislative framework, including by codifying and clarifying arbitral case law (reflecting practices already being adopted by businesses) and by strengthening and streamlining court supporting powers and procedures. The impact assessment determined that there would, therefore, be no direct costs posed to businesses, and although there could be costs to businesses if points of law under the new regime are litigated, these would be temporary. It also noted the wider economic benefits for all those involved in arbitration such as enhanced international competitiveness, more efficient and fairer domestic and international arbitration and reduced pressure on the court system.

Engagement to date with the Justice Committee

34. The Department has provided written briefing to the Justice Committee and an oral evidence session with officials was held on 24 October. At the conclusion of the evidence session, the Justice Committee agreed that it was content for a Legislative Consent Memorandum to be laid before the Assembly.

Conclusion

35. My view is that, to ensure that arbitration in Northern Ireland is governed by a legislative framework that is modern, fair and efficient, and also continues to operate under the same framework as applies to arbitration in England and Wales, as envisaged by the 1996 Act, the Assembly should support the terms of the draft legislative consent motion as set out in paragraph 1 of this memorandum.

Minister of Justice 08 November 2024