SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This supplementary Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Arbitration (Scotland) Bill. It describes the purpose of the provisions conferring power to make subordinate legislation amended or added at Stage 2, explains why the matter is to be left for subordinate legislation, and why the stated parliamentary procedure is appropriate.

2. It should be read in conjunction with the Delegated Powers Memorandum for the Bill.

AMENDMENTS TO DELEGATED POWERS

3. At Stage 2, the delegated powers in section 24 of the Bill were extended and an order-making power (section 33A(4)) added as part of new transitional provisions.

Section 24 – Amendments to UNCITRAL Model Law or Rules 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

4. Section 24 of the Bill as introduced gave the Scottish Ministers the power, subject to affirmative resolution procedure, to amend and update the Act, provision made under it, or other enactments providing for arbitration, in consequence of any amendment to the UNCITRAL Model Law or the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

5. As amended at Stage 2, section 24 also enables the Scottish Ministers to make the same modifications in consequence of amendments to the UNCITRAL Arbitration Rules. Those Rules provide a recognised international set of procedural rules upon which parties may agree for the conduct of arbitral proceedings.

6. Adding the UNCITRAL Arbitration Rules to section 24 allows the Scottish Ministers to keep the Scottish Arbitration Rules at the forefront of international developments by bringing forward amendments to arbitration law in Scotland to react quickly to any desirable changes in

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modern arbitral practice. In addition, it demonstrates to the outside world that Scotland is determined to meet UNCITRAL standards in the arbitration regime in the Bill which is based on UNCITRAL principles.

7. Section 24 was also amended at Stage 2 to require the Scottish Ministers to consult those they consider are interested in arbitration law before using the powers in section 24. This change was made as a result of representations made during Stage 1.

8. The powers in section 24 are subject to affirmative resolution procedure. This is considered appropriate as the powers allow alteration of the arbitration regime set out in primary legislation in the Bill, where desirable in line with the international instruments concerned.

Section 33A(4) – Transitional provisions

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9. Transitional provision was originally intended to be made by order under the Bill. The Bill has, however, been amended at Stage 2 to introduce transitional provisions (section 33A). Some stakeholders were of the view that the Bill should not apply to existing arbitration agreements, because voluntary arbitration is contractual and the parties should be able to rely on what is agreed at the time of the conclusion of the contract. Others took the opposite view and argued that the new law should apply to all arbitrations which commence after the Bill comes into force, as for example with the UK Arbitration Act 1996. This would avoid arbitrators having to be expert in two different arbitration laws. The Economy, Energy and Tourism Committee asked for commencement to be made clear in the Bill.

10. Under section 33A, the Bill will not apply to arbitrations which have begun at the time the Bill comes into force. It will apply to existing arbitration agreements, irrespective of when they were entered into, but with an opt out so that those parties who wish to use the old law may agree to opt out of the new regime in the Bill.

11. The transitional provision is a compromise so that parties who wish to use the old law may agree to do so. As time goes by, it is considered less likely that parties would wish to use the old law (the Bill was brought forward partly because the old law is obscure, out-of-date and incomplete). The Scottish Ministers are therefore given the power, by order under section 33A(4), to end the opt out after at least 5 years, following due consultation with parties interested in arbitration law.

12. Section 33A(4) is made subject to affirmative resolution procedure. While the provision is transitional, ending the opt out will have an effect on existing contracts, some of which can be in place for many years, and it is considered that exercise of this power should be subject to Parliamentary approval.
This document relates to the Arbitration (Scotland) Bill as amended at Stage 2 (SP Bill 19A)

ARBITRATION (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM