The Committee will meet at 2.15 pm in Committee Room 5.

1. **Arbitration (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

2. **Instruments subject to annulment:** The Committee will consider the following—

   - the Aquatic Animal Health (Scotland) Regulations 2009 (SSI 2009/85);
   - the Regulation of Care (Requirements as to Limited Registration Services) (Scotland) Amendment Regulations 2009 (SSI 2009/90);
   - the Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) Regulations 2009 (SSI 2009/91);
   - the Bankruptcy Fees (Scotland) Amendment Regulations 2009 (SSI 2009/97);
   - the Repayment of Student Loans (Scotland) Amendment Regulations 2009 (SSI 2009/102);
   - Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2009 (SSI 2009/103);
   - the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) Order 2009 (SSI 2009/106);
   - the Enforcement of Fines etc. (Diligence) (Scotland) Regulations 2009 (SSI 2009/110).

3. **Instruments not laid before the Parliament:** The Committee will consider the following—

   - Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Diligence) 2009 (SSI 2009/104);
   - Act of Sederunt (Rules of the Court of Session Amendment No.4) (Fees of Shorthand Writers) 2009 (SSI 2009/105);
   - Act of Sederunt (Sheriff Court Rules Amendment) (Diligence) 2009 (SSI 2009/107);
Act of Adjournal (Amendment of the Criminal Procedure (Scotland) Act 1995) (Appeals by Stated Case) 2009 (SSI 2009/108);

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The papers for this meeting are as follows—

**Agenda items 1 - 3**

- Legal Brief: SL/S3/09/11/1 (P)
- Summary of Recommendations: SL/S3/09/11/2
- Arbitration (Scotland) Bill - Scottish Government Response: SL/S3/09/11/3
- Scottish Government Responses: SL/S3/09/11/4
The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

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**Agenda Item 1  Arbitration (Scotland) Bill**

Section 24 – Amendments to UNCITRAL Model Law or New York Convention

The Committee may wish to consider the proposed power in so far as it relates to amendments to the UNCITRAL Model Law acceptable in principle and that affirmative procedure is appropriate.

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**Agenda Item 2  Instruments subject to annulment**

The Aquatic Animal Health (Scotland) Regulations 2009 (SSI 2009/85)

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that there is an error which does not appear to affect the operation of the instrument in respect that the references to ‘non-commercial undertaking’ in regulations 12(1) and (7) of the instrument should be to ‘non-commercial installation’. The Committee may wish to welcome the Scottish Government’s commitment to correct the error at the first convenient opportunity.

The Committee is invited to report this instrument on the ground that the definition of ‘processing establishment’ in regulation 3(1) could be more clearly expressed, given that the definition appears to require identification of those establishments which will be subject to future requirements under Part 4 of the instrument in relation only to slaughter of aquaculture animals in the event of an outbreak, and it is not clear whether these establishments can be identified and therefore authorised in advance.

The Committee will wish to consider whether the response received from the Government in regard to the explanation of how Article 33 of Directive 2006/88/EC has been implemented in the regulations is satisfactory and if so report accordingly.
The Committee may wish to consider that the Scottish Government's interpretation of the exclusion of the authorisation requirements under the Directive in relation to specialist transporters is not free from doubt, but it may wish to consider the response provided by the Scottish Government satisfactory and to report accordingly.

The Committee may also wish to consider that regulation 21 does not represent a failure to comply with the requirements of Articles 8(3) and 13(1) of Directive 2006/88/EC, but a different method of meeting those requirements; that the Committee is accordingly satisfied with the Scottish Government's response; and to report accordingly.

The Committee may wish to draw to the attention of the lead committee for its interests that there is no requirement for general publication of an initial designation and that there is no defence to a charge of contravention of regulation 25(4) that the person charged was not notified of the initial designation by the Scottish Government.

The Regulation of Care (Requirements as to Limited Registration Services) (Scotland) Amendment Regulations 2009 (SSI 2009/90)

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that there has been a failure on the part of the Scottish Government to follow normal drafting practice in respect that one of the relevant enabling powers – section 8(4) of the Regulation of Care (Scotland) Act 2001 - was not referred to in the preamble. It is not considered sufficient merely to footnote this reference. The Committee agrees with the Scottish Government’s view that this does not affect the validity or effect of the instrument.

The Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) Regulations 2009 (SSI 2009/91)

The Committee may wish to draw this instrument to the attention of the Parliament on the ground that there has been a failure on the part of the Scottish Government to follow normal drafting practice in respect that one of the relevant enabling powers – section 29(10) of the Regulation of Care (Scotland) Act 2001 – was not referred to in the preamble.

The Committee may also wish to draw this instrument to the attention of the Parliament on the ground that there is an error which does not affect the operation of the instrument in respect that the word ‘with’ is missing after the word ‘whether’ in regulation 6(4)(a).

The Committee may also wish to draw this instrument to the attention of the Parliament on the ground that there is an error which does not affect the operation of
the instrument in respect that the reference to ‘the Act’ in regulation 15 should have been a reference to the Regulation of Care (Scotland) Act 2001 or, alternatively, ‘the Act’ should have been a defined term in the instrument.

The Bankruptcy Fees (Scotland) Amendment Regulations 2009 (SSI 2009/97)

The Committee may wish to draw this instrument to the attention of the lead Committee and the Parliament in respect of a failure to follow proper drafting practice, so far as the provision for commencement of these Regulations is not fully set out within the italic heading, in accordance with the usual formula, and that in referring in regulation 1(3) of the instrument to ‘the Schedule’, it would have been proper practice to specify fully, there, the Schedule to which reference was being made.

The Repayment of Student Loans (Scotland) Amendment Regulations 2009 (SSI 2009/102)

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2009 (SSI 2009/103)


The Enforcement of Fines etc. (Diligence) (Scotland) Regulations 2009 (SSI 2009/110)

The Committee may wish to consider if it is content with these instruments.

Agenda Item 3 Instruments not laid before Parliament

Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Diligence) 2009 (SSI 2009/104)

Act of Sederunt (Rules of the Court of Session Amendment No.4) (Fees of Shorthand Writers) 2009 (SSI 2009/105)

Act of Sederunt (Sheriff Court Rules Amendment) (Diligence) 2009 (SSI 2009/107)

The Committee may wish to consider if it is content with these instruments.
Arbitration (Scotland) Bill

Section 24 – Amendments to UNCITRAL Model Law or New York Convention

On 11 March 2009 the Committee asked:

Given that the Model Law is to be repealed and will no longer form part of the Scottish law on arbitration, what is the justification for a power to amend Scots law in consequence of any amendment made to the Model Law?

The Scottish Government responds as follows:

1. The UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration was drafted so far as possible to provide a core framework for international commercial arbitration. Its aim was to harmonize the application of different States' arbitration regimes and offer a model – of the best international commercial arbitration practice at the time – in particular for countries with underdeveloped arbitration regimes.

2. The Model Law has since then been updated and modernised, most recently in 2006 (adopting, for example, provisions recognising electronic communications). It still represents a valuable baseline standard for the important international and commercial aspect of arbitral practice. The Arbitration (Scotland) Bill is based on the principles of the Model Law, as is the UK Arbitration Act 1996.

3. The Bill nonetheless proposes that the Model Law should be repealed as the default standard for international commercial arbitrations under Scots arbitration law. This is partly because the Model Law, as a consensus standard, is incomplete and contains important gaps (for example, no powers are given to an arbitrator to award damages, expenses or interest).

4. These gaps are a result of the attempt in the Model Law to accommodate different practices and beliefs in different jurisdictions. For example, Moslem countries may be unable to agree to provisions which would allow for the payment of interest, since such payments are prohibited under Islam.

5. The Model Law does not therefore provide a comprehensive arbitration regime and has to be supplemented by domestic law. The Bill, like the UK Arbitration Act 1996, is based on Model Law principles, but it will provide a comprehensive framework for arbitration in Scotland.
6. Other reasons why it is considered that the Model Law should be repealed are listed in the Annex.

7. In many other respects, however, where the UNCITRAL Model Law does make provision for the conduct of arbitral proceedings, it represents what is recognised as best modern arbitral practice and that is why the Bill is based on its principles. The Scottish Government accordingly believes that Ministers should, with the approval of the Scottish Parliament, have the ability to react to future changes, augmentations and improvements which may be adopted into the Model Law in the future. This will add flexibility to allow the Scots arbitration law measures consolidated in the Bill to be updated quickly in order to keep pace with any such international business developments which are considered valuable going forward.
ANNEX

Further reasons why the Model Law is to be repealed in Scotland

- The Model Law has not attracted a significant amount of international arbitration business for Scotland since 1990.

- Non-Model Law venues such as London, Paris, Stockholm, Geneva/Zurich and New York are thriving.

- Model law jurisdictions such as Germany, Australia, New Zealand, Norway and Denmark are not successful as a result and therefore the Model Law alone cannot be considered to be a panacea for attracting international arbitration business.

- There are Model Law jurisdictions which are successful, such as Singapore, Hong Kong and Vienna, but we are told that these are successful for other reasons, not simply because they have the Model Law. Hong Kong benefits from business from the People’s Republic of China, where Hong Kong awards can be enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Vienna is the venue of choice for central and eastern Europe, including Russia. Vienna is also seen as neutral (which is also the case with Geneva/Zurich). (It has been suggested Scotland might also be seen as a neutral venue by, for example, a foreign party in dispute with an English company.)

- Even if the Model Law is repealed, it will still be possible for parties to adopt the Model Law for their arbitration if they so wish (apart from those procedural rules which will be mandatory under Scots law).

- The model of the 1996 Act may be more familiar to other parties in the UK who may consider using Scotland as the seat of their arbitration.

- If the Model Law is not repealed, this will perpetuate the position where there are two arbitration laws in Scotland, one for domestic arbitration and one for international commercial arbitrations. It may lead to discrimination claims in EC law, in relation to other Member States – analogous case law in the Court of Appeal in England and Wales suggests at least some elements of a discriminatory regime may breach EC law, depending on any justification advanced for discriminating between the regimes.

(Noted at pages 9-10 of the Policy Memorandum.)
1. ‘Non-commercial installation’ is defined in article 3(1). Article 5(4) refers to the authorisation of a ‘non-commercial installation’ but article 12(1) and 12(7) refers to a ‘non-commercial undertaking’. Is it intended that the references in article 12 should be to a ‘non-commercial installation’ and, if so, what does the Scottish Government consider the effect of the error to be?

2. With reference to the definition of “processing establishment” in regulation 3(1):

(a) what is meant by “which processes aquaculture animals under Part 4 of these Regulations” since Part 4 relates to the procedures for notification and control of disease outbreaks and does not appear to regulate processing of aquatic animals?

(b) to explain how the Government considers this clearly imposes a requirement for authorisation on processing establishments slaughtering aquaculture animals for disease control purposes in accordance with article 33 of Directive 2006/88/EC as required by article 4 of that Directive?

3. To explain how the requirements in article 33 of the Directive for harvesting and further processing in relation to aquaculture animals from an infected area are implemented in these Regulations or otherwise.

4. With reference to regulation 12 to explain why specialist transport businesses may be subject to the restricted requirement for registration in accordance with article 4 of the Directive, when the derogation available appears to apply to businesses which keep aquatic animals which are not intended to be placed on the market?

5. To explain the basis within the Directive for the exemption for transport in small containers provided for in regulation 21.

6. In relation to the offences of non-compliance with the requirements imposed under regulation 25(2) and 29(2):

(a) to explain the measures which the Government will take to ensure that these requirements will be made sufficiently clear to all persons who are required to comply (and so risk criminal prosecution for a failure to do so) given that it is not a defence to such an offence that the person was not notified of the requirement;
(b) what measures the Government will take to publish withdrawal of those requirements under regulations 27 or 31?

The Scottish Government responds as follows:

1. As the Committee notes, the term 'non-commercial installation' is defined in article 3(1) of the Regulations. Whilst regulation 5(4) refers to the authorisation of a 'non-commercial installation', regulations 12(1) and 12(7) refer to a 'non-commercial undertaking'.

The Scottish Government is grateful to the Committee for drawing this error to its attention – regulations 12(1) and (7) should in fact refer to a “non-commercial installation”. The Scottish Government considers that whilst the error is unfortunate, it is unlikely to give rise to difficulty in practice. A court would be likely to discern that a drafting error had occurred and would interpret the term consistently with the defined term “non commercial installation”. The Government will use the first convenient opportunity to amend the instrument to remove this error.

2. With reference to the definition of “processing establishment” in regulation 3(1):

(a) Part 4 makes provision as to the steps to be taken in the event of a disease outbreak. These steps include the issue of a notice directing a person to take steps to secure the slaughter of any aquatic animal in the confirmed designation area in ways that are designed to control the disease (regulation 30(3)). A processing establishment as defined is a food business which processes aquaculture animals for food purposes, and which also has to comply with any notice issued under Part 4 of these Regulations directing the business to take steps to control the disease.

(b) There is a clear requirement for authorisation of processing establishments slaughtering aquaculture animals for disease control purposes in accordance with Article 33 of Directive 2006/88/EC as read with Article 4 by virtue of regulations 5(1) and 7. Regulation 5(1) makes it an offence to operate a processing establishment unless authorised to do so by the competent authority. Regulation 7 makes provision for the authorisation of processing establishments.

3. The requirements in article 33 of the Directive for harvesting and further processing in relation to aquaculture animals from an infected area are implemented by the authorisation of processing establishments under regulation 5, and by regulation 30(3)(a) which provides for notice to be given as to steps which must be taken for the slaughter and disposal of aquaculture animals.

4. Article 4 of the Directive requires the authorisation of aquaculture production businesses and processing establishments, subject to the derogation in Article 4(4). Article 4 does not apply to transporters.

The requirement for registration of a specialist transport business is based on the requirements of Articles 8(3) and 13(1) of the Directive. Whilst those provisions do not specify registration as a requirement, it is considered that in order to ensure that the requirements of those Articles are met, it is necessary to bring in a system of registration of specialist transport businesses. Regulation 12 therefore imposes such a requirement.
5. Article 13(1) requires Member States to ensure that necessary disease prevention measures are applied during transport and that aquaculture animals are transported under conditions which neither jeopardise the health status of the place of destination or of places of transit. It is considered that where aquaculture animals are transported in relatively small sealed containers, a method which represents a low risk of spread of disease, then these conditions are met. In other words, regulation 21 does not represent a failure to comply with Articles 8(3) and 13(1), but a different method of meeting those requirements.

6. In relation to the offences of non-compliance with the requirements imposed under regulation 25(2) and 29(2):

(a) the measures which the Government will take to ensure that these requirements will be made sufficiently clear to all persons who are required to comply (and so risk criminal prosecution for failure to do so) are to identify those persons likely to be affected by the making of the designation and serve a copy on those persons under regulation 25(3) or 29(3)(b) as the case may be. Those persons would include relevant transporters and processors. In the case of a confirmed designation, the confirmed designation will also be published under regulation 29(3)(a);

(b) the measures the Government will take to publish withdrawal of those requirements under regulations 27 or 31 are (a) to write to those on whom a copy of the initial or confirmed designation has been served, and (b) in the case of a confirmed designation, to publish a revocation notice in the same manner as the confirmed designation was published.

The Regulation of Care (Requirements as to Limited Registration Services) (Scotland) Amendment Regulations 2009 (SSI 2009/90)

The Scottish Government was asked:

The preamble states that the instrument is made in exercise of the powers conferred by section 29(1) and (2)(a) and (b) of the Regulation of Care (Scotland) Act 2001 (the 2001 Act) and all other powers enabling them to do so. Given that section 29 relates to regulations with respect to care services (which do not include limited registration services) the Scottish Government is asked whether or not this instrument is made in reliance on section 8(4) of the 2001 Act? If so, what does the Scottish Government consider is the effect of failing to refer to section 8(4)?

The Scottish Government responds as follows:

Section 8(4) of the 2001 Act provides that section 29 applies in relation to a limited registration service as it applies to a registered care service therefore the reference to section 29 (1) and (2)(a) in the preamble is entirely appropriate. The Requirement of Care (Requirements as to Limited Registration Services)(Scotland) Regulations 2003 (SSI 2003/150) which made provision as to limited registration services relied on section 29 in the same way. If the Parliament considers it helpful, we could, as a minor printing point expand the footnote relating to section 29 highlighting the connection to section
We do not consider that the failure to refer to section 8(4) in the preamble has any effect on the instrument.

The Regulation of Care (Fitness of Employees in Relation to Care Services) (Scotland) Regulations 2009 (SSI 2009/91)

On 12th March the Scottish Government was asked:

1. The preamble states that the regulations are made in exercise of the powers conferred by section 29(1),(2),(5) and (13) of the Regulation of Care (Scotland) Act 2001 (‘the 2001 Act’) and all other powers enabling them to do so. Given that the regulations create offences in respect of a contravention or failure to comply with the provisions of regulations 2(1) or 3(1), the Scottish Government is asked whether or not this instrument is made in reliance on section 29(10) of the 2001 Act and, if so, what does the Scottish Government consider is the effect of the failure to refer to section 29(10)?

2. In regulation 6(4)(a) is the word ‘with’ missing after the word ‘whether’? If so, does the Scottish Government consider that this has any effect on the meaning or interpretation of the instrument?

3. What is ‘the Act’ referred to in regulation 15, given that ‘the Act’ does not appear to be a defined term?

The Scottish Government responds as follows:

1. Section 29(10) of the 2001 Act provides that regulations made under 29(1), (2), (7) and (9) may make it an offence to contravene or fail to comply with any specified provision of the regulations. This provision does not state that regulations made under it may create an offence, rather that regulations made under section 29(1) etc may create an offence. Therefore we consider that the preamble cites the correct powers and that failure to refer to section 29(10) does not have any effect on the instrument. If however, the Parliament considers it would be helpful, we could refer to the connection with section 29(10) in a footnote.

2. We consider that regulation 6(4)(a) can be readily understood whether the word ‘with’ is included after ‘whether’ or not, and this has no effect on the meaning or interpretation of the instrument.

3. The ‘Act’ referred to in regulation 15 is the Regulation of Care (Scotland) Act 2001, which the regulations are made under. We did footnote and refer to the Act on page 1 of the SSI AS “the Act”. On reflection it may have been of more assistance to the reader if we had referred to the Act in full. However, we think that by implication when the Instrument is considered along with the relevant sections of that Act (which refer to “authorised persons”) that there can be no doubt about this. Therefore, we do not think that this would have any effect on the operation of the instrument. We would be happy to footnote this again and could do so if the Parliament so wishes.
The Bankruptcy Fees (Scotland) Amendment Regulations 2009 (SSI 2009/97)

On 13 March 2009, the Scottish Government was asked:

"...whether the provision for commencement of these Regulations is sufficiently clearly expressed given that the Regulations contain the following drafting errors:

the italic heading relating to coming into force states that the instrument comes into force on 1 April 2009 – which would not appear to reflect the drafter’s intention as described below;

regulation 1(2) provides that the instrument comes into force on that date subject to subsection (3); and

regulation 1(3) indicates that certain provisions are instead to come into force on 1st October 2009 but refers to those provisions as “Item 2 in Part II of the Schedule” when it would appear that what is intended to be referred to is Item 2 in Part II of the Schedule to the Bankruptcy Fees (Scotland) Regulations 1993 which is to be substituted by regulation 3 and the Schedule to these Regulations."

The Scottish Government responds as follows:

The intention is for the instrument to come into force on 1 April 2009, but with different provisions commenced at different dates. We do not think there is anything unusual in this approach. In this case, all the provisions are commenced on 1 April 2009 except the fee prescribed by Item 2 in Part II of the Schedule as substituted into the 1993 Regulations which is to be commenced on 1 October 2009.

As regards the third point, we agree with the Committee that the drafting is infelicitous and it would have been clearer to refer to the Schedule inserted into the 1993 Regulations. However, we think that the only meaning capable of being construed is a reference to the Schedule as inserted since there is no other reference in the instrument to this Item 2 in Part II except in respect of that Schedule. We will take care to avoid this type of compressed drafting in future.