



RESPONSE FOR THE FACULTY OF ADVOCATES

Arbitration (Scotland) Act 2010 – Ceasing the effect of section 36(3) – Consultation

Faculty of Advocates' Response

CONSULTATION QUESTIONNAIRE

1. Do you agree with the proposal that it should no longer be possible, with effect from 1 January 2017, for parties to agree that the 2010 Act will not apply to an arbitration under an arbitration agreement made prior to 7 June 2010 ?

We agree with this proposal. It is now difficult to believe that the provisions of section 36(3) allowing parties to opt into the discredited old arbitration law were enacted as an amendment to the original provisions of the Bill which were to restrict the operation of the new Act to arbitrations originating from arbitration agreements entered into after the Act came into force.

These original provisions would have stunted the effect and benefits of the 2010 Act in Scottish domestic arbitration substantially. We are unaware of any parties agreeing to opt into the old law. The old law is – with the exception of statutory arbitrations – in desuetude.

Given this and the obvious benefits of the 2010 Act, there is no reason to continue with the “opt-in” provisions in section 36(3).

Indeed given the flexibility inherent in the many default rules in the

Scottish Arbitration Rules as contained in the 2010 Act, should parties wish to incorporate into their arbitration any tolerable aspect of the old law, which for international commercial arbitration included the UNCITRAL Model Law, there will continue to be nothing to stop them so doing.

2. Do you have any concerns with the proposal?

No.

3. Will the draft Order at Annex A have an adverse impact on your organisation?

No.

4. Do you have any observations or further comments on the proposal outlined in this paper?

The Faculty observes that on page 4 of the Consultation Paper there is the statement:

“As the Act is now over 5 years old, the Scottish Government is proposing to repeal all old arbitration law on 1 January 2017.”

Regrettably, the making of the Order will **not** repeal all old arbitration law. The wholly inadequate and defective old law will continue to be in force in relation to statutory arbitrations for which there are many provisions on the statute book. Many are important provisions such as arbitration of compensation claims arising out of the activities of statutory public bodies.

Section 16 of the 2010 Act which is designed to apply the Act to statutory arbitrations remains to be brought into force more than 6 years after the rest of the Act. The continuing applicability of the old law for statutory arbitrations is a blot on the landscape of Scottish arbitration law.

There is no reason why section 16 cannot be brought into force at the same time as the Order. In so far as there is any misplaced concern about inconsistency between any existing statutory

provisions imposing arbitration to resolve claims and the framework of the 2010 Act, section 16(3) provides,

“None of the Scottish Arbitration Rules (or other provisions of this Act) apply to a statutory arbitration if or to the extent that they are excluded by, or are inconsistent with any provisions made by virtue of any other enactment relating to the arbitration.”

In other words the provisions of an inconsistent statutory provision prevail over the framework contained in Scottish Arbitration Rules. This is so even in the unlikely event of a conflict with a mandatory rule of the SAR. Just as it is unnecessary, and indeed it would be impossible, to amend every arbitration agreement to make it conform with the SAR, so it is unnecessary for a trawl of the statute book to find every arbitration provision which might require to be altered or amended to make it conform. Indeed in some instances it may be undesirable to amend the arbitration-imposing provision and better to leave it inconsistent, and thus prevailing over the SAR framework.

In these circumstances the Faculty urges the Scottish Government to bring section 16 into force and achieve the full repeal of old arbitration law by 1 January 2017.