

## **ARBITRATION BILL**

### **DELEGATED POWERS MEMORANDUM**

#### **A. Introduction**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (**the Committee**) to assist with its scrutiny of the Arbitration Bill (**the Bill**).

#### **B. Purpose and effect of the Bill**

2. The Bill gives effect to the recommendations from the Law Commission's report of their review of the Arbitration Act 1996 (**the 1996 Act**). The 1996 Act sets out the law relating to arbitration in England and Wales and Northern Ireland. The Ministry of Justice asked the Law Commission of England and Wales to conduct their review which comprised two consultations (one in 2022 and one in 2023).
3. The Bill delivers targeted amendments to the 1996 Act to update the legislative framework in line with international good practice. It will modernise the legislative framework governing arbitration and codify case law to clarify the legislative environment. In particular, the Bill will:
  - codify an arbitrator's duty of disclosure;
  - strengthen arbitrator immunity around resignation and applications for removal;
  - introduce a power for arbitrators to dispose summarily of issues which have no real prospect of success;
  - revise the framework challenges alleging that the arbitral tribunal lacked jurisdiction);
  - clarify the law applicable to arbitration agreements; and
  - clarify court powers in support of arbitral proceedings, and in support of emergency arbitrators.

#### **C. Delegated Powers**

4. There are three delegated powers in the Bill, none of which are considered to be "Henry VIII powers". The Ministry of Justice assess these powers to be an appropriate use of delegated powers as described below.

#### Clause 11: Procedure on challenge under section 67 of the Arbitration Act 1996

*Power conferred on:*                      *The Civil Procedure Rule Committee (rules of court)*

*Power exercisable by:*                      *Order made by statutory instrument*

*Parliamentary procedure:*              *Negative resolution procedure*

*Context and purpose*

5. Under section 67 of the 1996 Act, a party can challenge an award made by the arbitral tribunal on the basis that the tribunal had no jurisdiction.
6. Clause 11 of the Bill amends section 67 to confer a power for rules of court to provide that on a challenge to the court under section 67, there should be no new grounds of objection and no new evidence before the court, unless it was not reasonably possible to put these before the tribunal; and evidence should not be reheard by the court, unless necessary in the interests of justice.
7. The Law Commission recommended Clause 11 following their two public consultations on the reform of the 1996 Act.
8. The Ministry of Justice agrees with the Law Commission that Clause 11 will prevent challenges under section 67 becoming full re-hearings, which can cause delay, increase costs, and lead to unfairness. On the latter point about fairness, a party may raise a jurisdiction challenge before an arbitral tribunal. If unsatisfied with the tribunal's ruling, a party can then apply to court under section 67. Clause 11 seeks to ensure that section 67 does not allow a party an unrestricted second attempt, allowing it to change its evidence and arguments. Rather, evidence and arguments should be deployed in full and properly the first time, before the tribunal.
9. "Rules of court" in this context means Civil Procedure Rules, which are made by the Civil Procedure Rule Committee. Civil Procedure Rules govern practice and procedure in proceedings in the County Court, High Court and Court of Appeal (Civil Division).

*Justification for taking the power*

10. The power to prescribe matters of practice and procedure in proceedings before courts is commonly delegated to rules of court made by the relevant procedure rules committee (in this case the Civil Procedure Rules Committee), which is independent of Government.

*Justification for the procedure*

11. The majority of existing powers to make rules of court are subject to the negative resolution procedure. This is widely accepted as appropriate for what are generally

regularly made instruments which fine-tune an existing extensive body of rules and are made by an independent expert committee or senior judicial office holder. The Government sees no justification in the present case for departing from the usual Parliamentary procedure for rules of court.

Clause 17(2): Commencement Provision

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* None

12. Clause 17(2) confers on the Secretary of State a power to commence the Act on a certain date by way of statutory instrument.

13. It is standard procedure to make provision for commencement by way of regulations. It is also standard that no parliamentary procedure attaches to the regulation. Parliament has approved the provisions and the power enables the Secretary of State to bring them into force at a convenient time.

Clause 17(3): Transitional Provision

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations made by statutory instrument

*Parliamentary procedure:* None

14. Clause 17(3) confers on the Secretary of State a power to make transitional or saving provision by regulations in connection with the coming into force of any provision of the Act. It is standard to include a power to make transitional and saving provision in connection with commencement in order to ensure effective and orderly implementation.