

Consultation Paper

Technical Consultation on draft Arbitration Law

Date: 24 July 2015

Purpose and type of consultation

The Department and the Law Officers of the Crown have considered carefully the appropriate approach to the proposed new Guernsey Arbitration Law, with the benefit of detailed expert advice on the draft, but there a number of issues on which they wish to consult before final proposals are submitted to the Board of the Department and the States of Deliberation.

Closing date: 18 September 2015

The Department would like views on the following issues:

1. THE APPROPRIATE MODEL?

Detailed consideration has been given as to whether to implement a twin track system with one process for domestic arbitrations and a different process for international arbitrations. However, it was felt that this was overly complex for a small jurisdiction and so the proposal is for a single law for both domestic and international arbitrations.

In considering what model to adopt, it was recognised that it was important to follow an established model in order to provide certainty and familiarity for practitioners. It is considered that the UK Arbitration Act 1996 offers a number advantages over the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law'), albeit there were certain aspects of the Model Law that would usefully expand the Arbitration Act provisions. This draft is therefore based upon the Arbitration Act 1996, with modifications both to update it and to reflect additional elements of the Model Law.

Q1 Is this an appropriate model for Guernsey?

2. MEDIATION

It would be possible to make provision for mediation along the lines in Appendix 1 which is based on the UNCITRAL Model Law on International Commercial Conciliation (2002), which may provide certainty on certain aspects of mediation, such as confidentiality and the running of prescription.

Q2 Would this be helpful, or unhelpful given that mediation is a consensual process and that statutory intervention may fetter the discretion of the parties?

3. SECTION 1: INCORPORATION OF CLAUSES BY REFERENCE

Section 1(2)(c) refers to an arbitration clause being incorporated by reference either expressly or implicitly. This is an issue that has proved contentious within the Arbitration Act 1996, the wording of which has been amended in the draft Projet to permit incorporation by reference.

Q3 Does this strike the right balance or should only express incorporation be permitted?

4. SECTION 2: APPLICATION OF LAW

Section 2 applies the draft Projet only to arbitration agreements entered into after the commencement of the law, unless the parties otherwise agree (see section 92(3)).

Q4 Does this strike the right balance? If not, to what agreements should the law apply?

5. SECTION 3: ARBITRATION RULES?

Section 3 allows the Department to specify by regulation rules that will apply to Guernsey arbitrations in the event that the parties fail to elect any specific rules.

Q5 Is this helpful? If so, which rules should be specified?

6. SECTION 9: CONFIDENTIALITY

This section makes express provision as to the confidentiality of arbitrations in the terms proposed in this section.

Q6 Is this helpful and if so, does it strike the right balance? If not, please explain why.

7. SECTION 11: NUMBER OF ARBITRATORS

It is anticipated that the majority of disputes falling under this Law will be smaller disputes and so it is proposed that, in the absence of the parties' agreement the number of arbitrators should be one. If it was felt that the majority of disputes would be large scale commercial disputes then it may be sensible to increase this to 3.

Q7 Do you agree that one is the right default number of arbitrators? If not, please explain why.

8. SECTION 26: DETERMINATION OF JURISDICTION

As the equivalent provision in the Arbitration Act has not been frequently used, it could be that the ability to refer to the Court absent the consent of all parties is unnecessary. However it is considered that this may be a useful provision and so this option has been retained.

Q8 Is this right, or do you consider that it would be better not to have the ability to refer such an issue to the Court without the agreement of all parties?

9. SECTION 29: CONSOLIDATION OF PROCEEDINGS

This draft provision goes further than the equivalent Arbitration Act provision in that it permits the Court to consolidate proceedings if there is no agreement between the parties and where appropriate to do so (see subsections (3) and (4)).

Q9 Is this helpful or would it better not to so extend the Court's powers in relation to arbitration?

10. SECTION 32: POWERS EXERCISABLE BY THE TRIBUNAL

The draft Projet follows the general approach of the Arbitration Act, rather than the detailed approach of the Model Law (see chapter on interim measures, article 17 *et seq*). However, in the draft Projet the tribunal's powers have been widened to reflect some of the principles underpinning the Model Law provisions, albeit no equivalent provision has been made in respect of section 4 of the Model Law's interim measures chapter (see subsections (2)(b), (e) and (f) and (2)).

Q10 Does this strike the right balance? If not, please explain.

11. SECTION 36: ENFORCEMENT OF PEREMPTORY ORDERS

The draft Projet expands the equivalent provision of the Arbitration Act to incorporate the relevant test in the UK jurisprudence, which test further explains the basis on which an order can be made under this section (see subsection (4)(b)).

Q11 Is this helpful? If not, please explain.

12. SECTION 39: PRELIMINARY POINT OF LAW

The draft Projet follows the approach of the Arbitration Act which allows the parties to apply to the Court to determine a question of law, in contradistinction to Article 5 of the Model Law which excludes recourse to the Court unless expressly permitted by the Law.

Q12 Does this approach strike the right balance? If not, please explain.

13. SECTION 40: RULES APPLICABLE TO THE DISPUTE

This provision incorporates two of the principles in Article 28 of the Model Law in relation to the rules applicable to the substance of the dispute (see subsections (4) and (5)), as these rules appear to be a useful gloss upon the equivalent Arbitration Act provisions.

Q13 Do you agree? If not, please explain.

14. SECTION 42: REMEDIES

The wording of this section of the draft Projet does not limit the powers of the tribunal in the same way as section 48 of the Arbitration Act which does not permit the tribunal to order specific performance of a contract relating to land.

Q14 Is this appropriate, or should the restriction in the Arbitration Act be reflected in Guernsey law? If so, please explain why.

15. SECTION 53: TERMINATION OF ARBITRATION PROCEEDINGS

Unlike UNCITRAL, the Arbitration Act makes no provision for the termination of proceedings. It is considered that it may be useful to incorporate such a provision and so the draft Projet includes a provision along the lines of Article 32 of the UNCITRAL Model Law.

Q15 Is this useful? If not, please explain.

16. SECTIONS 57 & 58: COSTS OF THE ARBITRATION

The draft Projet modifies the terms of the relevant provisions of the Arbitration Act to make it clear that costs can be reserved to an arbitral institution (see 57(3) and 57(5)) and has linked this to the concept of recoverable fees, see s.58(1).

Q16 Does this strike the right balance? If not, please explain.

17. SECTION 63: CHALLENGING THE AWARD

The draft Projet adopts the grounds for challenge set out in the Arbitration Act, but these are narrower than the equivalent grounds in article 34 of the Model Law.

Q17 Would it be better to adopt the slightly wider grounds under Article 34 of the Model Law? If so, please explain.

18. SECTION 77: POWERS OF THE COURT

The draft Projet reserves an additional power to the Court in order to facilitate the Court's ability to assist tribunals and parties.

Q18 Would this be useful or does it extend the Court's powers too far? Please explain the reasons for your answer.

19. SECTION 78: CONSUMER PROTECTION

Given that this draft creates a single track system, the draft Projet balances this with a provision excluding consumer contracts from mandatory arbitration.

Q19 Is this useful? Please explain the reasons for your answer.

20. UMPIRES

The Department has been advised that umpires no longer tend to be used in arbitrations and so no provision has been made for them.

Q20 Does this reflect local practice? Is there a need for provisions as to umpires in Guernsey?

21. GENERAL COMMENTS

Q21 If you have any further technical comments on the draft Projet, these will be gratefully received.

Responding to the Consultation:

Please send the answers to the questions above and any further comments by email, preferably in a format that can be read by Microsoft Word, to arbitration@commerce.gov.gg.

Alternatively hard copy responses can be sent by post to Finance Sector Policy Unit, Commerce and Employment, Raymond Falla House, Longue Rue, St Martin, Guernsey, GY1 6AF.

How to contact us

Telephone: (01481) 234567

Email: arbitration@commerce.gov.gg

Disclaimer

**Please note that consultation responses may be made public.*

(sent to other interested parties on request, quoted in a published report, reported in the media, published on www.gov.gg, listed on a consultation summary etc.)

**Please indicate in your response how the Department should treat your response, the options available include:*

I agree that my comments may be made public and attributed to me

I agree that my comments may be made public but not attributed (i.e. anonymous)

I don't want my comments made public

Name:	<hr/> <hr/>
Address:	<hr/> <hr/> <hr/> <hr/>