SUBMISSION FROM JAMES M. ARNOTT

THE OBJECT OF THE BILL

1. To attract arbitration work from within and outwith Scotland by effecting procedural changes to cure long standing weaknesses in the common law powers of the arbitrator and to make improvements to eliminate other perceived defects.

THE INVITATION TO MAKE SUBMISSIONS

2. The five points identified by the Committee in its call for written evidence are a helpful statement of some outcomes and methods of curing the long standing weaknesses and defects, but in themselves do not fulfill the object which I assume has to be the only object of the bill, unless an element of compulsion is agreed as being necessary.

THE BASIC NATURE OF ARBITRATION

3. Arbitration is a consensual process of dispute disposal entered into voluntarily or not at all. Upon that hypothesis work will only come to arbitration in Scotland if it is made attractive to the customer. Otherwise, the Bill (the eventual Act) will not be used. It will not attract new work unless its provisions reflect the interests of the customer in a recognizable manner or if statutory compulsion to use it is introduced as an alternative to other forms of dispute disposal. I have referred in my letter of 14 November 2008 to Alison Dewar (attached) to the success of adjudication in the construction industry as a paradigm, and I have suggested that the reasons for its success are carefully considered. Construction arbitrations were notorious for their prolixity, complications and very heavy expense particularly in hospital contracts. A dispute disposal process such as adjudication—you can call it what you like e.g. new, scheme or code arbitration—would, under a new scheme, be a right exercisable by the parties but not a mandatory requirement and would give the necessary lead using the metaphoric combination of the carrot and the stick.

THE PERCEIVED WEAKNESSES AND DEFECTS OF ARBITRATION AT PRESENT

4. Arbitration at the present time is considered as being

- Slow
- Complicated
- And Expensive.
- The decision is not final.
- It is not a one-stop shop.
- Money does not change hands immediately upon the issue of the decision and expenses keep mounting and can run for years and any net recovery can be derisory, particularly if there is inflation—as it is predicted there will

be in the medium term—and a challenge of the arbitrator's decision goes to court, where crime has to come first.

In brief, the current arbitration system does not meet the customer's cash flow needs—which are a vital consideration.

THE PRESENT CHOICES

- The courts
- Mediation
- Private negotiation
- Arbitration

THE EXISTING BARRIERS

5. The thought of arbitration repels, instead of attracts, users. As it is a voluntary process, which is now little used, any new initiatives have to overcome ingrained opposition. Unless an impetus is injected by the Bill and followed through, that opposition will not be overcome.

DISPUTE DISPOSAL

6. For the customer, arbitration is rather like going to the dentist, only when strictly necessary and in great pain but the sooner you go the better. However that is the point at which the analogy breaks down, because there is no guarantee that arbitration will end the financial pain. The patient is not in control of the proceedings and relies upon the skill of the dentist. So it is with dispute disposal, but the arbitrator's role ceases to be comparable with the dentist because there is another party who typically has to be dragged along. His consent is somewhat qualified by obvious reluctance or by less than full co-operation. The arbitrator has to be careful. He cannot readily assume that he is dealing with a recalcitrant respondent (for fear of challenges). Arbitration only works if there is genuine co-operation or, if, in place of the present arbitration system, a new system is put in place to which both parties will sign up, and in which it is accepted that a dispute disposal process fails unless it is dynamic.

COMPULSION

7. There has to be some degree of compulsion if a dispute disposal system is to work properly. By this, I mean eradicating the perceived defects of the present arbitration system. How can this be achieved in the interests of both parties, the arbitrator and the process itself thus restoring the reputation of arbitration?

THE REFORMS NEEDED

8. The arbitrator has to be given not just powers but obligations.

9. The parties must also be subjected to strict disciplines.

10. The parties have to accept the decision of the arbitrator.

11. Money has to change hands immediately upon the issue of the decision.

12. The parties have to accept at the outset that the arbitrator may get it wrong (as might a judge) on both the facts and the law, and that they have submitted to the process in the overriding interest of getting a decision quickly and cheaply. If that is not their real purpose, they have failed to understand the disadvantages of more traditional systems or, more seriously, they are intent upon dilatory tactics. If the parties want justice from on high i.e. after full scrutiny of the facts and the law using the law of evidence and procedure and a full opinion and judgment, they can go to court and take their turn in the queue, bearing in mind the chance of appeals, the very significant expense and delays, with much of the expense irrecoverable, even if the court action is won.

13. The Bill does not contain a self-contained code (see below) but the Government sees the advantages of having a self-contained code in the interests of accessibility and simplicity. It would be a framework binding not only the parties but also the arbitrator. I make no apology for again drawing upon the example of adjudication as a useful paradigm. As to why I see clear advantages in having a code, and why the Bill does not contain a recognizable code, see below.

14. After the money has changed hands, a challenge- on any ground- of the decision can be mounted in court as in construction adjudication which has now been up and running for over ten years and where, at least according to anecdotal evidence, the decisions of adjudicators (although not always perfect and fully acceptable) have kept the wheels turning and have proved a lot better than a long legal battle. Upon this hypothesis, neither an appeal on a point of law nor a challenge upon the blunt shortly stated grounds in the 1695 Articles of Regulation or the somewhat wider and less precise serious irregularity ground would be necessary, as the re-run in court would cover both grounds.

15. The rules upon expenses in adjudications should apply. Each party should meet its own expenses and the arbitrator should decide which party should pay his expenses in full or in part. This incentivises the parties to keep their own expenses down and reduces point-scoring procedural arguments.

16. In the 1960’s,the view was held that, at common law, the arbiter (as he was called) was obliged to deliver his final award within a year and a day or within such shorter period as had been agreed, and that otherwise his remit fell, on the ground that he had not exhausted it. It seems likely that a year and a day was regarded as being long enough in practice and it seems probable that the same view would hold to-day. However, subsequent to the 1960’s that view was departed from. In my experience the point was never raised and in practice the arbitration just went on. It is highly possible that this is one reason why arbitration got a bad name and has fallen by the wayside. On that assumption, there would be a strong case for a statutory maximum period upon the expiry of which the

remit of the arbitrator would drop, the arbitrator would have no right to payment, and the parties would have to dispose of their dispute by other means. The point is reinforced, in my view, by the use of 28 and 42 day periods in adjudication only, unless both parties and the adjudicator jointly agree upon an extension prior to the expiry of the statutory periods. Arguably, that is too weak and old bad practices will revive. Much depends upon the arbitrator but it might protect and constrain him from too much pressure if provision was made that extensions outwith the statutory periods should only be agreed in exceptional circumstances with some definition of 'exceptional'.

17. If the parties want to see the arbitrator's reasons for his decision, he may deliver them after issuing his decision, as in adjudication.

HOW TO ACHIEVE THIS REFORM

18. For <u>domestic arbitrations</u>, reform could be achieved

19. By introducing a new scheme which supersedes and replaces:-

(i) All existing statutes from the 1695 Articles of Regulation
(ii) All existing common law falling within its ambit.
(iii) Apply the lessons learned from the past, and the refreshing lessons learned for adjudication.

20. By persuading potential users (customers) of its merits by introducing it to trade, industry, commercial and professional organisations in the first instance.

21. By emphasizing the recognition by Government of the crying need to introduce a system designed to meet the customer's requirements and, obviously, to listen to their response.

22. By emphasizing that the scheme does not insist upon being used; it confers a right to do so which need not be exercised, as is the case in construction adjudication.

23. By setting limits on the application of the scheme.

24. Old-style arbitration cannot be banished, because it rests on the consent of the parties to settle their dispute privately. Use mandatory rules to tidy it up.

For <u>international arbitrations</u>, reform could be achieved

By providing an obvious gateway in the Bill, for the reasons which I give below.

THE COMMITTEE'S FIVE POINTS

Q1. The need for, and value of, a consolidated and codified statutory Scots arbitration law for domestic and international arbitrations

25. The Bill does not re-state and does not replace the common law which is still to be found in old case law and old text books, old with the exception of the article by The Rt. Hon. Lord Hope in The Stair Memorial Encyclopedia. Classically, the Bill as it presently stands may come to be described as a statutory intrusion and not a scheme or code, and certainly not as a self-contained all-embracing scheme. I assume that introducing such a scheme is the aim of the Scottish Government in achieving accessibility and simplicity.

26. Unfortunately, the Bill confuses procedural with substantive law. The court may competently decide points of foreign law just as an arbitrator may. See Rule 40(1) in schedule 1, part 5.

27. The Bill omits to make good the recognized long standing weaknesses in the arbitrator's powers in a satisfactory manner. In relation to interest, the arbitrator interprets and applies the terms and conditions of the underlying contract and calculates the interest due but he cannot award the sum so calculated because at common law he does not have power to do so. He needs statutory powers to do so. What the court has power to do is beside the point and, in any event, referring to the court at this stage buries the point in obscurity rather than expiscates the law. (Rule 47)

28. As regards damages (Rule 45(b)), an arbitrator may, at common law, find that a party is in breach of contract but he has no common law power to do the next thing, namely, calculate and award the damages. He needs a statutory power to do so.

29. As regards interim decrees, the arbitrator has no power to award them based on the common law hypothesis that the parties have appointed him to exhaust his remit, which is to decide finally all the issues submitted to him for a decision in a final award. Part awards encounter the same difficulty.

30. Provisional awards are not part of Scottish arbitration law although the same may not be true of England, and to introduce English terminology, particularly without any definitions, is to introduce a new dimension and source of debate. The introduction of any English procedure is likewise.

Q2 The economic benefits that will derive from a single statute incorporating a set of principles and rules to govern both domestic and international arbitrations

31. Statistical evidence of the economic benefits to the main centers of arbitration exists e.g. London. Professor Sir Alan Peacock delivered a paper 'The Market for Commercial Litigation' at a conference in Edinburgh organized by The Scottish

Council for International Arbitration upon ‘International Arbitration and the Role of the UNCITRAL Model Law’ in 1993.

32. The aim is clearly desirable but is it achievable? I have felt from the start (see also my letter of 14 November 2008) that it is wise to respect the fact that that there are differences in the law and practice throughout the world, and not to lump domestic and international arbitration together. That is likely to be interpreted as a lack of openness and respect for the foreign party i.e. “If you are coming here, you will do it our way or not at all.” As I see it, all the foreign party wants to know is that the contract into which he has entered will be interpreted soundly using the legal principles of the system the parties have agreed should apply, and that the arbitrator, having done that (in accordance with rules settled upon by them and the international appointing authority, e.g. the I.C.C) and reached a decision, the local courts will support that decision. The international bodies such as the I.C.C. have their own rules which govern the procedure from A to Z and they seek assurance that their rules will be followed by the parties and that the process and decision will not be endangered by interference or worse from the local courts or organisations, so that any arbitration is not only a one stop shop but also an expeditious and final disposal.

33. On the other hand, do we really want to introduce into our domestic law a new ground of challenge, namely ‘serious irregularity’ which would now seem to be the mantra internationally? Plainly, in my view, that would be a mistake because that would open the door to challenges in court and defeat the object.

Q3. The principle of developing a set of rules based on the United Nations Commission on International Law (UNICITRAL) Model Law for arbitrations in Scotland

34. The UNCITRAL Model law on Arbitration was introduced because of a profound distrust, if not a fearful apprehension, that the local courts in a foreign jurisdiction in which the arbitration had its seat would support the home team, who would possibly be the state or an offshoot. If Scotland wants international work, so the argument runs, it has to show that it is not such a jurisdiction and that demonstrably politics and the judiciary are kept well apart. I have no objection to attracting non-Uncitral arbitrations from abroad but it has to be shown positively what Scotland offers.

35. This not just a matter of presentation but also a matter of essential, demonstrable simplicity and compatibility, which means eschewing the old Scots common law on arbitration and not introducing incompatible statutory provisions if there is any chance of them conflicting with the rules of the London Court of International Arbitration, International Chamber of Commerce, American Bar Association, or International Bar Association—as well as the UNCITRAL model law itself.

Q4 The appropriateness of the designation of the Scottish Arbitration Rules contained in Schedule 1 as either "mandatory" or "default"

36. I do not like the use of both default and mandatory rules, nor the present selection of mandatory and default rules as set out in the bill, primarily because there may be unintended consequences which produces uncertainty and delays in securing a clean appointment. When so many bodies have their own rules, why introduce rules on an optional basis? Arguably, discussions on rules do not necessarily lead to a clear outcome. It is reasonably foreseeable that such discussions could get in the road of the appointing authority, the arbitrator and the parties, both at the outset and later.

37. My instinctive view is that the only rules should be mandatory rules, but I am content to hear submissions to the contrary to try and understand the other side of the argument.

38. For a new system with minimal rules which has apparently worked very well for the construction industry, see adjudication.

Q5. The extent to which the provisions in the Bill, particularly the Scottish Arbitration Rules, will ensure fairness and impartiality in the arbitration process, minimise the expenses of an arbitration and promote efficiency in the arbitration process

39. Existing Scots law is redolent with legal authority but the process chosen dictates what is or is not fair in the given circumstances. In the interests of efficiency, sacrifices have to be made and the parties have to understand and accept this.

40. Impartiality (and independence) can be preached but it is down to all concerned to play their part.

41. There is room for a practice manual.

CONCLUSIONS

42. Having spent many years seeking a Bill, I am delighted there is one. My personal views reflect my 40+ years of experience and now that I have fully retired and have no axe to grind, I hope my views are dispassionate and objective. The uninitiated customer is not well placed to know what is best and he will take advice, which will vary, but above all he will look for simplicity, certainty, speed and cheapness. I respectfully submit that the responsibility presently shouldered by the Scottish legislature is best discharged by facing up to the defects which I have described, by cutting through the tangled undergrowth and by introducing a new, fully fledged simple system for domestic arbitrations for Scotland where most disputes are about modest sums and where parties cannot possibly bear the costs of an old fashioned arbitration. Such a system could be honestly marketed as being to the obvious economic advantage of all concerned.

43. The market for international arbitrations as I hope I have already made clear is quite different and requires separate treatment. The reference to an appointments referee makes me wary that there is a public sector agenda and an alert foreign party might be apprehensive and turn away, thus killing the goose which lays the golden eggs.

James M. Arnott T.D.,B.L.,W.S.
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