

SUBMISSION FROM CHARTERED INSTITUTE of ARBITRATORS (CIArb) SCOTTISH BRANCH

Introduction

1. The Committee has sought written evidence on the *general principles* of the Bill and this is the CIArb's response. We strongly believe that the Bill is an important and worthwhile measure inherently designed to bring positive economic benefit to Scotland.

The CIArb has approximately 12,000 members in more than 100 countries across the world and CIArb members and/or branches have been closely involved in preparing new arbitration legislation in (among many others) England, Ireland, UAE, Malaysia and Bermuda. In addition, since the CIArb moved to a system of electing its President, two of the first five elected Presidents have been Scots.

The CIArb not only responded to the June 2008 Consultation Questionnaire, but also provided very extensive and detailed drafting and other comments covering the entire Bill. A 3-person, highly-experienced drafting sub-committee was formed and was assisted by valuable contributions from members of the Branch Committee and others. These submissions were discussed in detail with the Justice Department team in October 2008 and thereafter excellent progress was made; as a result the published Bill incorporates a great deal of the CIArb's substantial worldwide arbitral expertise and the CIArb has already commenced the process of "selling" the Bill to domestic and international parties.

The following submission addresses, first, the five issues raised by the Committee, then other matters.

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

2. Scottish arbitration law suffers from numerous inherent problems, not the least of which is the difficulty of ascertaining what the law in fact is in some respects, given the antiquity of the precedents. Some Scots arbiters sit with a solicitor as Clerk to advise on the law, a process unknown in England and elsewhere.

Typical of the many shortcomings of the present law are the following¹: (i) the internationally-accepted principle that an arbiter can determine his own jurisdiction including the validity of a referral to arbitration is expressly rejected in Scotland²; (ii) contrary to international norms, there is no inherent power in Scots law for an arbiter to award any of damages, expenses (costs) or interest; (iii) it is unclear in Scots law whether an arbiter has immunity from suit (as Judges do) as is the norm in most common law, and some civil law, countries; (iv) there is no legal presumption in Scots law that an arbiter may make a part (partial) or interim award³; (v) it is unclear whether an arbitration agreement is, as is the international norm, treated as a separate contract from its container contract, as recently confirmed in a landmark English case in the House of Lords; (vi) a party or his agent can be appointed sole arbiter⁴; (vii) the position regarding privacy or confidentiality of arbitration is unclear; (viii) whether not court rules of evidence must be

¹ An article in the CIArb's Journal "ARBITRATION" Vol. 70/2 details the many shortcomings, some serious (e.g. in that they cannot be contracted out of), in Scottish arbitration law (with full citations and references) so we submit only a selection here.

² In a decision in 1872 !

³ Typically, the relevant precedents date from the early 19th century.

⁴ This astonishing legal proposition derives from two cases in the late 18th century.

applied is uncertain⁵; (ix) the currently-in-force (and almost universally unpopular) Stated Case Procedure is an anachronism⁶.

It follows, we submit, that these (and other) anomalies must be cleared up and that the law of arbitration be collected in one place, readily accessible by commercial parties and individuals. All the weaknesses, omissions and anomalies of the present domestic law have been dealt with in this Bill by modern provisions drawing on the most relevant and/or effective features of the Dervaird Bill (2002), the UNCITRAL Model Law, the UNCITRAL Rules, the UK Arbitration Act 1996 and other sources. The provisions of the Bill reflect, wherever possible, international norms in arbitration. However, importantly and as with the 1996 Act, the Bill rests on three founding principles which govern its operation, one of which is (as is the international norm) the minimisation of the role of the Court.

The Bill establishes a single regime covering both domestic and international arbitration. While some jurisdictions have separate domestic and international arbitration laws, we see no advantage and some disadvantage in this; legal advice to HMG at the time of drafting the 1996 Act⁷ was that to have different domestic/international regimes could infringe the UK's obligations under the Treaty of Rome, so England has a unified regime⁸. In those jurisdictions with split regimes, difficulties can arise as to which one applies: for example, Daimler Benz AG is clearly German so an international regime would apply, but what about Daimler Benz (Scotland) Ltd or a Scottish-resident trading branch of Daimler Benz AG ? The far-preferable solution is, as in the Bill, to have a unified regime with a comprehensive yet flexible set of Rules allowing (for example) each of Daimler Benz AG and a private individual to choose the form of arbitration best suited to their specific individual needs.

Should Scotland not adopt the Model Law across-the-board rather than enact this Bill? The clear answer is "no": (i) the principles of the Model Law are central to the Bill and there is nothing in the Bill which contradicts those principles; (ii) there are omissions in the Model Law requiring additional legislation to cover over⁹; (iv) the Model Law has been a notable non-success in its 19 years on the Scottish statute book¹⁰; (v) an informal survey of leading international arbitrators led to an 8-point list of the key features that a successful arbitration jurisdiction should have; the Model Law did not feature on this list and there is no evident causal link between application of the Model Law and the success of an arbitral venue. London, Stockholm, Geneva/Zurich and New York are all successful arbitral venues but have not adopted the Model Law; Singapore, Hong Kong, Vienna and Bermuda (all Model Law) are successful for other reasons. Germany, Australia, New Zealand, Malaysia, Denmark, India and Cyprus are all Model Law countries but see little international arbitration.

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

3. Refer above concerning the Bill's unified regime covering both domestic and international arbitration.

⁵ The international norm is that the parties can agree what rules to apply, failing which the arbitrators will decide.

⁶ It was expressly removed in England by the Arbitration Act 1979

⁷ It should be noted that the Arbitration Act 1996 applies in full in Northern Ireland.

⁸ ss.85-88 create a separate domestic regime but these sections were never brought into force and now never will be.

⁹ The Singapore Act needs 7,000 words, New Zealand 11,000, of additional bolted-on language necessary to make the Model Law work in practice in a common law jurisdiction.

¹⁰ Arbitration being private, there are no public statistics; as best CI Arb can establish (from anecdotal evidence) there have been <20 cases in the 19 years since 1990.

Engaging in disputes is essentially a non-economic activity; while monies might well be spent on fees and other costs, no dispute is a worthwhile or productive activity for commercial enterprises. At best, a party recovers monies to which it was entitled anyway, at worst the fruits of economic activity are lost even before the legal bills arrive. Further, for small and medium enterprises (SMEs) substantial management time, otherwise assumed to be economically productive, is wasted on conducting the dispute. It follows, we submit, that efficient, cost-effective dispute resolution processes are essential to minimise such wastage, and, therefore that one of the fundamental foundation stones of a sound economy is the availability of effective dispute resolution processes, which provide civil justice between disputing parties in the most efficient manner possible¹¹.

In almost all countries of the world, civil justice is primarily dispensed by the courts but, equally, and since time immemorial¹², all civil justice systems (and, in modern times, ECHR jurisprudence) recognise the right of disputing parties to resolve their disputes privately in a manner of their own choosing. Arbitration is the principal alternative to the courts, and the main method of choice for commercial people across the world, being widely practised, for example, in commerce, landlord and tenant disagreements, agricultural, construction and consumer disputes. Arbitration is often preferable to litigation for many reasons, including the privacy of proceedings, the confidentiality both of matters raised and of documents, cost-effectiveness, time-effectiveness, freedom from the often restrictive rules of the courts, the ability to appoint an arbitrator with subject-matter expertise, the ability to agree efficient, tailored procedures, and the ability to agree the most convenient place for arbitral hearings etc to be conducted¹³. This is as true for domestic cases as it is for international ones. Furthermore, when arbitrations take place, such cases are removed from the Court, freeing up Court time and therefore reducing pressure on the public purse.

In addition, and critical for international trade, arbitral awards are enforceable in 144 foreign jurisdictions whereas court judgments are, with a few exceptions (e.g. within the EU), not enforceable cross-border. Even between Scotland and England, more so within the EU, enforcement of judgements can be a difficult, time-consuming¹⁴ and expensive matter.

This Bill has two principal aspects: first, it will permit domestic parties to choose to resolve their disputes privately, away from the glare of the public eye, under agreed procedures (e.g. giving short timescales and limited costs) with a chosen arbitrator. The Bill will also enable international parties to choose Scotland as an arbitral forum. Jurisdictions such as Singapore aggressively seek international arbitration business to boost their invisible earnings and the local economy. Scotland has the almost unique combination of a pleasant place, expert lawyers, reasonable hourly rates (much lower than London or New York), good venues and, above all, (once the Bill becomes law) a thoroughly up-to-date set of Arbitral Rules. Experience elsewhere suggests that with an appropriate and attractive legal infrastructure, Scotland could become a highly attractive place for international dispute resolution business. An authoritative survey¹⁵ has reported that

¹¹ In addition, access to civil justice is guaranteed by Article 6 ECHR.

¹² In Scotland, an Act of 1598 reinforced the freedom to choose.

¹³ For example, in a hypothetical arbitration concerning an extension to a private residence, the arbitration could be conducted in the new extension, in a shirtsleeve environment (no wigs and gowns!) with all the evidence immediately to hand. Similarly, an agricultural arbitration can be conducted at the farm, an oil refinery one at the refinery, etc.

¹⁴ Taking 10 years or more in certain EU countries.

¹⁵ Drahozal, *Regulatory Competition and the Location of International Arbitral Proceedings*; (2004) 24 *International Review of Law and Economics* 371

adopting new arbitration legislation or significantly revising one's regime leads to a very significant increase in arbitrations being held in a country¹⁶.

In addition to the general principles outlined above, arbitration has two main areas of economic benefit, one relating to domestic arbitrations, the other to international ones. For economic purposes, there is a critical distinction explained below.

Domestic Arbitrations

4. In a very recent and very typical court case in England¹⁷, the economic necessity for efficient dispute resolution was very clearly demonstrated. Mead was a small but growing building contractor driven into a Creditors' Voluntary Arrangement (CVA), and to the brink of insolvency, by its client's non-payment of bills. Had Mead folded, jobs would have been lost (with a consequent imposition on the public purse by way of unemployment and other benefits), both income and corporate tax revenues would have decreased, and a piece of the national economy obliterated. With an efficient dispute resolution process such as arbitration, cases such as Mead's can be resolved quickly and cost-effectively and the supplier or sub-contractor paid with no threat of CVA or insolvency and therefore no threat to its contribution to the national economy. Court time in Scotland is severely limited; proofs or trials are commonly set a year ahead whereas an arbitration could start next Monday.

Similarly, in the early 1990s, the UK's construction industry was close to collapse because cash was not moving down the contractual chain (client to main contractor, main to sub-contractor etc) and, in 2009, we can envisage much the same happening in commerce in general in the present economic climate. Unless suppliers and sub-contractors are paid, they will be very likely to go out of business, thereby not only depriving the economy of the fruits of their activities (production, taxes, the multiplier effect), but also increasing unemployment and the burden on the State.

In all such cases, it is not only the loss through insolvency of a single supplier or a sub-contractor which matters, but also (the "multiplier effect") the loss of the economic benefits that company creates by purchasing (and by its employees purchasing) goods and services from others.

It follows that rapid, cost-efficient, effective means of dispute resolution are essential to economic well-being.

There is another way in which we can consider the economic benefits of arbitration: at present we believe that there are approximately +/-300 arbitrations in Scotland annually, comprising +/-50 commercial disputes, and +/- 250 consumer ones. We cannot establish a precise number since, by definition, arbitration is private and there are no comprehensive reported statistics. We can reasonably envisage (based on levels in England) a starting point, within a reasonably short time after the Bill has come into force, of 200 commercial cases, 250 small business cases and 500 consumer cases. If we assume five days in arbitration for a commercial case, two for a small business case and half a day for a consumer case, that gives 1,750 days of arbitrations compared to the existing 375, an increase of 1,375 days over present volumes. That would mean an additional 6 x 1,375 hours of court time freed up, i.e. 8,250 hours. In fact this figure

¹⁶ The SPICe Briefing cites an article (Anderson) suggesting that the 1996 Act made little difference to the volume of arbitration business in England; that article misunderstands (i) the position of the 1996 Act in the sequence of legislation 1950/1979/1996 (ii) the significant effect on the volume of arbitration business of the Housing Grants, Construction and Regeneration Act 1996 which diverted a large number of construction arbitrations (the mainstay of UK domestic arbitration) into a different dispute resolution process called adjudication.

¹⁷ Mead General Building Ltd (In Creditors' Voluntary Liquidation) vs Dartmoor Properties Ltd; (2009) EWHC 2000 (TCC); judgment given 4th February 2009.

should be greater, since a well-managed arbitration can be inherently more time-efficient than the court, so every arbitral hour should save >1 court hour.

Further, the cost to the parties of a day in court is very approximately 8 hours x £300 for an Advocate, 8 hours x £200 for a Solicitor, or a total of £4,000; we can reasonably suppose that in many arbitrations Advocates will not be required and the daily cost therefore immediately drops to £1,600; many arbitrations (particularly construction ones) are done with Quantity Surveyors or Engineers representing the parties at (say) £100-150/hour or +/-£1,000/day. We can therefore see a saving of between £1,000 and £3,000/day compared with court. Further, arbitrations will take less time when the arbitrator acts proactively, as the Bill encourages (and see below).

We have, therefore, 1,375 days of arbitration time (court time should be longer) with a daily saving to each party of at least £1,000/day, or more, over court costs, requiring to be factored up to take account of the fact that arbitration should be more flexible and tailored to the circumstances. This is why CI Arb press releases referred to savings by disputing parties of millions of pounds in costs.

Further, empowered by the Bill and the forthcoming short-form Rules (see below), any appropriately-qualified person (whether lawyer, engineer, QS, architect or other) will be able to set up an arbitration practice in his/her own area. This means that the spread of new business in Scotland need not be confined to the larger cities. Disputes readily lending themselves to arbitration will arise in Brora, Ullapool, Fort William, Lerwick and Dumfries just as they will in Edinburgh or Glasgow. The CI Arb's marketing strategy and member support infrastructure (training, technical updates, quality control) will support this.

International Arbitration

5. Imagine a German main contractor with a South Korean sub-contractor engaged on an infrastructure construction project in Lesotho; if they fall into dispute, where do they go to resolve it? The courts of Lesotho? No, not least because no judgement by any such court is enforceable outside Africa (and may have very limited enforceability even within Africa). The German courts? No, say the South Koreans (who might see this as far worse than an away football game). No, say the Germans too; we cannot enforce any judgement outside the EU¹⁸.

International Arbitration? "Yes", say both: we can agree on all the main features of the arbitration including (i) venue (ii) language of proceedings (iii) the tribunal (iv) the arbitral law (v) the arbitral rules etc. Most importantly of all, an arbitral award¹⁹ rendered in any one of the 144 countries party to the New York Convention²⁰ can easily be enforced (with minimal grounds for challenge) in any other of the 144 countries.

Can they arbitrate in Scotland? Yes, they will be able to do so under the 2009 Act. The UK is party to the New York Convention and the Act is already seen as modern, progressive, user-friendly legislation. Why should they arbitrate in Scotland instead of London? Three main reasons: (i) legal and related costs in Scotland are approximately 40% lower than in London; (ii) the Act has some innovative features not included in the (English) 1996 Act; and (iii) Scotland has many advantages over London, including better

¹⁸ The South Koreans would also take this view since any US dollar bank account held by the Germans in New York would be untouchable.

¹⁹ The equivalent of a court judgment.

²⁰ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; this includes almost all relevant trading countries of the world; the few non-parties include Angola, Chad, Iraq, Namibia, Nauru, North Korea, Myanmar, Tajikistan, Tanzania, and Yemen. The Convention has been widely and frequently described, particularly last year around the time of its 50th Anniversary, as the most important trade treaty ever created by the United Nations since, without the enforceability of arbitral awards, international trade would be massively more risky, complex and expensive. There is a strong analogy here with the position in Scotland.

hotels, spectacular scenery, golf, whisky, bagpipes, friendly people, good lawyers, and world-class venues for the Hearings. Scotland is accessible, user-friendly, with a good, modern court system if it is needed, and a practical, hands-on reputation for 'getting the job done'²¹.

As stated above, since arbitration is a private dispute resolution process, precise data on volumes are hard to find. We have calculated a figure of £250 million/year as being the value of international arbitration to London²². This covers tribunal costs, institutional costs and the parties' legal and other costs. This is economic turnover, in real money, generated by arbitration practitioners in London.

Taking the population ratio as between England and Scotland, this suggests a potential for up to £25 million in new business in Scotland, but that would be at London's legal rates; applying a 40% discount to convert London to Edinburgh/Glasgow rates brings us back to a potential for at least £15 million of new international arbitration business. Of course this will not happen overnight: international competition for this business is fierce, most notably the aggressive competition of recent years between Singapore, Hong Kong and Kuala Lumpur.

This new business opportunity for Scotland requires zero investment by the Scottish Government or taxpayer.

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

6. As stated above, the principles, and much of the drafting, of the UNCITRAL Model Law have been incorporated into the Bill, much as into the 1996 Act. However the Bill will repeal the Model Law as it presently applies to international arbitration in Scotland, a decision which might appear controversial. In particular it might be argued that repeal will drive international arbitration business away from Scotland. We submit quite the contrary, because (i) there is almost no international arbitral business at present anyway, perhaps only 1 case/year (ii) there is no causal connection between a country's adoption of the Model Law and its success as an international arbitral venue (see above) and (iii) international parties will respond positively (some have expressed interest already) to the availability of an effective arbitral venue with a sophisticated modern arbitration law and rules.

The appropriateness of the designation of the Scottish Arbitration Rules (SAR) contained in Schedule 1 as either "mandatory" or "default".

7. Arbitration is, as stated above, an inherently flexible process offering the significant advantage of procedures being tailored to the requirements of each case. However, there are certain fundamental principles (e.g. those which flow from 'natural justice' or from ECHR Art.6 which cannot be ignored and, as a matter of public policy, are necessarily mandatory and this is common across the world. It follows that there must be mandatory and non-mandatory (i.e. "default") rules, the latter to apply in the absence of agreement to the contrary by the parties, so that if the parties agree nothing or do nothing, they will still acquire a complete and comprehensive set of rules for the conduct of their case. However, if the parties have already agreed something else (except as to the mandatory rules) either by express agreement or by adoption of some other set of rules (e.g. ICC,

²¹ It might seem odd to insert a touristic element here, but place yourself in the position of a party to an arbitration faced with a choice of four weeks in Edinburgh, Glasgow or Aberdeen (on the one hand) or four weeks in Lagos, Riyadh, Düsseldorf or Moscow (on the other); which would you choose ?

²² In 1978 the Commercial Court Committee believed that international arbitration generated hundreds of millions of pounds for the English economy - see its *Report on Arbitration* (1978) Cmnd 7284, para 18.

LCIA or the Scottish Arbitration Code 2007), then that agreement will, where applicable, supersede the default rules in the SAR.

The division mandatory/non-mandatory derives from the UNCITRAL Model Law and is replicated worldwide e.g. in England, Hong Kong, New Zealand and Ireland.

The CI Arb will shortly submit any revisions it recommends concerning which rules should be mandatory and which should be default rules.

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.

8. The Bill has numerous provisions in this regard, in part flowing from Section 1 which states clearly: "The founding principles of this Act are (a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense, ...". Examples of the application of these principles include the following rules (all mandatory)

8(2) An individual to whom this rule applies must, without delay, disclose to the parties any circumstances known to the individual (or which become known to the individual before the arbitration ends) which might reasonably be considered relevant when considering whether the individual is impartial and independent.

12 The Outer House (of the Court of Session) may remove an arbitrator if satisfied on the application by any party (a) that the arbitrator is not impartial and independent²³, (b) that the arbitrator has not treated the parties fairly, ...

23(1) The tribunal must (a) be impartial and independent (b) treat the parties fairly, and (c) conduct the arbitration (i) without unnecessary delay, and (ii) without incurring unnecessary expense.

24 The parties must ensure that the arbitration is conducted (a) without unnecessary delay, and (b) without incurring unnecessary expense.

Extensive experience around the world, particularly in England, has put much flesh on these bones and, for example, CI Arb training programmes hammer home these key messages. Further, the CI Arb's "gold standard" worldwide qualification, "Chartered Arbitrator", not only guarantees the effective and proper conduct of arbitrations but reinforces that by rigorous quality control, complaint and disciplinary procedures.

Other Issues Not Addressed Above

CI Arb Short-Form Rules

9. The Bill covers the entire spectrum of arbitrations and, at first sight, might seem unfriendly to small businesses and consumers. It is, of course, essential that the Bill benefit the entire community at all levels and be seen as a user-friendly process, both domestically and internationally. The CI Arb Scottish Branch has begun drafting new Short-Form Rules to cover smaller arbitrations, and these will be launched in parallel with the Bill and will form a key element of the benefits the Bill will bring the whole community in Scotland.

Comparison to Arbitration Act 1996

10. The Bill has a number of features which, we believe, improve on the 1996 Act; these include:

²³ Rule 74 defines "independence"

- (i) Under the Bill Ministers may by order make any provision which they consider appropriate for the purposes of giving full effect (subject to due parliamentary process) to any provision of the Bill. This is intended to preclude the need for primary legislation to rectify any minor problems (including transitional matters and obvious absurdities or inconsistencies) that may come to light, thereby permitting a rapid response.
- (ii) Section 18 of the 1996 Act brings in the Court to deal with any failure of the appointment process but the question may be asked - with respect, what experience does the Judiciary have of appointing arbitrators? Would it not be more logical to have an experienced arbitral appointing body sort out such failures? Section 22 of the Bill creates "Arbitral Appointments Referees" (AARs) who will resolve such failures.
- (iii) Consistent with ECHR Article 6, the Model Law, the UNCITRAL Rules and extensive recent international developments, the Bill requires arbitrators to be independent as well as impartial; further, prospective arbitrators and arbitrators post-appointment are placed under a clear and continuing disclosure requirement concerning conflicts of interest.
- (iv) The Bill is fully consistent with the Model Law; further, the Scottish Arbitration Rules (SAR) are intended to be both "cutting edge" and consistent, as far as practicable, with the UNCITRAL Rules. To preserve these consistencies, section 24 of the Bill provides that Ministers may by order modify (a) the SAR or (b) any other provision of the Act, in such manner as they consider appropriate in consequence of any amendment made to the UNCITRAL Model Law; it is proposed that the final draft of the Bill will add reference to the UNCITRAL Rules here since they are under revision at present.
- (v) Rule 25 provides an express confidentiality/privacy obligation as a default rule (i.e. from which the parties can opt out), as is given in England by case law; the draftsmen of the 1996 Act considered this area too difficult to draft; the proposed Scottish solution is novel and has been seen and warmly approved by international colleagues.

These (particularly (v)) and other such features have already been noticed by the international community

Conclusions

11. Significant benefits to the Scottish Economy can be achieved for no outlay from the public purse.

At a time when our Courts and the public purse are under so much pressure, the time is right for this Bill to take its place in the armoury of dispute resolution tools available to commercial people, public authorities and consumers.

At the same time, the Bill brings the law in a key area of economic activity right up to date (in world terms), applies to both domestic and international disputes, saves time and money (both private and public) in the Courts and will enhance the image of Scotland in the developed world. This Bill contains the very best of modern international practice and will be much imitated.

The CI Arb is confident that the Committee will see the force of these arguments.

CHARTERED INSTITUTE of ARBITRATORS (CI Arb)
SCOTTISH BRANCH
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