WRITTEN SUBMISSIONS FROM RICHARD N.M. ANDERSON F.C.I.Arb

INTRODUCTION.

1. This Bill, which the Sponsors have persuaded the Ministers to adopt and which has now been assigned to the Economy, Energy and Tourism Committee, has as its stated aims and objectives:- (1) the consolidation of existing arbitration case law; (2) an improvement in the use of domestic arbitration in Scotland; and (3) the attraction of international arbitration to Scotland. These are laudable aims and objectives and in my view the real issue is whether this Bill adequately meets those aims and objectives and whether or not this Bill should be brought into law in its current form. In my view, for the reasons set out below, it should not be.

IMPLEMENTATION

2. A leading international practitioner in arbitration recently said to me “Why should I put forward Scottish Arbitration as a recommendation to my clients when I do not know what that involves and I have heard no reports as to its efficacy”. That would appear to be an entirely understandable approach but it does underline what I take to be a fact of life in international arbitration which is that a country really only gets one chance at ‘making its name’ on the international arbitration scene. Accordingly, it is my view that it is vital that we “get it right” with this Bill. If the general view is that this Bill will do that job then the Bill could be implemented. If, however, there are some doubts about that then in my view the Bill should be postponed until it is in a condition whereby we are likely to “get it right”. It would be a bed, probably fatal, tactic in my view to introduce this Bill and then incessantly ‘tweak’ the legislation in an attempt to ‘get it right’. It is my view, for the reasons set out below, this Bill should be postponed for a brief period.

THE “CHAIN” EFFECT

3. It also appears to me, as a practitioner in arbitration in both Scotland, England and abroad, that there is a ‘chain’ or ‘link’ effect here in the sense that if arbitration can be seen to be very effective domestically in Scotland then that of itself is likely to attract international arbitration. I now turn, therefore, to consider the extent to which this Bill is likely to improve the use of domestic arbitration in Scotland. I do so by reference to an example.

DOMESTIC ARBITRATION IN SCOTLAND

4. I propose here to take the example of a company which undertakes to carry out a substantial body of work for another company. For their contract, they use a Standard Form which contains an arbitration clause (although the objective of the Bill, of course, is that, even without that, in the event of a dispute the Parties would chose arbitration over litigation). This particular contract represents virtually the entire turnover of the company involved. So far as the company

placing the contract is concerned, their relationship with their Client alters from a fixed price to a cost plus basis and they decide to take back the work in order to make a greater profit from it. The company affected – now financially stretched in that virtually a whole year's turnover has been expended on this job - raises a court action alleging repudiation of their contract. Because of the arbitration clause, the court action is sisted (paused) to allow an arbitration to take place (again, the objective of the Bill would be to create a situation where the Parties would have chosen this in any event).

5. From the point of view of the disinterested bystander (and society as a whole), this dispute should not have taken long to resolve. It was referred by a Court to an Arbiter who ought simply to speedily arrive at his determination which, if necessary, could be reported back to the court. From the point of view of the company placing the work, they are presumably interested primarily in obtaining natural justice and a fair decision as to whether or not they have repudiated the contract. From the point of view of the company given the work, however, this arbitration is more serious – a successful outcome would allow the company (some 50 employees) to recover its losses and continue in business. An unsuccessful outcome in the arbitration, they would have to accept, would mean the end of the business and the company. For all concerned, the objectives of this arbitration (and, through it, any international arbitration attracted) must be a reasonable procedure; a reasonable timescale; and at a reasonable cost.

How, then – using that example - are these issues to be addressed in arbitration to-day and as a result of the introduction of this Bill in its present form?

PROCEDURE

6. Believe it or believe it not, but when arbitration underwent a resurgence in the last century, it was regarded as a speedy method of dispute resolution which was far better than the cumbersome method of litigation. As the century developed, however, it was arbitration which became much more cumbersome to the point where arbitration became worse than litigation and in drawing up contracts for clients many lawyers preferred litigation in the commercial court to arbitration and struck out arbitration as a choice.

7. The reason for this, I believe, is to be found in a book recently written by J Mariott QC, a leading practitioner in arbitration in England in which he states: "There is strong anecdotal evidence to suggest that the standards in domestic arbitration in England, particularly in the construction industry, declined during the 1980's. Despite pleas to the contrary by very distinguished judges and frequent public pronouncements to the same effect by other leading figures, Arbitrators continued to conduct proceedings slavishly following High Court procedures." Similar pronouncements have been made by leading Judges in Scotland to no effect.

8. The fact of the matter appears to be that while litigation tends to involve something of a learning curve for all involved until the dispute is worked into a

form suitable for decision, increased specialisation in the areas subject to arbitration allows for unlimited ‘nitpicking’ as to the contents of the reference to arbitration.

9. In the example given here, the Arbitrator was unable to resist adopting the mantle of a Court of Session Judge. He insisted upon detailed written pleadings in the arbitration and then pronounced those pleadings to be inadequate before throwing the whole arbitration out without a single word of evidence being heard. To some extent, situations such as this could be improved by better training of Arbiters but in my view the real solution – if international arbitration is to be attracted – is to address this problem in the legislation.

10. My own personal view is that the Arbitration (Scotland) Bill in its present form has not been well drafted. Amongst other things, I am of the view that the Arbitration Rules should be in an Act and not in a Schedule. This Bill, in my view, is a pale shadow of the excellent Arbitration Act to be found in England.
However, the point is that even with that excellent Act in England, my experience in England – supported by strong anecdotal evidence – is that there is virtually no domestic arbitration taking place in England.

11. What is required here, therefore, is for the Scottish Bill to ‘leapfrog’ the English Act. The Scottish Bill must go ‘one better’ and provide the solution to this problem which will allow domestic arbitration to take off in Scotland and to be a success there. This Bill simply does not do that. There is no shame in that, in my view. Over the 20 years of attempted reform some ‘reform fatigue’ appears to have set in. In England, the combined efforts of the best brains at the English Bar and the best Parliamentary Draftsmen in the Westminster Parliament took about six attempts before they got their Act through. It is unlikely that Scotland could achieve this in ‘one go’. This Bill, in my view, should be the subject of wider consultation and a redraft

TIME

12. A major consideration in arbitration is the time it takes. Adopting procedures such as those outlined above tends to drag matters out. In the example given – through no fault of the Claimant who has pursued his Claim as hard as he could – the matter has so far taken 16 years.

13. The best solution here, in my view, is for the legislation to specify the time involved. As a general principle, arbitration should be consensual and if the parties wish to go down the traditional route and leave the arbitration open-ended so far as time is concerned then that should be their choice. However, it is my view that for domestic arbitration to work in Scotland (and for international arbitration to be attracted to Scotland) there must be a procedure introduced within an Act itself which allows the Parties to choose a framework as regards time. It will not do, in my view, to suggest that there will later be some other regulations drafted which can be attached to this Bill. In my view, this aspect must be a ‘mainplank’ of this legislation and has to be found within the very body

of any Act. This Bill, in my view, should be the subject of wider consultation and a redraft.

COSTS

14. Another major consideration in arbitration is the cost involved. Arbitration is not a free service and professional representatives require to be paid. There is nothing wrong with the principle that expenses should follow success in the outcome of the arbitration at the end of the day. However, if arbitration is to be attractive – both domestically and internationally – then the costs of arbitration must not be allowed to run away with themselves. In the example giver, the Arbiter made an award of expenses for a Minute of Amendment to the Pleadings (which did not alter the legal case made in any way and was simply a 'tidying up' exercise) which the Arbiter allowed to be taxed and which produced a bill of £196,000 which required to be paid before the arbitration could proceed.

15. In its present form the Bill appears to simply make the rather clumsy provision that "expenses will be taxed by the Auditor of the Court Of Session". Why should that always be the case? Why should that high scale always be used? Why should an Arbiter not have the option to use the lower Sheriff Court scale or even employ a Cost Accountant and arrive at his own determination of costs (capped if necessary). In my view, in order to make arbitration attractive both domestically and internationally, this aspect of cost requires to be addressed. This Bill, in my view, should be the subject of wider consultation and a redraft

SUMMARY AND CONCLUSIONS

16. As noted above, the aims and objectives of this Bill are very worthwhile and the exercise should not be lost sight of. The simple fact of the matter, in my view, is that the Bill in its present form will not achieve the declared aims and objectives [bar aim or objective (1)]. In my view, it would be a major tactical error to try to introduce this Bill and then try to amend it later. The Bill itself, in my view, represents a good foundation and with further consultation and redrafting – which could perhaps be achieved in as little as six months – offers the potential for achieving its declared aims and objectives which would benefit Scotland.

Richard N.M. Anderson F.C.I.Arb
Advocate, barrister and Attorney (NY)
14 May 2009