Arbitration
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The Arbitration (Scotland) Bill 2009

A giant leap for [Scots] mankind

On 18th November the Arbitration (Scotland) Bill 2009 was passed by the Scottish Parliament, the first time in the 800-year history of arbitration in Scotland that we have had a fully comprehensive arbitration statute. This was an event of immense significance, not only for Scotland. This article, written by Hew Dundas, who had a significant role in the passing of the legislation, will focus on some comparisons with the Arbitration Act 1996; a full, definitive article will appear in 'Arbitration', the Journal of the Chartered Institute of Arbitrators, in February 2010.

Background

Scots law is wholly different from that in England & Wales (and that in Northern Ireland) although many aspects of the law are near-identical eg corporate law, adjudication law and all laws derived from Brussels. Arbitration law is probably as far-apart different as any as will become apparent; in particular, the 1996 Act was an evolution of successive Arbitration Acts dating back at least to 1889 whereas Scotland has never had a 'proper' arbitration Act before, being one of the few countries in the world lacking a modern domestic arbitration statute. Scots arbitration law is a mixture of out-of-date, old, very old and truly ancient case law (dating back at least to 1207) and piecemeal statute (back to 1598 and 1695) and is riddled with anomalies and uncertainties. An attempt at a Bill was made in 1996 but attracted no political support and a privately-drafted Bill was submitted to the Scottish Government in 2002, substantially consistent with the Model Law and drawing on the best features of the 1996 Act, but the Government all but ignored it.

There are numerous problem areas in existing Scottish arbitration law, not least that it is almost totally reliant on old and obscure case law (in a November 2009 case in the Scottish court the most recent case cited was in 1909; a recent query over present Scots law is answered (wrongly!) by cases from 1875 and 1884) amd many of the features of modern arbitration are absent or, worse, in some instances even rejected (see (iii) below). In many aspects, the law provides no answer or guidance at all so that everything has to be left to the parties to agree - the law will not help. Futher, the obscurity and complexity of the law is such that it has been common for Scots arbiters to sit with a solicitor as clerk to advise on the law. I give but a few examples:

(i) the question of severability in Scots domestic law is unclear

(ii) the principle of *kompetenz-kompetenz*, enshrined in the Model Law and the 1996 Act, was expressly rejected in the leading (and still binding) Scots case (1872) where it was held that the concept of an arbiter determining his own jurisdiction would be 'as unwarrantable in principle as … it is inexpedient in practice';

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(iii) there is no express provision in Scots law for an arbiter to award damages, costs or interest

(iv) the law does not make any provision regarding privacy or confidentiality in arbitration, there being neither statute nor case law on the point;

(v) the applicability of court rules of evidence in Scots arbitration is uncertain;

(vi) the dismal and profoundly discredited Stated Case Procedure, a licence to delay and disrupt an arbitration, was introduced in 1972, shortly before England (very sensibly) repealed it in the 1979 Act;

(vii) there is no s57 slip rule;

(viii) there is no legal presumption in Scots law that an arbiter may make a part (partial) or interim award; absent express agreement between the parties providing for rectification or correction of a slip, the award will not be corrected;

(ix) the question whether arbiters have any immunity from suit is no more clear than other areas in Scots arbitration law;

(x) one of the most remarkable anomalies of Scots law is that a party or his agent can be appointed arbiter, although it is hard to see such an appointment nowadays surviving in the climate of ECHR Art.6;

There are many more anomalies and even more uncertainties in Scots arbitration law; it is striking how often there is no definitive answer available to commonplace arbitration issues and disappointing to see how many of the common themes of modern arbitration have no place in Scots law.

All this has, of course, been rectified by the Bill ... and more!

The Arbitration (Scotland) Bill 2009

Readers of *Arbitration Law Monthly* might well say 'it's simple; why didn't you adopt the 1996 Act ?' I cannot speak for what did/did not happen around 1996 but in 2008/09 this was one of the options under consideration, the others included (a) do nothing (b) adopt the Model Law across all arbitration (see below) and (c) draft our own Bill. Politically, the last was strongly preferred (ie refusing to adopt anyone else's legislation) whatever analytical merits each option had; my own view was always, strongly, for (c).

This Bill is unique in the 10 years since the reopening of the Scottish Parliament and, wholly separate from the massive changes made in Scots arbitration law (dragging it from its mire in the 19th century to today, indeed a 'Giant Leap for [Scots] Mankind'), has considerable wider significance; *inter alia*, with a minority government inevitable under the devolution voting structure, the intention of the legislation was that the Parliament function by consensus politics but, sadly, this has not always been the case but the Bill saw all-party co-operation on an unprecedented scale and may, in time, be seen to represent the model of how the system should work and can work. Further, unlike any other Scottish legislation (save only one other Act implementing treaty obligations concerning extraditing terrorists), the Bill has worldwide extraterritorial effect in that, should they chose to seat their arbitration in Scotland. The fact that approximately 30 countries have contributed by way of consultation is, again, unique. Never before has Scottish legislation seen such a massive contribution from private parties, one in particular, a fact graciously recognised by the First Minister of Scotland in a letter; the CIArb Scottish Branch's various submissions totalled more than 40,000 words and its final Briefing Paper was 17,000 words, longer than the Bill itself.

The main provisions of the Bill have been arrived at after extensive consultation, both in Scotland and elsewhere; there will be few surprises for those familiar with the 1996 Act although, pursuant to the Scottish Government's 'plain English' drafting policy, some of the language is different and simpler, particularly having shorter sentence lengths. Old fr iends such as separability, limitation on the Court's involvement, the arbitrator's control of procedure, consolidation, challenges to arbitrators, the awarding of interest, the slip rule, costs follow the event, cost-capping, challenges to awards, the opt-out of challenges on a question of law, judge-arbitrators, etc reappear, not because they are in the 1996 Act but because they are, in our carefullyconsidered, internationally-consulted view, necessary inclusions. The regime for challenging jurisdiction is substantially the same as in the 1996 Act, despite this being out of line with modern international practice which, outside England and Wales, generally excludes a full *de novo* review by the Court.

Further, the process of challenging awards broadly follows the successful 1996 Act model including challenges on questions of law; since the 10-Year Survey of the 1996 Act showed a clear majority for retaining the present s69 1996 Act regime we saw good reason to follow the international market's preferences in this contentious area. As in England, the parties can agree to exclude any such appeal.

There is a major structural difference between the 1996 Act and 2009 Bill: the former is a mixture of law and procedure while latter separates 'the legal stuff' from 'the procedural stuff' by putting the latter in Sched 1 to the Bill, as the Scottish Arbitration Rules (the 'SAR'), the concept being that the businessman need only refer to the Rules.

The Bill has a number of features which build on the 1996 Act and/or extend and/or augment it to cover issues not addressed therein:

(i) English law is contradictory as to which law applies to the arbitration agreement; in *Sonatrach Petroleum Corporation v Ferrell International Ltd* ([2002] 1 All ER (Comm) 627), it was decided that the law of the main (ie container) contract

should govern the arbitration agreement itself (ie the separable contract to arbitrate), as distinct from the law agreed to govern the arbitration) whereas in *C vs D* (2007] EWCA Civ 1282 (upholding the first instance decision of Cooke J at [2007] EWHC 1541 (Comm)) the Court decided that the law of the seat should govern. The Bill provides that where (a) the parties agree that the arbitration is to be seated in Scotland, but do not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law. An informal worldwide survey revealed a remarkable lack of clarity in this area; to my knowledge, no legislation anywhere else definitively addresses this difficult issue.

(ii) s18 of the 1996 Act brings in the Court to deal with any failure of the appointment process but, with respect, what experience does the judiciary have of appointing arbitrators? Would it not be more logical to have an experienced appointing body sort out such failures? The Bill creates 'Arbitral Appointments Referees' who will do so and the CIArb, RICS and (no doubt) others will, in due course, apply to be registered as an AAR.

(iii) Mindful of the excellent example of Singapore where the legislature has in the past responded with remarkable speed to rectify anomalies in its arbitration law, under the Bill Ministers may by order make any provision which they consider appropriate for the purposes of giving full effect to any provision of the Bill (a parliamentary process follows, albeit a simplified one compared to primary legislation). Subject to certain constitutional restrictions, this will preclude the need for the full panoply of pr imary legislation to rectify any minor problems (including transitional matters and obvious absurdities or inconsistencies) that may arise, thereby permitting a rapid response.

(iv) The Bill is fully consistent with the Model Law and incorporates the relevant text of NYC58; further, the SAR are intended to be both 'cutting edge' and consistent, as far as practicable, with the UNCITRAL Rules. To preserve these consistencies, s24 of the Bill provides that Ministers may by order (see (ii) above) modify (a) the SAR, (b) any other provision of this Act, or (c) any enactment which provides for disputes to be resolved by arbitration, in such manner as they consider appropriate in consequence of any amendment made to the UNCITRAL Model Law, the UNCITRAL Rules or the New York Convention.

(v) There are express provisions concerning the resignation of an arbitrator, a curious omission from the 1996 Act where the consequences of resignation are addressed but not the process of resignation itself. These provisions have a potential drastic effect on the arbitrator's immunity from suit by the parties eg in that an unreasonable resignation may lead to loss of immunity.

(vi) There is an express confidentiality/privacy obligation as a default rule (ie from which the parties can opt out by express agreement), as is given in England by case law but the drafters of the 1996 Act considered this area too difficult to draft (as it undoubtedly was at the time); thanks to Lawrence Collins LJ's (as he then was) masterly judgment in *Emmott v MichaelWilson & Partners Ltd* [2008] 1 Lloyd's Rep 616, a Scottish solution (substantially drafted by the CIArb) is both novel and, we submit , as effective as is reasonably practicable.

(vii) The Bill covers oral arbitration agreements, excluded from Part 1 of the 1996 Act, since these reportedly do occur from time to time eg in local agricultural disputes; of course proving such an agreement is another matter; preservation of the common law for such oral arbitration agreements (as in s81 of the 1996 Act) is a recipe for disaster given the dire state of that common law.

(viii) Consistent with ECHR Art 6, the Model Law, the UNCITRAL Rules and extensive recent international developments, the Bill requires arbitrators to be independent as well as impartial. We respectfully disagree with the DAC's analysis here, particularly given ECHR Art 6 (not directly applicable in 1996).

(ix) Prospective arbitrators and arbitrators post-appointment are placed under a clear and continuing disclosure requirement concerning conflicts of interest.

(x) Following *Cetelem v Roust* [2005] 2 Lloyd's Rep 494 the Court will have the power to grant interim measures given no more than the existence of an arbitration agreement and a (*prima facie*) relevant dispute;

(xi) The Bill expressly deals with the *Gannet v Eastrade lacuna* where, following application of the slip rule to correct a miscalculation, the arbitrator revisited his expenses award to make a consequential change to the costs award from 100/0 to 50/50;

(xii) In an effort to reduce the role of the Court, the Bill limits jurisdictional, serious irregularity and legal error appeals from the first instance decision; further, there is no appeal to the Supreme Court in any circumstances.

(xiii) Every person who participates in an arbitration as an expert, witness or legal representative has the same immunity in respect of acts or omissions as that person would have if the arbitration were civil proceedings.

(xiv) The confusing and often mis-used terminology 'interim', 'part/partial' and 'provisional' awards is made precise; 'interim' will drop out of usage, 'part/partial' will refer to a final and binding award on one or more issues in the arbitration, and 'provisional' will mean an award, eg for an interim payment on account, but binding only until superseded by a partial or final award on the same issue.

Finally, the language of the Bill differs from that in the 1996 Act, in part because of the obvious reason of different Scots legal terminology (but the time-honoured 'arbiter' is gone) but, more significantly, because the Scottish Government's 'Plain English' Policy rejects some of the language in the 1996 Act (otherwise regarded as a model of elegant, simple drafting) as being too difficult. To repeat, the SAR are intended to be read and used by businessmen, not only lawyers; one example is in Rule 3 which specifies that an arbitrator shall be an individual whereas reference to 'natural person' might be expected. In addition, there are a number of provisions which are not strictly necessary but are included 'for the avoidance of doubt' to help lay users, eg Rule 9 lists, with cross-references to Rules 4, 10, 11/12, 13, or 15, five ways in which an arbitrator's tenure can end.

One matter has been omitted from the Bill and that concerns express provisions to deal with smaller cases, eg those involving consumers and small businesses. Politically it is essential that the Bill be seen to benefit the entire community at all levels and be seen as a user-friendly process. The CIArb Scottish Branch has drafted the Scottish Short-Form Arbitration Rules to cover smaller arbitrations, intended as applying to claims up to £25,000.

There is one aspect of the Bill which is unsatisfactory but a political compromise had to bemade. Certain parties in Scotland effectively wanted to preserve the old law in perpetuity by requiring that any arbitration agreement in existence at the time the Act comes into force (the Commencement Date) should continue to apply the old law, despite it being universally recognised that the old law was antiquated, wholly inadequate and often plain wrong (eg the principle of *Kompetenz-Kompetenz* is presently expressly excluded from Scots law thanks to an 1872 case). The only logical solution is that all arbitrations already under way at the Commencement Date continue under the old law and all new ones under the new law. The proposed perpetuation of the old law was, quite frankly, utterly absurd; *inter alia*, its proponents argued that the simple solution was unconstitutional in effectively being retrospective legislation. This argument was patently rubbish since the Arbitration Acts of 1889, 1934, 1950, 1979 and 1996 all adopted the 'simple solution'. The compromise is that (a) arbitrations already under way continue under the old law and (b) the Bill will otherwise apply to all arbitration agreements whether made on, before or after the Commencement Date BUT the parties to an existing arbitration agreement may agree that the Act is not to apply to arbitrations arising under that arbitration agreement; this option expires five years after the Commencement Date.

The most controversial aspect of the Bill is the repeal of the 1990 legislation which enacted the Model Law in Scotland; that legislation was fundamentally and fatally flawed from the outset in that it failed to address, let alone rectify, the significant inadequacies of the old law. I was not involved at the time, but I have been told by several key players that the 1990 legislation was political opportunism in response to the 1989 Mustill Report which rejected the Model Law as the way forward in England, not carefully-thought-out legal strategy. How on earth could anyone in 1990 have expected foreign parties to come to Scotland to arbitrate when the law gives the arbitrator no power to award damages, costs of interest? (Of course, the parties could give that tribunal such powers but that is to miss the point of the serious deficiencies in the law.)

The solution in the Bill is twofold: first, as I have said above, the Bill includes all the provisions of the Model Law; second, the Bill gives the parties the option to apply the Model Law but not as a total alternative to the Bill, instead subject to the overriding safeguards in the Bill (many not given by, therefore adding to, the Model Law) which apply on a mandatory basis. The solution seen in many Model Law jurisdictions,ie of enacting the Model Law then adding vast swathes of extra legislation to fill in the gaps (the Model Law has a mere 5,400 words but Bermuda adds 5,500 words to it, Singapore 8,500 and New Zealand 11,000) was unanimously rejected in Scotland.

Postscript

By way of postscript, I observe that the Bill is approx 15,500 words long (excluding technical material such as Schedules of Repeals etc) whereas the UK's 1996 Act is 19,200 words and I am told that the new Irish Act has more than 22,000. The as-approved text can be found at *www.scottish.parliament.uk/s3/bills/19-Arbitration/b19bs3-aspassed.pdf*.

Further, the Official Report of the Parliamentary Debate can be found at *www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1118-02.htm#Col21260*