

Scottish
Branch**CI Arb**

www.ciarb.org/scotland

Special points of interest:

- First Arbitration Act cases discussed
- Full complement of Branch courses
- September events not to be missed

Patron: the RT HON LORD HOPE OF CRAIGHEAD

The Chairman's message**By John Hunter, MCI Arb.**

As we look forward to a New Year in these difficult times I am pleased to say that the Scottish Branch has lots of positive initiatives planned for 2012. We will start off the year by supporting the SAC at its London launch on 18 January. Our annual dinner in March will have an international flavour once again with our main speaker travelling from the USA to entertain us. We then look forward over the summer to our preparations for hosting the World Congress in the autumn. In conjunction with that event we are planning a



conference at which we hope to be able to launch the Scottish Short Form Arbitration Rules.

Best wishes for Christmas and a prosperous New Year.

Scottish Branch Newsletter

THE CHARTERED INSTITUTE OF ARBITRATORS

**In this edition...**

**Donny Mackinnon FCI Arb, C. Arb,
Honorary Editor and
Alice Williams, Burness LLP**

Happy Christmas.

This month we have pleasure in offering you a double treat concerning the first cases arising from appeals under the Arbitration (Scotland) Act 2010. Shona Frame and David Bartos have been busy keeping us up-to-date with the judgments and their thoughts on them. Len Bunton updates us on the high activity on the education front, with changes to CPD and the Associate Member entry course.

In addition, the forthcoming events include our Branch Annual Dinner, which takes place on 16 March 2010. This year, it is in Edinburgh. A booking form is attached. Book early to save disappointment.

We look to 2012 with great anticipation. Now that the Arbitration Act has been tried and tested, we may have further judicial guidance next year and, of course, we have the pleasure of hosting the institute's Congress in October: expect to hear much more on this in due course. It will be an extra-ordinary opportunity for all Scottish Branch members to participate in a truly international event and meet practitioners from across the globe.

We wish you a Merry Christmas and a peaceful New Year.

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Legal Error Appeals: The First Shoot Appears

by David Bartos, Advocate

Finality is one of the underlying reasons why arbitration is often preferred to litigation as a means of dispute resolution. The arbitrator or tribunal of arbitrators is chosen with care as it is expected that their views will be final. The advantage of finality is that for better or worse a line can be drawn under the dispute and parties can move on against that background without the uncertainty that a continuing dispute can bring. That advantage comes with a price. The price is the absence of the quality control present through the review of a court. Where an award has been made without the tribunal having jurisdiction or following unfair or irregular procedure by the tribunal, it has always been acknowledged that the price for finality is too high. Parties would not have confidence in a process which allowed such errors to be made without review. What of the position regarding errors by the tribunal in choosing and applying the law to the merits of the dispute? Should finality override quality in those situations?

Across the world different arbitral regimes have adopted different solutions. In Scotland, prior to the Arbitration (Scotland) Act 2010, the stated case procedure under the Administration of Justice (Scotland) Act 1972 in practice allowed full review of errors of law in relation to the merits of awards. By contrast, the UNCITRAL Model Law on International Commercial Arbitration allowed no such control. In England and Wales, the Arbitration Act 1996 followed a middle way, allowing a challenge to a tribunal's award on the grounds of the erroneous application of the law to the merits in certain limited circumstances (1996 Act, s. 69). That practice had been reviewed by an English Commercial Court Users Standing Committee which reported in 2006 and found it to be satisfactory with no great demand for either exclusion or widening of legal error challenges.

The 2010 Act decided to follow the English experience in Rules 69 and 70 of the Scottish Arbitration Rules contained in schedule 1 to the 2010 Act. Parties are given the power to opt out of

such challenges under these rules and the exclusion of the stated case procedure is deemed to be such an opt out. The recent case **Arbitration Application No. 3 of 2011** [2011] CSOH 184

available on www.scotcourts.gov.uk, provides an example of a challenge under these rules.



The dispute arose out of a building contract. The employer claimed against the contractor for repayment of money paid under interim assessments. The contractor counterclaimed for payment of additional sums. The arbitrator was asked to decide a number of preliminary issues. He decided these in a part award. There is some uncertainty about the terms of the part award. It may have been a declaratory award, given that Lord Glennie comments that “the result of the decision cannot presently be expressed in monetary terms”. Presumably as part of the reasons for the award, the arbitrator held (1) that the onus lay on the employer to prove that less was due than had been paid, but that the onus lay on the contractor to prove that more was due; and (2) that the employer's averments about a tender from another contractor were irrelevant to the issue in dispute.

The employer challenged the award claiming that the arbitrator had erred in law on the two issues. Rule 70(2) allows a challenge to an award by means of a legal error appeal only with the leave of the Outer House of the Court of Session unless the other side agrees. In this case the employer had to seek leave. The appeal had to be made by means of a petition to the Court of Session combined with a motion for leave to appeal being made at the same time.

In order to grant leave to appeal the Outer House has to be satisfied that –

- (a) deciding the point will substantially affect a party's rights
- (b) the tribunal was asked to decide the point

'Across the world different arbitral regimes have adopted different solutions'

Legal Error Appeals: The First Shoot Appears continued

(c) that on the basis of the findings in fact (including any facts treated as established for the purpose of deciding the point), the tribunal's decision on the point –

- (i) was obviously wrong, or
- (ii) where the court considers the point to be of general importance, is open to serious doubt.

These conditions are very similar to those in section 69 (3) of the 1996 Act.

In deciding whether the point of law will “substantially affect a party's rights”, English case law indicates that the rights in question are the rights under the award being challenged. Thus the point of law must by itself have the effect of substantially changing the terms of the award.

The whole aim is to ensure that points of law are raised only in relation to significant rights determined in the award which hinge on the point of law.

'The court does not disclose even in general terms what the award was, and so it is impossible to assess the extent to which the issue of onus affected the terms of the award'

On the first ground of challenge, the court found that the point of law regarding the onus “is likely to have a significant impact on the whole conduct of the arbitration and might well affect the final result” and therefore “substantially affected a party's rights”. This seems to miss the aim of condition (a). The court does not disclose even in general terms what the award was, and so it is impossible to assess the extent to which the issue of onus affected the terms of the award. Generally speaking onus rarely affects the terms of an award although it is possible that onus could affect such rights in an award after a debate without evidence being led. However the reasoning of the court suggests that the court has not properly applied condition (a). This has the risk that challenges to awards could be allowed on points of law which would have no substantial effect on the award being challenged. That was not the intention of Rule 70 (3) (a).

Turning to condition (c), namely that the tribunal's decision was “obviously wrong”, or if a point of general importance, open to “serious doubt”, the court found that given that the parties

had contracted under a standard form of building contract, the point of whether the employer had the onus of proving that he paid more than he was required was one of general importance on which the court had serious doubt as to the correctness of the tribunal's decision. The doubt rested on the provisional nature of the assessments under which the employer had paid and a “possible mismatch” between the onus being placed on the employer to prove that the sum due was lower and the onus being placed on contractor to justify its claims to additional sums by proving that the overall sum due, (inclusive of sums challenged by the employer) was higher. Here the court's treatment is in line with the control anticipated by the 2010 Act.

By contrast the court found that the second ground of challenge did not involve an error of law at all. The second ground was that the arbitrator erred in law in refusing to allow the employer to lead evidence about that tender at a subsequent hearing despite that evidence being legally relevant. The court found that even if the arbitrator had erred, this did not involve an error of law for the purposes of a legal error appeal under Rule 69. It observed that under Rule 28 (1) (b) the relevance and materiality of any evidence was a matter for the tribunal to determine and that the tribunal's decision on this was not an error of law in the sense contemplated by Rule 69. This is undoubtedly correct. Firstly there is some doubt whether a decision to exclude averments of fact (in effect evidence) can be covered by the terms of award as opposed to a procedural direction or order or reasons for an award, none of which are challengeable. Secondly, if a tribunal makes such a direction under Rule 28 (1) (b) then the only conceivable remedy lies in a serious irregularity appeal under Rule 68 against the eventual award on the basis of the tribunal causing substantial injustice to a party by not giving a party a reasonable opportunity to put its case in terms of Rule 24 or perhaps not dealing with all of the issues that were put to it. Any remedy for the employer therefore lay in the future, in a possible serious irregularity appeal against the award to which the excluded averments and evidence would relate. It

Legal Error Appeals: The First Shoot Appears continued



was therefore apt for the court to remind the employer that it was still open for him to try to persuade the tribunal of the relevance of that evidence.

Arbitration Application No. 3 of 2011 provides an interesting illustration of the concept of a legal error appeal. The differing treatment of the two grounds of challenge shows that a legal error appeal is limited to an error in the law used to decide the merits of the award and that other

points of law must be brought, if possible under the heads of a serious irregularity or jurisdictional appeal. It also provides valuable guidance on the practice to be followed in making applications for leave and appeals generally and indicates that even if leave is allowed, the aim of the court is to dispose of the appeal within weeks. In the interests of finality, that is strongly to be welcomed.

Members' Discount: Scottish Arbitration Handbook

Avizandum Law Publishing is offering members a time-limited discount of 10% on the *Scottish Arbitration Handbook* (by David Parratt and Peter Foreman).

ISBN: 978-1-904968-44-3 Full price £95.00
To secure your copy at the discount (£85.50) just email customerservice@avizandum.com and quote the code 'ARBOFF1'.

The *Scottish Arbitration Handbook* is an accessible and practical guide to the new law. Using the legislation as a framework, it combines explanation of 2010 Act and the Scottish Arbitration Rules with informed commentary on how the conduct of arbitration in Scotland is likely to develop and analysis of the concepts that have developed in other jurisdictions.

The book is aimed primarily at practitioners, whether arbitrators, advocates, solicitors, parties or their representatives. The authors draw on their experience in practice to address the issues that commonly arise during arbitration, and interject 'Practical Points' throughout the text.

Coverage includes:

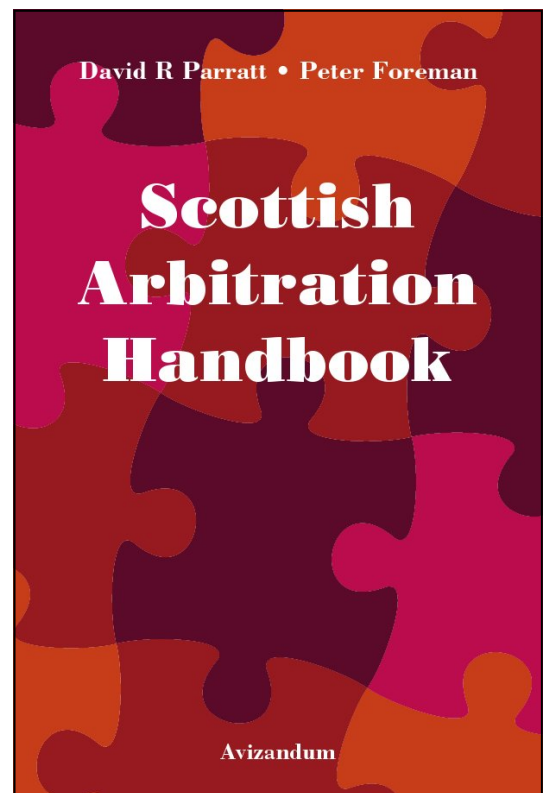
- Arbitration (Scotland) Act 2010
- Scottish Arbitration Rules
- Rules of Court, Chapter 100

applications and appeals under the 2010 Act) and new rule on enforcement of Convention awards

- sample applications under the 2010 Act

The *Scottish Arbitration Handbook* is an invaluable source of information and guidance for all those considering arbitration.

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Court Approach to Appeals under Arbitration (Scotland) Act 2010

By Shona Frame, Partner, MacRoberts LLP



Following the codification of the Scottish Law on Arbitration in the Arbitration (Scotland) Act 2010, the Court of Session has now set out useful guidance on its approach to appeals under the Act. This guidance applies not just to the legal approach but also to the application and operation of the new Rules of Court which have been introduced setting out the procedure to be followed in arbitration referrals.

To date (end November 2011), there are two case reports. To preserve anonymity of parties, these are referred to as: "Arbitration Application No 3 of 2011" (5 October 2011) and "Arbitration Application No 2 of 2011" (9 November 2011) (which in fact incorporates Application No1). Both applications were dealt with by one of the dedicated arbitration judges, Lord Glennie.

Application No 3 was for leave to appeal the decision of an arbitrator on grounds of legal error. To justify leave, the court needs to be satisfied that deciding the point will substantially affect a party's rights, the tribunal was asked to decide the point and the tribunal's award was obviously wrong or, if the point is considered to be of general importance, is open to serious doubt. The judge drew parallels between this test and that in England under the Arbitration Act 1996 so that English authorities were said to be relevant. It was also said that this wording was deliberately restrictive to protect party autonomy, privacy and finality and avoid awards being too easily transferred to the Courts for review. That would appear to be a clear message that the Courts will not lightly interfere in arbitrations.

The first question considered in Application No 3 related to a decision on which party had the onus. The judge was satisfied that this raised a point of law (both a general point and a point about the construction of the contract), the tribunal was asked to decide the point and a decision on it would substantially affect parties' rights. The point was also of general importance as it arose from a standard form building contract. The judge did not go so far as to say the arbitrator was obviously wrong but considered the decision was open to serious doubt. Leave to appeal was granted.

The second question was whether the arbitrator was correct to exclude statements within one party's written pleadings.

This was considered to be an evidential matter, not one which raised a point of law. It was for the arbitrator to decide questions as to admissibility, relevance, materiality and weight of evidence. The court would not interfere. Even if this was treated as a question of law, the court would not have granted leave as the arbitrator was not obviously wrong, that being the test since there was no suggestion that this was a matter of general importance.

Application No 2 was a legal error appeal. In discussing the test to be applied, the judge confirmed that the "obviously wrong" test only applies to the issue of leave to appeal where the point is not of general public importance and there is no agreement between parties that an appeal can be brought. The judge referred to this as a "threshold test". In the appeal itself, however, that is no longer the test. At that stage the court is only concerned with whether, on the point of law raised in the appeal, the arbitrator made a legal error. On the facts and legal arguments of this particular case, the judge was not convinced the arbitrator did err in law and the award was upheld.

The above provides some clarification of the tests applicable. However Application No.3 is particularly helpful in the guidance provided to practitioners on procedural matters with reference to the new Chapter 100 of the Court of Session Rules which deals with Arbitration.

Rule of Court (RC) 100.5 provides that all applications and appeals must be made by petition, or, if there is already a petition in place for another aspect of the arbitration, by a note in that pre-existing petition. The case clarified, however, that the intention is not to introduce the formality associated with petition procedure and as a result some of the normal procedural rules associated with petitions are disapplied. It was said that the intent was to make the procedure as flexible as possible. RC 100.7 lists the information to be

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Court Approach to Appeals under Arbitration Act 2010 continued

included in the petition but, other than that, it was said that it should not be necessary to set everything out at length in the petition. The basis of the challenge, in the context of the underlying dispute and what has happened in the arbitration, should be set out as simply as possible.

Following intimation and service of the petition on the other party, and except in applications for leave to appeal in legal error appeals, the next step is that the respondent will normally be required to lodge answers. An application is then made to the court for further procedure to be fixed. This is regarded as an essential case management step. The purpose of this is to allow the court *"to take hold of the case and ensure that it is dealt with as expeditiously and economically as possible"*. The court would decide at that stage on the further procedure most appropriate in the circumstances.

Taking the example of a legal error appeal, the court commented that the point of law would be argued on the basis of facts found or assumed in the award. The legal arguments for each party would be set out briefly *"but adequately"* in the petition and answers and the court should then be able to move straight to fixing a legal hearing (a debate) and, if necessary, order written notes of arguments in advance, without any further exchanges between the parties.

In contrast, where there might be disputed issues of fact, such as in a serious irregularity appeal, it might be necessary for further exchanges between the parties, possibly restricted to particular issues, followed by an exchange of witness statements and a full hearing of evidence (proof).

The message in the judgment is that there is no one right way to proceed. The overriding approach is to be one which is in accordance with the founding principles of the Act. This involves the need for procedure to be simple and flexible and designed to allow the dispute to be dealt with as expeditiously and economically as possible, as far as consistent with fairness.

Legal error appeals are governed by RC 100.8. Given that in some cases leave is required, it is suggested that the petition should state whether or not the other party agrees to the appeal. In the

absence of consent, leave is required. In these cases, the petitioner needs to apply to the court for leave to appeal and provide any documents relied on in the application for leave. That application needs to identify the point of law concerned and the basis on which it is said leave should be granted. This should be based on the tests for granting of leave set out in the Scottish Arbitration Rules. The respondent is then entitled to submit its ground of opposition to the application for leave and any evidence relied on for this. It does not need, at that stage, to lodge answers to the legal error appeal itself.

The application for leave is, in most cases and in terms of RC 100.8(4) dealt with on the basis of the documents submitted only and without a hearing. The procedure the court has put in place to deal with this is that when the opposition is received, the case is passed to the commercial clerks who are to pass it to one of the nominated arbitration judges (see RC 100.2) at the earliest opportunity for a decision.

The decision is then based on *"a necessarily brief reading of the award and the arguments put in by the parties"* and, the judge considered, should be accompanied by brief reasons. The decision on whether or not to grant leave is final and cannot be appealed. If leave is not granted, that brings the matter to an end. If it is then the court will hold a procedural hearing to decide on the appropriate form of further procedure, on the basis of the principles described above.

In terms of timescales for appeals, the judgment provides reassurance in that the judge was talking in terms of weeks, not months, for matters to be dealt with in legal error appeals, although possibly longer for jurisdiction and serious irregularity appeals, presumably depending partly on whether or not there would be a need for witness evidence. This indication of accelerated timescales will of course be very welcome to those concerned about court intervention causing delay and are a quantum leap from the old days of stated case timetables which tended to be measured in years rather than weeks. The emphasis on flexibility of the procedure and the recognition of the founding principles of the Act in terms of allowing the dispute to be dealt with expeditiously and economically are also to be welcomed.

'The message in the judgment is that there is no one right way to proceed. The overriding approach is to be one which is in accordance with the founding principles of the Act'

ADR in the Energy Sector: Minister and Chapter

By Bob Shorter, Branch Development Officer



Pictured are:

Jennifer Young, Bob Shorter, Roseanna Cunningham MSP, Derek Auchie (chapter chair), Chris Arnold, and Andrew Mackenzie (Scottish Arbitration Centre CEO).

'Scotland has all the benefits of a modern statute underpinning arbitration'

Roseanna Cunningham, Minister for Community Safety and Legal Affairs met with Chapter chair Derek Auchie and representatives of the CIArb Northern Chapter on 27 September 2011 in Aberdeen. They were joined by Andrew MacKenzie, Chief Executive of the newly set up Scottish Arbitration Centre.

The new opportunities presented by the Arbitration (Scotland) Act 2010 and Scottish Arbitration Centre were discussed. These included an emphasis on confidentiality, the distinctive and mature Scottish legal system, and lower costs of arbitration which can be achieved in Scotland.

Feedback to the Chapter from Oil & Gas colleagues indicates a tradition of settling disputes in London via litigation and an assumption that arbitration is slow and expensive. SAC is working to change this percep-

tion now that Scotland has all the benefits of a modern statute underpinning arbitration.

The Minister very helpfully offered to support the chapter and SAC influence others to consider adopting arbitration to resolve disputes rather than litigation, and to do so in Scotland.

Thanks to Paull & Williamson for providing the venue for the meeting.



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Education Update by Len Bunton FCIARB

CPD TRAINING

Training sessions have been held for the Chairman's Panel of Arbitrators and Adjudicators with excellent attendance at both. A further session has been run for Aspiring Adjudicators.

Also, and in conjunction with Burness Solicitors, two workshop sessions were held on the Arbitration [Scotland] Act 2010.

In 2012 it is proposed to combine the two annual Adjudicators Training Sessions with RICS Scotland to avoid duplication of effort.

ENTRY COURSE

We have arranged with London that where delegates can demonstrate a reasonable knowledge of dispute resolution, and they will not be required to attend the Entry Course but are required to submit a 1000 word assignment on dispute resolution strategies.

This is a significant way forward minimising the cost for those who want to progress to Associate Membership. The assignment fee is £50.00.

Two delegates successfully completed the Assignment and have been approved as Associate Members and are now indicating they wish to proceed to the next stage of achieving member grade.



Forthcoming Events by Brandon Malone

Date	Event	Speakers	Host/Venue
January / February	To be announced	TBA	TBA
1 March	Adjudicators and Natural Justice	Garry Borland	TBA
16 March	Annual Dinner	Fred Samelian (President of Hill International)	Caledonian Hilton, Edinburgh

Entry courses will be held in Glasgow on 27 January 2012, and in Aberdeen on 3 March 2012 and marketing of these courses will commence shortly.

MODULES 1 and 2

It is proposed to commence with Module 1 on 1 February 2012. I am currently estimating that we will have 6 – 8 candidates interested in joining this course.

However I am currently waiting on London endorsing the registration of Richard Farndale and Chris Mackay of Burness as tutors for Module 1. Ian Trushell and I will be responsible for Module 2 Arbitration or Adjudication.

MODULES 3 AND 4

Subject again to Ian Trushell and I being ratified as approved tutors, in the next 12 weeks, Modules 3 and 4, will commence on the conclusion of Modules 1 and 2 in late November 2012.

Once all of these courses are in place, we will then be in a position of being able to offer the marketplace, annually, the complete range of courses in the *CIARB Pathways to Fellowship*.

