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The Arbitration (Scotland) Act 2010: Converting Vision into Reality

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A Focus on Scotland

The Arbitration (Scotland) Act 2010: Converting Vision into Reality*

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Letters Patent signifying Her Majesty's Assent to the Arbitration (Scotland) Bill were recorded in the Register of the Great Seal on January 5, 2010.

The Arbitration (Scotland) Act is born.

1. INTRODUCTION

“Here’s tae us, wha’s like us”; one of the real joys of being Scottish is to share in the national belief that we can do anything and can be the best at anything. After all, we invented the steam engine, tarmac, pneumatic tyres, the telephone, television, penicillin, haggis, the Arbroath Smokie, the deep-fried Mars bar, etc. We gave birth to Eric Liddell, Bill Shankly, Alex Ferguson, Jimmy Johnstone, Stephen Hendry and Chris Hoy¹; we won the European Cup in 1967 before any English team did.² So with the law there is a belief, at least in some quarters, that Scots law is superior (or, at least, not inferior) to those of other jurisdictions. That belief, whether credible or not on a wider view, is wholly contradicted by the lamentable state of Scottish domestic arbitration law (see below). Further, while there may well be commendable aspects of Scots law, there are also many areas where it seems to have fallen behind the times; the language of the courts is a mixture of Latin, old Scots, English and other influences and is, linguistically at least, not readily accessible to the general public.³

Arbitration law is more inaccessible than most areas of law since Scotland is one of the few countries in the world lacking a modern domestic arbitration statute, the law being a mixture of out-of-date, old, very old and truly ancient case law (dating back at least to 1207⁴) and piecemeal statute (back to 1598 and 1695) and is riddled with anomalies and uncertainties. A CI Arb/SCIA⁵ team led by Lord Dervaird drafted, privately, the Arbitration (Scotland) Bill 2002 (the Dervaird Bill) substantially consistent with the Model Law and drawing on the best features of the “English” Arbitration Act 1996, but our then political masters displayed no vision and ignored it.

The political landscape of Scotland changed dramatically in May 2007 and, inter alia, a minority government has to focus on non-contentious legislation. The Arbitration (Scotland) Bill 2009, first published on January 30, 2009 following an extensive consultative process,⁶

* The Arbitration (Scotland) Act in the form granted Royal Assent is not yet publicly available, therefore readers should note that the citations of section and rule numbers quoted are from the CI Arb working copy of the final Bill (November 18, 2009).

¹ This article will not address the 2009 Westminster political landscape.

² However, we do occasionally miss the target, e.g. in 1978 when Ally’s (disastrous) Army had (mentally) won the World Cup before the team had even left Scotland.

³ *Assoilzied, avizandum, esto* . . . etc. (also Latin!)

⁴ The oldest case cited in one leading modern text, Robert L.C. Hunter, *The Law of Arbitration in Scotland*, 2nd edn (Butterworths, 2002), dates from 1207.

⁵ Scottish Council for International Arbitration.

⁶ The initial consultation draft was published on June 27, 2008.

was not only non-contentious, it had all-party support since “everyone’s a winner”.⁷ Even better, the relevant Ministers⁸ had (in contrast to their predecessors) a clear understanding both of the necessity for legislation and of the principal issues, and drove the Bill forward with commendable support from an excellent Justice Department team. The CI Arb Scottish Branch not only responded fully to the consultation questionnaire but also provided very extensive and detailed drafting and other comments covering the entire Bill. A drafting sub-committee comprising Hew Dundas, Professor Fraser Davidson⁹ (Stirling University) and David Bartos FCI Arb (Advocate) was assisted by valuable contributions from members of the Branch Committee and from CI Arb President John Campbell Q.C.¹⁰

The Bill passed stage one of the Scottish Parliamentary process in June 2009 and stage two on October 7; the stage-three debate (in full Parliamentary session) took place on November 18¹¹ and Parliament duly approved the Bill. The principal sections of the Act are due to come into force in early 2010.

2. HISTORY OF ARBITRATION IN SCOTLAND¹²

The beginnings of arbitration in Scotland are lost in the mists of time and no substantive records survive showing to what extent, and how, disputes were resolved in any such fashion; the Celtic peoples had a *brithemh*, a person with legal knowledge, and the Norse peoples had a *birleyman*, both of whom were evidently involved in dispute resolution, but the detail of those roles is unclear even if the former survived into the 15th century.

The period 1100–1650 saw significant development of the law in Scotland, with the incorporation into the law of elements of civil and canon law systems; it is often forgotten that, while England settled into a mini-Dark Ages of intellectual development from c.1250, exacerbated by extended war with France, Scots scholars, including lawyers, studied widely at the great seats of learning across Europe. Further, as Hunter sagely observes,¹³ the legal system in Scotland did not represent, and did not have to enforce, the requirements of a conqueror; conversely, with the growth of the clan system, dispute resolution was often carried out locally with a clan head as resolver; a second reason for this was the remoteness of many communities and the poor communications which then existed.

In medieval times, arbitration in Scotland was in two forms, one legalistic in nature where an “arbiter” had to determine the case in accordance with principles of law,¹⁴ and

⁷ Inter alia, the CI Arb has prepared a draft of new Scottish Short Form Arbitration Rules (SSFARs) designed to bring arbitration to small businesses and to consumers; while the SSFARs do not form part of the Bill itself, they are wholly consistent with it—see further below.

⁸ Initially Fergus Ewing MSP, Minister for Community Safety and a solicitor by profession; for purposes of the Scottish parliamentary system, Jim Mather MSP, Minister for Enterprise, Energy and Tourism and a chartered accountant by profession, is the sponsoring Minister. I must place on record here due recognition of the efforts of both Ministers but the ability of Jim Mather, a non-lawyer, to master a complex and detailed brief has been truly impressive.

⁹ Author of the leading text on Scottish arbitration law: Fraser Davidson, *Arbitration in Scotland* (Edinburgh: Green, 2000).

¹⁰ President Campbell and members of the Branch have also made valuable contributions to this article by way of comment on previous versions which contributions I gratefully acknowledge. I accept sole responsibility for any errors or omissions in this article.

¹¹ i.e. after this article goes to press; the article is based on the version of the Bill as approved in Parliamentary Committee on October 7, 2009.

¹² This section has been adapted from Lord Dervaird et al., “Arbitration in Scotland—A New Era Dawns” (2004) 70 *Arbitration* 115 which was substantially written by the present author; neither that article nor this summary thereof should be taken as a definitive statement of the present law of Scotland since it is not normally possible to encapsulate the many complications and nuances of that law in short form.

¹³ Lord Dervaird et al., “Arbitration in Scotland—A New Era Dawns”, (2004) 70 *Arbitration* 115.

¹⁴ But not necessarily involving a reasoned decision—see further below.

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the other equitable, where an “arbitrator” determined cases in a manner substantially similar to the modern concept of *ex aequo et bono*. The latter (“arbitrator”) form survived until the beginning of the 19th century and the term “arbitrator” is no longer used domestically, though of course it is well understood.¹⁵ In addition, there was an “amicable compositor”,¹⁶ a kind of mediator, and arbitration agreements commonly referred to all three.

The earliest known treatise in which we find a mention of arbitration in Scotland, *Regiam Majestatem*, dates from the early 1300s, and shows a system modelled on the judicial one. It addressed such matters as who could submit a dispute to arbitration, what was arbitrable, what was to happen if there were two arbiters who disagreed and how an award should be issued. Scholars have suggested that much of this treatise can be traced to Justinian’s *Corpus Juris*.¹⁷ Although *Regiam Majestatem* hardly deals with arbitration in any purposeful way, it does state that an arbitrator could deal with cases between husband and wife, or affecting personal liberty or any criminal cause; interestingly, a woman could be an arbitrator, although not until the very late 19th, even early 20th, century could she be a solicitor, chartered accountant or doctor!

Later writings show that arbitrators dealt with cases of assault, kidnapping and even homicide.¹⁸ Tribunals could be of as many as 16 persons¹⁹ leading to the near-inevitability of failure to agree, whereupon an oversman (or oversmen—often two) would be appointed, probably of higher social standing than the arbitrators; the role of the oversman still exists today, albeit closer to the English “umpire”, and is hardly seen outside agricultural disputes.

From the 15th century onwards arbitration developed as Scotland became a vigorous trading nation, since with increased trade came a requirement for some form of arbitration of trade-related disputes. A law passed in 1427²⁰ distinguished arbitration in burghs (effectively commercial arbitration) from other forms of arbitration. Curiously, during this period certain criminal matters could also be referred to an arbiter or arbitrator.

From 1650–1760, arbitration, particularly equitable, seems to have fallen into disarray, and the court system consequently became overloaded. In an effort to cut the case load, art.25 of the Articles of Regulation of 1695, a far-sighted precursor of the Arbitration Act 1996 s.68(2)(g), excluded appeals against awards except on grounds of corruption, bribery or falsehood of the tribunal. However, awards not in accordance with the submission to arbitration could still be set aside.²¹ Notwithstanding some difficulties caused by the language of art.25, the 1695 Act remains in force today.²² In addition, around this time the distinction between arbiters and arbitrators fell away, with the former now being seen as possessing flexibility beyond application of the strict rule of law,²³ a flexibility in contrast to the legalistic path which development of the English law followed.

¹⁵ The Bill uses “arbitrator” (and other modern terminology) throughout to bring Scots arbitral language into line with international norms.

¹⁶ Not to be confused with the French notion of “*amiable compositeur*”. [Editor’s note: There is a large body of scholarly writing, see now Anne Lefebvre-Teillard “Arbiter, Arbitrator seu Amicabilis Compositor” in *Etudes d’Histoire du Droit Privé en Souvenir de Maryse Carlin* (Paris: *Law Mémoire du Droit*, 2008) reproduced in (2008) 3 *Revue de l’Arbitrage* 369.]

¹⁷ This was still being taught, in Latin, as an option at Edinburgh University in the 1930s.

¹⁸ Respectively *Pitcairn Trials*, Vol.I, p.167; *Carruthers v Maxwell* March 3, 1471, ADA 22; *Pitcairn Trials*, Vol.III, p.390.

¹⁹ *Pitcairn Trials*, Vol.I p.167.

²⁰ APS 1427 (c.6), Vol.ii, p.14 (cited in Hunter, *The Law of Arbitration in Scotland*, 2nd edn, 2002, p.27, fn.4).

²¹ Prima facie, such set aside was excluded by Articles of Regulation of 1695 art.25 but the assumption that this was not intended was subsequently confirmed in *Crawford v Hamilton* (1707) Mor. 6835.

²² It will, of course, be repealed by the 2009 Bill.

²³ Sir George Mackenzie, *Institutions of the Law of Scotland*, Vol.IV, p.3.

Scots arbitration grew along with the growth of commerce and of the law in the 19th century with public works contracts becoming a major feature; mirroring the development of liberal thought, the Scottish judiciary never exercised the same degree of control of arbitration as was the case in England until 1979 (see also below). However, the extent of judicial supervision did increase; the freedom to decide according to equitable principles was removed by a House of Lords decision in 1835,²⁴ and the Court held that an error of law on the face of an award was grounds for reduction (set aside). Further, supervision of awards was effectively exercised by strict interpretation of the related submission agreements: *inter alia*, it was held in 1852 that there was no implied power for an arbiter to award damages.²⁵ The courts also decided that their jurisdiction could not be ousted by an arbitration agreement unless it named the arbiter.²⁶

Not all 19th and early 20th century “news” was “bad news”: the arbiter’s procedural flexibility was largely upheld²⁷ (with what we now term “natural justice” being seen as fundamental) as was the validity of an arbitration agreement which excluded the jurisdiction of the Court²⁸. Whereas the payment of arbiters had previously been prohibited, that prohibition was, very fortunately, rendered obsolete in 1913.²⁹

Throughout this period of development of arbitration law in Scotland, the topic was substantially ignored by the legislators: other than an Act of 1598³⁰ and art.25 of the Articles of Regulation 1695, the statute book is silent until the Arbitration (Scotland) Act 1894 (short and dealing only with three minor issues³¹) and again so until 1972³² when a single clause (the notorious “stated case” procedure of which more anon) was introduced and then 1990 when the UNCITRAL Model Law of 1985 became the law for international commercial arbitrations conducted in Scotland.³³

3. PROBLEM AREAS IN EXISTING SCOTTISH ARBITRATION LAW³⁴

General

It will be readily apparent from the historical survey above and the absence of a modern codified arbitration law that Scots arbitration suffers from numerous inherent problems, not

²⁴ *Clyne’s Trustees v Edinburgh Oil & Gas Light Co* (1835) 2 Sh. & Macl. 243 at 271.

²⁵ *Aberdeen Railway Co v Blaikie Brothers* (1852) 15 D (HL) 20, reversing the Court of Session.

²⁶ *Campbell v Shaws Water Co* (1864) 2 M. 1130.

²⁷ *Christison’s Trustee v Callendar-Brodie* (1906) F 928 at 931, per Lord Dunedin.

²⁸ A repeated theme in Scots case law, from *Tenants of Dennie v Lords Fleming and Sanctjohn* (1553) Mor. 623 to *Sanderson v Armour & Co*, 1922 S.C. (HL) 117.

²⁹ *McIntyre Bros v Smith*, 1913 S.C. 129 at 132, per Lord Kinnear.

³⁰ “*anent removing and estinguishing of deidlie feidis*” providing that parties in dispute should submit it to “*tua or thrie freindlis on ather side or to subscriyve ane submission formit and sent be his majestie to thame to be subscriyvit*”; however, it is unclear whether the Act of 1598 remains in force although it is highly likely that it has fallen into desuetude. The Bill assumes the latter.

³¹ *Inter alia*: (i) abolishing the requirement that an arbiter be named; and (ii) validating arbitration agreements referring to future disputes.

³² Administration of Justice (Scotland) Act s.3 (see also below); this merely introduced, over the opposition of several leading professional bodies, a “stated-case procedure” into Scots law, apparently to bring it into line with English law, shortly before England repealed the equivalent; 37 years on, this unwanted anomaly survives.

³³ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s.66 and Sch.7, albeit very rarely used since enactment (see below why this has been the case). Of course other legislation, not specific to arbitration, is applicable including the Civil Evidence (Scotland) Act 1988 and the Requirements of Writing (Scotland) Act 1995. Further, the Arbitration Act 1975 remains in force in Scotland in respect of the New York Convention.

³⁴ fn.9 applies to this section.

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the least of which is the difficulty of ascertaining what the law is in some respects. This seems to be one of the major reasons why it has been common for Scots arbiters to sit with a solicitor as clerk to advise on the law.³⁵ The following survey of the present state of Scots domestic arbitration law is eclectic and not intended to be comprehensive, but rather, in my experience, a highlighting of areas where the Scots law of arbitration is either out of kilter with the modern world or is uncertain, a theme that runs strongly through Hunter's work.

Severability

The question of severability of an arbitration agreement from its container contract³⁶ was not settled in English law until 1992³⁷; the position in Scots domestic law is unclear except in respect of the Scottish Arbitration Code (1999 and 2007) (refer below); such juridical authority as exists appears to stem from the English case of *Heyman v Darwins*.³⁸

Agreements to arbitrate

The interpretation of arbitration agreements in Scotland has varied in approach over the last 250 years, being broadly supportive from around 1770–1850, after which the judicial approach to interpretation became one of considerable strictness, apparently on the broad assumption that the parties' normal preference would be for litigation instead of arbitration, so that it was necessary to restrict arbiters to simple determinations of fact.³⁹ More recently, the courts have adopted a less restrictive approach, although the dominant theme remains the ousting of the jurisdiction of the court. While some decisions have upheld arbitration agreements despite defects, others have regrettably adopted 19th century thinking⁴⁰ and appear to be anything but flexible.

Tradition in Scotland is for ad hoc arbitration via deeds of submission or "submission agreements", in part reflecting the law as it was prior to 1894; perhaps typical of the outdated nature of Scots arbitration laws, these submissions are categorised into special, general and mixed (also known as "general-special"), distinctions which, to outsiders, appear to be fine ones of no immediately obvious merit.

Despite difficulties at the detail level, the policy of the Scottish courts remains, as it has always been, that if the parties had contracted to arbitrate, "to arbitration they must go".⁴¹ There was never any policy in Scotland that a contract, e.g. an arbitration agreement ousting the jurisdiction of the court, was invalid as against public policy; further, the Scottish courts never had any discretion as to whether or not to apply any arbitration agreement, absent ambiguity of expression.

³⁵ Seen by some English arbitrators as akin to David Beckham hiring someone to kick the football for him and seen internationally as Tiger Woods hiring someone to hit his golf-ball for him.

³⁶ i.e. that where a clause in a contract provides for arbitration of disputes, that agreement to arbitrate is treated as a separate contract from the rest.

³⁷ In *Harbour Assurance v Kansa General International Insurance Co Ltd* [1992] 1 L.R. 81; [1993] 1 L.R. 455 CA.

³⁸ *Heyman v Darwins* [1942] A.C. 356.

³⁹ Modern jurisprudence outside Scotland has gone in the opposite direction, see, e.g. *Fiona Trust v Privalov* [2007] UKHL 40; [2007] Bus. L.R. 1719, *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) [1999] 2 All E.R. (Comm) 44.

⁴⁰ cf. *Bruce v Kordula* Unreported May 15, 2001 Outer House, where two simple and easily-rectifiable defects in an arbitration agreement were considered sufficient to render the agreement void for uncertainty; the learned judge appeared unaware of the international trend, in particular of the extensive efforts (particularly in France) to give effect to an agreement, albeit imperfect, to arbitrate and, in consequence, delivered a retrogressive judgment contradicting efforts to promote Scotland as an arbitral centre.

⁴¹ Lord Dunedin in *Sanderson v Armour & Co*, 1922 SC HL 117 at 126.

One of the most remarkable anomalies of Scots law is that a party or its agent can be appointed arbiter,⁴² although it is hard to see such an appointment nowadays surviving in the climate of ECHR art.6.

The continental principle of *kompetenz-kompetenz*, enshrined in the Model Law and the 1996 Act, was expressly rejected in the leading (and still binding) Scots case⁴³ where it was held that the concept of arbiters determining their own jurisdiction would be “as unwarrantable in principle as . . . it is inexpedient in practice”.

Scots law takes a more restrictive view than English law of what constitutes a dispute (in particular, the *Halki* principle⁴⁴ does not apply): if the defender (respondent) merely refuses or delays fulfilment of its obligations, there can be no submission to arbitration,⁴⁵ although there is no reason why an agreement to arbitrate could not be enforced by the courts.

Procedure

As stated above, it was common practice to appoint a clerk (normally a solicitor experienced in Scots arbitration law) to advise and assist the arbiter; such practice has, in the past, been so much the norm that some commentators have thought it necessary to cite authority for the proposition that the arbiter has a discretion *not* to appoint a clerk.⁴⁶ Whether one attributes this to nervousness about the uncertain state of the law or to some other reason, the cost of a clerk has sometimes been cited as a deterrent to parties considering arbitration.

Unsurprisingly, Scots arbitration law does not make precise provision regarding privacy or confidentiality in arbitration, there being neither statute nor case law on the point. It is however generally assumed that proceedings are private but that there is no such general presumption regarding confidentiality. These issues have never been tested in Scotland in the light of the ECHR⁴⁷ (but have been fully so in England⁴⁸).

The applicability of court rules of evidence in Scots arbitration is as uncertain as in several aspects of the law referred to above and below, there being an apparent contradiction between the notions that an award cannot be reduced (set aside) solely on the grounds that the arbiter relied on evidence which would have been excluded in court, whereas the Civil Evidence (Scotland) Act 1988 appears to imply that court rules are or may be applicable in arbitrations.⁴⁹

In principle, the stated-case procedure (introduced in 1972 to provide a “ready mechanism” for providing authoritative determinations of the law) is for achieving a decision of the court

⁴² *Buchan v Melville* (1902) 4 F. 620.

⁴³ *Caledonian Ry Co v Greenock & Wemyss Bay Ry Co* (1872) 10 M. 892 at 898 (a court of seven judges sat).

⁴⁴ Recently refined in England & Wales by Jackson J. in *AMEC Civil Engineering Ltd v the Secretary of State for Transport (represented by the Highways Agency)* [2004] EWHC 2339 (TCC) in which he set out the then state of the law in seven propositions (the “Jackson Seven”); in *Collins Ltd v Baltic Quay Management (1994) Ltd* [2005] 1 B.L.R. 63 the Court of Appeal approved the Jackson Seven.

⁴⁵ *Albyn Housing Society Ltd v Taylor Woodrow Homes Ltd* 1985 SLT 309.

⁴⁶ *Mowbray v Dickson* (1848) 10 D. 1102 at 1125.

⁴⁷ First, in *North Range Shipping v Seatrans Shipping* [2002] EWCA Civ 405; [2002] 1 W.L.R. 2397, the Court of Appeal confirmed ECtHR jurisprudence in holding that a consensual (but not a statutorily compulsory) arbitration agreement is an opt-out of art.6 ECHR; per Tuckey L.J.: “Parties to a consensual arbitration waive their Article 6 rights in the interests of privacy and finality.” Secondly, in *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2003] EWHC 1377 (Comm); [2003] 1 W.L.R. 2885 (refer my article at (2003) 69 *Arbitration* 4), the confidentiality of arbitration *and of ensuing court proceedings* was confirmed as consistent with ECHR—see at [32] et seq. See fn.54 below for the ECJ position.

⁴⁸ *City of Moscow v Bankers Trust* [2004] EWCA Civ 314; [2005] Q.B. 207; [2004] 3 W.L.R. 533.

⁴⁹ Civil Evidence (Scotland) Act 1988 s.9.

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of any preliminary question of law arising during proceedings; however, in practice, the stated case goes significantly wider and may involve consideration by the court of matters of fact. It is of some historical interest that, in *Cambuskenneth Abbey v Dunfermline Abbey* Unreported 1207, it was evident that such a procedure—or something like it—existed 800 years ago—rich history indeed! In reality the procedure has become an easily-adopted device for the promotion of unconscionable delay.⁵⁰

The word “misconduct” is used in Scots arbitration, but without any statutory definition, although it has been said that misconduct involves breach of “the express conditions contained in the contract of submission or any one of those important conditions which the law implies into every submission”.⁵¹

Awards and other procedural issues

A common feature of arbitration in Scotland is the practice of issuing awards in draft for review by the parties; it is argued, e.g. by Hunter, that this prevents mistakes and misunderstandings but, it is submitted, such are more easily and more effectively dealt with by the English slip rule (Arbitration Act 1996 s.57) and that the issue of an award in draft opens a Pandora’s box evidently better left closed. However, Lord Wark stated in 1939:

“[I]t is an implied condition of the contract, importing universal practice, that the parties have a right to make representations upon the ‘proposed’ findings of an arbiter.”⁵²

One of the many anomalies in Scots arbitration practice is the giving of reasons separate from the award, primarily in an effort to avoid challenge. It has been suggested that ECHR art.6 requires that an award should now contain reasons unless expressly agreed otherwise, but this perhaps underestimates the critical point that the ECJ has ruled that an arbitration agreement is a partial opt-out from art.6 ECHR.⁵³

There is no legal presumption in Scots law that arbiters may make a part (partial) or interim award; of course, given express power, they can do so. The court may imply such power in appropriate circumstances. However, the relevant precedents date from the early 19th century and may be of limited application today.

Scots law permits the rectification of an error of calculation in an award⁵⁴ but otherwise, absent express agreement between the parties providing for rectification or correction of a slip, the award will not be corrected.

There is no express provision in Scots law for arbiters to award expenses—in universal (outside Scotland) terminology “costs”—and, while they were formerly considered to have an implied power⁵⁵, the modern position is that the power is, in the first instance, a matter for construction of the arbitration agreement.⁵⁶ However, no arbiter or arbitral tribunal has any implied power to award damages: such power can be conferred only by clear and express language in the arbitration agreement, a conferring of a general power being insufficient.⁵⁷

⁵⁰ *ERDC Construction Ltd v HM Love & Co* 1994 SC 620; see also above.

⁵¹ *Adams v Great North of Scotland Ry Co*, 1890 18 R (HL) 1 at 8.

⁵² *McLaren v Aikman*, 1939 S.C. 222 at 230; no such universal practice exists today outside Scotland, or has done in the last 30 years or so (if ever).

⁵³ *Nordström-Janzon v Netherlands* (28101/95) Unreported November 27, 1996 concerning the alleged partiality of an arbitrator. The European Court declared the applicants’ case inadmissible saying, inter alia, that, by choosing arbitration, the parties had renounced the requirement of a procedure before the ordinary courts which satisfied all art.6 ECHR guarantees.

⁵⁴ *Hetherington v Carlyle* Unreported June 21, 1771 FC.

⁵⁵ *Pollick v Heatley*, 1910 S.C. 469 at 480.

⁵⁶ *Grampian Regional Council v John G McGregor (Construction) Ltd*, 1994 S.L.T. 133 at 138E.

⁵⁷ *Aberdeen Ry Co v Blaikie Brothers*, 1852 15 D. (HL) 20.



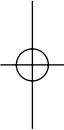
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The award of interest is no less problematic: there is no express power given in the law to award interest and there appears to be no implied power either.⁵⁸ The arbitration agreement must confer such power expressly or impliedly. There is no reason in principle why an award of interest at a fluctuating rate (e.g. bank base rate) should not be enforceable, provided that it is clearly expressed.


It has been suggested that two 18th century cases involving corruption (these exclude the demanding and the acceptance of any payment by one of the parties with a view to influencing the arbiter's judgment) is sufficient ground to exclude the English position (s.56) whereby an arbitrator exercises a lien over the award until his fees are paid by one or other party. However, at that time it was not normal for arbiters to charge fees and it is possible that a modern court would take a different view. However, in 1988 an award was set aside on precisely such grounds.⁵⁹ Once again, it is important to achieve precision of expression within the deed of submission.

An anomalous consequence of the Requirement of Writing (Scotland) Act 1995 is that an award is not invalidated by not being in writing (ignoring New York Convention enforceability issues); there are exceptions (e.g. land) and, of course, in practice proving an oral award offers significant practical difficulties.

The question of an arbiter's immunity from suit is no clearer than other areas in Scots arbitration law; two potentially relevant cases (1793 and 1862) not only predate the payment of arbiters becoming customary but also relate to ecclesiastical disciplinary procedures, not to commercial arbitration, and a third, in 1929, related to an action by an arbiter for his fees. In the 1862 case,⁶⁰ Lord Curriehill stated:



“[P]arties upon whom judicial functions are lawfully conferred... *bona fide*... fall into errors of judgement are not liable to the parties in damages in consequence of such errors. *Humanum est errare*... The law unquestionably confers immunity upon judges... It also extends such immunity to [arbiters]... it being the policy of our law to encourage and support the settlement of disputes by such private arrangements... [Arbiters] are not liable in damages... for the *bona fide* exercise of the functions conferred upon them.”



In the later (1929) case,⁶¹ Lord Moncrieff said:

“[T]he fact that an arbiter has gone wrong and given an inept legal decision afforded no ground for depriving him of his remuneration unless it could be shown that he had acted corruptly.”

Summary

There are many 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 will, of course, be rectified by the Bill.

4. THE ARBITRATION (SCOTLAND) ACT 2010⁶²

The Act addresses and resolves all the many weaknesses, omissions, grey areas, imprecisions, anomalies, etc. of the present domestic law by modern provisions, drawing on what were

⁵⁸ *Farrans (Construction) Ltd v Dunfermilne DC*, 1988 S.L.T. 466 at 489.

⁵⁹ *Blair v Gib*, 1738 Mor. 664.

⁶⁰ *McMillan v Free Church of Scotland* (1862) 24 D. 1282.

⁶¹ *Rutherford v Magistrates of Findochty*, 1929 S.N. 130.

⁶² The following is based on the text of the Bill as amended at Stages 2 and 3 of the Parliamentary process. The sections and rules are likely to be renumbered in the Act.

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assessed as the most relevant and/or effective features of the Dervaird Bill, the UNCITRAL Model Law, the 1996 Act and numerous other sources.⁶³

Many of the provisions of the Act replicate international norms in arbitration and so will not be covered in this Paper. However, importantly and as with the 1996 Act, the Act rests on three founding principles which govern its operation:

“(a) [T]hat the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense, (b) that parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest, (c) that the court should not intervene in an arbitration except as provided by this Act. Anyone construing this Act must have regard to the founding principles when doing so.”

However, the Act has a different shape from legislation in other jurisdictions in that it collects together all the procedural aspects in the Scottish Arbitration Rules (the SAR set out in Sch.1) so that the commercial user (and arbitration practitioner) effectively need only consider the Rules, ignoring the “legal stuff” in the Act itself. However, the SAR will, on coming into force, form part of the law of Scotland in contrast to, for example, the Rules of the ICC or LCIA.

The Rules are of two types: (i) mandatory rules which apply in all cases⁶⁴; and (ii) default rules which will apply absent agreement to the contrary by the parties so that if the parties agree nothing or do nothing, they acquire a complete and comprehensive set of rules.⁶⁵ If they 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, LCIA or the Scottish Arbitration Code 2007 (SAC07—see below)), then that agreement will, to the extent applicable, supersede the default rules in the SAR just as it would the default provisions of the Model Law or the 1996 Act.

Repeal of the Model Law

The Act establishes a single regime covering all arbitration and therefore, somewhat controversially, repeals the UNCITRAL Model Law which has been a relative failure in Scotland since 1990 with a mere 10–15 (so it is understood) cases in 19 years (see also below). Non-Model Law venues such as London, Paris, Stockholm, Geneva/Zurich and New York are thriving while Model Law jurisdictions such as Germany, Australia, Canada (parts), New Zealand, Cyprus, Norway and Denmark are not proving any particular success. It follows that having, or not having, the Model Law is not the determinative factor in achieving success as an arbitral venue.

While the apparent big Model Law-based winners are Singapore, Hong Kong and Vienna, these are successful for other reasons, not because they are Model Law. Typically, a leading Singaporean arbitrator identified the key reasons why Singapore is successful as including: (i) a good/effective arbitration law, i.e. one which leaves a tribunal to get on with matters but gives them court support when needed (subpoenas, injunctions, etc.); (ii) a good arbitration attitude by the courts, i.e. positive, supportive, non-interfering; (iii) competent, honest arbitration-specialist judges who understand the difference between litigation and arbitration; (iv) an efficient, well-run arbitration centre. These factors significantly outweigh the advantages of having the Model Law; they also apply (with different weightings) in Hong Kong and elsewhere

⁶³ The CI Arb considered arbitration laws and developments in 25–30 jurisdictions in developing its submissions on the Bill.

⁶⁴ These cannot be modified or disapplied (by an arbitration agreement, by any other agreement between the parties or by any other means) in relation to any arbitration seated in Scotland.

⁶⁵ A Scottish solicitor firm’s newsletter appeared to criticise this two-part approach, overlooking that that same approach is incorporated in the Model Law and in the 1996 Act.

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Furthermore, Singapore is a special case, for a number of reasons relating to Singapore's aggressive drive to secure arbitration business; in addition to the attributes listed above, in *Dermajaya*⁶⁶ a judge came up with an eccentric interpretation of the Model Law; there were two consequences: with remarkable speed, the legislature amended the International Arbitration Act to remove the apparent anomaly; all arbitration-related cases are now routed through a single specialist judge.

Vienna is a success because it has always been, and remains, the venue of choice for Eastern European and some Russian parties; this is a consequence of politics where Austria/Vienna is seen as neutral (ditto Stockholm, Geneva, Zurich) and its success predates the introduction of the Model Law effective on July 1, 2006. Austrian arbitration colleagues say that there has been no noticeable change in caseload since that date.

An informal survey of my senior arbitrator colleagues around the world has failed to identify one single jurisdiction which sees the Model Law as the, even a, main factor in its success as an international arbitral venue; Ireland is successful largely because of the AAA/ICDR presence, Bermuda because of its strengths in financial services, particularly insurance/reinsurance, and Hong Kong has a high volume of PRC-related business and an HK award can be enforced in the PRC through NYC58. Malaysia has relatively recently (December 31, 2005) adopted the Model Law but the previous position that almost all large Malaysian arbitrations went to Singapore appears not to have changed, probably because the eight criteria referred to above are not all met in Kuala Lumpur.

Most importantly of all for Scotland, the Model Law is incomplete, containing many gaps, e.g. with no reference to damages, expenses (costs) or interest; while civil law codes purportedly cover these gaps (but do not always do so⁶⁷), Scots law does not; hence the Model Law is inadequate in Scotland without a Part 2 (or a detailed submission agreement) filling in the gaps. This was a fatal flaw in the 1990 enactment of the Model Law, i.e. in that these significant gaps were not addressed at all. While Germany enacted the Model Law verbatim and it fits neatly into the *Zivilprozeßordnung* without amendment or augmentation (but refer to fn.66), the Bermuda statute needs an *additional* 5,500 words, Singapore 7,000 and New Zealand 11,000 words to make the Model Law work. Ireland and Hong Kong appear *prima facie* much the same, i.e. with substantial bolted-on language. In Scotland we considered that approach pointless: it is argued that Model-Law jurisdictions are the same and parties can go to any one of them with ease and confidence; but the word counting contradicts that argument.

It has reportedly been suggested that Sweden is considering adopting the Model Law; this is not the case.⁶⁸ Although some academics are reportedly arguing for the Model Law, the Ministry of Justice has no present plans to amend the Arbitration Act 1999 and has not been approached in this regard, and the practitioners are not interested either.

It will be argued that the Act/SAR, by declining to adopt the Model Law, will impose a barrier to foreign parties coming to Scotland to arbitrate; this is quite simply not the case. The main reasons for choice of an arbitral venue are listed above and, as a major priority, it is up to Scotland to meet those criteria; parties arbitrate in Singapore/HK/etc. under local (SIAC/HKIAC) or international (ICC, LCIA, UNCITRAL, AAA other) Rules; while there are indeed differences between the various sets of Rules (particularly the ICC), this is not a major factor in selecting the arbitral venue; parties wanting an ICC or LCIA (or other) arbitration (and there are good reasons either way) can arbitrate in any of London/Paris/Stockholm/Geneva/Vienna/Singapore/HK, etc.; there is no need to correlate

⁶⁶ *Dermajaya Properties Ltd v Premium Properties Ltd*, (2002) 2 S.L.R. 164.

⁶⁷ In fact, the Austrian Civil Code does not and an arbitrator's power to award interest is derived by implication from equivalent judicial powers; with respect, it must be considered unsatisfactory to draft legislation which is incomplete *ab initio*. Further, the German *Zivilprozeßordnung* does not provide any such power.

⁶⁸ Confirmed with leading members of the Swedish arbitral community.

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rules to venue; it follows that the having or not having the Model Law in Scotland will have no real effect on parties' choice of Scotland as arbitral venue, other factors being significantly more important; the examples of London, Paris, Stockholm, Geneva/Zurich and New York show that not having the Model Law is no barrier at all to foreign parties.

The main provisions of the Act

These 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 friends such as separability, limitation on the Court's involvement, the arbitrator's control of procedure, peremptory orders, 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 carefully-considered 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 s.69 regime in England, 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.

The 1996 Act is (ignoring ss.85–91 and Schs 2, 3 and 4) 19,000 words long and the Bill (ignoring Sch.2 (Repeals)) is 15,200. The Model Law is a mere 5,400 words (see above re: Bermuda, Singapore and New Zealand).

The Act has a number of features which, in our humble view ("Here's tae us, wha's like us"), either improve on the 1996 Act and/or augment it to cover issues not addressed therein.

English law is contradictory as to which law applies to the arbitration agreement; in *Sonatrach Petroleum v Ferrell*,⁶⁹ it was decided that the law of the main (i.e. container) contract should govern the arbitration agreement itself (i.e. the separable contract to arbitrate, as distinct from the law agreed to govern the arbitration) whereas in *C v D*⁷⁰ the Court decided that the law of the seat should govern. The Bill provides that where the parties agree that the arbitration is to be seated in Scotland, but do not specify the law which is to govern the arbitration agreement, 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.

Section 18 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" (AAR)⁷¹ who will do so and the CIARB will, in due course, apply to be registered as an AAR.⁷²

⁶⁹ *Sonatrach Petroleum Corp v Ferrell International Ltd* [2002] 1 All E.R. (Comm) 627.

⁷⁰ *C v D* [2007] EWCA Civ 1282; [2008] Bus. L.R. 843 (upholding the first instance decision of Cooke J. at [2007] EWHC 1541 (Comm)).

⁷¹ Arbitration (Scotland) Act 2010 s.24.

⁷² No doubt the RICS, ICE, Law Society of Scotland and Faculty of Advocates and others will apply too; the requirement at Arbitration (Scotland) Act 2010 s.24(2) is that AARs: (a) have experience relevant to making arbitral appointments; and (b) are able to provide training, and to operate disciplinary procedures, designed to ensure that arbitrators conduct themselves appropriately.

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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 Act⁷³ 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). Although there are constitutional restrictions on the use of such power in practice, this is intended to preclude the need for the full panoply of primary legislation to rectify any minor problems (including transitional matters and obvious absurdities or inconsistencies) that may arise, thereby permitting a rapid response.

The Act is fully consistent with the Model Law⁷⁴ 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, s.26 provides that Ministers may *by order* (see previous paragraph) 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.

There are express provisions⁷⁵ 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 potentially drastic effect on the arbitrator’s immunity from suit by the parties, e.g. in that an unreasonable resignation may lead to loss of immunity.

There is an express confidentiality/privacy obligation⁷⁶ as a default rule (i.e. from which the parties can opt out by express agreement, so the rule will, for example, apply to an ICC arbitration seated in Scotland), as is given in England by case law but the drafters of the 1996 Act considered this area too difficult to draft; thanks to Lawrence Collins L.J.’s masterly judgment in *Emmott*,⁷⁷ a Scottish solution (substantially drafted by the CIArb) is both novel and, we submit, as effective as is reasonably practicable.

The Bill covers oral arbitration agreements, excluded from Pt 1 of the 1996 Act, since these reportedly do occur from time to time, e.g. in local agricultural disputes; of course proving such an agreement is another matter, and while these fail the NYC writing requirement, these are not NYC circumstances. Further, preservation of the common law for such oral arbitration agreements (as in the 1996 Act s.81) is a recipe for disaster, given the dire state of that common law (see above).

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.⁷⁸

Prospective arbitrators and arbitrators post-appointment are placed under a clear and continuing disclosure requirement concerning conflicts of interest.⁷⁹

⁷³ Arbitration (Scotland) Act 2010 ss.32 and 33.

⁷⁴ The Justice Department has carried out a detailed analysis.

⁷⁵ SAR rr.15 and 16, both mandatory.

⁷⁶ SAR r.26.

⁷⁷ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus. L.R. 1361.

⁷⁸ We respectfully disagree with the DAC’s analysis here, particularly given Art.6 ECHR. Further, the CIArb’s September 2008 redraft of the Bill expressly required arbitrators to be wholly neutral irrespective of who appointed them but it was agreed that the requirement of SAR r.24(1)(a) to be both impartial and independent was sufficient.

⁷⁹ SAR r.8, a mandatory rule.

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Following *Cetelem SA v Roust Holdings Ltd*,⁸⁰ 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.⁸¹

The Bill expressly deals with the *Gannet v Eastrade*⁸² lacuna where, following application of the slip rule to correct a miscalculation, the arbitrator revisited his costs award to make a consequential change to the costs award from 100/0 to 50/50.⁸³

In an effort to reduce the role of the court, the Act limits jurisdictional appeals from the first instance decision (1996 Act s.67(4) refers)⁸⁴; further, there is no appeal to the Supreme Court.⁸⁵ The same applies to serious irregularity appeals⁸⁶ and to legal error appeals.⁸⁷

SAR r.75 (mandatory) provides that 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 the person would have if the arbitration were civil proceedings.

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, e.g. for an interim payment on account, but binding only until superseded by a partial or final award on the same issue.

One matter has been omitted from the Act and that concerns express provisions to deal with smaller cases, e.g. 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.⁸⁸ The CI Arb Scottish Branch has drafted the Scottish Short-Form Arbitration Rules to cover smaller arbitrations and these will be launched in parallel with the Act being brought into force and will form a key element of the marketing.⁸⁹

Transitional/commencement provisions

Arbitrations begun before the date upon which the Act comes into force (commencement) will not be affected, i.e. will continue under the old law but the Act will otherwise apply to all arbitration agreements whether made on, before or after commencement. However, the parties

⁸⁰ *Cetelem SA v Roust Holdings Ltd* [2004] EWHC 3175 (QBD), Beatson J. The outcome was confirmed in the Court of Appeal ([2005] EWCA Civ 618).

⁸¹ SAR r.43(3) (a default rule) provides: “This rule [i.e. interim measures] applies (a) to arbitrations which have begun, (b) where the court is satisfied (i) that a dispute has arisen or might arise, and (ii) that an arbitration agreement provides that such a dispute is to be resolved by arbitration.”

⁸² *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] Lloyds Rep 713.

⁸³ SAR r.58(7) (a default rule) provides: “Where a [slip rule] correction affects (a) another part of the corrected award, or (b) any other award made by the tribunal (relating to the substance of the dispute, expenses, interest or any other matter), the tribunal may make such consequential correction of that other part or award as it considers appropriate.”

⁸⁴ SAR r.67 (a mandatory rule) provides: “(4) An appeal may be made to the Inner House against the Outer House’s decision on a jurisdictional appeal (but only with the leave of the Outer House). (5) Leave may be given by the Outer House only where it considers: (a) that the proposed appeal would raise an important point of principle or practice, or (b) that there is another compelling reason for the Inner House to consider the appeal.”

⁸⁵ SAR r.67(6).

⁸⁶ SAR r.68(5)–(7) (a mandatory rule).

⁸⁷ SAR r.69(8)–(10) (a default rule).

⁸⁸ There was reportedly a case in England concerning a house extension for a new kitchen; the arbitration was held in the kitchen, in a shirt-sleeve environment and with everyone sitting around the table.

⁸⁹ However, the Arbitration Act 1996 ss.89–91 (the only sections which apply in Scotland) remain as is; consumer protection is a reserved matter.

to an existing arbitration agreement may agree that the Act is not to apply to arbitrations arising under that arbitration agreement; this transitional provision will last five years only.

In the CI Arb's view, there is no objective justification for any such transitional provision. Inter alia the 1889, 1934, 1950, 1979 and 1996 Arbitration Acts in England allowed for no transition. Applying the policy objectives encapsulated in s.1(a) and (b) of the Bill, it is essential to move arbitration into the "new way" as soon as possible with a minimal run-off period for the old law. We accept, however, that consensus-derived political exigencies required that such a transition be available. It has been argued (paraphrasing and simplifying): (a) that parties have entered into Scots arbitration agreements with full knowledge and understanding of what that would entail; (b) that parties have, consequently some right to continuation of the present law which we all accept is antiquated and in dire need of reform; (c) that parties somehow lose something by being transferred to the new law whereas, as we are (again) all well aware, the new law offers massive advantages over the old. The stated-case procedure has been cited here as though it was something of value to the parties; first, as Lord Hope famously indicated,⁹⁰ it is not; secondly, the new rr.40 and 41 (similar to s.45 of the 1996 Act) gives the parties a comparable right without the risk of derailment and delay of the arbitration. Further, an express provision in an arbitration agreement made before commencement which disapplies the stated-case procedure⁹¹ shall, unless the parties otherwise agree, be treated as being an agreement to disapply the equivalent SAR rr.40, 41 and 69.

5. CIVIL JUSTICE IN SCOTLAND—THE BROADER LANDSCAPE

Scotland has just finished a major review of its civil justice system under the chairmanship of the Rt Hon Lord Gill, the Lord Justice Clerk⁹²; his Report was published in September 2009. While his proposals do not go as far as the Woolf Reforms in England in the late 1990s, significant modernisation of the civil justice system will follow with arbitration and mediation playing key parts. In a conference speech in May 2009,⁹³ Lord Gill described the courts as "Victorian" and he identified the three main weaknesses in the civil justice system as access to justice, delay and inefficiency. He said:

"Unless there is major reform and soon, individual litigants will be prevented from securing their rights, commercial litigants will continue to look elsewhere for a forum for their claims... Scotland's economic development will be hindered."

The answers to Lord Gill's trenchant criticisms lie in the Arbitration (Scotland) Act 2010.

6. SUMMARY

We stand at the threshold of what will prove to be a new Golden Age of arbitration in Scotland. The CI Arb's Scottish Branch has played (and will continue to play) a key role in the practical implementation of the Act, arguably the most important, purely Scottish, commercial legislation in our beloved country's long history. The First Minister of Scotland has most graciously and very warmly recognised this in a letter to the Branch, suggesting that since the reopening of the Scottish Parliament in 1999 no private organisation has played such a major role in developing new legislation.

⁹⁰ See *ERDC Construction Ltd v HM Love & Co Ltd (No.2)*, 1997 S.L.T. 175, where he stated that: "Excessive use of this procedure is liable to bring the whole process of arbitration into disrepute." And: "If arbiters are to have the confidence which they require to simplify and accelerate procedure in such cases, they ought not to be exposed to the risk of challenge to their decisions by means of the cumbersome and time consuming procedure of a stated case."

⁹¹ Administration of Justice (Scotland) Act 1972 s.3.

⁹² The second most senior position in the Scottish judiciary, broadly analogous to that of the Master of the Rolls in England; some English reports inaccurately refer to him as "Clerk L.J."!

⁹³ Law Society of Scotland Annual Conference; Lord Gill's remarks are as quoted in *The Scotsman*, May 9, 2009.