

# **The Renaissance of Scottish International Arbitration**

**By**

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## **Introduction**

The 18<sup>th</sup> of November, 2009 was a historic day in Scotland as the Scottish Parliament passed the Arbitration (Scotland) Bill 2009<sup>2</sup>. The Bill should be given Royal Assent sometime in December and the Arbitration (Scotland) Act 2009 is likely to commence in February or March 2010 and a new era will dawn for Scottish arbitration.

Dispute resolution is a buzz concept these days. Everybody is talking about it, attending seminars, presenting seminars (including me) and some solicitors have even rechristened their litigation department, their “dispute resolution” department. As dispute resolution practitioners and as a consequence dispute resolution conference goes, we are more aware than ever of a whole host of tools in our dispute resolution kit. Each tool has been considered and reverse engineered like never before, to enable us to utilise these tools with confidence and success (well hopefully!). We can negotiate, mediate, adjudicate, arbitrate, litigate, and expert determinate to name but a few.

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<sup>2</sup> [www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm](http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm)

Whatever mechanism we employ to resolve our disputes, the primary objective is on solution finding and in seeking to get from problem to solution as quickly, efficiently and cheaply as possible. The current economic climate dictates even more acutely that disputes need to be solved as quickly and as cheaply as possible, not just for the claimant whose tight cash flow restricts a long and expensive battle, but the longer it takes to get your money the more likely it may be that the respondent will be bust. As I say to many of my clients, on my standard revolving portfolio of caveats which I exhume at my first consultation with all of them, no matter how strong a case they have on the facts and on the law, you cannot get blood from a stone and that even the most speedy and cost effective arbitration might simply result in an award that is only good for putting in a frame and hanging on the wall.

Of all the tools in the dispute resolution arsenal, it is arbitration that really interests me. It is court with flexibility and without the restrictions. No wigs, no gowns, no oppressive rules, no particular place to sit or stand, no rules on how to plead or what to say and most importantly of all, no losing the case on a mere technicality. This together with interesting disputes, with interesting people, in interesting locations such as London, Paris, Geneva, New York, Singapore, or Hong Kong give some spice to ones otherwise ordinary practice.

Awareness of arbitration is increasing. With increasing globalisation comes increasing awareness of the benefits of arbitration and the necessity of arbitration for the protection of trans-national business. The Scottish Bill 2009 is a direct product of that increasing awareness. As was said by Jim Mathers MSP, Minister for Enterprise, in the Scottish Parliament on 18<sup>th</sup> November, 2009<sup>3</sup>:-

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<sup>3</sup> [www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1118-02.htm#Col21260](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1118-02.htm#Col21260)

*“Members might be interested to know that there is considerable interest in the bill among academics and students of arbitration. That bodes well for both the use of arbitration in Scotland in future and the necessary supply of well-qualified arbitrators and arbitration specialists. The bill has been a catalyst for a new course on international commercial arbitration at the University of Edinburgh, which is the most popular postgraduate masters law course this year, with some 48 students from around the world enrolled on it. That reflects the international interest in using arbitration as a means of commercial dispute resolution.”*

The Minister also goes on to say;-

*“Let us hope .....the use of arbitration at home increases markedly as a result of the reforms and modernisation that the bill has introduced. We hope that, as a result, more international arbitration work will be attracted to Scotland and we will see a renaissance of Scottish arbitration.”*

It seems the title of this evening’s talk in is keeping with the national mood. The fact that we are all here this evening is evidence of this optimism of a new beginning and of a bright future for Scottish arbitration.

### **Arbitration in Scotland Today**

Scots arbitration law is found in a myriad of different places<sup>4</sup> -- from obscure statutes to inaccessible case law or, more often than not, not expressed at all. It is found in judicial precedent (which is our main source), institutional or near institutional authorities, and also in a patchwork of legislation, eg art 25 of the Articles of Regulation 1695 (dealing with the grounds for reduction of decrees arbitral in certain circumstances), the

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<sup>4</sup> Steven P Walker, A Scottish Arbitration Act? Why? SLT 2002, 6, 49-51.

Arbitration Scotland Act 1894, the Administration of Justice Scotland Act 1972, s 3 (which introduced the stated case procedure whereby any party to an arbitration can make a reference to the Court of Session on any point of law arising during the arbitration process for a ruling -- this provision has resulted in extreme delay and expense in Scots arbitration), the Arbitration Act 1975 (incorporating the New York Convention), the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 66 and Sched 7 (incorporating the UNCITRAL Model law into Scots arbitration law), the Civil Evidence (Scotland) Act 1988 and the Requirements of Writing (Scotland) Act 1995. In short, there is a very wide area to be considered and fully understood before one arbitrates in Scotland and this will continue to be relevant, at least in theory, for at least 5 years post commencement of the Scottish Act as there is provision in section 33A(3) for the parties to agree that the Act does not apply to an arbitration arising under an arbitration agreement made before commencement.

The Model Law although implemented in Scotland in 1990, anecdotal evidence suggests that there have only been around 10-15<sup>5</sup> international arbitrations with Scotland as a seat since 1990. Unfortunately, the Model law has not been a success. There are several reasons why the Model law has not proved a success, including lack of any international promotion or marketing, but the main ones are that there is no reference to damages, costs or interest in the Model law and Scots law does not fill these gaps.

### **Ancient Domestic & International Arbitration**

As I said in an article in 2006<sup>6</sup> I co-wrote with Lord Dervaird, John Campbell QC and Hew Dundas, arbitration has long had a place in Scotland the Celtic peoples had a *brithemh*, a person with legal knowledge, and the Norse peoples had a *birleyman*, both

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<sup>5</sup> Opinion of Lord Dervaird, who is widely regarded as Scotland's leading international arbitrator.

<sup>6</sup> Lord Dervaird, John Campbell QC, Steven P Walker, Hew Dundas, Arbitration in Scotland – A New Era Dawns SLT 2006. 20. 125-130 and 21, 133-136.

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 immense 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, as England settled into a mini Dark Ages of intellectual development from around 1250, exacerbated by extended war with France, Scots scholars, including lawyers, studied widely at the great seats of learning across Europe. Further, as Hunter observes<sup>7</sup> 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 mediaeval 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, but not necessarily involving a reasoned decision, and the other equitable, where an 'arbitrator' determined cases substantially *ex aequo et bono*. The latter 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. In addition, there was an amicable compositor (not to be confused with the French notion of *amiable compositeur*), who was 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 14th century, 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*.

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<sup>7</sup> The Law of Arbitration in Scotland, 2<sup>nd</sup> Edition, 2002.

From the 15th century onwards international arbitration developed as Scotland became a vigorous trading nation, and with increased trade came a requirement for some form of arbitration of trade related disputes.

From 1650 to 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, 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. Notwithstanding some difficulties caused by the language of art 25, the 1695 Act remains in force today.

In Scotland, no arbiter<sup>8</sup> or arbitral tribunal has any implied power to award damages as such power can be conferred only by clear and express language in the arbitration agreement, and the conferring of a general power is insufficient.<sup>9</sup> The award of interest is no less problematic as there is no express power given in law to award interest and there appears to be no implied power either.<sup>10</sup> The arbitration agreement must confer such power expressly or impliedly. Also, there is no express provision in Scots law for an arbiter to award expenses and, while the arbiter was formerly considered to have an implied power<sup>11</sup> the modern position is that the power is, in the first instance, a matter for construction of the arbitration agreement.<sup>12</sup>

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<sup>8</sup> The term used in Scots law for an arbitrator. The Scottish Bill 2009 adopts the more internationally recognised term of arbitrator.

<sup>9</sup> See *Aberdeen Railway Co v Blaikie Brothers* (1852) 15D(HL) 20.

<sup>10</sup> See *Farrans (Construction) Ltd v Dunfermline District Council*, 1988 SLT 466; 1988 SC 120, at p 469 (pp 124-125).

<sup>11</sup> See *Pollich v Heatley*, 1910 SC 469 at p 480; 1910 1 SLT 203 at p 207).

<sup>12</sup> See *Grampian Regional Council v John G McGregor (Contractors) Ltd*, 1994 SLT133 at p 138E.

## **Scottish Arbitral Procedure & Court Procedure**

Scottish court practice and procedure is precise, logical and traditional.<sup>13</sup> We still favour latin here and there and technical knockouts as a consequence of inadequate pleading and the failure to adhere to the rules of pleading. There is the ability of a party to go to debate<sup>14</sup> on questions of relevancy and specification which causes, in my view, much unnecessary delay, complexity and cost.

Scots court practice and procedure is not easily accessible to the general public and is only now undergoing some reform following Lord Gill's recent review of the civil courts.<sup>15</sup> The procedure adopted in domestic (and perhaps also in some of the few international arbitrations there have been in Scotland) tends to be a reflection of the standard way we plead and draft our pleadings and appear in court. This is not a criticism, just a fact as we are all products of our home jurisdiction. We have a summons or writ and a defence all with pleas-in-law and a generous sprinkling of latin, adjustment periods in which to work up these pleadings followed by a closed record, amendment and legal debates on those pleadings etc, etc. We also have lengthy examination in chief, as opposed to witness statements which is the common practice in international arbitration. It is a bit of an exaggeration to say that these witness statements replace the chief, as in reality, they augment the chief as they are an amalgam of the witness evidence as worked up by their legal representatives which the witness then adopts.

In Scotland, the parties tend to control or derail as the case may be the timetable without adequate and proactive case management by the arbitrator. The tendency is to let the process control the parties rather than proactively controlling the process.

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<sup>13</sup> [www.scotcourts.gov.uk/session/rules/index.asp](http://www.scotcourts.gov.uk/session/rules/index.asp) [www.scotcourts.gov.uk/library/rules/ordinarycause/index.asp](http://www.scotcourts.gov.uk/library/rules/ordinarycause/index.asp)

<sup>14</sup> Similar procedure to striking out under the English Civil Procedure Rules, Rule 3.4(2). Although, in the writer's opinion, with the exception of the Commercial Court of the Court of Session the procedure not as swift.

<sup>15</sup> [www.scotcourts.gov.uk/civilcourtsreview/](http://www.scotcourts.gov.uk/civilcourtsreview/)

Scots arbitration has thus far adopted *brevitatis causa*<sup>16</sup> and lock, stock and barrel the practice and procedure of the courts. Why, one may ask? Adopt the best parts makes sense, but to adopt the worst as well does not. This in itself has been the cause of extreme delay and over complexity of the arbitral process.

In addition, Scottish arbitrators have historically been non-lawyers and have often lacked the confidence even when assisted by a legally qualified clerk to proactively manage and control the arbitral process with the result that some arbitrations have lasted for many years. This too has been a disincentive to pursue arbitrations in Scotland. In short, Scottish arbitration takes too long and is too expensive.

### **Arbitration (Scotland) Act 2009**

The Scottish Bill 2009<sup>17</sup> brings Scottish domestic and International arbitration up to date and Scotland will benefit from having all of Scottish domestic and international arbitration law in one accessible and user friendly piece of legislation. Parties in Scotland and from abroad, will have the choice to resolve their differences more quickly and more cost effectively than by litigation or arbitrating elsewhere. They can choose the arbitrator(s), they can choose the procedure, they can choose how and where the hearings will be conducted, in what timeframe and most importantly of all they can benefit from high quality and low cost Scottish legal services.

The Bill is in many respects similar to the English Arbitration Act 1996. This is expected as both acts are based on and are consistent with the UNCITRAL Model law and also compliant with the New York Convention. The UNCITRAL Model law has been a huge success and has been adopted in more than 50 countries.<sup>18</sup> The Model law allows a

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<sup>16</sup> Latin – for the sake of brevity.

<sup>17</sup> [www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm](http://www.scottish.parliament.uk/s3/bills/19-Arbitration/index.htm)

<sup>18</sup> [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)

State to add to the Model law in order to accommodate its own specific needs and this is generally necessary are the Model law is silent on damages, interest and costs. Notwithstanding the success of the Model law, it is interesting to note that the first division arbitration players of the world – England, France, Switzerland, Sweden and USA have all drafted their own national arbitration laws. England has the Arbitration Act 1996, France has the New Code of Civil Procedure, Switzerland has the Swiss Private International Law Act 1987, Sweden has the Swedish 1999 Arbitration Act, USA has the Federal Arbitration Act.

The Bill deals with the seat of the arbitration, separability, law governing the arbitration agreement, suspension of legal proceedings, court intervention in arbitrations, anonymity in legal proceedings, arbitrators powers, peremptory orders, challenges to arbitrators, consolidation, awarding damages, interest and expenses (costs), challenges to awards, questions of law, judge arbitrators etc. The Bill also uses English and International legal language and refers to “applications” and “orders” and to “directions”.

The Scottish Arbitration Rules, which include both mandatory and non-mandatory (termed default) rules for the conduct of arbitrations in Scotland are cleverly produced as a convenient and user friendly pullout contained within Schedule 1 of the Bill. It is highly user friendly as the mandatory parts are marked with an “M” and the default parts, which the parties are free to contract out of are marked with a “D”. Section 24 of the Bill also allows Ministers the straightforward ability to order modifications to the Bill to cope with future changes to the Model law, New York Convention etc. This will ensure the Act is as easy as possible to keep updated. The Bill creates an arbitral appointments referee who will be an appropriate appointing body in the event of a failure by the parties to appoint an arbitrator. There is an express confidentiality provision which is default option which the parties can opt out of if they wish. This missing from the English Act 1996 as it is implied by English law. The Bill is to be commended for its clarity on the sometimes tricky issue of confidentiality.

The Bill, unlike the English Act, covers oral agreements. This keeps the Bill in line with the Requirements of Writing (Scotland) Act 1995 in that an agreement is not invalidated by not being in writing. This is likely to be problematic for international arbitrations where enforcement under the New York Convention is desired. As Article II(1) of the Convention states;-

*“Each Contracting State shall recognize **an agreement in writing** under which the parties undertake to submit to arbitration...”*

The Bill provides that parties may choose to opt for arbitration under the UNICITRAL Model law, which would replace the default rules of the Bill. Also, under the Bill, the court has the power to grant interim measures and deal with appeals concerning jurisdiction, serious irregularity and legal error are limited to an appeal to the Outer House and a further and final appeal to Inner House<sup>19</sup> of the Court of Session.

The immunity provided by the Bill is wide. The Scottish Arbitration Rules 70, 71, 72 provide for immunity of the tribunal, appointing arbitral institution, and experts, witness and legal representatives as if the arbitration were civil proceedings. Lastly and importantly, the Bill makes provision for damages, interest and expenses. That’s all I am going to say about the Bill, because its available on line, easy to read and understand by lawyer and non-lawyer alike.

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<sup>19</sup> Similar to the Court of Appeal in England.

## What is International Arbitration?

International arbitration has been defined as;<sup>20</sup>

*“International arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal and non-legal standards chosen directly or indirectly by the parties.”*

The world is a global market place as never before. Legal individuals contract with others across the globe. The rules of doing business and resolving disputes vary dramatically across the world and are quite different to what we are used to in the cosy, well ordered and organised West where we are unconsciously protected by Dicey’s Rule of Law.<sup>21</sup> How different other parts of the world, where corruption reigns supreme and corrupt local courts, together with a lack of well developed jurisprudence, make sensible local litigation an almost impossibility. Geopolitical and other risks which impact directly on investment needs to be controlled and managed. Parties attempt to do this by international arbitration. Parties can choose where and how to resolve their transnational disputes, they can take the dispute out of the country where the dispute had arisen and in doing so protect their investment. Parties can benefit from a judgment – termed an Award - that is generally more effective and enforceable than a judgment of

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<sup>20</sup> Julian DM Lew/Loukas A Mistelis and Stefan M Kroll, Comparative International Arbitration, Kluwer Law International; 2003, para 1-1.

<sup>21</sup> Albert Venn Dicey (February 4, 1835 – April 7, 1922) was a **British jurist** and **constitutional** theorist who wrote An Introduction to the Study of the Law of the Constitution (1885).

a National Court thanks to the New York Convention which has now been ratified in 144 countries.<sup>22</sup>

The arbitral process is all about party choice and party freedom. It is a child of capitalism. You can choose the type of arbitration. It can be ad hoc or institutional international arbitration (where parties adopt tried and tested rules such as those of the ICC<sup>23</sup>, LCIA<sup>24</sup>, ICDR<sup>25</sup> etc). Lawyers who are operating in a global marketplace (almost all of us will be touched by the global market place at some point in our practice no matter how domestic) must be aware of how transnational disputes are resolved and the legal environment which facilitates such a process.

Lawyers need to understand what arbitration actually is, what are the applicable laws, how arbitration clauses work – the good, the bad and the ugly, how the arbitral tribunal is comprised and what it does, what the jurisdiction of the arbitral tribunal is, how and where to conduct of arbitral proceedings, the role of the national courts, the award, how to challenge the award, and how to successfully seek recognition and enforcement of the arbitral award at the end of the day.

Parties also benefit from a process which is private and (hopefully) confidential with flexibility and autonomy of procedure, limited discovery/disclosure, and which should be more cost effective and quicker than litigation. The average arbitration, in my experience, normally lasts from 1 to 3 years, some will be quicker and some will be

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<sup>22</sup> [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

<sup>23</sup> [www.iccwbo.org/court/](http://www.iccwbo.org/court/)

<sup>24</sup> [www.lcia-arbitration.com/](http://www.lcia-arbitration.com/)

<sup>25</sup> [www.adr.org/](http://www.adr.org/)

longer. The compares well to litigation especially when one considers the risk of multiple appeals following any first instance judgment. In addition, most parties involved in arbitration comply with the award and approximately 90% of awards are complied with on a voluntary basis.<sup>26</sup>

The key element which makes international arbitration so popular is that it is supported by an international legal framework. The New York Convention provides for mutual recognition and enforcement between signatories and very limited grounds on which to refuse recognition and enforcement. These limited grounds are repeated in the Scottish Act at section 18(2) and (3). Whilst litigation can be quick and effective, this tends to depend on where you choose to litigate and importantly, where you intend to enforce your decree or judgment. If there is no reciprocal agreement, treaty or convention between the UK and the country where enforcement of the judgment is sought this can be fatal to a quick and effective enforcement.

Article 1(1) of the New York Convention applies;-

*“to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought...”*

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<sup>26</sup> The writer’s experience together with anecdotal evidence from arbitration colleagues.

With Article II(1) providing;-

*“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”*

The success of international arbitration is dependent on the interaction between a variety of laws and rules. This includes;-

1. The arbitration law of the "seat" (or place/venue/locale) of arbitration - which if Edinburgh, would mean the Arbitration (Scotland) Act 2009.
2. The procedural law of the arbitration (the "*lex arbitri*") which governs the existence and proceedings of the arbitral tribunal which will extend to such matters as whether the dispute is arbitrable under the local law, time limits for commencing arbitration, interim measures for protection, conduct of the arbitration including rules on disclosure of documents, evidence of witnesses etc, powers of the arbitrators, form and validity of the arbitration award and the finality of the award, including any right to challenge it in the courts of the place of arbitration.
3. The governing law of the arbitration clause or arbitration agreement which is usually the same as the contract as a whole, but need not be and will govern the validity of the arbitration clause or agreement.

4. The governing law of the contract which governs the substantive rights and obligations of the parties which is usually the same as that governing the arbitration clause or arbitration agreement, but again need not be.
  
5. The arbitration rules agreed upon by the parties (if any) such as UNCITRAL Rules<sup>27</sup>, ICC or LCIA etc.

So for example, you could have a dispute between a French and Nigerian company and arbitration agreement which provides for ICC arbitration in Edinburgh with a Swiss governing law of the contract. Therefore, the procedural law of the arbitration is found in the law of the seat, the Scottish Act. The ICC Rules regulate the procedure of the arbitration and contract out of some/all of the default rules contained within the Scottish Act and Swiss law applies to the rights/obligations remedies of the parties under the contract.

### **What sort of Arbitration?**

Generally speaking, there are two types of arbitration. Ad hoc and institutional. Ad hoc is where the parties have either not adopted a set of rules and so must agree them or in the event that proves difficult they are left with the default rules under the arbitration law of the seat (eg; the default rules of the Scottish Arbitration Rules). A lot of people assume, incorrectly, that an arbitration using the UNCITRAL Rules is an institutional arbitration. It is ad hoc as there is no institution to administer them. Although this does not mean that arbitral institutions cannot assist in the management and administration of ad hoc rules. The ICC and LCIA etc frequently do, for a fee of course!

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<sup>27</sup> [www.uncitral.org](http://www.uncitral.org)

Institutional arbitration is where an institution, for a fee, administers the arbitration process and the parties use the institutions rules. The ICC is the leading provider of institutional arbitration and they calculate the arbitrators fees based on the value of the dispute as opposed to an hourly rate as the preferred by the LCIA and others. As a general rule of thumb, the ICC tends to be the most expensive form of institutional arbitration with the LCIA tending to be one of the more cost effective forms. Costs are a hot topic in international arbitration at the moment as they are a serious concern. According to a survey conducted by Klaus Sachs in 2006,<sup>28</sup> approximately 85% of the costs involved in arbitration relate to legal fees with the remaining 15% relating to arbitrator costs and administrative expenses of any institution. Mr. Sachs conducted a survey of ICC disputes ranging from USD\$218 million to USD\$12 million where he also noted counsels fees ranged from USD\$4.2 million to USD\$1.8 million. Arbitration is big business, but it is also an expensive one.

Arbitrating using English or US lawyers is on any view prohibitive.<sup>29</sup> With the cost of leading London QCs and partners in the magic circle firms of approximately £1000 per hour costs rise quickly on any dispute. In comparison, Scotland has the same high quality at a fraction of the cost with QCs and partners in the leading Scottish firms perhaps around 30% of this figure at best and, might I add even less for junior counsel !! International arbitrators are quite cheap in comparison with average hourly rates ranging from £150 - £450 per hour. I should also say that the trend in international arbitration for disputes in excess of USD\$10 million is for a tribunal consisting of three arbitrators. This may well cause delay and will cause additional cost (in fact three times the cost!), but the attraction is mainly on the basis (mistaken or otherwise) that three heads are generally better than one.

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<sup>28</sup> Klaus Sachs in his article Time and Money, Pervasive Problems In International Arbitration (L. Mistelis and D.M. Lew, eds. 2006) 103 -115.

<sup>29</sup> Again from the writer's experience in practice.

According to the ICC in 2008 there were;-<sup>30</sup>

- **663** Requests for Arbitration were filed with the ICC Court;
- Those Requests concerned **1,758** parties from **120** countries and independent territories;
- In **10.7%** of cases at least one of the parties was a State or para-statal entity;
- The place of arbitration was located in **50** countries throughout the world;
- Arbitrators of **74** nationalities were appointed or confirmed under the ICC Rules;
- The amount in dispute was under one million US dollars in **27.5%** of new cases;
- **407** awards were rendered

According to the 2008 International Arbitration Study<sup>31</sup> carried out by the School of International Arbitration, Queen Mary, University of London, 45% of the participating corporations said they preferred to submit their disputes to the ICC (45%), followed by AAA-ICDR (16%) and the LCIA (11%). The 2008 Study confirms the increased preference for regional arbitration institutions as viable alternatives to international institutions.

In that study, reported statistics<sup>32</sup> from the arbitration institutions show that AAA-ICDR is the most frequently used institution who handled 3,047 international arbitrations from 2003-2007, followed by ICC who handled 2,854 international and domestic arbitrations from 2003-2007. The LCIA handled 549 international arbitrations from 2003-2007 and

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<sup>30</sup> [www.iccwbo.org/court/arbitration/index.html?id=26612](http://www.iccwbo.org/court/arbitration/index.html?id=26612)

<sup>31</sup> [www.arbitrationonline.org/research/Corpattitempirical/index.html#2008](http://www.arbitrationonline.org/research/Corpattitempirical/index.html#2008)

<sup>32</sup> [www.ccls.qmul.ac.uk/sia/research/ArbitrationInstitStat/index.html](http://www.ccls.qmul.ac.uk/sia/research/ArbitrationInstitStat/index.html).

the SCC handled 703 international and domestic arbitrations from 2003-2007. Approximately 50% of the arbitrations handled by the SCC are international.<sup>33</sup>

### **Scotland as a Venue of Choice – the Seat**

The most popular international arbitration venues are England, France and Switzerland. The well-known seats of arbitration are London (NML<sup>34</sup>), Paris (NML), Geneva (NML), Stockholm (NML), Hong Kong (ML), Singapore (ML<sup>35</sup>), New York (NML). There are many others as well including Vienna (ML), Frankfurt (ML), Oslo (ML), Sydney (ML), Dubai (NML) etc.

When one considers the best venue for an international arbitration, the most important consideration is (1) is the seat a party to the New York Convention and (2) is the national arbitration law Model law based or influenced. Essentially, is the seat arbitration friendly.

However, neutrality of the seat as well as convenience are also highly important considerations as is the fact that we are English speaking and English is the international language of business. Scotland with its roman law origins and common law influences is in a good position to bridge the civil/common law divide in international arbitration although we may have become too contaminated by long oral and written pleading to bridge the gap in any meaningful way, although we Scots are certainly in tune with our Civilian brothers in looking disdainfully at the excessive and costly approach taken in England and the US to almost blanket document disclosure.

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<sup>33</sup> [www.sccinstitute.com/hem-3/statistik-2.aspx](http://www.sccinstitute.com/hem-3/statistik-2.aspx)

<sup>34</sup> NML – non-Model Law but the national arbitration law is based on Model Law principles.

<sup>35</sup> ML – Model law adopted and incorporated in to domestic law with some additions/enhancements.

Scotland already has its own distinctive international and independent brand. Scotland is increasingly viewed abroad as being quite separate and distinct from England. This has become more so since devolution, more so with the current SNP administration at Holyrood<sup>36</sup> and it is this distinction and separate branding that could be highly advantageous to Scotland in establishing itself as an independent, and importantly neutral, international arbitration venue.

Much has been said recently in the Scottish Parliament and elsewhere that Scotland, regardless of the new Act, cannot compete with England. I don't think we could ever seriously compete with England who is an arbitration superpower, the mother of the common law and one of the world's leading financial centres. There is much more potential, in my view, for Scotland to develop and to become another Sweden. However, the Scottish Act will not in itself achieve this or result in a flood of international arbitrations using Scotland as a venue. Consumers of arbitration around the world need to know that Scotland has a new Act which is Model law and New York Convention compliant, they need to know that arbitrations conducted in Scotland will be conducted with greater speed and at lower cost than elsewhere, they need to know that the Scottish courts (and the judges who supervise the arbitral process), the advocates and solicitors are of high quality and good value. They need to know that we have a supply of well trained and able commercial arbitrators, not just skilled in construction law which has thus far been the national diet for Scottish arbitrators. Organisations like the Scottish Branch of the Chartered Institute of Arbitrators are trying to make this happen.

If the international consumers of international arbitration services recognise the benefits of arbitrating in Scotland and we embrace modern and internationally recognised methods of pleading in international arbitration and dispense with traditional Scots

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<sup>36</sup> Scotland has a devolved Parliament based at Holyrood, Edinburgh and the Scottish National Party is the current Scottish Government.

pleadings, technical pleading points and with oral examination in chief in favour of written witness statements, as well as proactively taking control of the arbitral process (achieved by using good quality arbitrators) to ensure speed and cost efficiencies we will position Scotland as a serious contender to be an arbitration venue of choice in the global arbitration marketplace. The creation of a Scottish Centre for International Arbitration,<sup>37</sup> which has been suggested, could prove to be a useful tool and a focused platform from which to boost the Scottish International Arbitration brand.

Lord Dervaird, John Campbell QC and Hew Dundas<sup>38</sup> have been, and continue to be, tremendous ambassadors for the renaissance of Scottish International Arbitration. We all need to do our part in putting the international spot light on Scottish Arbitration. Edinburgh University is doing its part to boost Scottish arbitration. Edinburgh has re-established the LLM in international arbitration taught by myself and Lord Dervaird.<sup>39</sup> Next week we are formally launching the arbitration intern programme with the support of the international law firm, Lovells.<sup>40</sup> In addition, I am currently in discussions with Edinburgh, the CI Arb, and the Law Society of Scotland to co-host an international arbitration conference early in the New Year to welcome the Scottish Act and to focus the international spotlight on Scotland. If we all act as ambassadors, I have no doubt that together we can create a renaissance of Scottish International Arbitration. I have great expectations – I hope you do too!

**Steven P Walker**

**24<sup>th</sup> November, 2009**

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<sup>37</sup> See the Report by the Business Experts and Law Forum (BELF), quoted in the SPICe Briefing No. 09/14: <http://www.scotland.gov.uk/Publications/2008/10/30105800/0>.

<sup>38</sup> All of whom are leading advocates for the renaissance of Scottish arbitration.

<sup>39</sup> [www.law.ed.ac.uk/courses/viewcourse.aspx?ref=56](http://www.law.ed.ac.uk/courses/viewcourse.aspx?ref=56)

<sup>40</sup> [www.lovells.com/Lovells/MediaCentre/PressReleases/Lovells+team+up+with+Edinburgh+Law+School+and+Tanfield+Chambers+for+International+Arbitration+intern.htm](http://www.lovells.com/Lovells/MediaCentre/PressReleases/Lovells+team+up+with+Edinburgh+Law+School+and+Tanfield+Chambers+for+International+Arbitration+intern.htm)