

Scotland the modern: A new age for arbitration

After more than 300 years of making do with a patchwork of often confusing legislation governing arbitration, Scotland has finally brought itself into the 21st century with a new Arbitration Act and the opening of the Scottish Arbitration Centre. **Fraser Allan** finds out that while the foundations have now been well-laid, much hard work lies ahead in making Scotland a prime arbitration venue

The Scottish Arbitration Act (2010) was, to put it mildly, a somewhat overdue piece of legislation. Replacing a set of disparate regulations dating as far back as 1695, it has finally brought clarity to arbitration proceedings in Scotland, which, the Scottish government and the local legal profession hope, will reverse the precipitous decline in the use of arbitration over the last two decades.

Critically, the new Act, which is modeled closely on UNICITRAL rules and the equivalent English Act of 1996, is formulated so as to encourage a pragmatic, commercial approach.

An example of this is the streamlined approach to appeals. “Previously we operated a system whereby the parties could refer points of law by way of stated case, which went straight to the Inner House,” [Scotland’s equivalent to the Court of Appeal], explains **Brandon Malone**, head of **McClure Naismith’s** construction disputes team in Edinburgh. “This could hold up progress of an arbitration for twelve to eighteen months, and could happen multiple times in a single arbitration.”

“It was,” Malone says, “the ultimate delaying tactic.”

Under the new system, parties can exclude point of law referrals, and legal error appeals, but even if they don’t, such referrals and appeals are now to be dealt with by a single, specially appointed, arbitration judge, and will take weeks, not years to resolve.

The importance of the Scottish Act’s close correspondence with existing English legislation cannot be underestimated, says **John Campbell QC** of the **Hastie Stable of Advocates**.

“The 1996 England & Wales Act gives us an enormous encyclopaedia of cases and case law from single judges and appeal courts to the House of Lords,” he explains. “Our Act has acquired, with one single piece of legislation, this whole body of experience which we can choose to rely on or not. By taking the best of the English experience, which has worked well since 1996, we can draw great benefit.”

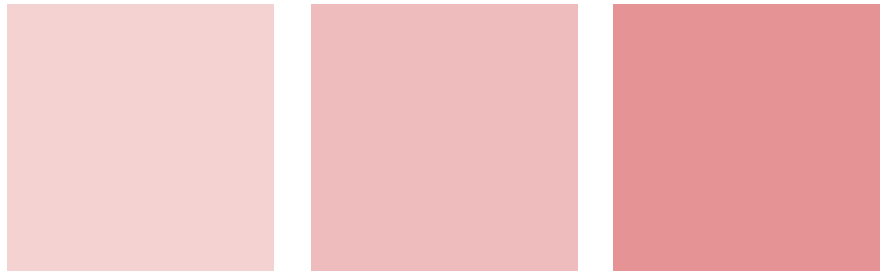
Whether Scotland’s devolved government - run by the pro-independence Scottish National Party - will agree with utilising English experience in this way, however, remains to be seen. Given recent controversies over the referral of Scottish cases to the UK Supreme Court, which provoked fierce debate within the local profession, utilising English law for Scottish awards might raise an eyebrow or two in Scotland’s Parliament.

While the bulk of the Act is familiar to anyone in arbitration, there are several innovations, which, its supporters say, will hopefully prove to be important in attracting parties to choose Scotland as their seat of arbitration. The all-important issue of confidentiality has been given particular attention, and the Act makes any breach actionable.

Court support

In addition, the Act gives parties limited rights of appeal. “Apart from the usual corruption or Bribery Act issues,” Campbell QC explains, “appeals are only allowed on limited jurisdictional grounds, and on grounds of legal error or serious irregularity.





Each form of appeal is differently and strictly regulated. Otherwise, you can effectively take out the involvement of the courts in a properly run arbitration, and our commercial judges have made it clear that they will be very supportive of the process if matters do go to court.”

Others, however, believe that while the Act is a positive step and a well-constructed piece of legislation, innovations such as the confidentiality section won't be bringing parties to Scotland in droves any time soon. “It's unlikely to make any difference,” says **David Scott**, a partner in **McGrigors'** contentious construction and engineering team in Edinburgh. “There is no such section in the English Act, nor is there I believe one in any other – but this is because there is already the assumption that arbitration is confidential and there will be action if there is a breach of confidence. The other factor is that if you go on and have the award enforced in court or there is an appeal in court on a point of law, it will end up in the public domain anyway.”

Steven Walker, a dual-qualified advocate and barrister at **Tanfield Chambers** in London, stresses that while confidentiality is paramount, “it's enforceability that people demand – generally most parties conducting transnational business want to know that they are protected and that if there is a dispute it can be settled – and enforced.”

But even the Act's most ardent supporters realised early on that not only the legislation itself would be enough to re-energise arbitration in Scotland. In tandem with the Act's development, plans were laid by the Scottish government in partnership with various local bodies including the Chartered Institute of Arbitrators, the Faculty of Advocates and the Law Society of Scotland, to set up the Edinburgh-based **Scottish Arbitration Centre**, which launched in March this year.

Heavyweight support

Andrew Mackenzie, the Centre's chief executive, says the organisation, whose board is chaired by McClure Naismith's Malone and boasts the internationally respected former European judge **Sir David Edward QC** as its honorary president, aims not only to host arbitrations but also to fight Scottish arbitration's corner worldwide.

Indeed, in May the Centre attracted two **more arbitration heavyweights**, **Lord Dervaird** (Professor John Murray) and **Hew R. Dundas**, who were appointed as honorary vice-presidents. “Both men are well known in the world of

international arbitration, and will play a vital role in the Centre's promotion of Scottish arbitration and Scotland as a place to arbitrate,” Mackenzie said.

The Centre's leadership may be high in stature, but according to Steven Walker, the weakness is however that they are all Scots. “If Scotland really wants to create awareness as an international arbitration venue, then the way forward is to make leading international practitioners a part of the Centre, whether as honoraries or associates.”

Malone however says that the Centre is in the process of setting up an appointments committee for international arbitration, which will have non-Scots in the majority and which will have free hand to appoint the best arbitrators from around the world.

So the foundations are now in place for Scotland to revive itself as a venue for arbitration. But nobody denies that it will take time for it to establish the track record enjoyed by England and other jurisdictions. “The other thing you need is a body of good arbitrators,” says Scott at McGrigors. “Scotland's isn't very strong right now as there hasn't been much in the way of arbitration in the last 15 years, as most cases have gone to court or to mediation.”

While it is clear that rebuilding this strength as well as raising international awareness of what Scotland has to offer will take some time, the Scottish Arbitration Centre possesses one distinct advantage enjoyed by other countries which have already emerged as global arbitration centres - strong support from both government and the legal profession.

If momentum can be sustained, perhaps Scotland can step out from London's shadow and carve its own identity on the arbitration scene. And (potential parties and international arbitrators take note here) London doesn't have the scenery, the whisky, or the golf courses. ■

