# THE ARBITRATION (SCOTLAND) ACT 2010: A GREAT COLLABORATIVE SUCCESS AND AN INNOVATIVE MODEL FOR OTHER JURISDICTIONS TO FOLLOW

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**Abstract**

*This article is in three parts: the first summarising the history of arbitration in Scotland and the law as it existed pre-2010; the second outlining the numerous innovative provisions of the Arbitration (Scotland) Act 2010 (never recorded in print in this form before) and looking at those innovations; and the third examining post-2010 Scottish jurisprudence in arbitral matters. The article concludes both (i) that matters in Scotland are in good order and in excellent hands and (ii) that other jurisdictions can advantageously 'borrow from' the Scottish achievements … at no cost!*

## I. Scottish Arbitration Law pre-2010

### A. General Introduction

Prior to 2010, the state of domestic arbitration law in Scotland could be described as truly dismal. That law was more inaccessible than most areas of law since Scotland was one of the few countries in the world that lacked a modern domestic arbitration statute, the law being a mixture of out-of-date, old, very old and truly ancient case laws (dating back at least to 1207[1]) and piecemeal statute (back to 1598 and 1695). The law was also riddled with anomalies and uncertainties.

A CIArb/SCIA[2] team led by a distinguished retired Scottish judge, the Hon. Lord Dervaird, drafted, privately, the Arbitration (Scotland) Bill 2002 [the "**Dervaird Bill**"] substantially consistent with the UNCITRAL Model Law on International Commercial Arbitration, 1985 [the "**Model Law**"] and drawing on the best features of the "English"[3] Arbitration Act 1996 [the "**1996 Act**"]. However, Scotland's then Labour Government displayed a complete absence of vision and ignored it.

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1 The oldest case cited in one leading modern text, ROBERT L.C. HUNTER, THE LAW OF ARBITRATION IN SCOTLAND (2nd ed. 2002), dates from 1207.

2 (i) Chartered Institute of Arbitrators (Scottish Branch); (ii) Scottish Council for International Arbitration.

3 Although often described as "English", the 1996 Act is in a fact a U.K. Act, applying in full in Northern Ireland and, in respect of consumer arbitration only, in Scotland.

In the 2007 Scottish Parliamentary Election, Scotland acquired a new, Scottish National Party, government which had made a manifesto commitment to reforming arbitration law. Work on this began in 2008 and the Arbitration (Scotland) Bill was published on 30th January 2009 following an extensive consultation process.[4] The CIArb not only participated fully in that process but also provided very extensive and detailed drafting and other comments[5] covering the entire Bill. Following a rare display of an all-party co-operation, the Bill was passed by the Scottish Parliament on 18th November 2009 and Royal Assent followed on 5th January 2010. The Arbitration (Scotland) Act 2010 [the "**2010 Act**"] came into force on 7th June 2010.

### B. Key Features in History of Arbitration in Scotland

With the origins of Scottish arbitration dating back almost to 1,000 AD, it grew along with the growth of both commerce and 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[6], in which the Court held that an error of law on the face of an award was sufficient ground 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.[7] The courts also decided that their jurisdiction could not be ousted by an arbitration agreement unless it named the arbiter.[8]

Not all 19th and early 20th century 'news' was 'bad news': the arbiter's procedural flexibility was largely upheld[9] (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 Court.[10] While the payment of arbiters had previously been prohibited, that prohibition was, very fortunately, rendered obsolete in 1913.[11]

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4 The initial Consultation Draft was published on 27th June 2008.
5 Totalling approximately 42,500 words whereas the whole 2010 Act is 16,250 words.
6 Clyne's Trustees v. Edinburgh Oil & Gas Light Company, (1835) 2 Sh. & Macl. 243, 271 (U.K.).
7 Aberdeen Railway Co. v. Blaikie Brothers, [1854] UKHL 1 (appeal taken from Scot.), reversing the Court of Session.
8 Campbell v. Shaws Water Co., (1864) 2 M. 1130 (Scot.).
9 Christison's Trustee v. Callendar-Brodie, (1906) 8 F. 928, 931 per Lord Dunedin (Scot.).
10 A repeated theme in Scots case law, from Tenants of Dennie v. Lords Fleming and Sanctjohn, (1553) Mor. 623 to A. Sanderson & Son v. Armour & Co., [1922] S.C. 117 (H.L.) (U.K.) (appeal taken from Scot.).
11 McIntyre Bros v. Smith, (1913) S.C. 129, 132 (per Lord Kinnear) (Scot.).

Throughout this period of development of arbitration law in Scotland, the topic was substantially ignored by the legislators: other than an Act of 1598[12] and Article 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 issues[13]) and again so until 1972[14] when a single clause (the notorious "Stated Case" procedure) was introduced and then 1990 when the Model Law became the law for international commercial arbitrations conducted in Scotland[15].[16]

## C. Problem Areas Pre-2010[17]

### *i. General*

It will be readily apparent from the historical survey above and the absence of a modern codified arbitration law that Scots arbitration suffered from numerous inherent problems, not the least of which was the difficulty of ascertaining what the law in fact was in some respects. This seemed to be one of the major reasons why it was common for Scots arbiters to sit with a solicitor as clerk to advise on the law.[18] The following survey of pre-2010 Scots arbitration law is eclectic and not intended to be comprehensive but rather, in the experience of the author, a highlighting of areas where the Scots law of arbitration was either out of kilter with the modern world or was uncertain, a theme that ran strongly through Hunter's work.

### *ii. Severability*

The question of severability of an arbitration agreement from its container contract[19] was not settled in English law until 1992;[20] the position in Scots domestic law was unclear except in

12 "*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 subscryve ane submission formit and sent be his majestie to thame to be subscryvit*"; however, it is unclear whether the Act of 1598 remained in force in 2009 although it was highly likely that it had fallen into desuetude. The 2009 Bill and 2010 Act assumed the latter.

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

14 Administration of Justice (Scotland) Act, 1972, § 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; this unwanted anomaly survived until repealed by the 2010 Act.

15 Law Reform (Miscellaneous Provisions) (Scotland) Act, 1990, § 66, sch. 7, albeit very rarely used since enactment (see below why this has been the case).

16 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 remained in force in Scotland until the 2010 Act in respect of the New York Convention.

17 *See* Christison's Trustee v. Callendar-Brodie, (1906) 8 F. 928, 931 per Lord Dunedin (Scot.).

18 Seen by some English arbitrators as akin to David Beckham hiring someone to kick the football for him and seen internationally as Jordan Spieth hiring someone to hit his golf ball for him.

19 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.

20 Harbour Assurance Co. v. Kansa General International Insurance Co. Ltd., [1993] 1 Lloyd's Rep. 455 (Eng.).

respect of the Scottish Arbitration Code (1999 and 2007) (refer below); such juridical authority as exists appeared to stem from the English case of *Heyman v Darwins*[21].

### *iii. Agreements to Arbitrate*

The interpretation of arbitration agreements in Scotland varied in approach over the 250 years pre-2010, being broadly supportive from around 1770 to 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.[22] In the later 20th century, the courts generally adopted a less restrictive approach, although the dominant theme remained the ousting of the jurisdiction of the court. While some decisions upheld arbitration agreements despite having defects, others regrettably adopted the 19th century thinking[23] and appeared to be anything but flexible.

Tradition in Scotland was 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 used to be categorised into special, general and mixed (also known as 'general-special'), distinctions which, to modern eyes, appear to be fine ones of no immediately obvious merit.

Despite difficulties at the detail level, the policy of the Scottish courts remained, as it has always been, that if the parties had contracted to arbitrate, 'to arbitration they must go'[24]. There was never any policy in Scotland that a contract, e.g. an arbitration agreement ousting the jurisdiction of the court, was invalid as being 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.

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21 [1942] A.C. 356 (H.L.) (appeal taken from House of Lords).

22 Modern jurisprudence outside Scotland has gone on the opposite direction; see e.g. Fiona Trust v. Privalov, [2007] UKHL 40 (U.K.) (appeal taken from Eng.), Eco Swiss China Time Ltd v. Benetton International NV, [1999] 2 All E.R. (Comm.) 44 (Eng.).

23 *Cf.* Bruce v. Kordula, 5 Int. A.L.R. 2002 (Scot.), 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 (as also in England) , 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.

24 A. Sanderson & Son v. Armour & Co., [1922] S.C. 117 (H.L.) 126 (Lord Dunedin's opinion) (U.K.) (appeal taken from Scot.).

One of the most remarkable anomalies of pre-2010 Scots law was that a party or his agent (lawyer) could be appointed arbiter[25], although it was hard to see such an appointment surviving in the climate of the European Convention on Human Rights [the "**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 binding until 2010) Scots case[26] where it was held that the concept of an arbiter determining his own jurisdiction would be 'as unwarrantable in principle as … it is inexpedient in practice'.

Scots law took a more restrictive view than English of what constituted a dispute (in particular, the *Halki* principle[27] did not apply): if the defender (respondent) merely refused or delayed fulfilment of its obligations, there could be no submission to arbitration[28], although there was no reason why an agreement to arbitrate could not be enforced by the courts.

*iv. 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 was, in the past, so much the norm that some commentators thought it necessary to cite authority for the proposition that the arbiter had a discretion ***not*** to appoint a clerk.[29] Whether one attributed this to nervousness about the uncertain state of the law or to some other reason, the cost of a clerk was sometimes cited as a deterrent to parties considering arbitration.

Unsurprisingly, Scots arbitration law did not make precise provision regarding privacy or confidentiality, there being neither statute nor case law on the point. It was however generally assumed that proceedings were private but that there was no such general presumption regarding confidentiality. These issues were never tested in Scotland in light of the ECHR[30] (but were fully so in England[31]).

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25 Buchan v. Melville, (1902) 4 F. 620 (Scot.).

26 Caledonian Railway Company v. Greenock & Wemyss Bay Railway Company, (1872) 10 M. 892, 898 (Scot.) (a court of seven judges decided the case).

27 Recently refined in England & Wales by Jackson J. (as he then was) in AMEC Civil Engineering Ltd v. The Secretary of State for Transport (represented by the Highways Agency), [2005] EWCA (Civ) 291 (Eng.) in which he set out the then present state of the law in seven propositions (the "Jackson Seven"); in Collins (Contractors) Ltd. v. Baltic Quay Management (1994) Ltd., [2004] EWCA (Civ) 1757 (Eng.), the Court of Appeal approved the Jackson Seven.

28 Albyn Housing Society Ltd. v. Taylor Woodrow Homes Ltd., 1985 S.C. 104 (Scot.).

29 Mowbray v. Dickson, 1848 10 D. 1102, 1125 (Scot.).

30 First, in North Range Shipping v. Seatrans Shipping, [2002] EWCA (Civ) 405 (Eng.), the Court of Appeal confirmed ECHR jurisprudence in holding that a consensual (but not a statutorily compulsory) arbitration agreement is an opt-out of Art.6 ECHR; per Tuckey LJ "*Parties to a consensual arbitration waive their Article 6 rights in the interests of privacy and*

The applicability of court rules of evidence in Scots arbitration was as uncertain as in several other 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 ground that the arbiter relied on evidence which would have been excluded in court, whereas the Civil Evidence (Scotland) Act 1988 appeared to imply that court rules were or might be applicable in arbitrations.[32]

In principle, the Stated Case Procedure (the "SCP", introduced in 1972 to provide a 'ready mechanism' for providing authoritative determinations of the law) was intended to lead to a decision by the court on any preliminary question of law arising during proceedings; however, in practice, the SCP went significantly wider and could even involve consideration by the court of matters of fact. It was of some historical interest that, in the case *Cambuskenneth Abbey v Dunfermline Abbey* (1207), it was evident that such a procedure – or something like it -- existed 800 years ago – rich history indeed! In reality, the procedure became an easily-adopted device for the promotion of unconscionable delay.[33]

The word 'misconduct' was used in Scots arbitration, but without any statutory definition, although it has been said that misconduct involved 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'[34].

### *v. Awards and Other Procedural Issues*

A common feature of pre-2010 arbitration in Scotland was the practice of issuing awards in draft for review by the parties; it was formerly argued, e.g. by Hunter, that this prevented mistakes and misunderstandings but, it is submitted, such were more easily and more effectively dealt with by a 'slip rule' procedure (s.57 of the 1996 Act) and that the issue of an award in draft would open a Pandora's box evidently better left closed. However, Lord Wark stated in 1939 that "it is an

*finality*.". Secondly, in Department of Economic Policy and Development of the City of Moscow and the Government of Moscow v. Bankers Trust Company and International Industrial Bank, [2003] EWHC (Comm) 1377 (Eng.) (refer the author's article at Hew R. Dundas, *Confidentiality in Arbitration: The Story Continues*, (2003) 69 ARB. 4, the confidentiality of arbitration *and of ensuing court proceedings* was confirmed as consistent with ECHR – *see* ¶ 32ff. *See infra* note 51 for the ECJ position.

31 City of Moscow v. Bankers Trust, [2004] EWCA (Civ) 314 (Eng.).

32 Civil Evidence (Scotland) Act 1988, § 9.

33 ERDC Construction Ltd. v. HM Love & Co., (1994) S.C. 620 (Scot.).

34 Adams v. Great North of Scotland Railway Co., [1891] A.C. 31 (H.L.) (U.K.) (appeal taken from Scot.).

implied condition of the contract, importing universal practice, that the parties have a right to make representations upon the 'proposed' findings of an arbiter"[35].

One of the many anomalies in Scots arbitration practice was the giving of reasons separate from the award, primarily in an effort to avoid challenge. It has been suggested that ECHR Art. 6 required that an award should now contain reasons unless expressly agreed otherwise, but this perhaps underestimates the critical point that the European Court of Human Rights has ruled that an arbitration agreement is a partial opt-out from the ECHR Art. 6.[36]

There is no legal presumption in Scots law that an arbiter may make a part (partial) or interim award; of course, given express power, he can do so. The court may imply such power in appropriate circumstances. However, the relevant precedents date from the early 19th century and were of limited application 150+ years later.

Scots law permitted the rectification of an error of calculation in an award[37] but otherwise, absent express agreement between the parties providing for rectification or correction of a slip, the award could not be corrected.

There was no express provision in Scots law for an arbiter to award expenses (in universal (outside Scotland) terminology 'costs') and, while the arbiter was formerly considered to have had an implied power[38], the modern position, pre-2010 was that the power was, in the first instance, a matter for construction of the arbitration agreement[39]. However, no arbiter or arbitral tribunal had any implied power to award damages: such power could be conferred only by clear and express language in the arbitration agreement, the conferring of a general power being insufficient[40].

The award of interest was no less problematical: there was no express power given in the law to award interest and there appeared to be no implied power either.[41] The arbitration agreement had to confer such power expressly or impliedly. There was no reason in principle why an award of

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

36 Nordström-Janzon and Nordström-Lehtinen v. The Netherlands, Decision of the European Commission of Human Rights (Second Chamber), Application No. 28101/95 (Nov. 27, 1996). The case concerned 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 guarantees.

37 Hetherington v. Carlyle, Fac. Coll. June, 1771 (Scot.).

38 Pollick v. Heatley, (1910) S.C. 469, 480 (Scot.).

39 Grampian Regional Council v. John G McGregor (Construction) Ltd., (1994) SLT 133, 138E (Scot.).

40 Aberdeen Railway Co. v. Blaikie Brothers, (1852) 15 D.(H.L.) 20 (Scot.).

41 Farrans (Construction) Ltd. v. Dunfermline District Council, (1988) S.L.T. 466, 489 (Scot.).

interest at a fluctuating rate (e.g. bank base rate) should not be enforceable, provided that it was 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) was sufficient ground to exclude the English position (s.56 of the 1996 Act) whereby an arbitrator could exercise a lien over the award until his fees were paid by one or other party. However, until the 20th century it was not normal for arbiters to charge fees and it was then thought possible that a modern court would take a different view. However, in 1988 an award was set aside on precisely such grounds.[42] Once again, the importance of achieving precision of expression within the deed of submission was reinforced.

An anomalous consequence of the Requirements of Writing (Scotland) Act 1995 was that an award was not invalidated by not being in writing (ignoring enforceability issues under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 [the "**New York Convention**"]; there were 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 was no more clear than other areas in pre-2010 Scots arbitration law; two potentially relevant cases (from 1793 and 1862) not only predated the payment of arbiters becoming customary but also related 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[43], Lord Curriehill stated inter alia:

"*parties 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,[44] Lord Moncrieff said "the 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."

42 Blair v. Gib, (1738) Mor. 664 (Scot.).
43 McMillan v. Free Church of Scotland, (1861) S.C. 1314 (Scot.).
44 Rutherford v. Magistrates of Findochty (1929) S.N. 130 (Scot.).

### D. Summary

Pre-2010 there were many anomalies and even more uncertainties in Scots arbitration law; it is striking how often there was no definitive answer available to commonplace arbitration issues and disappointing to see how many of the common themes of modern arbitration then had no place in Scots law.

All this was, of course, fully rectified by the 2010 Act.

## II. The Great Reform of 2009/10

### A. The Arbitration (Scotland) Act 2010

The 2010 Act addressed and resolved all the many weaknesses, omissions, grey areas, imprecisions, anomalies etc. of the pre-2010 domestic law by modern provisions, drawing on what were assessed as the most relevant and/or effective features of the Dervaird Bill, the Model Law, the 1996 Act and numerous other sources.[45]

Many of the provisions of the 2010 Act replicate international norms in arbitration and therefore will not be covered in this part of this article. However, importantly and as with the 1996 Act, the 2010 Act rests on three founding principles which govern its operation: "... (a) that 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."[46]

However, the 2010 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 Schedule 1 to the 2010 Act) so that the commercial user (and arbitration practitioner) effectively need only consider the SAR, ignoring the "legal stuff" in the Act itself. However, the SAR do form part of the law of Scotland in contrast to, for example, the Rules of the International Chamber of Commerce ["**ICC**"] or London Court of International Arbitration ["**LCIA**"].

45 Arbitration laws and developments in 25-30 jurisdictions were considered by the CIArb in developing its submissions on the Bill.

46 Arbitration (Scotland) Act, 2010, (A.S.P. 1), § 1 [hereinafter "2010 Act"].

The Rules are of two classes: (i) mandatory rules which apply in all arbitrations seated in Scotland[47]; 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 comprehensive, complete and fully-integrated set of rules. 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. UNCITRAL, 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 supersede the default provisions of the Model Law or the 1996 Act.

*i. Repeal of the Model Law*

The 2010 Act established a single regime covering all arbitrations and therefore, somewhat controversially, repealed the UNCITRAL Model Law which had been a 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, New York were thriving while Model Law jurisdictions such as Germany, Australia, Canada (parts), New Zealand, Cyprus, Norway and Denmark were not proving any particular success. It followed that having, or not having, the Model Law was 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. That arbitrator saw these factors as significantly outweighing the advantages of having the Model Law. Factors (i), (ii) and (iii) apply in Scotland and, as to (iv), there is a relatively new Scottish Arbitration Centre for whom it is still 'early days'

Vienna is seen as successful 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

47 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.

introduction of the Model Law effective on 1st July 2006. Austrian arbitration colleagues say that there has been no noticeable change in caseload since that date.

An informal survey of the author's senior arbitrator colleagues around the world failed to identify one single jurisdiction which saw the Model Law as the main factor in its success as an international arbitral venue; Ireland is successful largely because of the American Arbitration Association/International Centre for Dispute Resolution presence, Bermuda because of its strengths in financial services, particularly insurance/reinsurance, and Hong Kong has a high volume of People's Republic of China ["**PRC**"] related business and a Hong Kong Award can be enforced in the PRC through the New York Convention. Malaysia has adopted the Model Law (31st December 2005) but the previous position that almost all large Malaysian arbitrations went to Singapore appears not to have changed significantly.

Most importantly of all for Scotland, the Model Law was 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 so[48]). 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 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 fn.48), the Bermudan statute needs an *additional* 5,500 words, Singapore 7,000 words 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; Scotland considered that approach to be pointless. While it is argued that the Model Law jurisdictions are the same and parties can go to any one of them with ease and confidence, the word-counting wholly contradicts that argument.

### *ii. The Main Provisions of the 2010 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,[49] consolidation,

48 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.

49 However, the word "peremptory" is not used because of possible confusion with its dual meaning.

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 a 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 working of the 1996 Act showed a clear majority for retaining the present s.69 regime in England, there was a 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.

Interestingly, the 1996 Act is (ignoring ss. 85-91 and Schedules 2, 3 and 4) 19,000 words long and the 2010 Act (ignoring Schedule 2 (Repeals)) is 15,200. The Model Law is a mere 5,400 words (and see above re Bermuda, Singapore and New Zealand).

The 2010 Act has a number of features which, in the author's humble view, either improve the 1996 Act and/or augment it to cover issues not addressed therein:

(i) English law is contradictory as to which law applies to the arbitration agreement: in *Sonatrach Petroleum v Ferrell*[50], 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 vs D*[51], the Court decided that the law of the seat should govern. The 2010 Act 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 the author's knowledge as at 2010, other than s.48 of the Swedish Arbitration Act 1999, no legislation anywhere else has definitively addressed this difficult issue.

50 Sonatrach Petroleum Corporation v. Ferrell International Ltd., [2002] 1 All E.R. (Comm.) 627 (Eng.).

51 [2007] EWCA (Civ) 1282 (Eng.) (upholding the first instance decision of Cooke J. in C v. D, [2007] EWHC (Comm.) 1541 (Eng.)).

(ii) s.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 2010 Act creates "Arbitral Appointments Referees"[52] ["**AARs**"] who will do so and the CIArb and others are registered as AARs.[53]

(iii) Mindful of the excellent example of Singapore where the legislature has in the past responded with remarkable speed to rectify anomalies in its arbitration law, under the 2010 Act[54], Ministers may *by order* make any provision which they consider appropriate for the purposes of giving full effect to any provision of the 2010 Act (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.

(iv) The 2010 Act is fully consistent with the Model Law[55] and incorporates the relevant text of the New York Convention; further, the SAR are intended to be both "cutting edge" and consistent, as far as practicable, with the UNCITRAL Arbitration Rules. To preserve these consistencies, s.24 of the 2010 Act provides that Ministers may *by order* (see (ii) above) modify (a) the SAR, (b) any other provision of this Act, or (c) any enactment which provides for disputes to be resolved by arbitration, in such manner as they consider appropriate in consequence of any amendment made to the UNCITRAL Law, the UNCITRAL Arbitration Rules or the New York Convention.

(v) There are express provisions[56] concerning the resignation of an arbitrator, a curious omission from the 1996 Act where the consequences of resignation are addressed but not the process of resignation itself. These provisions have a potential drastic effect on the arbitrator's immunity from suits by the parties e.g. in that an unreasonable resignation may lead to loss of immunity.

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52 2010 Act, *supra* note 46, § 22.

53 The requirement (at § 22(2) of the Bill) 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.

54 2010 Act, *supra* note 46, §§ 30, 31.

55 The Justice Department has carried out a detailed analysis.

56 Scottish Arbitration Rules, 2010, Rule.15, Rule 16 [hereinafter "SAR"], both mandatory.

(vi) There is an express confidentiality/privacy obligation[57] (see Appendix) as a default rule (i.e. from which the parties can opt out by express agreement so the rule will 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 LJ's masterly judgment in *Emmott*[58], a Scottish solution (substantially drafted by the CIArb) is both novel and, it is submitted, as effective as is reasonably practicable.

(vii) The 2010 Act covers oral arbitration agreements, excluded from Part 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 New York Convention writing requirement, these are not the New York Convention circumstances. Further, preservation of the common law for such oral arbitration agreements (as in s.81 of the 1996 Act) is a recipe for disaster given the dire state of that common law (see above).

(viii) Consistent with the ECHR Art. 6, the Model Law, the UNCITRAL Arbitration Rules and extensive recent international developments, the 2010 Act requires arbitrators to be independent as well as impartial.[59]

(ix) Prospective arbitrators and arbitrators post-appointment are placed under a clear and continuing disclosure requirement concerning conflicts of interest.[60]

(x) Following *Cetelem SA v Roust Holdings Ltd*[61], the Court has the power to grant interim measures given no more than the existence of an arbitration agreement and a (*prima facie*) relevant dispute.[62]

(xi) The 2010 Act expressly deals with the *Gannet v Eastrade*[63] lacuna where, following application of the slip rule to correct a miscalculation, the arbitrator revisited his

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57 *Id.* Rule 25.

58 John Forster Emmott v. Michael Wilson & Partners Limited, [2008] EWCA (Civ) 184 (Eng.).

59 We respectfully disagree with the DAC's analysis here, particularly given art. 6. 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 (SAR, *supra* note 55, Rule. 23(1)(a) to be both impartial and independent was sufficient.

60 SAR, *supra* note 55, Rule. 8 (a mandatory rule).

61 [2004] EWHC (QBD) 3175 (Beatson J.) (Eng.), the outcome was confirmed in the Court of Appeal (Cetelem SA v. Roust Holdings Ltd., [2005] EWCA (Civ.) 618 (Eng.).

62 SAR Rule 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*."

63 Gannet Shipping Ltd. v. Eastrade Commodities Inc., [2002] Lloyds Rep. 713 (Eng.).

expenses award to make a consequential change to the costs award from 100/0 to 50/50.[64]

(xii) In an effort to reduce the role of the Court, the 2010 Act limits jurisdictional appeals from the first instance decision (s.67(4) of the 1996 Act)[65]' further, there is no appeal to the Supreme Court.[66]

(xiii) The same applies to serious irregularity appeals[67] and to legal error appeals[68].

(xiv) SAR Rule 72 (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 was a civil proceeding.

(xv) 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 2010 Act and that concerns express provisions to deal with smaller cases, e.g. those involving consumers and small businesses. Politically, it was essential that the 2010 Act be seen to benefit the entire community at all levels and be seen as a user-friendly process.[69] The CIArb Scottish Branch has drafted the Scottish Short-Form Arbitration Rules to cover smaller arbitrations and these were launched in November 2012.[70]

### *iii. Summary*

The international community stands at the threshold of what should prove to be a new Golden Age of arbitration in Scotland. The CIArb's Scottish Branch has played (and will continue to play) a key role in the development of the 2010 Act, arguably the most important, purely Scottish, commercial legislation in our beloved country's long history. The then First Minister of

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64 SAR, *supra* note 55, Rule56(7) (a default rule) provides that "*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*".

65 SAR, *supra* note 55, Rule 65 (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."

66 *Id.* Rule. 65(6).

67 *Id.* Rule. 66(5)-(7) (a mandatory rule).

68 *Id.* Rule. 67(8)-(10) (a default rule).

69 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.

70 However, Arbitration Act, 1996, c. 23, § 89-91 (U.K.) [hereinafter 1996 Act] (the only sections which apply in Scotland) remain as is; consumer protection is a Reserved Matter which is handled by the U.K. Parliament, not the Scottish one.

Scotland most graciously and very warmly recognised this in a letter to the Branch, suggesting that since 1999 no private organisation had played such a major role in developing new legislation.

*iv. Postscript*

In England, the Departmental Advisory Committee ["**DAC**"] produced two reports, one in February 1996 on the Arbitration Bill (then in substantially final form) and a Supplementary Report in January 1997 on the 1996 Act; these reports are considered highly persuasive and are often relied on, including by the judiciary, to clarify aspects of the 1996 Act. There is no direct equivalent in Scotland, although the Policy Memorandum and the Explanatory Notes issued with the Bill on 29th January 2009 go part way in that direction but, of course, neither document addresses the many significant changes to the Bill made after that date. The CIArb's Scottish Branch's drafting team combined forces to publish a detailed commentary on the 2010 Act[71] and that commentary incorporates all relevant discussions, documentation etc. from 2008/09.

## III. The Scottish Judiciary's Approach to Appeals against Awards

The judiciary were active and greatly-valued participants in the 2008/09 development of the 2010 Act and hence would have been well aware of its objectives and the policies underpinning it. One of those policies was to minimise judicial involvement even in comparison with the restricted judicial involvement under the 1996 Act. While this is covered in detail in an article in the CIArb's journal "Arbitration"[72], it is helpful to summarise it here: (i) all first instance decisions, except appeals against awards, are final and there is no right of appeal; (ii) in respect of appeals against awards, the threshold for appeal to the appellate Inner House is set very high indeed, it being intended that only cases as fundamental as *Northern Pioneer*[73] or *Golden Victory*[74] will be capable of appeal; (iii) there is no right of appeal to the UK Supreme Court at all[75].

Only six cases under the 2010 Act have given rise to reported decisions[76] and five of those involve appeals against awards and a sixth an appeal against a jurisdictional ruling by an arbitrator; while the low number relates in part to the 2010 Act's highly restricted scope for

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71 DUNDAS & BARTOS ON THE ARBITRATION (SCOTLAND) ACT, 2010 (W. Green ed., 2nd ed. 2014).

72 Hew R. Dundas, *The Arbitration (Scotland) Act 2010: Converting Vision into Reality*, (2010) 76 ARB. 1, 2-15.

73 CMA CGM SA v. Beteiligungs KG MS Northern Pioneer Schiffahrtsgesellschaft mbH & Co., [2002] EWCA (Civ) 1878 (Eng.).

74 Golden Strait Corp. v. Nippon Yusen Kubishika Kaisha (The Golden Victory), [2007] 2 All E.R. (Comm.) 97 (Eng.).

75 In contrast, subject to obtaining leave (where necessary), any decision by a first instance judge under the 1996 Act, *supra* note 69, even a § 45 one, is capable of appeal all the way to the UKSC.

76 Pursuant to § 15 of the 2010 Act, the parties are entitled to anonymity so some of the cases are referred to in the style "Arbitration Application No. 3 of 2011".

judicial involvement, it is also probably due to the small number of arbitrations taking place in Scotland.

Case 1[77]

This was the very first 2010 Act reported case and was an application for leave to appeal an award for legal error (Rules 69 and 70 SAR). Neither parties were represented. Further, under Rule 70(5), the application was determined without a hearing. The actual details of the case can be omitted and, instead, focus may be shifted on Lord Glennie's[78] general observations; as he said,[79] "this Opinion[80] addresses certain procedural matters[81] with a view to offering guidance to practitioners". Importantly (see above) he said that:[82]

"Since the Act was closely and unashamedly modelled on the [1996] Act, and reflects the same underlying philosophy, authorities on that Act ... in relation to questions of interpretation and approach will obviously be of relevance. *There is no point in re-inventing the (arbitration) wheel*. In the written submissions relating to this application, both parties have helpfully referred to authorities on the approach to granting leave to appeal under the English Act. [Author's emphasis added]

Further he said the following:

[18] Because of the possible desire for anonymity[83] ... it would not be my intention to publish decisions on the grant or refusal of leave on the judicial website, unless they raised issues of law or practice.

[26] ... I also consider that the point is one of general importance. It arises under a standard form of building contract. ... While I am not prepared to say ... that the arbitrator was obviously wrong ... I have formed the view that his decision is open to serious doubt. ... These are matters which will no doubt be explored in more detail at the hearing of the appeal[84] and it would not be appropriate to say more at this stage.

77 Arbitration Application No. 3 of 2011, [2012] S.L.T. 150 (Scot.).

78 He was then the designated "Arbitration Judge" (Rules of the Court of Session, 1994, r. 100.2 [hereinafter "RCS"] by whom all arbitration applications are normally heard.

79 Arbitration Application No. 3 of 2011, [2012] S.L.T. 150, ¶ 1 (Scot.).

80 "Judgment" in English terminology.

81 In 2010, Lord Glennie had chaired the Rules Sub-Committee which developed RCS, *supra* note 77, r. 100 covering arbitration so his very useful observations on how the RCS are to apply to arbitration applications are of particular importance but the minutiae of court procedure do not concern us here.

82 Arbitration Application No. 3 of 2011, [2012] S.L.T. 150, ¶ 8 (Scot.).

83 § 15(1) provides that a party to any civil proceedings relating to an arbitration (other than domestic enforcement proceedings) may apply to the court for an anonymity order.

84 *See* Case 3 below.

[28] The point [relating to para.363 of the award] was presented in the petition as a point of law, on the basis that averments in the pleadings about that other tender could not necessarily be said to be irrelevant .... I am not persuaded that [this is applicable to] an evidential point. .... Giving a sensible interpretation to what is written there, I think the arbitrator was saying no more than that this evidence was not going to help him and was not sufficiently probative to justify its admission.

[29] I do not consider that this issue raises a point of law. *Pleadings in arbitration need not, indeed normally should not, follow the form of pleadings in common use in the Court of Session*. It is for the arbitrator to decide questions as to the admissibility, relevance, materiality and weight of any evidence: Rule 28(1)(b). It is not to be assumed that the absence of averments directly on the point will mean that evidence relating to it is inadmissible. Even if the averments are excluded, the evidence may still be admitted. That is for the arbitrator. The petitioners complain that the arbitrator misunderstood the potential relevance of the evidence. If so, so be it. That is not a complaint which the court can entertain. They can try again, at an appropriate stage, to persuade him of its relevance. The exclusion of the averments from the pleadings seems to me to be irrelevant to that question, though *ultimately that is for the arbitrator to decide, not the court*. [Author's emphasis added]

[30] Even if the question is one of law, I am not persuaded that the arbitrator was obviously wrong. That is the test that has to be met, since is not suggested that this point is one of general importance. They fail to meet it on this second point.

In the author's respectful submission, this widely-applauded Opinion made an excellent start to Scottish jurisprudence under the 2010 Act.

Case 2[85]

This was a Rule 69 (legal error) appeal[86] (in fact, upheld) and Lord Glennie made an important distinction between leave to appeal and the appeal itself. He stated:

*[22] The question before the court is whether the arbitrator erred in law in a material way in his approach to fixing a market rent for [certain items]. If he did, the case should be sent back to him to reconsider the market rent in light of all the evidence and applying the correct legal approach. This may seem obvious, but it needs to be stated because, in the [respondent's submissions], it was sought to be argued that the court should not interfere with the decision of the arbitrator in his award unless he was not just wrong*

85 Arbitration Application No. 2 of 2011, [2011] CSOH 196 (Scot.).

86 Arbitration Application No. 3 of 2011, [2012] S.L.T. 150 (Scot.) was r. 68 (serious irregularity) appeal arising out of the same dispute; it fell away consequent on the refusal of leave to appeal under r. 69. Lord Glennie queried why there had been two separate applications.

> *but "obviously wrong". In other words, it was contended that the "obviously wrong" test for the grant of leave to bring a legal error appeal [Rule 70(3)] should carry over to the merits of the appeal itself. That was said, in the note of argument, to be consistent with the policy and intention of the 2010 Act. At the hearing of the appeal, [Counsel for] the respondents did not press this point. In my view, she was right not to do so. It is, to my mind, clear that the "obviously wrong" test ... is a threshold test. There is no warrant for the argument that the same test should apply also to the hearing of the appeal on its merits. At that stage, the court is simply concerned with the question whether, on the point of law raised in the appeal, the arbitrator made a legal error and, if so, what consequences flow from that.*

Having refused leave to appeal, Lord Glennie made another important observation:

> *[31]* […] *At the motion for further procedure, I granted a motion for anonymity in terms of s.15 of the 2010 Act. In setting out and explaining my decision, I have attempted to respect both the letter and spirit of this requirement for anonymity, though the subject matter of the lease makes the task somewhat difficult. This difficulty is likely to be encountered to some degree, though possibly not in the acute form in which it arises here, whenever arbitration applications come before the courts, particularly since, subject to the statutory protection of anonymity in arbitration cases where an order is made under s.15, there is a public interest in open justice. It was agreed at the end of the hearing that in the first instance I should issue my Opinion to the parties without publishing it more widely, to enable them to make representations as to whether there should be publication and, if so, whether any details could be omitted without removing from my decision such sense as it might otherwise have.*

The award was in fact upheld and the appeal dismissed.

Case 3[87]

This gave rise to no points of general principle concerning arbitration but it should be noted that the case was a legal error appeal (Rules 69 and 70 SAR) against an award in a dispute relating to construction works carried out by the respondent at the claimant's premises; what is interesting is: (i) that this appeal arose from that leave granted in Arbitration Application №.3 (above); and (ii) it is unclear why the parties sought anonymity at the leave to appeal stage but waived it at the appeal stage. In any event, the appeal was dismissed.

87 SGL Carbon Fibres Ltd v. RBG Ltd., [2012] CSOH 19 (Scot.).

Case 4[88]

This was a rent review case and the appeal was for both "*serious irregularity*" (Rule 68) and "*legal error*" (Rule 69) and Lord Glennie had previously granted leave to appeal under Rule 69. The claimant now sought an order from the court that the arbitrator should reconsider his award. The Judge upheld the legal error appeal, quashed the arbitrator's determination and remitted the whole matter to him for reconsideration, saying that "*it was for him to determine the appropriate minimum and maximum levels [of rental], though I hope that he will gain some assistance from the terms of this Opinion*".

Case 5[89]

This was the first ever decision on a jurisdictional ruling under the 2010 Act (Rules 19 and 20; although G1 Venues Limited appealed under Rule 67, the Judge could not see how that rule could be engaged since no award had been issued[90]), the arbitrator having held that he had no jurisdiction. The petitioners owned property on the ground and basement floors of a building in Glasgow and the respondents owned property on the first, second and third floors. A Deed of Conditions governing the building gave rise to (owner-created) regulations concerning "the preservation, cleaning, use or enjoyment of the common property, or any part thereof"; the Deed included an arbitration agreement, specifying that the arbitrator was to be the Dean of the Royal Faculty of Procurators ["**DRFP**"] in Glasgow, whom failing, such arbitrator as shall be appointed by the Sheriff[91].

G1 Group plc, G1 Venues' parent, served the appropriate notice on the DRFP within time but the respondent objected that the notice of arbitration was defective since G1 Group owned no property at the premises in question. The arbitrator held a hearing in July 2012 to debate the jurisdictional issue and, in May 2013, issued a decision upholding the objection and declining jurisdiction.

The key question was whether a black-letter approach or a broader commercial one should be adopted in respect of the notice. The Judge's Opinion includes several points of general relevance:

88 Manchester Associated Mills Limited v. Mitchells & Butler Retail Limited, [2013] CSOH 2 (Scot.). With Lord Glennie having dealt with the application for leave to appeal, self-evidently a different judge had to hear the appeal itself.

89 G1 Venues Ltd. v. Glenerrol Ltd., [2013] CSOH 202 (Scot.).

90 An application for leave to appeal under Rule. 69 had already been rejected by Lord Woolman for the same reason.

91 I.e. the local District Judge in non-Scots terminology.

*[13]* *The whole background ... indicates that the reference to the parent company rather than G1 Venues Limited was a mistake which would not mislead anyone who had knowledge of the circumstances .... [Counsel for] the respondents submitted that the jurisdictional argument under Rule 21 was essentially the same as that put forward in the context of the legal error appeal, for which leave was refused. However the rules for granting leave for legal error appeals are restrictive - hence the refusal - whereas in respect of jurisdictional challenges, such as under R21, no leave is required. I consider that I am not prevented from considering the R21 appeal on its merits - indeed I am bound to do so.* (Author's emphasis added)

*[16]* *In my opinion, the error here, far from going to the heart of the proceedings, can be regarded as a technical or immaterial mistake, which would not mislead the respondents, nor the arbitrator once he was informed of the full facts. ... In my opinion the arbitrator misdirected himself by concentrating only on the impression which an arbitrator would gain when opening the letter. I prefer the view that, when deciding upon his own jurisdiction, he should have considered the reasonable reaction of the other parties to the dispute. In any event, whoever may be identified as the reasonable recipient of the notice, he is understood to be aware of the factual background. Furthermore the arbitrator did not consider the intention of the parties to the deed in respect of the requirements for notices under condition fifteenth.*

*[17]* […] *I will uphold the Rule 21 appeal against the arbitrator's decision and remit the whole matter to him to deal with the merits of the dispute. Despite the now long delay since the passing of the resolution, I understand that the issue remains live between the parties.*

Tellingly (and commendably), the Judge added an Addendum to his Opinion:

*[18]* *Over ten months elapsed between the [hearing] and the arbitrator's decision. Those acting as arbitrators should keep in mind that the founding principles of the 2010 Act include that arbitrations should be resolved without unnecessary delay.* (Author: Hear Hear!)

Case 6[92]

This was a combined Rule 68 (serious irregularity) and Rule 69 (legal error) appeal concerning a 125-year lease of a hotel with 14-year rent reviews potentially leading to arbitration under the auspices of the RICS Scotland; the tenant contended that the annual rent should remain as was, while the landlord argued for a 214% increase and the arbitrator arrived at +129%. The parties had sought anonymity in terms of s.15 of the 2010 Act.

92 Arbitration Application No.1 of 2013, [2014] CSOH 83 (Scot.).

The arbitration was, as customary in such cases, conducted by the surveyor arbitrator as a 'desktop' exercise, with the parties being represented by surveyors. Also as customary, the arbitrator requested the surveyors to identify any point of law that arose during the course of the proceedings. He also asked them to declare what role they intended to adopt in the arbitration[93] and both the surveyors replied "advocate" with the consequence that they required the permission of the arbitrator before proffering their own opinion evidence.

The landlord's surveyor [the "**LS**"] applied an earnings-based valuation and he also calculated the market rental value per hotel room. In arriving at his conclusions, he had assumed that a new tenant would carry out a major redevelopment of the hotel to maximise its trading potential and he used comparable evidence from seven other hotels. Each of his two valuations resulted in a similar figure. The tenant's surveyor [the "**TS**"] applied a different basis of valuation and was highly critical of the LS's approach suggesting, inter alia, that the latter's opinion should be ignored because he had not acted within the confines of his role as an advocate. The TS summarised his views on the LS's valuation as follows: "*[It] has no basis in fact, disregards the terms of the lease and bears no relation or regard to the rent review assumption that the property be valued as the subject property in its 1970 configuration. The valuation approach is so fundamentally flawed, ill-founded and wrong that I respectfully request that it should be disregarded in its entirety.*" Subsequently, the arbitrator issued his determination in a very concise form.

Lord Woolman restated some general principles, noting that the 2010 Act had been modelled on the 1996 Act and agreeing with Lord Glennie's observations in *Arbitration Appeal №.3 of 2011* that English decisions provided helpful guidance in this area. The founding principles set out in s.1 of the 2010 Act underpinned all questions of arbitration in Scotland where those principles reflected and restated a long line of authority. For example, in *Zermalt Holdings* v *Nu-Life Upholstery Repairs* [1985] 2 EGLR 14, Bingham J stated:

"as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

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93 That standard query follows Royal Institution of Chartered Surveyors (RICS) guidance on the matter: SURVEYORS ACTING AS ADVOCATES (2nd ed. 2009) and SURVEYORS ACTING AS EXPERT WITNESSES (3rd ed. 2009); the guidance states that surveyors must inform a tribunal whether they intend to act as an advocate, expert witness, or (exceptionally) in a dual role.

More recently, Lord Clarke stated in *Hashwani* v *Jivraj* [2011] 1 WLR 1872, at para 61:

"*One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute.*"

The tenant's Counsel submitted that there had been serious irregularity in the arbitration because: (a) the LS had acted not only as an advocate but also as an expert; (b) the arbitrator had himself acted as an expert; (c) his reasoning had been deficient or absent; and (d) he had wrongly taken into account inadmissible material. Counsel contended that a fresh arbitration should take place before a new arbitrator. The Author has tersely mentioned the relevant issues below:

A. The Rule 58 (Slip Rule) Issue

The landlord's Counsel raised a preliminary point, submitting that the appeal was incompetent because the tenant had failed to exhaust its rights of appeal or review within the arbitral process (Rule 71(2) refers). Since the main thrust of the tenant's challenge concerned the arbitrator's allegedly inadequate reasons. It should therefore have asked the arbitrator to clarify or remove any ambiguity in his determination within 28 days of the award being issued (Rule 58 refers). If a problem remained thereafter, the tenant could have asked the court to direct the arbitrator to give further reasons (Rule 71 (8)). While the Judge agreed with the tenant's Counsel that Rule 58 did not allow an arbitrator to rewrite a determination, he disagreed with the submission that it concerned only minor matters such as typographical errors. In the Judge's view, Rule 58 did provide significant corrective powers implementing the philosophy that arbitration is intended to be a stand-alone process with its own remedial mechanisms.

The author comments here that this is very interesting since the Judge has somewhat widened the applicability of Rule 58 beyond that which had been envisaged in 2010 based on s.57 of the 1996 Act; that said, such widening is clearly correct in principle.

Even if the tenant had made a Rule 58 application, the questions concerning acting as an expert and taking account of inadmissible evidence would have remained. The Judge declined to uphold the competency challenge, for the reasons set out below.

B. The Rule 68 (Serious Irregularity) Appeal

The Judge made three general points (derived from English jurisprudence) about serious irregularity appeals: (1) they were designed as "*a long stop available only in extreme cases where the*

*tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*"[94]; (ii) the court will not intervene on the basis that it might have done things differently, or expressed its conclusions on the essential issues at greater length; (iii) such an appeal can succeed only if there has been substantial injustice so that a dissatisfied party has to meet a high test.

*Did the landlord's surveyor act as an expert witness?*

The arbitrator was required to determine "*the admissibility, relevance, materiality and weight of any evidence*" (Rule 28(1)(b)) so the LS' use of language such as 'in my opinion' was insufficient ground for challenge. Such challenge would arise under Rule 68 only if it could be established that the arbitrator had himself acted irregularly in consequence of the LS's conduct.

*Did the arbitrator act as an expert?*

The tenant contended that, given the arbitrator's reasoning (or lack thereof) on the key issues, his selection of figures and his approach generally, he had departed from his appointed role and had instead issued what was in fact his own view on the matter, thereby breaching Rule 68(2). The Judge was unpersuaded since the lease envisaged that any arbitration be a practical exercise carried out quickly by an experienced surveyor who would be expected to deploy his knowledge in arriving at his decision. There was nothing in the award to indicate that the arbitrator had stepped beyond his role.

*Failure to give reasons*

The tenant's Counsel argued that his client was entitled to proper reasons and that the arbitrator's reasoning had been "*in many cases obscure, not apparent to the parties or, in some instances, non-existent*". He further contended that the arbitrator's conclusion had emerged out of nowhere. Dismissing these arguments, the Judge cited English authority to the effect that (i) an arbitrator is only required to deal with the essential issues, not every point that is raised[95] and (ii) an award may be upheld, even if the reasoning is poor and unimpressive[96]. One approach was to ask whether the award made sense and it did here: even although the arbitrator's reasoning was very brief, it was sufficient to explain the conclusion he reached. The fact that in some instances he 'averaged' the figures presented by the respective surveyors was not surprising and did not

94 DAC Report, ¶ 280 as cited e.g. in Walsall Metropolitan Borough Council v. Beechdale Community Housing Association Ltd., [2005] EWHC (TCC) 2715 (Eng.). However, Lord Woolman does not mention Christopher Clarke J.'s observation in Bandwidth Shipping Corporation v. Intaari (the Magdalena Oldendorff), [2006] EWHC (Comm) 2532 (Eng.) ¶61 (undisturbed on appeal Sebastian Holdings Inc. v. Deutsche Bank, [2007] EWCA (Civ) 998. (Eng.)), that that passage was not intended to add any gloss to, or to displace the language of § 68 of the 1996 Act.

95 Fidelity Management SA v. Myriad International Holdings BV, [2005] EWCH (Comm.) 1193, ¶ 9 (Eng.).

96 Compton Beauchamp Estates Ltd v. Spence, [2013] EWCH (Ch.) 1101, ¶ 79 (Eng.).

require elaborate analysis. An exercise of professional judgment of this type is not readily susceptible to elaborate reasons. For that reason, the Judge declined to order additional reasons under Rule 71(8).

*Comparative materials*

The rent review clause called for an open market valuation; so the only relevant information was that available to the hypothetical tenant.[97] The tenant argued that it had been a serious irregularity for the LS to have referred to confidential information about a particular hotel but (i) it was only one out of the seven hotels relied upon as comparators and (ii) the TS had responded fully to the trading information. The Judge rejected this ground on the basis that it was a point of law, not a serious irregularity.

## C. The Rule 69 (Legal Error) Appeal

The tenant alleged that the arbitrator had failed: (i) to have determined the relevance and admissibility of opinion evidence proffered by the LS; (ii) to have acted as arbitrator, substituting his own judgement; (iii) to have analysed the evidence placed before him; (iv) to have rejected as inadmissible or irrelevant evidence relating to one hotel; (v) to have carried out a proper calculation and instead "averaged" the submissions of the parties; (vi) to have analysed the parties' submissions on gross and net operating profit.

The Judge found it surprising that the tenant had relied upon the same factors for both branches of its case. If something was an error of law, it could not also be an irregularity but the grounds relied upon by the tenant were not genuine points of law. Essentially, the tenant was criticising the arbitrator for not providing fuller reasoning but valuation was more of an art than a science and the arbitrator's task had been to have exercised his professional judgement to arrive at the correct figure. It followed that the threshold test for making a legal error appeal was not made (Rule 70(4) and RCS 100.8(2)).

*Had the arbitrator's decision been obviously wrong ?*

For a decision to be obviously wrong, it must involve something in the nature of a major intellectual aberration or "*making a false leap in logic or reaching a result for which there was no reasonable explanation*"[98] but no such finding could be made here. The arbitrator had used his professional judgment to arrive at the rental figure on the basis of the submissions presented to him.

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97 Cornwall Coast Country Club v. Cardgrange Ltd., [1987] 1 EGLR 146 (Eng.).

98 HMV UK Ltd. v. Propinvest Friar Ltd Partnership, [2012] 1 Lloyd's Rep. 416 (Eng.).

Concluding, the Judge rejected the application for leave to appeal.

## IV. Conclusions Concerning Scottish Jurisprudence

With the caveat that six such cases constitute a very small sample compared to the hundreds or more such cases in England, it is already clear (and no surprise at all) that Scottish jurisprudence is squarely on track.

All those (many others in addition to CIArbSB) involved in developing the 2010 Act can be justly proud of a great achievement.