



**Scottish Arbitration Centre
Paper for the Access to Justice Committee of the Scottish Civil Justice Council**

Introduction

Given that, in carrying out its functions under the Act, the Scottish Civil Justice Council must have regard to the principle that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted, the Scottish Arbitration Centre would like to provide the Access to Justice Committee of the Council with (a) information on arbitration; (b) the background to the Centre; (c) its position on the promotion of arbitration by the Court; and (d) a vision for integration of alternative dispute resolution into the civil justice system.

Arbitration

Arbitration, a form of alternative dispute resolution (ADR), is a legal technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons (the "arbitrators" or "arbitral tribunal") by whose decision (the "award") they agree to be bound.

Advantages of arbitration

Parties often seek to resolve their disputes through arbitration because of the potential advantages over the courts. Advantages include:

- Unlike in court, parties can select an arbitrator with an appropriate degree of expertise.
- Arbitration is often faster than litigation in court.
- Arbitration can be cheaper and more flexible, and, if desired, less formal than court.
- Unlike court rulings, arbitration proceedings and arbitral awards are confidential.
- Unlike in court, there are very limited avenues for appeal of an arbitral award, which limits the duration of the dispute and any associated liability.
- Due to the provisions of the New York Convention 1958, arbitral awards are generally easier to enforce in other nations than court judgments.

Advantages of Scottish arbitration

The Scottish courts have always recognised the right of parties to agree to exclude the jurisdiction of the courts to inquire into the merits of their disputes and instead to refer any disputes to arbitration.

Scotland has new legislation which reforms and modernises its law of arbitration. Indeed, some commentators have pointed out that the Arbitration (Scotland) Act 2010 ("the Scottish Act") offers a number of improvements on the Arbitration Act 1996 ("the English Act"), which applies to the rest of the UK. For example, few other legislatures in the world have made clear that arbitration is usually a confidential business. Confidentiality is of course one of the attractions of arbitration to parties whose dispute is commercially sensitive. Where a party to an arbitration suffers loss as a result of another party breaching the duty of confidentiality, the aggrieved party can bring an action for damages. Furthermore, unlike anywhere else, the anonymity provisions ensure that where there is an appeal to the Court parties can request that their names do not appear on the decision. Indeed, Lord Glennie has gone further, opining that words could be redacted if they might give away the identity of the parties or, in certain cases, judgements may not be published at all.

Background to the Centre

The Centre, established in March 2011, is a non-profit company limited by guarantee made up of the Law Society of Scotland, the Faculty of Advocates, the Chartered Institute of Arbitrators, the Royal Institute of Chartered Surveyors, and the Scottish Ministers. The members have nominated directors and put in seedcorn funding, and the Scottish Government has also seconded a member of staff, Andrew Mackenzie, to the Centre to be its Chief Executive Officer. At present, it has ten Directors, including Brandon Malone, Chairman of the Board. Sir David Edward is Honorary President of the Centre. The Centre also has two Honorary Vice Presidents, The Hon Lord Dervaird (Professor John Murray QC) and Hew R. Dundas. The Scottish Arbitration Centre also has an independent Arbitral Appointments Committee for making arbitral appointments, which consists of:

- David Carrick, Senior Vice President, Hill International, Edinburgh
- Sandra Cassels, Partner, Brechin Tindal Oatts, Edinburgh
- Teresa Cheng, Senior Counsel, Des Voeux Chambers, Hong Kong
- Vincent Connor, Head of Asia Pacific, Pinsent Masons, Hong Kong
- Thomas Halket, Partner, Halket Weitz, New York
- Kaj Hobér, Partner, Mannheimer Swartling, Stockholm
- Elie Kleiman, Partner, Freshfields, Paris
- Lindy Patterson QC, Partner, Dundas and Wilson, Edinburgh
- James Wolffe QC, Dean of the Faculty of Advocates, Edinburgh

The Centre promotes arbitration, building on the entry into force of the Arbitration (Scotland) Act 2010, to the Scottish business community as an effective alternative to litigation, and Scotland to the world as a place to conduct international arbitration. Developing the Centre into a fully serviced arbitration institution is a longer term objective.

Integrating alternative dispute resolution into the civil justice system

The Centre considers that alternative dispute resolution (ADR) should not only be encouraged and promoted by the Court, in appropriate cases, but should be an option provided to users of a modern civil justice system.

The Report of the Scottish Civil Courts Review in 2009 made few recommendations relating to ADR. However, in 2011 the Civil Justice Advisory Group, chaired by the Rt Hon Lord Coulsfield, which reconvened to consider the Report of the Scottish Civil Courts Review, published its final report and recommendations. Lord Coulsfield went much further than Lord Gill, proposing more radical access to justice reforms, looking beyond the courts and emphasising greater use of ADR. He raised the concept of the 'multi-door courthouse' approach and said such "‘trriage’ could best operate if the different dispute resolution processes available were better integrated" into the civil justice system.

The Centre, along with Citizens Advice Scotland; Money Advice Scotland; the Scottish Mediation Network; and Which?, share Lord Coulsfield's vision.

There are various forms of dispute resolution, including litigation. It would not be appropriate for Scottish Court Service to work to keep disputes out of court, as suggested in its consultation on court closures, because litigation can be the most appropriate method for dealing with certain disputes. Nevertheless, there should be a move away from the current default position of litigating. Greater use of arbitration and mediation should be encouraged, so potential court users should be made aware of these alternatives to litigation. ADR should not be introduced as a compulsory step before proof is allowed. Parties should simply be provided with options before reaching the court. This could be facilitated by the Scottish Court Service directly or contracted out to the private sector. Therefore, a system must be devised.

A system must ensure that parties have the relevant information and advice to make a decision on the most appropriate dispute resolution method for their particular circumstances. The Scottish Government or Scottish Court Service should have a website with the relevant factual information with links to advice services, including Citizens Advice Scotland and local Bureaux; the Law Society of Scotland; and the Faculty of Advocates.

A centralised system should also be considered for initial case management. In other words, once a party has opted for a particular form of dispute resolution they confirm this with Scottish Court Service. That central unit would then inform the local court or ADR practitioner, who would in turn deal direct with the parties. The system should be electronic where possible.

Mediation is an obvious ADR option to integrate into the civil justice system. This could be face-to-face, video, or telephone mediation. Each type would involve difference timeframes and associated fees, as opting for non-face-to-face mediation would save time and travel and accommodation costs. As noted above, this could be facilitated by the Scottish Court Service directly or contracted out to the private sector.

Arbitration could also be built into the civil justice system. It could involve a face-to-face, video, or telephone hearing or be decided upon without a hearing following the submission of papers (preferably in the form of online dispute resolution (ODR)). Each type would involve different timeframes and associated fees, as opting for a paper based decision would save time and travel and accommodation costs. To ensure the advantages of Scottish arbitration, such as confidentiality and flexibility, this would likely have to be facilitated by the private sector.

There should also be more collaboration between Scottish Court Service and other public bodies, such as health boards, local authorities and community councils. More should be done to share facilities with other organisations. This will be especially important in remote parts of Scotland, where the shutting of some courts will lead to parties travelling even further to court. As noted above, ADR can be dealt with in less formal surroundings, so where hearings were required the arbitrator or mediator could meet the parties in the most appropriate location at a time that suits the parties. For example, this could be in an appropriate local authority building. Further investment in both the equipment and technology is required, and also in the arrangements for supporting the smooth technical operation of the system. It would allow the pulling of resources, such as joint funded video conferencing facilities and agreements on the sharing of accommodation.

The integration of arbitration into the civil justice system would encourage a more flexible approach to dispute resolution, including the prospect of paper based/online decisions without hassle and expense of court hearings. Of course, should face-to-face hearings be required, the arbitrator (public or private sector) could hold the arbitration in the most suitable place for the parties, which is unlikely to be in the court. Of course, it would be hoped that many such cases could be dealt with by telephone or video conferencing or under a paper based/online system. Again, such a system could be managed centrally. The arbitrators or mediators could be based within such a service or, if contracted out to the private sector, might be based in their own homes or offices for telephone or online dispute resolution.

The establishment of such systems would require initial investment, but would reduce the burden on the courts and the judiciary so may result in a longer term cost saving, especially if telephone and online schemes are devised. Incentives for using alternatives to litigation may also assist, such as increased fees for litigation.

Court Reform (Scotland) Bill

Sections 96 and 97 of the Bill as Introduced provide that the Court, may make rules of court for or about the procedure and practice to be followed in proceedings in the Court and any matter incidental or ancillary to such proceedings. This power includes power to make provision for or about avoiding the need for, or mitigating the length and complexity of, such proceedings, including encouraging settlement of disputes and the use of alternative dispute resolution procedures.

We have raised concerns with the Scottish Government that this does not go far enough. Indeed, it may be the case that no such rules are actually made by the Court. However, if such rules are made there is no guarantee that they would provide for our proposed integration of ADR.

Conclusion

Like Lord Coulsfield, the Centre considers that alternative dispute resolution (ADR) should not only be encouraged and promoted by the Court, in appropriate cases, but should be an option provided to users of a modern civil justice system. This is supported by Citizens Advice Scotland; Money Advice Scotland; the Scottish Mediation Network; and Which?. Arbitration and mediation schemes should be built into the civil justice system, enhancing access to justice and user choice. ADR can be dealt with in less formal surroundings, reducing the burden on court buildings, so where hearings were required the arbitrator or mediator could meet the parties in the most appropriate location at a time that suits the parties. Of course, it would be hoped that many such cases could be dealt with by telephone or video conferencing or under a paper based/online system and such a system could be managed centrally.

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