

Justice Committee

Alternative Dispute Resolution

Written submission from the Scottish Arbitration Centre

The Scottish Arbitration Centre is grateful to the invitation from the Justice Committee to provide written and oral evidence in respect of its round-table session on ADR.

Arbitration

Arbitration is a private dispute resolution method, often used in cross-border commercial disputes, but can be used in a variety of matters, including family disputes. Parties have to agree to such a method, usually by way of written contract, but arbitration can also stem from legislation. An arbitrator will act as private judge and decide on the matter. Proceedings are usually confidential and decisions (or Awards) can be enforced under the New York Convention, an international treaty. Arbitration offers a flexible and often more cost-effective method of dispute resolution. It also provides finality, unlike mediation.

Scottish arbitration

Scotland has a separate arbitration system to England and Wales, with no appeal to the Supreme Court in London. This makes Scotland a neutral jurisdiction for arbitration, allowing us to market Scotland with its independent arbitration system. The Arbitration (Scotland) Act 2010 was modelled on the English Act and the Scottish Courts have opined that English case law on similar provisions would be persuasive in Scotland. The Scottish Act does have some improvements though, with a breach of confidentiality being actionable here and anonymity for parties in respect of any Court involvement in the arbitration, such as where there is an appeal of the Award. This is attractive to parties looking for a jurisdiction where their dispute can remain between themselves.

Scottish Arbitration Centre

Background and services

The Centre was established in 2011, following the SNP Manifesto commitment of 2007 to set up such a body and on the back of the establishment of the Arbitration (Scotland) Act 2010, as a long term investment strategy to promote arbitration as an effective alternative to litigation and Scotland as a destination to conduct international arbitration. The Board is made up of Directors from each of our Member Bodies: the Chartered Institute of Arbitrators; the Law Society of Scotland; the Royal Institution of Chartered Surveyors; and the Scottish Government. Brandon Malone is the Chairman of the Board of the Centre. The Chief Executive is Andrew Mackenzie, a solicitor on secondment from the Scottish Government. Sir David Edward QC is the Centre's Honorary President.

The Centre offers an arbitral appointments service, where the selection of an arbitrator is made by our arbitral appointments committee, which acts independently from the Board of the Centre. We have made both domestic and international appointments in recent years. We do not administer arbitrations, so are not acting as a private court at this stage. However, we provide administrative services to the School Closure Review Panel.

We are also involved in the provision of training events and hold a training day every year. Our events are attended by international practitioners and Annabelle Ewing MSP, the Minister for Community Safety and Legal Affairs, spoke at our annual training day in September, demonstrating the Scottish Government's continued support to the work of the Centre. We also have a research project on energy arbitration with the University of Dundee.

Our premises on Princes Street in Edinburgh offers modern, centrally located, and affordable facilities for arbitration, mediation and other dispute hearings, and for conferences, events and meetings.

Achievements

The Centre is focused on promotion of Scottish arbitration and Scotland as a jurisdiction and venue for dispute resolution. Since our establishment, we have pursued the development of international commercial arbitration in Scotland with energy and enthusiasm and have grown and developed international recognition. There is also anecdotal evidence suggesting that there is an increase in arbitration in Scotland and the Scottish Government and others using arbitration as their default dispute resolution method.

The Centre and Scotland has been recognised by Global Arbitration Review, being nominated for various international awards over the last few years.

We are currently involved in the committees of the International Bar Association, the International Chamber of Commerce and the Alliance for Equality in International Dispute Resolution. Brandon Malone is also chairing a project on cybersecurity in international arbitration. All this ensures Scotland has a voice within these key international bodies.

We also worked with the Court on establishing an Arbitration Court User Group. Lord Clark launched the group in September, which emphasises the importance the Court places on ensuring its approach to arbitration remains supportive. This is an important step in ensuring Scotland is viewed as an attractive seat for both domestic and international arbitration.

The Centre was successful in its bid for Edinburgh to host the International Council for Commercial Arbitration (ICCA) Congress in 2020, seeing off stiff competition from the other cities on the shortlist: Copenhagen; Mexico City; Stockholm; St Petersburg; Vancouver; and Vienna. This prestigious event will attract over 1,000 delegates from all over the world to Scotland, which will undoubtedly enhance Scotland's presence in international arbitration. VisitScotland estimates that this will boost Scotland's economy by more than £2 million. The legacy of ICCA 2020 to the Scottish

economy can be huge and the opportunity of having the key people in the arbitration sector here in Edinburgh is one that we must take full advantage of in 2020 and beyond, as we try to develop a new industry in international arbitration for Scotland.

Availability of ADR in Scotland and any barriers to use

Availability of ADR

There are various practitioners involved in arbitration and mediation in Scotland, including advocates, solicitors and surveyors. There are also a number of bodies, such as the Centre, appointing arbitrators on request. We have facilities for hosting arbitration hearings and mediations. There are some public ADR schemes, such as the in-court mediation scheme in Edinburgh. There are also private schemes in Scotland and across the UK, such as consumer schemes where arbitration or mediation might be involved. However, ADR is not widely used in Scotland yet and there are no bodies based here currently administering cases.

Barriers to use

Alternatives to court, such as arbitration and mediation, might be more appropriate methods of dispute resolution than litigation in some cases. However, barriers to increased use exist, such as lack of knowledge of the benefits and a mind-set that disputes are only for courts. Arbitration, mediation and litigation, including the association fees and costs, should be known and understood by all potential users. This requires support from various bodies and practitioners, ensuring that users can access information and advice services.

Persons seeking to use arbitration cannot apply for legal aid to cover related costs, whereas legal aid can be used for mediation. This is a barrier to the wider use of arbitration, which might be more suitable for certain disputes than court or mediation. If the only choice for legal aid is litigation and mediation, users will go down those roads, despite the fact that court or mediation might be more expensive and less suitable than arbitration. Opening legal aid up to arbitration might actually save the public purse.

Encouraging greater use

The Centre believes that alternatives to court often provide more effective means of resolving disputes. Arbitration and mediation might be quicker and more cost-effective than litigation and the potential appeals. Such options can be facilitated by telephone or online. Arbitrations can be done on papers or online, so without a hearing if appropriate. Indeed, we welcome the Scottish Government's Justice Digital Strategy which committed the government to establishing an online dispute resolution platform for arbitration and mediation. All such approaches save money in terms of venues and transport costs. This is particularly beneficial to those living in rural areas, where the nearest court might be as much as 100 miles away.

We would like to see an arbitration or ADR strategy in Scotland and more being done to encourage the use of arbitration, which would benefit individuals in dispute, ease the burden on the courts and benefit the wider Scottish economy. Attracting

international arbitration to Scotland continues to prove challenging given competition from nearby established arbitration seats in London, Paris, Geneva, and Stockholm. As a jurisdiction, Scotland must do more to make itself more appealing to international parties looking to locate dispute resolution work.

The Centre welcomed the previous Lord President's proposal to consider a specialist energy and environment court, and consider there is merit in promoting Scotland's expertise in energy law. A separate English law court might also be attractive to international parties and such courts are being established in other European jurisdictions, partly on the back of Brexit.

There are potential advantages for arbitration in terms of Brexit. At present, a choice of Scottish court jurisdiction will be upheld throughout the EU, subject to a limited number of exceptions, and a Scottish court judgment will be recognised and enforced throughout the EU under the reciprocal Brussels Regulation regime. This will not be the case post-Brexit, unless the EU and the UK enter into a new agreement to replicate the existing rules on jurisdiction and reciprocal recognition and enforcement. However, choosing a Scotland-seated arbitration agreement provides the comfort of resolving the dispute under the supervisory jurisdiction of the Scottish courts but with the enforcement benefit of the New York Convention. All EU member states are contracting states to the Convention, and Scotland-seated awards will be recognised and enforced across the EU (and, of course, beyond) post-Brexit. We encourage the promotion of Scottish arbitration over litigation in EU cross-border contracts given the uncertainty around Brexit.

We would urge the public and private sector to use arbitration as the default dispute resolution method in all its contracts. We welcome the fact that arbitration is the default method in Scottish Government goods and services contracts. We would also encourage the use of arbitration as the dispute resolution method in legislation, where appropriate and in cases where court is not essential. The Centre also wants to see the implementation of the remaining sections of the Arbitration (Scotland) Act 2010. At present, the provisions on statutory arbitration are not in force.

All political parties should recognise the role that dispute resolution plays in Scotland's economy and the need to promote alternatives to court, such as arbitration, and Scotland as a jurisdiction and venue for both domestic and international disputes.

Scottish Arbitration Centre
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