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A Renaissance For Scottish Arbitration

Shona Frame of MacRoberts examines the Scottish Arbitration Act which has given tribunals new teeth to ensure fair and impartial hearings, with no undue expense or delays. Great hopes have been pinned on the new rules, making Scotland an attractive venue for dispute resolution.

Key Points

- Encapsulated in one place, the Scottish law on arbitration
- Halled as setting the scene for a 'renaissance of Scottish arbitration'
- 'Founding principles' Include a requirement to deal fairly, impartially and without unnecessary delay of expense
- Supported by a framework of rules giving the tribunal the teeth to achieve this
- Awards will be enforced by the courts
- Plugs gaps in Scottish common law related to awards of interest and damages and correction of errors

The Arbitration (Scotland) Act 2010 (ASA 2010) was passed by the Scottish Parliament on 18 November 2009, received Royal Assent on 5 January 2010 and was expected to come into force in March 2010.

It was said by the Enterprise Minister, Jim Mather, that it 'sets the scene for a renaissance of Scottish arbitration' and it is hoped that it will make Scotland an attractive place for dispute resolution by providing a 'modern, impartial and efficient arbitration regime' so high expectations accompany it. Whether that will prove to be the case remains to be seen. However, what it does do is finally encapsulate, in one place, the Scottish law on arbitration thereby providing clarity where this was previously lacking.

The transitional provisions provide that the *ASA 2010* does not apply to arbitration which have already started before it comes into force but does apply to an arbitration agreement (which could be contained within an arbitration clause of a contract) made on, before or after it comes into force. For agreements made before, parties can agree the *ASA 2010* is not to apply. However, the Scottish Ministers can, no sooner that five years after the Act comes into force, make an order disapplying this opt out provision.

The Act itself is relatively brief, consisting of 37 sections, but supplemented by 84 Rules contained in Sch 1, the Scottish Arbitration Rules. It can apply equally to domestic, inter-UK or international arbitrations. 'Arbitrator' can be a reference to a sole arbitrator or a member of a tribunal.

The Scottish Arbitration Rules are stated to govern every arbitration seated in Scotland. Some of the Rules are mandatory, meaning they cannot be modified or disapplied and some are non-mandatory (referred to as the 'default rules'). The default rules apply unless the parties have agreed to modify or disapply them

The founding principles

The ASA 2010 starts by setting out the 'founding principles' in s 1, namely: the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense; parties should be free to agree how to resolve disputes; and the court should not intervene in arbitration expect as specifically provided.

The Act itself contains provisions related to:

- Suspension of any court action if there is an agreement in the contract to arbitrate. It is provided that the court must, if any party to a court action applies for it, sist (or stay) the court action. The application needs to be made before the applicant takes any step in the action to answer any substantive claim and the applicant must not have acted in such a way as to indicate it wished to resolve the matter in court.
- Enforcement of arbitration awards by the court. The tribunal's award in final and binding on the parties to the arbitration but not binding on any third party. This is subject to the right to challenge the award under Pt 8 of the Rules or by any available appeal or review (see below). The court will treat the tribunal's award as if it is an extract registered decree (a court judgment) containing a warrant for execution. The court will not make an order if satisfied that the arbitral tribunal did not have jurisdiction to make the award but only if the party objecting to the jurisdiction raised that challenge timeously in the course of the arbitration itself.
- Court intervention in arbitrations – review or appeal. Review is possible if the tribunal did not have jurisdiction to make the award. A review by the court of a tribunal's decision on jurisdiction can take place in parallel with the arbitration. Review also possible where there is serious irregularity. This means:
    - The tribunal did not conduct the arbitration in accordance with the arbitration agreement, the Rules or any other agreement between the parties as to conduct,
    - The tribunal acted outwith its powers,
    - The tribunal failed to deal with all matters put to it,
    - Uncertainty or ambiguity as the effect of the award,
    - The award being contrary to public policy or obtained by fraud or another way contrary to public policy,
    - The arbitrator not being impartial and independent,
    - The arbitrator not treating the parties fairly,
    - The arbitrator being incapable of acting,
    - The arbitrator not having a qualification that the parties agreed he should have,
    - Or any other irregularity in the conduct of the arbitration which is admitted by the tribunal or the arbitral appointments referee.

- Jurisdiction and serious irregularity reviews would go to the Outer House of the Court of Session and its decision can be appealed, with leave, to the Inner House. Leave requires an important point of principle or practice or another compelling reason. If the court upholds a challenge based on serious irregularity it can make such order as it thinks fit about the arbitrator's entitlement to fees and expenses and can order the arbitrator to make a repayment.
- Jurisdiction and serious irregularity reviews are mandatory provisions of the Rules. Where there is a legal error a party can appeal to the Outer House only if the parties agree or with the leave of the Outer House. Leave will require the court to be satisfied that deciding the point will substantively affect a party's rights, that the tribunal was asked to decide the point and that, on

the basis of relevant finding of fact, the tribunal's decision was obviously wrong or open to serious doubt. Appeal is possible, with leave, to the Inner House. Legal error reviews are non-mandatory and can be avoided if the parties dispense with the tribunal's duty to give reasons for its award.

- Court intervention in arbitration – points of law. The Rules allow a point of law to be referred to the court to determine. However, there are safeguards built in to prevent this being used as a delaying tactic. It is only possible where the parties have agreed to this or the tribunal has consented to it and (in both cases) that the court is satisfied that determining the question is likely to produce substantial savings in expenses, that the application was made without delay and there is a good reason why the question should be determined by the court. The arbitration can continue in tandem with this. The Outer House makes the decision on whether an application is valid and on the question referred and their decision is final with no appeal to the Inner House.
- Court intervention in arbitration – interim orders. The court may order attendance of witnesses or production of documents. Other court powers include ordering the sale of any property in dispute in the arbitration, orders to secure any amount in dispute in the arbitration, granting warrant for arrestment or inhibition (freezing moveable property in the hands of a third party or attaching heritable property preventing its sale), and granting interdict (equivalent of injunction) or interim interdict.
- Recognition and enforcement of foreign arbitration awards. Awards made outside the UK but in countries which are parties to the New York Convention are recognised as binding on the parties to the award and the Scottish courts may order that such awards be enforced.
- Authorisation of 'arbitral appointment referees'. The Scottish Ministers are given power to authorise people or bodies as 'arbitral appointment referees', better known as appointing bodies. These referees are to be appointed with reference to their experience in making arbitral appointments and ability to provide training an operate disciplinary procedures to ensure arbitrators conduct themselves properly.
- Judges acting as arbitrators. The ASA 2010 provides that judges may act as arbitrators in commercial disputes and where pressures of other court business allow. In such cases any court intervention (as described above) would be dealt with by the Inner House only.
- The founding principles are given effect throughout the Rules. For example, there is a mandatory provision in the 'general duties' that the tribunal must be impartial, independent and treat the parties fairly. Treating the parties fairly is said to include giving each party reasonable opportunity to put its case and to deal with the other side's case. That is followed through to the provisions related to challenge to an arbitrator's appointment and removal of an arbitrator by the court, both of which apply where the arbitrator has failed in these duties.

Addressing some of the criticisms levied at arbitration is the past – delay and expense – will be a key aspect of reversing the decline of arbitration. The Act and its rules put a framework in place to allow this and contain teeth for the tribunal to bear where necessary. Operating the effectively in practice will be crucial in persuading parties to reconsider arbitration as a form of dispute resolution.

Provisions on delay and expense

In keeping with the founding principles, the new rules contain duties on both the arbitrator and the parties to the arbitration to conduct the arbitration without unnecessary delay and without incurring unnecessary expense.

Further, the tribunal is given the power to determine the procedure in the arbitration including the timing and format of any hearing (questioning or witnesses, written or oral argument and presentation of documents), and the extent of submissions by the parties.

Directions given by the tribunal are to be complied with by the parties. In the event of failure, the tribunal may direct that the failing party may not rely on any allegation or material which was the subject matter of the direction. The tribunal may also draw adverse inferences, proceed with the arbitration and make its award or make a provisional award.

In the event of delay where this is considered unnecessary, where there is no good reason for it and where this causes risk that it will not be possible to resolve the issues fairly or it causes serious prejudice to the other party, the tribunal is to end the arbitration and make whatever award it considers appropriate.

Where a party fails to attend a hearing, having been given reasonable notice of it, or fails to produce any document or evidence requested by the tribunal, and where the tribunal considers there is no good reason for the failure, the tribunal may make its award on the basis of what it does have.

These provisions, in addition to the general duty on the parties to conduct the arbitration without unnecessary delay and without incurring unnecessary expense, are designed to ensure the process is run in a expeditious and cost effective manner. It will be for the tribunals to exercise powers given to them to ensure the effectiveness of such provisions.

As a further sanction to curb excessive cost there are provisions allowing scrutiny of tribunals' fees by the parties, the arbitral appointments referee or the Auditor of the Court of Session. The entitlement is to a 'reasonable commercial rate of charge' and the Auditor's powers extend to ordering repayment of fees by the tribunal if they are considered excessive.

The tribunal's powers to award damages and interest are confirmed in the Rules. These were two important powers which arbitrators in Scotland did not automatically have at common law and which previously required to be expressly provided for by the parties.

The tribunal is given power to correct awards where there are clerical, typographical or other errors arising by act or omission (similar wording to that in the Revisals to the Construction Act allowing correction of errors by adjudicators). Again, this was not a power previously available at common law.

After arbitration's decline in recent years and the rise of the Commercial Courts and adjudication, it will be a case of waiting to see whether this new Act is sufficient to increase arbitration's popularity. It does appear to contain the framework to address previous concerns but much will depend on its operation in practice.

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