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The elephant in the dispute resolution room:
Problems with the definition of arbitration in Scots law

In his lecture inaugurating the Law School at Robert Gordon University, former Lord President and now practising arbitrator, Lord Hamilton pointed out that there is no definition of "arbitration" within Scots law. He said:

> *"What, then, is arbitration? …it is very difficult to find a modern, comprehensive and authoritative definition of the term…So far as I am aware, no court in the United Kingdom has, in modern times, offered a comprehensive definition of "arbitration"-though, as we shall see, there may be some judicial pronouncements which are of assistance."*[1]

It should be said that Scots law is not alone in this respect: there is no concise definition of "arbitration" in English law or in most UNCITRAL Model Law jurisdictions. Having said that, each system has its own distinct features and while the broad points set out below have resonance beyond Scotland – the present focus will be on the key features and issues as they impact in Scots law.

It will be seen that, having looked at the way in which arbitration is defined in Scots law; there is a dissonance between that definition and the way that arbitration operates in practice. A number of issues arise as a result of that dissonance and these will be identified and examined. There is an opportunity for Scots law to resolve this issue and that too will be looked at and discussed.

Thanks to Lord Hamilton for his kind review and comments on an earlier draft of this article and for letting me have a pre-publication copy of his lecture to the Chartered Institute of Arbitrators on 27 March 2015. Thank you as well as to Dr Andrey Kotelnikov and Dr Joseph Mante. Thank you also to Information Management Masters student, Ruth Montague for her help in tracking down some of the information referred to.

[1] Extract published in Journal of the Law Society of Scotland, 16 June 2014 and full text available at: http://www.axiomadvocates.com/newsitem/240/lord_hamilton_-_rgu_inaugural_lecture_-_arbitration_in_scotland__its_nature_and_its_future (accessed 12 January 2015) ("Hamilton Lecture")

The elephant in the room

In terms of the purported lack of definition of "arbitration" in Scots law, a survey of the relevant literature does not suggest that the lack of clear definition is the cause for undue concern – and the general response to this question by the standard textbooks in this area[2] is to sketch out some of the key features and incidents of arbitration: rather than attempt too detailed a definition. An attempt to describe arbitration calls to mind a parable about a group of blind men trying to describe an elephant. Each man was able to describe the bit of the elephant closest to him in relateable terms but, as a group, they could describe no more than a room which contained a rope (in actual fact the tail); spears (the tusks) a snake (the trunk) a wall (the elephant's side) and so on. Finding a way to capture the whole image was impossible. An elephant is something that you know when you see but difficult to identify by description beforehand.

Unless the parties know what they are faced with, then they might well struggle to work it out for themselves. This presents them with risks if dealing with an elephant – and, as we will see, in dealing with arbitration.

Scots law has missed an opportunity to distinguish itself from other jurisdictions by not harnessing the recent reform of the law of arbitration in Scotland to make the position of arbitration clear. It did not deal with the elephant in the room.

An opportunity missed

The lack of definition may have been a missed opportunity since (i) the existing definition – such as it is - does not meet the expectations of parties (ii) the changing face of non court ("alternative") dispute resolution may lead to difficulties in distinguishing the different processes in law and (iii)

[2] See for example Davidson, *Arbitration* (2nd Ed 2012) Sweet and Maxwell Chapter 2 and Mustill & Boyd *Commercial Arbitration* (2nd Ed 1989) Butterworths – pp 38 to 52.

the lack of definition will impact on how the people appointed as arbitrators see themselves – and treat the process.

In what follows, the definitions of arbitration and the image of the arbitrator as they currently stand in Scots law will be looked at.

This will be followed by a suggestion as to how the position in Scotland, at least, could evolve and how such an evolution would help resolve some of the problems identified above.

Where are we now? The definition of arbitration

Acknowledging in his lecture that there was no "official" definition, Lord Hamilton identified three possible definitions as follows.
Firstly, Professor Davidson had "tentatively" defined arbitration as:

> *"….a process whereby two or more parties agree to submit a legal dispute to one or more third parties, whose role it is to pronounce judicially on that dispute in the shape of a binding award".*[3]

Secondly, Erskine's definition of the analogous process of "submission" (which is broadly the same as arbitration) was as follows:

> *"…. a contract, entered into by two or more parties, who have debateable rights or claims against one another, by which they refer their differences to the final determination of an arbiter or arbiters, and oblige themselves to acquiesce in their decision"* [4]

Notwithstanding that the different definitions arise from wholly different eras, it is worth noting that there is remarkably little difference between the two definitions. Having said that, there is a significant difference in one crucial aspect, which will become clear from the following.

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[3] See n.1 for reference to Hamilton Lecture and reference to *Davidson* para. 2-01.
[4] N.1 for Hamilton Lecture and Erskine *Institute of the Law of Scotland* IV.3.29

Thirdly, while there is no complete definition of arbitration in the case law when looking at the question of whether a third party charged with resolving a dispute was immune from suit, a number of criteria emerged which could be applied to arbitration – acting as indicators of the sorts of factors which ought to be applied.

The leading case on this question was *Arenson*[5] which set out the following:

> *"(a) there is a dispute or a difference between the parties which has been formulated in some way or another;*
>
> *(b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called on to exercise a judicial function;*
>
> *(c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and*
>
> *(d) the parties have agreed to accept his decision."*

It is interesting that – although not directly linked to the definition of arbitration; the four grounds are broadly similar to those identified above. The primary difference is the third, ground (c) ("*(c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute"*). As will be seen below, deciding where this is " appropriate" can be tricky.

These three definitions bring out broadly the same propositions as follows. For arbitration, the following criteria may be applied:

[5] *Arenson v Casson Beckley Rutley and Co*. [1977] AC 405

(i) An obligation, usually in the form of an agreement[6] (between at least two parties) to resolve a dispute by arbitration

(ii) A dispute (covered by the terms of the agreement) needs to involve "legal" issues (namely those which it seems would require the recognition or vindication of rights in some way, and the consequences of that)

(iii) Referral of this dispute to a third party for a decision.

(iv) This decision will be binding on the parties in dispute.

(v) The mode of this decision will either be a 'determination' or a 'judicial pronouncement'.

Point (v) is expressed with alternatives because this is the key source of difficulty in the understanding of Scottish arbitration. Davidson identifies the judicial quality of the process as "*perhaps* the *defining characteristic of arbitration*" [7]

However, the distinction between Davidson's definition and that in Erskine on this point serves to identify an apparent tension in the Scottish case law where the boundaries of arbitration have been considered.

This is very important because it impacts on the fundamental approach to be taken by the person who is deciding the dispute. Moreover, it identifies one of the key differences between the various forms of alternative dispute resolution. The difference in word may not appear much but at the very least it operates as a shorthand to distinguish variations in approach to the role of the decision maker in a dispute. Simply put, what is the difference between their acting in a judicial capacity and their making a determination?

"***Determination*" v Judicial Pronouncement**

[6] It is recognised that such obligations may also be imposed by legislation (again see Hamilton Lecture at n.1)

[7] *Davidson* para. 2.03

In broad terms, therefore, we see that there is probably a reasonable settled definition of arbitration in Scots law – save for one significant issue and that is the the ambiguity in the idea of an arbitrator's "judicial" quality.

At first blush, this may not seem a particular problem. Intuitively,[8] since arbitration is widely considered to be a form of private litigation;[9] the idea that an arbitrator has a "judge-like" quality seems entirely appropriate.

Moreover, it is not necessarily the case that the meaning of "judicial" as discussed in the case law is unclear; rather there seems to be a difference in the way in which case law treats the operation of arbitration and the way in which arbitration is often carried out in practice.

The confidentiality of arbitration makes it difficult to assess this too closely but there are significant pointers in this direction – which chime with the writer's own perception drawing from time in private practice. This dissonance between law and practice causes a number of problems which will be discussed below. Initially, however, it will be necessary to examine the issue in a bit more detail.

There a number of important preliminary points which need to be brought out at this point. Firstly, the discussion of the definition of arbitration in Scots law has largely taken place in the context of discussions in court about whether a procedure which has been followed was operating as an arbitration or as an expert determination, for reasons which will be discussed below. The definition of arbitration has been discussed above and in some detail (and will continue to be discussed below).

The standard textbook on Expert Determination opens with the definition "*Expert Determination is a means by which parties to a contract jointly instruct a third party to decide an issue between them*" [10]

[8] Thanks to Dr Andrey Kotelnikov for highlighting this particular point.
[9] See for example para 8 of the Scottish Civil Justice Council's *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions* (2014) - "*Arbitration operates like a privatised court system"*
[10] Kendall, Freedman and Farrell *Expert Determination* (4th Ed. 2008) at p.1

It will be quickly apparent that this seems broadly similar to the definition of arbitration – and the authors of the standard textbook acknowledge this early on in their book.[11] A precise survey of the scope of the differences between the two methods is beyond the scope of the present article but for present purposes it is enough to recognise that there are likely to be overlaps. For present purposes, drawing on the word which Erskine used – and the overall references to expert determination – the alternative to a "judicial approach" will be known as "determination."

This contrast was expressed most clearly in the case of *MacDonald Estates PLC v National Car Parks Ltd*[12] where it was said by Lord Reed in the Inner House:

> *"Expert determination, in particular, can be broadly distinguished from arbitration in not being judicial in character … A person who sits in a judicial or quasi-judicial capacity, as an arbitrator ordinarily does, decides matters on the basis of submissions and evidence put before them, whereas an expert, subject to the provisions of their remit, is entitled to carry out their own investigations and come to their own conclusion regardless of any submission or evidence"*[13]

The way in which "judicial" is characterised here would appear to be based on the traditional idea that Scottish civil justice has been based on the 'adversarial' model of proceedings. In this model, the judge essentially acts as a referee during the process ensuring fairness between the parties in dispute and making his decision based on the information put before him by the parties. In particular, as was confirmed in the earlier case of *Sutcliffe v Thakrah:*

> "*judicial duties do not include investigations*" [14]

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[11] Ibid p. 2
[12] 2009 CSIH 79A
[13] Ibid at. para. 21
[14] Sutcliffe v Thakrah [1974] AC 727 at 735 – and see McMillan and Wilson infra.

There is an alternative paradigm of dispute resolution – which is an inquisitorial system where the decision maker is not removed from the process in the same way but is responsible for conducting investigations themselves and engaging with the material – using their own analyses and so on. It seems that this might be the model which is applied to expert determination in the *MacDonald Estates* case.

Matters are not, however, that simple. *MacDonald Estates* recognises that the "*boundary*" between arbitration and expert determination "*can be difficult to draw*". The reference to a 'judical function' hides ambiguity about the role of the arbitrator within Scottish law – especially at a time when more interventionist and inquisitorial approaches are found in the growing preference for case management in Scottish civil litigation and legislation – especially in commercial actions.

It is therefore necessary to examine, in a bit more detail, where the boundary might be drawn.

Drawing the boundary

Essentially, on the basis of the ruling in *MacDonald Estates*, the question is whether the third party is drawing on their own opinion (essentially following an inquisitorial route) or whether they are coming to a judgement based on the parties' competing views (essentially adversarial).

The number of previous cases on this point vouch for the point that this distinction is not always clearly drawn in practice and changes made by the new Act may serve to muddy the waters further.

In terms of exploring this issue further, McMillan and Wilson have helpfully captured useful ways in which this distinction can be identified in practice such as,

> "*A useful tool in determining whether a third party is an expert or an arbiter, therefore, can be to analyse how much information she has been presented with by each party to the contract, and whether the parties have put forward an opinion as to what their preferred …[position]… would be"*[15]

This chimes with the broader view taken in a recent work by a leading expert in arbitration, Jan Paulsson. In his book, "The Idea of Arbitration" he says:

> *"National laws rarely (if indeed ever) contain general definitions of arbitration. Rather, they define specific features which are relevant to the effectiveness of contractual arrangements for the resolution of disputes…We thus derive our understanding of the mechanics of arbitration by observing what the parties do voluntarily*"[16]

Apart from looking at the way the parties, and arbitrator, have approached the process, there are other significant issues involved. The primary one is, of course, the parties' contract. It is from which the jurisdiction of the arbitrator and/or the expert determiner flows. It might be supposed that this would make the position clear. However, the principal issue which arises from the cases (and which is discussed by McMillan and Wilson[17]) is that while courts may give a great deal of weight to the terms of the contract; they do not treat the terms of the contract as conclusive. In the absence of clear definitions of what is involved in each of the terms (arbitrator and expert), it is therefore difficult to identify what the contractual ramifications of either might be.

Essentially, then, when asked to assess what form of procedure has been followed, the courts can only do so with the benefit of hindsight taking the contract as a piece of evidence as to the parties broader intentions which

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[15] McMillan and Wilson *Experts and Arbiters: Ne'er the twain shall meet?* 2008 JR 273 at 275
[16] Paulsson *The Idea of Arbitration* (2013) (OUP) at p.19
[17] Op. Cit – n. 15 at p. 279

can also be gleaned from their conduct in the process. This is unsatisfactory since there is such a wide range of events which can put the position into doubt.

The consequences of this are significant in terms of the distinction between arbitration and expert determination. They fall into two broad categories which are termed here as practical and moral. They also impact on broader questions in the law relating to alternative dispute resolution.

Issues at the boundary between arbitration and expert determination

Practical issues

The specific practical issues are as follows. The first two have been drawn out of McMillan and Wilson's work.[18]

1. *Challenges to awards/decisions.* There are set routes for challenge to the arbitral award - which, although circumscribed, are set out clearly. Challenges to expert decisions are generally much harder to sustain. Breaches of natural justice or exceeding jurisdiction are the most common but they can be difficult to prosecute where the expert is given significant discretion.

2. *Liability of decision maker*. As is seen from the above, the arbitrator is immune from suit. Lord Hamilton points out that, in *Arenson*, that distinction was doubted – but it remains in place. An expert is not – by default – unless provision is made in the contract (and even then that is likely to create some nervousness on the part of the expert).

3. *Freedom of procedure*. The Arbitration (Scotland) Act 2010 – and in particular the mandatory and default rules in the Schedule to that

[18] Ibid. p.285ff

Act – apply to all Scottish arbitrations. There is no such constraint on the process of expert determination.

4. *The access to the power of the state.* Linked to this is the question of whether the state apparatus can be used to enforce the decision or not. Arbitral awards are enforceable using the same mechanisms as court judgements and, if the award is made in a state which is party to the New York Convention – enforceable internationally. Those other forms of dispute resolution which only flow from parties' agreement, such as expert determination, do not engage the apparatus of the state in this way –or have the same transferability in terms of enforcement.

5. *Avoiding court*. ADR, almost by definition, seeks to avoid court processes. The greater the ambiguity as to the process being followed – the more likely that a court will be required to intervene to resolve it.

'Moral' issues

Beyond this are issues of legal principle. Firstly, a decision on the type of dispute resolution ought not to be drawn from an *ex post facto* assessment of what has happened. It should be clear at the outset – especially standing the practical issues identified above, what process is being followed. Moreover, Paulsson identifies one of the key ideas in arbitration and one which by extension applies to all forms of ADR as being "freedom"[19] meaning that parties have the possibility to choose the means of resolving their dispute. In line with that, it ought to be clear that the parties ought to get the procedure and outcomes which they had bargained for.

Beyond that, secondly, there is of course the position of the person charged with resolving the dispute. He might have a different conception of the role being thrust upon him – and can change the interpretation of the position

[19] Op. Cit. *Paulsson at pp 1 and 2*

through his own conduct. While the parties can of course seek to correct his course, pragmatism may favour keeping the arbitrator on side. In any event, the result of this may be that the actions of the parties at a time of dispute may well not meet the spirit of their consensus at the time of agreeing the contract.

Thirdly, linked to the second, there is also an important question regarding the role of the arbitrator and the identity the take for themselves. There is a desire to progress arbitration expeditiously – certainly to keep it away from the formal structures of court litigation. However, much of making that desire a reality will fall on the arbitrator as the person with the final say on the process – as such, as Lord Hamilton captured: "*Much may depend on the personal authority of the arbitrator or arbitrators to progress matters."*[20]

That personal authority is likely to be weakened if its boundaries are not clearly defined. Certainly, if he is to follow the role of a judge as outlined in *MacDonald Car Parks*, it would be more difficult to pursue matters expeditiously. If he takes a more direct role, he falls into the risk of straying over the boundary identified.

Four broader problems

There are four broader problems with the existing distinction. Firstly, it does not reflect the idea of what arbitration is; secondly, it does not reflect the practice of arbitration in Scotland; thirdly, it does not reflect the terms of the 2010 Act and fourthly, the lack of clarity is storing up problems for the future.

First problem: *"The idea of arbitration"*

One of the key issues is that the distinction around the approach to the meaning of the arbitrator's "judicial" function may not chime with what

[20] Hamilton Op. Cit.

parties (including potential arbitrators) generally understand the role of arbitration to be.

Paulsson makes three observations which frame this idea and serve to set the scene. He canvasses the view of how people imagine the archetypal arbitrator. Three observations are particularly pertinent – because they go to the idea of the arbitrator that emerges from the case law. Those observations are:

> "*Parties can trust the arbitrator to get to the bottom of the thing, to identify and to consider all the reasons…why one feels the other is in the wrong*"[21]

"*Getting to the bottom of the thing*" seems to suggest a higher degree of intervention that the netural referee which the Scottish case law suggests is encompassed by the meaning of "judicial". Paulsson goes on:

> "*Above all, parties are attracted to arbitration because it promises a resolution of their dispute…To resolve has a richer meaning than to hear or even 'to decide'*" [22]

Again, the concept of an arbitrator seems to require more than neutrality. Finally:

> "*The idea of arbitration is above all at a great remove from some features of the imagined judicial temperament"* [23]

In this he includes features such as an impersonal attitude and an indifference to the parties. Instead, it suggests a more proactive and positive engagement with the parties as well as the issues.

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[21] Paulsson Op. Cit. p. 8
[22] Ibid. p.17
[23] Ibid. p.9

These three ideas suggest someone who is not sitting above the arbitrator but being more involved in the process. Paulsson is speaking from an international perspective but it seems from what follows that these ideas apply to Scots as much as anyone.

Second problem: Arbitration in practice

In Scottish case law, this desire for more interventionist approaches has manifested itself in the disputes about whether the 'arbitrator' was acting as an arbitrator or an expert (with the consequences set out above). One explanation for these cases is that they flow from parties and arbitrators/experts pushing at the boundaries of the court imposed paradigm on how their process is to operate. That parties are approaching disputes as arbitration – even when they do not fit the "judicial" paradigm described in *MacDonald Estates* – supports the ideas of Paulsson that they are looking for something more.

That this is an ongoing issue is seen in the more recent decision in *Arbitration Reference No. 1 of 2013* [2014] CSOH 83.

This case is particularly noteworthy in the present context as it is decided under the new Act. Specific issues with that Act will be discussed in the context of our "third problem" below but for present purposes, it is worth highlighting the approach from the parties – as an approach which chimes with other cases "at the boundary" and the remarks of Paulsson above.

It seems clear from the judgement in this case that the arbitrator was actively involved in the conduct of the proceedings (and indeed this was one of the bases of the challenge which gave rise to the decision). It is worth tracing this through the reasoning in the case, as follows.

A number of grounds for challenge of the arbitrator's decision were advanced. For present puposes, the most significant of these was that the arbitrator had acted as an expert and not as an arbitrator. The basis for this challenge was not altogether clear since it seems to have been expressed

as being under rule 68(1). This provision merely provides that a decision can be challenged on the basis of 'serious irregularity'. It is followed by a list of the grounds for 'serious irregularity' but none is enumerated in the decision in this case.

In any event, the judge was content that there was no valid challenge here. Saying in respect of the question of whether the arbitrator acted as an expert (emphasis added):

> *"The **lease envisages** that the parties intended **any rent review arbitration** to be a **practical** exercise carried out quickly by an experienced surveyor…and that the arbitration should be **completed within one month** (although that did not occur here). **The arbitrator would be expected to deploy his knowledge in arriving at his decision**. My conclusion is reinforced by the parties' submissions. They are couched in language designed to speak to another professional with expertise in the field. I see nothing within the award to indicate that the arbitrator stepped beyond his role."* [24]

The highlighted phrases illustrate that the arbitrator was acting as the principal figure in resolving the dispute – but this seem to be at odds from the more neutral judicial figure envisaged in the case law. Indeed, it seems that the judge was content to allow the arbitrator to deal with matters as he saw fit, where he said:

> "*The arbitrator's task was to exercise his professional judgement to arrive at the correct figure. Indeed he might find it startling to be told that the task he under took bristled with so many legal problems*." [25]

Both of these quotes seem to discount the possibility that the arbitrator would *not* have the key role in actually working out the answer (aside from

[24] *Arbitration Reference No. 1 of 2013* [2014] CSOH 83 at para. 21
[25] Ibid. at para 28

simply determining it) – rather than simply judging between competing submissions.

Now, it may be that the parties' contract was clear on this (and Lord Woolman does put some weight on the terms of the lease in the first quote noted above) – we are not told; but it seems in any event that this process was conducted with more emphasis on intervention than the "judicial" model suggested in *MacDonald Estates*. Despite this, there was no argument run – at least on the evidence of the judgement – that this process was anything but an arbitration.

In the context of the other case law, it would seem that there is at least a fairly common approach to arbitration which imagines it as something more interventionist and inquisitorial than the "judicial" model set out in *MacDonald Estates*.

It might be argued that the present case, *Arbitration Reference No. 1 of 2013*, can be distinguished on the basis that it post dates the Act but the similarity of approach by parties whether taking action before or after the Act's coming into force that that was not a key factor. Moreover, there was no discussion of any differences of approach which might have arisen as a result of the new legal regime in the judgement in this case.

Instead, it is suggested that this case evidences an approach and practice which reflects that which is found in the pre-2010 cases.

Third problem: Storing up trouble in the wider ADR context

Beyond the issues in Scots law, the lack of definition is also important to the operation of a variety of other forms of ADR operating in the present legal universe – some of which have greater overlap with arbitration. The discussion above has looked at difficulties in Scots law of distinguishing two long standing and generally well understood processes – arbitration and expert determination.

Beyond those two procedures, however, there is the spectrum of mediation and conciliation where the "mediator" can become progressively more of the decision maker, with the parties agreement. In addition, there are hybrids of those various processes, such as dispute boards which sit in major projects and – with varying degrees of formality – can assist parties in resolving their disputes as they arise. There are a host of others.

The idea that parties might stray from one to another as a result of the proceedings not meeting particular criteria would be dangerous and with potentially unintended consequences. At the same time, the novelty of these forms; combined with the very fact that they discourage court proceedings, means that their definitions – and distinctions from arbitration – are not even as developed as those for expert determination and arbitration.

If one looks at the definitions of arbitration set out above, it might be possible to carve out some of these mechanisms from it – the decision might not be "binding"; there might not be a "dispute" constituted within the usual definition of the law – and so on. That, however, requires a definition of arbitration in the first place.

It may well prove that the lack of a clear definition of the various concepts might pose problems in the future.

For these reasons, it might have been hoped that a definition of arbitration could be found in the 2010 Act – but the position arising from there is far from clear.

Fourth problem: the terms of the 2010 Act

The Arbitration (Scotland) Act has created further scope for confusion.

The passage of the then Arbitration (Scotland) Bill through the Scottish Parliament and the passage of *MacDonald Estates* through the Scottish courts seems to have happened in broad parallel (with the decision of the

court arriving at its conclusion first).[26] However, it does not seem that there was any reference to the other in these parallel processes – which is perhaps unfortunate in the context of the issues identified in this article and in particular the fact that there may now be a tension between the common law definition and the way in which arbitration is set out in the Act.

"Tension" is used because the Act, as mentioned above, does not include any formal definition of arbitration. Instead, there are inferences which might be drawn from some of the wording. Those inferences are only arguably irreconcilable with the position set out in the case law – which leaves the whole position somewhat unclear.

This lack of clarity is particularly troubling given the role of the state in facilitating arbitration (as set out above). Beyond that, the state has an important role in the way in which arbitration is understood[27] - even compared to other forms of ADR.

Given that situation, it is strange that the state's position is not clear in the underlying legal regime.

Before going further, it is necessary to briefly sketch out the position. The 2010 Act contains, in the main body of the Act, a series of rules to give authority and substance to arbitration which have their "seat" in Scotland (essentially, those which can – taking account of the complex rules, be described as "Scottish" Arbitrations). The Schedule to the Act contains a series of procedural provisions called the Scottish Arbitration Rules. These make up a complete set of rules which can be followed in Scottish arbitrations. These rules fall into two camps: one set are mandatory rules and the other set are "default" rules. Mandatory rules apply to all 'Scottish'

[26] See details on http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16034.aspx (accessed 23 February 2015)
[27] Davidson Op. Cit. at paras 2.11 to 2.16 contains a useful, brief summary of the various theories of the foundations of arbitration.

arbitrations and default rules only apply where the parties have not agreed something to the contrary. [28]

In terms of how this impacts on the way in which arbitrations in Scotland are conducted (and therefore on the essence of Scottish arbitration), the position is as follows.

Firstly, mandatory provisions in Rules 24 and 25 provide that that the arbitrator and the parties have duties to conduct proceedings without "unnecessary delay" and without "unnecessary expense."

This appears to require some degree of "proactivity" on the part of all parties. Of itself this would reflect a departure – at least in emphasis – from the "judicial function" described above. However, since these duties must be balanced against the other requirements that the arbitrator allows parties to put its case and treats them fairly, this is not perhaps too radical. Indeed, there can be tension between the need for fairness and the need to control the process. This is not, however, made clear.

Combined with this, the Rules also provide further detail on the arbitrator's potential powers in Rule 28. These rules are default rules and so can be changed by the parties' agreement.

These rules provide the arbitrator with broad scope over the procedure.

They begin

> *"28(1) It is for the tribunal to determine—*
>
> > *(a) the procedure to be followed in the arbitration, and*
> > *(b) the admissibility, relevance, materiality and weight of any evidence.*

[28] See Arbitration (Scotland) Act 2010 – sections 8 and 9

(2) In particular, the tribunal may determine…"

The Rules go on to provide a number of specific powers which the tribunal (i.e. the arbitrator or arbitrators) can determine for themselves. Crucially for present purposes, these include the power (in Rule 28(2)(e)) for the arbitrator to determine *"whether and, if so, to what extent the tribunal should take the initiative in ascertaining the facts and the law"*.

This power is a repeat of a very similarly worded provision in the English Arbitration Act 1996.[29] In both pieces of legislation, it is commonly described as giving the arbitrator scope to exercise an 'inquisitorial' role.[30]

The precise content of that role is problematic in the context of the differentiation between arbitration and expert determination set out by Lord Reed in *MacDonald Estates*.

It may, of course, be said that the 2010 Act changes the law – legislation trumps common law, of course.

However, there are four points which might suggest that that is not the case. Firstly, if that was intended to change the law, then it ought to have been made clearer and more explicit. This change, if there is one, is found in a sub-subsection to a rule found half way through a schedule to the Act(however central that schedule might be) – that would not seem to be the prime position for such a change.

Secondly, the nature of the rules involved is different. The sub rule relates to the procedure which the arbitrator might adopt and follow, rather than striking at the nature of the arbitrator's function which, at least arguably, is what is described in *MacDonald Estates*.

[29] S.34(2)(g)
[30] See for example Harris, Planterose and Tecks *The Arbitration Act 1996: A Commentary* (5th Ed. 2014) at 34K

Thirdly, the extent to which an arbitrator can take the initiative is unclear. The same wording exists in the English Arbitration Act of 1996.[31] While the Scottish courts have been clear that English authority can be used to help interpret equivalent provisions in the Scottish Act[32] that does not fully answer the question. The purpose of the provision has been understood in England to allow the arbitrator to act inquisitorially[33] but the provision itself does not, obviously, express itself in terms of the distinction between adversarial and inquisitorial. Moreover, even in England there is doubt about the extent to which that provision allows the arbitrator to be proactive – it seems to be accepted that, even there, it is at least good practice to not stray too far from adversarial procedures, at least without the parties consent.[34]

Fourthly, if an arbitrator is to be empowered to hold an inquisition then this has the potential to "crowd out" expert determination from the options available to a party – the distinction between the processes becomes less clear.

There are, therefore, problems in reconciling the provision with Scottish law.

It must be said that there are benefits to rule 28(2)(e). It allows the arbitrator to move away, if appropriate, from the strictness of the position as set out in terms of judicial function in *MacDonald Estates* and closer to the more "proactive" approach which is recognised in the case law and by Paulsson above:

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[31] S34(2)(g)
[32] See e.g. Arbitration Application No.3 of 2011 [2011] CSOH 164 per Lord Glennie at para.8
[33] see St John Sutton, Gill, Gearing *Russell on Arbitration* (23rd Edition, 2007) at para. 5.099
[34] See. Aeberli *The Tribunal in the Driving Seat: Inquisitorial Procedures in Adjudication and Arbitration* A paper given to the Society of Construction Law December 2005 D61 at p.21 (with reference to Mustill and Boyd *Commercial Arbitration* 2nd Ed. 1989, pp 288 – 289).

That has the benefit of aligning the powers of the arbitrator with practice – but the problems with the underlying lack of clarity about the arbitrator's fundamental role which are discussed here, remain: the boundary between expert determination remains unclear. In addition, since the approach to be taken by the arbitrator is to be determined by the arbitrator (at least by default) that weakens the role of the parties agreement regarding the nature of the process they are seeking to deploy to resolve their dispute.

At the very least, although the powers allowed in the 2010 Act do help in aligning the law with practice – issues remain. There are however ways in which these difficulties might be resolved.

Possible solutions

There a number of possible solutions.

Firstly, Paulsson suggests that freedom for the parties to the process is at the heart of arbitration[35] – and let the definition of their procedures, as agreed by the parties rule the day. That has the benefit of allowing the parties freedom of choice. As a proposition, that is attractive and has some force – but it would pose a number of logistical difficulties and might leave the position open to misinterpretation. In Scots law, the lack of clarity in the overall legal framework and the different outcomes in terms of immunity of the decision maker and in terms of the avenues of appeal, mean that a lack of definition ends up constraining choice: the parties agreement is not capable of clear implementation.

The key is ensuring that the outcomes and parameters of the various processes ought to be clear – especially for arbitration in which the state also has a role to play.

If the baselines are clear and the parties agree it, it ought to be relatively easy to define the process they want: they will know what "arbitration"

[35] See e.g. Op. Cit. Chapter 9

means and can set up their process accordingly. In the absence of that clarity, then there is the scope for difficulty.

Another alternative might simply be to carve out a separate form of arbitration specific to rent reviews – it is noteworthy that cases which have traversed the boundary between arbitration and expert determination have generally come from that area. This would leave arbitration "proper" in the more rarefied, "quasi-judicial" position envisaged in *MacDonald Estates*. The difficulty with that solution is that it does not deal with the issues which Paulsson captures neatly and which are discussed above which imagines that the arbitrator is more than a "private judge" – but someone with more control over the proceedings.

The question, therefore, is how to define the extent of that control but retain the distinction – which has been made in the law - between "judicial" arbitration and expert determination.

Leaving it only to the choice of the parties would be the preference but the language and terminology used must be clear before this can be done. The difficulty then is to reconcile law and practice. An attempt to do so follows.

Construction Adjudication: hybrid solutions?

Over the last fifteen years or so, hundreds of cases in the UK centred on the role of a dispute resolving decision maker who sits within what could comfortably be described as a hybrid role between arbitrator and expert. This is the role of the construction "adjudicator".

The role of the construction "adjudicator" was put on a statutory footing for "construction contracts" (as defined) by s108 of the Housing Grants, Construction and Regeneration Act 1996.[36]

[36] As now amended by sections 138 to 141 of the Local Democracy, Economic Development and Construction Act 2009

In essence, within the parameters of the statutory framework, an adjudicator's role has broadly similar features to both arbitration and expert determination as characterised above. The most striking feature of the process – and its biggest difference from other forms of dispute resolution - is that it imposes a 28 day deadline for the reaching of a decision on the adjudicator, and only relatively limited scope for that to be extended. In an environment where a resolution within 28 months is otherwise far from unusual, that is a significant feature.

The precise conceptual nature of adjudication is unclear but in Scotland, it has been said that construction adjudication is a "species of arbitration."[37] This is to the extent that

> *"It involves a procedure whereby parties agree to submit their dispute to the decision of a named individual rather than resort to court proceedings. That agreement may be found in an express adjudication clause in the parties' contract, or such a provision may be implied by the Housing Grants Regeneration and Construction Act 1996. However the agreement to go to adjudication is created, however, the critical features of an arbitration are present. The only distinction is that an adjudicator's award is merely provisional, and may be undone by subsequent litigation or arbitration*."[38]

It is notable that this case defines adjudication as similar to arbitration largely by reference to the fact that the submission of a dispute to an individual following parties agreement (albeit in the case of adjudication this agreement is implied (or perhaps more accurately "imposed") by the legislation).

Going beyond that similarity, which exists on the face of the process, it should be said that while the links between arbitration and adjudication are recognised, there are some question marks around issues such as the

[37] Deko Scotland Limited v. Edinburgh Royal Joint Venture and Others [2003] SLT 727 at para. 9
[38] Ibid

possibility of making claims against adjudicators[39] (it will be recalled that arbitrators have immunity). More generally some commentators have voiced their concern that the process has become more formal and legalistic than it was first intended to be.[40] In that latter sense, it might be said that the use of "judicial" (in the context of arbitration) might be an accurate term in the sense that it conveys a sense of formality and weight to proceedings – rather than something more "rough and ready". In any event, the distinction between arbitration and adjudication is the subject for another day.

For present purposes, it is appropriate to note that adjudication shares features with arbitration and expert determination and that adjudication has been a significant success. It can be said that it, generally, it appears to fulfill the desires of parties.

One of the reasons it does this may be the perception that a construction adjudicator is getting involved with the resolution of the dispute – rather than simply deciding on the position presented to them. That would mean it was meeting the aims and understanding of the parties, as set out above.

For the author of one of the leading textbooks in the field, that is a clear point of distinction between adjudication and arbitration:

> "*The 1996 Act makes clear that the adjudicator's role is inquisitorial and investigatory. It is therefore up to the adjudicator to investigate the facts that he considers to be relevant and to arrive at his own conclusion as to the answer to the dispute that has arisen. To that extent, the process is different to litigation or arbitration which, at its simplest, is an adversarial process, at the end of which the judge or*

[39] In particular, there are question marks over whether they can recover their fees see the recent decision of Stork Technical Services (RBG) Limited v Ross [2015] CSOH 10

[40] See for example the views of Bingham "*Construction Act: Super size me*" Building magazine, 6 January 2014.

arbitrator has to choose between the two alternative cases advanced before him." [41]

The source of this "inquisitorial" role is contained in the 1996 Construction Act (as amended) but will be familiar from what has been discussed above. Section 108(2)(f) provides that the construction contract which provides for adjudication (or has adjudication implied into it) "*shall enable the adjudicator to take the initiative in ascertaining the facts and the law*"[42] (and if there is no such provision then a statutory Scheme setting out the procedure will apply).

As will be recalled, this echoes the very similar wording in s34(2)(g) of the Arbitration Act 1996 and Rule 28(2)(e) of the Scottish Arbitration Rules. In the adjudication context, there has been significant consideration of how this would operate in practice. While it is beyond the scope of this work to go into significant detail on the relevant case law the overall approach to be taken appears to be clear.

It is the initiative flowing from s108 of the Construction Act which creates the role for the adjudicator to get involved – they must be proactive in seeking to identify the issues arising rather than relying on the parties to "bring the facts to them". They set the agenda and seek information. Much will rely on the information and submissions given by the parties, of course – but the adjudicator controls the process with its 'initiative'; not just reactively.

Coulson notes that there are limits to that inquisitorial role imposed by (i) the lack of time which is available to allow any forensic investigation; rather a more hands off approach is needed – where the adjudicator is forced by circumstances to rely on the information as presented to them and (ii) the requirements of natural justice – which prevent the adjudicator from

[41] Coulson *Construction Adjudication* 2nd Ed. Oxford at para. 19.28 [new edition forthcoming at time of writing]
[42] (s108(2)(f) Housing Grants, Construction and Regeneration Act 1996)

reaching conclusions without providing the parties' opportunities to comment on them.[43]

Notwithstanding those constraints, there have been a number of cases, recently, which have looked at the extent of the adjudicator's proactivity in taking the initiative. The adjudicator is responsible for setting the procedure to be followed. In terms of the extent to which they can go beyond the material provided by the parties, the recent cases have been boiled down to the idea that:

> "*in these adjudications, an adjudicator may come up with his own argument, or analysis of the facts or the evidence, or attach significance to a contractual term not argued by the parties; the adjudicator is not confined to the material and arguments provided by the parties".*[44]

However, there are constraints to this. As Coulson noted, the adjudicator is not *obliged* to go beyond the materials provided and, in accordance with the rules of natural justice, parties must be:

> "*informed by the adjudicator of arguments or analysis which the adjudicator has come up with beyond the submissions of the parties, and to a reasonable opportunity to comment on that material, before the adjudicator reaches a decision on the matter in question*". [45]

The time constraints can therefore act against the use of initiative: it can take a moment to find a spark of genius, but if that needs to be built into a fire and the parties given time to douse the resulting flames: too much of the allotted period for adjudication can elapse to make the effort worth the candle.

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[43] Coulson – page 19.28
[44] Peter Sheridan "Construction Act review: adjudicators using their own experience, expertise or argument" [2014] Const LJ 304 at p.322
[45] Ibid.

The clear indication from this – and the relevant cases[46] - is that the constraints of natural justice operated in practice to provide that the inquisitorial role is hemmed in by the need to ensure the parties are allowed to comment on the information or issues which the adjudicator raises.

In the course of the strictly time limited process of adjudication, the focus is on the dispute as captured in the intial documents produced. That also operates to constrain the process: there is little scope to expand the issues beyond those captured in those initial documents.

In arbitration, where there can be a somewhat more leisurely pace (although that is of course a matter for the parties), that could lead to an expansion of issues and avenues for exploration. That may simply be a feature of an inquisitorial style – but it is unlikely to meet the desires of all commercial parties. At the same time, the ability of an inquisitorial decision maker to help focus a dispute and manage a process more efficiently can be vital to the process.

Adjudication can provide some indication of how to fit an inquisitorial approach into the Scottish system and practice. The practical constraints on adjudication – especially the time limits which, combined with the requirements of natural justice, act as a constraint on the adjudicator's ability to become to "inquisitive" – mean that it is not a straightforward solution. However, the case law supporting the role of the adjudicator might then offer a path to follow between the adversarial and inquisitorial paradigms advanced by Lord Reed in *MacDonald Estates.*

Solving the problem for arbitration

Adjudication has two lessons which could be applied to assist our understanding of arbitration. While the former has clearly been around for

[46] See e.g. SGL Carbon Fibres Ltd v RBG Ltd 2011 SLT 417 at para. 12 and then the discussion of this in context of the facts of the case in paras. 29 to 36.

less time than the latter, its novelty combined with a high density of court cases has allowed its nature to be explored and developed judicially.

Firstly, there is no definition of "adjudication" in the legislation but the nature of the process seems to be clearly enough understood. This is drawn from (i) the clear legislative intention to use the process to assist cash flow in construction projects and (ii) the procedural framework set out in the legislation itself. From that the understanding of adjudication has arisen. The parameters and procedures seem to be clearly understood. That is not to say that the picture is complete: there is the existing lack of clarity about adjudicator immunity, for example which might be more easily filled if there was a clear definition. However, the system seems to be well understood and operated in practice.

Applying this lesson to Scottish arbitration, therefore, the need to identify the purpose and the procedures of arbitration is clear. Helpfully the 2010 Act does both. From what has been discussed above, there would remain the clear issue about the extent to which the arbitrator can adopt an "inquisitorial" approach. However, if one looks at the framework the Scottish Arbitration Rules set out, the link with adjudication is clear.

The purposes of arbitration and the role of the arbitrator are made clear in Rule 24:

> "*24(1) The tribunal must—*
>
> *(a) be impartial and independent,*
>
> *(b) treat the parties fairly, and*
>
> *(c) conduct the arbitration—*
>
> *(i) without unnecessary delay, and*
>
> *(ii) without incurring unnecessary expense.*
>
> *(2) Treating the parties fairly includes giving each party a reasonable opportunity to put its case and to deal with the other party's case."*

This then echoes the position as now established for adjudication since there is a need for some sort of “efficient” dispute resolution – but this efficiency must be balanced with fairness – and indeed the express requirement for parties to be allowed to comment on the other parties case which echoes the natural justice requirement in adjudication.

Interestingly, there is no express requirement for fairness to require the arbitrator to allow the parties to comment on any issues raised by the arbitrator

However, when the broad framework in Rule 24 is combined with the possible powers in Rule 28, the position in construction adjudication can be seen as sufficiently analogous – and that allows exploration of the second lesson which arbitration can take from adjudication.

The second lesson from adjudication is that the ability for case law surrounding the meaning of “*taking the initiative in ascertaining the facts and the law*” to be used. One of the problems is that this language now appears in both the Scottish and English arbitration acts, and in the 1996 Act. It seems to be commonly understood to be bringing in inquisitorial powers – but the scope of these powers is not clear. What does seem reasonably clear, is that, in terms of construction adjudication at least, the words seem to be understood and meet what the parties might be generally looking for in their arbitration, in terms of intervention.

However, construction adjudication reflects a specific response to the needs in a particular sector. It is purposely structured to maximise cash flow in the construction industry.

Arbitration – undefined as it is – is more flexible. In terms of the level of intervention, some parties might wish less; some might wish more – there are trade-offs in terms of efficiency of the process and opportunities to ensure quality control depending on where on the spectrum that is placed.

As will have been seen above, that level of intervention goes to the heart of the process. It might be said that the issues ought to be left to the parties.

That might be the case but of course, at present, it is not: instead the issue is left to the arbitrator to determine – and his apparent discretion; unless he is an avid follower of the case law[47] is wide. At present, he may stray into the realm of expert determination – perhaps unwittingly. That ought to be avoided. To corrupt the words of Lord Dunedin: If parties have contracted to arbitrate, to arbitration – and not expert determination – they must go.

In addition, the example of adjudication shows how other procedural constraints can matter here. Even the most inquisitive adjudicator has to get to his decision in less than a month: the scope for going "off on a frolic" is limited.

This again points to the importance of procedure in terms of defining the process. As identified above, the difference between adversarial and inquisitorial arbitration is made in the case law. The 2010 legislation may have changed the position but the extent of that change is unclear. That distinction is important for a whole host of reasons.

At present, Rule 28(2)(e) of the Scottish Arbitration Rules is a default rule. Parties can therefore modify it as suits them – to either specify the level of initiative that can be taken; or provide in other ways to control the scope of the arbitrator's ability to intervene in the proceedings. They should do so, however, with a clear view of what they intend to achieve and with the consequences of changing the provision clear.

It may be said that the new rule, 28(2)(e) has altered the position, away from *MacDonald Estates*. The arbitrator is no longer purely involved in

[47] Many arbitrators are, of course, but the other side of the story is that there may also be preferences for arbitration where the arbitrator does not have the same detailed understanding of the law.

adversarial proceedings. It could be argued that the use of the language is clear – by its analogues in other legislation at least – that this is to import an inquisitorial procedure. In terms of adjudication, however, the operation of that role in practice is constrained by other aspects of procedure. Moreover, given that the difference is a key one in differentiating arbitration from other forms of dispute resolution; if it is no longer in place: what are the alternatives?

Much then will depend on the parties' agreement to the way in which the procedure is to be operated both at the time of agreement of the contract and later (when it might be that agreement is more difficult).

In that case, it ought to be considered (i) what role the arbitrator is to have (ii) what impact other procedural restrictions will have on it and (iii) if it ought to be made clear – at least by way of an indication – what procedure is being adopted.