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Some Thoughts on the Scottish Arbitration Code 2007

By

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Reprinted from
(2008) 74 *Arbitration* 348-359

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Articles

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1. INTRODUCTION

November 2007 saw the launch of the new Scottish Arbitration Code by the Scottish Branch of the Institute. This replaces the 1999 version of the Code, which was promulgated not only by the Branch but also by the Scottish Council for International Arbitration and the Scottish Building Contract Committee. The new Code is also known as the Scottish Arbitration Rules 2007. This is helpful, as individuals like myself will no longer need to explain to our foreign students why the "Code" has no actual legislative status, but only applies if adopted by the parties. The Code was originally designed to apply in the construction and engineering industries, and while it was ultimately decided that it could apply in all forms of arbitral proceedings, its origins may be detected in certain provisions. This short article does not seek to provide a comprehensive survey of the Code, but rather seeks to draw attention to noteworthy features and the questions that may be raised thereby.

2. THE SCOTTISH CONTEXT

It is interesting that, in the absence of agreement of the parties, the arbitrator has the power under art.9 to fix the seat of the arbitration, with the implication that Scotland may not be the chosen seat, since in certain other respects the Code seems to proceed on the basis that Scots procedural law will be applicable. It seems unlikely that parties to arbitrations outside of Scotland would contemplate invoking the Scottish Arbitration Code, and it is submitted that its main benefit will be to provide a framework for the conduct of arbitration in Scotland which avoids, in so far as this is possible, the pitfalls that await unwary parties who choose to arbitrate in Scotland.

It is therefore useful to sketch briefly the context in which the Code will mainly operate. Scotland is one of those rare jurisdictions that lacks a comprehensive arbitration statute. There is indeed legislation that deals with arbitration, but this is fragmentary and designed to deal with specific problems. This it does not always successfully and sometimes quite ineptly.[1] The oldest legislation touching on arbitration dates back to 1695 and is alarmingly archaic. It should of course be mentioned that this view is subject to the major corrective that in 1990 Scotland adopted the UNCITRAL Model Law on International Commercial Arbitration,[2] and that parties to an arbitration agreement that would not otherwise be subject to the Model Law may contract into its provisions. The version of the Model Law that applies in Scotland is the original version, with a few questionable adaptations,[3] no account being taken of the amendments that UNCITRAL made to the Model Law in 2006.

[1] See Fraser Davidson, "The Law Relating to the Operation of Arbitral Tribunals—Room for Improvement?" (1989) 57 *Scottish Law Gazette* 42.

[2] By virtue of s.66 and Sch.7 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

[3] See generally Fraser Davidson, *International Commercial Arbitration: Scotland and the UNCITRAL Model Law* (Edinburgh: W Green, 1991).

Of course, even if parties do choose to contract into the Model Law, it is not the case that every aspect of the arbitral process will be governed by the Model Law. The Model Law is, after all, a partial law, which operates within the context of the domestic legal regime governing arbitration, i.e. the Scots common law of arbitration. Here, fresh difficulties are to be found since in an extraordinary number of respects the Scots common law of arbitration either provides no answers to commonplace questions regarding the practice of arbitration, or provides answers that are entirely unhelpful.[4] It is therefore very important to be able to arbitrate under a set of rules such as the Scottish Arbitration Code, which recognises the problems created by the Scots common law of arbitration and seeks to overcome them, although, as will be seen, it is not always possible to remedy the deficiencies of the law via agreement.

It should be added that it is certainly not the case that the Scots are indifferent to the inadequacies of their law. The Scottish Advisory Committee on Arbitration Law, which had recommended that Scotland adopt the Model Law, went on to consider the weaknesses of the Scottish Domestic Law of Arbitration[5] and eventually produced a draft Arbitration Bill in 1996.[6] This remained unenacted, but the appearance of radical, modern arbitration legislation in a variety of other jurisdictions prompted the Scottish Council for International Arbitration and the Scottish Branch of the Institute to produce a more ambitious and wide-ranging Arbitration Bill in 2002. This would have served to cure practically all of the woes of the Scots law of arbitration. Although this Bill also remains unenacted, it is believed that arbitration law reform is on the agenda of the new Scottish Government, and the Bill is likely to provide the template for any future legislation.

The deficiencies of existing Scots Law and how these might be remedied by the Bill were the subject of a masterly analysis in an article which appeared in this journal in 2004,[7] and readers are referred to that article for an overview of the Scots law of arbitration and the provisions of the Bill. Frequent reference will be made to those provisions in examining the Code, certain of the articles of which are patently inspired by the Bill.

3. KEY POWERS

As might be expected, many of the provisions of the 1999 version are repeated in the new Code. Thus, for example, the arbitrator is given certain powers which he would certainly not have under the law of Scotland in the absence of agreement, such as the power to award damages,[8] the power to award interest,[9] the power, if so requested by a party, to order interim measures such as the provision of security for the amount in dispute or for expenses, or the preservation, storage, sale or disposal of property under the control of a party and relating

[4] See Fraser Davidson, "International Commercial Arbitration in Scotland" (1992) *Lloyd's Maritime and Commercial Law Quarterly* 376

[5] The Operation of Arbitration in Scotland in light of the UNCITRAL Model Law 1990.

[6] Consultation Paper on Legislation for Arbitration in Scotland 1997. For commentary see Fraser Davidson, "The Draft Arbitration Bill" (1997) 2 *Scottish Law and Practice Quarterly* 171.

[7] Lord Dervaird *et al.,* "Arbitration in Scotland—A New Era Dawns" (2004) 70 *Arbitration* 115.

[8] Scottish Arbitration Code 1999 art.12.3. Authority for the view that an arbitrator has no such inherent power under the law of Scotland is provided by *Aberdeen Ry Co v Blaikie Bros* (1853) 25 D. (H.L.) 20. Such a power would be conferred by cl.22(1)(b) of the Bill.

[9] While an arbitrator does have an implied power to award interest on sums due from the date of his decree until payment, there is no such implied power to award interest on sums prior to that date—see Lord Dunpark in *John G McGregor (Contractors) Ltd v Grampian Regional Council* 1991 S.L.T. 136 at 137L. Scottish Arbitration Code 1999 art.12.5, echoing cl.22(1)(d), of the Bill, empowers the arbitrator to order that simple or compound interest be payable at such rate or rates and in respect of such period as the arbitrator determines to be appropriate, without being bound by the prevailing legal rates of interest.

to the subject matter of the arbitration,[10] the power to rectify the terms of any contract,[11] the power to correct clerical and similar errors in the award,[12] and the power to make an additional award to cover claims presented but omitted from the award.[13] The arbitrator is also given powers the existence of which would at the least be doubtful, such as the power to make interim or partial awards.[14]

It is interesting that art.1.5.2 of the Code states quite baldly that a "single arbitrator shall be appointed", rather than a three-arbitrator tribunal as is commonplace in international arbitration. While the parties could no doubt vary this rule by agreement, all the provisions of the Code, including those relating to the failure of appointment procedures, contemplate only a single arbitrator.[15] This strengthens the supposition that, despite the occasional nod in favour of internationalism, the Code is essentially designed for domestic use.

4. THE ARBITRATOR

By virtue of art.3(1), the arbitrator may be a natural person of full age and capacity of whatever nationality. This may seem in part to be stating the obvious, but serves to deal with those Scots decisions which indicate that a minor[16] or an unincorporated body[17] can be validly appointed as an arbiter. If Scotland is not the seat of the arbitration (and perhaps even where it is) the question may arise as to what legal system should determine whether the

[10] See Scottish Arbitration Code 1999 art.16. Where a party fails to comply with such an order the tribunal may dismiss any claim or counter-claim or disallow any defence—art.16(3). While art.17(1) of the version of the Model Law which applies in Scotland indicates that the tribunal may, at the request of a party order any party to take interim measures of protection, and to provide appropriate security in connection with any such measure, it is silent as to what those measures might be, so that the Code is useful in making this explicit. The 2006 version of the Model Law, which contains a number of detailed provisions regarding interim measures, has not been adopted in Scotland. The Arbitration Bill 2002 would deal with such matters in cl.21(3)–(6).

[11] To the extent permitted by the law applicable to it—Scottish Arbitration Code 1999 art.12.4. While an arbitrator would have no inherent power of rectification under Scots law, there would appear to be no reason to suppose that such power could not be conferred by agreement. Clause 22(1)(c) of the Arbitration Bill 2002 is in similar terms, but does not actually indicate that an arbitrator is to have that power under Scots law.

[12] See Scottish Arbitration Code 1999 art.19. A similar power exists under Art.33(1)–(2) of the Model Law and would be conferred by cl.37 of the Bill, but probably does not exist under domestic law—*Simpson v Strachan* (1736) Mor. 17007. But such errors do not afford a ground for reducing an award—*Morison v Robertson* (1825) 1 W. & S. 143.

[13] See Scottish Arbitration Code 1999 art.19. A similar power exists under Art.33(3) of the Model Law, but not under domestic law. Indeed a failure to deal with all claims submitted is a ground for reducing an award—*Pollich v Heatley* 1910 S.C. 469. The Arbitration Bill 2002 does not address this issue.

[14] See *Taylor Woodrow Construction (Scotland) Ltd v Sears Investment Trust Ltd* (1992) S.L.T. 609. While Art.32(1) of the Model Law in referring to "final" awards seems to contemplate that other sorts of awards may be made, it probably leaves the question of whether a tribunal actually has power to make such awards to domestic law. Clause 22(1)(a) of the Arbitration Bill 2002 would confer power to make interim, provisional or partial awards.

[15] The Arbitration Bill 2002 cl.9 contains default appointing procedures in respect of tribunals involving one, two or three arbitrators. This is a great improvement upon the existing default provisions for domestic arbitration contained in the Arbitration (Scotland) Act 1894, which are seriously deficient—see Fraser Davidson, "Appointing Arbiters—Reinforcing the Law" (1989) *Scots Law Times* 373.

[16] *Gordon v Earl of Errol* (1582) Mor. 8915. This may now be incompetent under the Age of Legal Capacity (Scotland) Act 1991. The Arbitration Bill 2002 would not address this issue.

[17] *Bremner v Elder* (1875) 2 R. (H.L.) 136. Under cl.8 of the Arbitration Bill 2002 only a natural person could act as arbitrator.

arbitrator is of full age and capacity. There is also the question of what "full age" actually means, and how, if at all, it differs from capacity. The question of nationality under art.3(1) must presumably be subject to the requirement under art.3(2) that the arbitrator must be and remain independent and impartial, since situations can be envisaged where nationality would have a direct bearing on such issues.[18]

It is notable that an arbitrator requires to be both independent and impartial,[19] especially in light of the decision of the framers of the Arbitration Act 1996 to refer only to lack of impartiality as a ground for removing an arbitrator in s.24(1)(a). Explaining why a reference to independence was not included, the Departmental Advisory Committee on Arbitration Law observed[20] that its inclusion:

> "[W]ould give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the independence of an arbitrator."

One possible reason for its inclusion is that the fact that Art.6(1) of the ECHR speaks of an entitlement to an "independent and impartial" tribunal, albeit that this was obviously not an argument which commended itself to the Government in passing the 1996 Act.

5. CHALLENGING THE ARBITRATOR

Where an arbitrator is challenged on the basis of justifiable doubts as to his independence or impartiality, then in terms of art.4.3 he may decide to withdraw, and must do so if the other party agrees with the challenge.[21] Otherwise, art.4.4 contemplates that the arbitrator shall in the first instance determine such a challenge. The same is true if the challenge is to the arbitrator's jurisdiction, including any claim that the arbitration agreement is invalid or non-existent.[22] Article 4.5 further provides that an arbitration clause is to be treated as an agreement independent of the other terms of the contract, and a decision that, "the arbitration clause is null and void shall not for that reason alone render the arbitration clause invalid".

[18] And certain institutional rules demand that if the parties are of different nationalities, the arbitrator cannot be of the same nationality as a party, unless the parties agree otherwise, e.g. LCIA Rules para.6.1.

[19] Although the author must concede that other institutional rules feature a similar requirement, e.g. LCIA Rules para.5.2. Indeed the *IBA Guidelines on Conflicts of Interest in International Commercial Arbitration* (2004) also demand that every arbitrator must be and remain independent of the parties—Guideline 1. The Guidelines provide very detailed guidance of what is meant by independence and impartiality, with examples of the sorts of relationships and behaviour which would, might or would not compromise those standards. It is a perhaps a pity that the Code does not provide similar guidelines in an annex, or else invoke the IBA Guidelines. Clause 13(1)(a) of the Arbitration Bill 2002 would render it a ground of challenge that circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

[20] Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996), para.102. For an example of a case where an arbitrator was regarded as impartial although not strictly independent see *AT & T Corp v Saudi Cable Co* [2000] 2 Lloyd's Rep. 127, CA. See also Gillian Eastwood, *A Real Danger of Confusion: The English Law Relating to Bias in Arbitrators* (2001) 17 *Arbitration International* 287. It might also be noted that Art.11(1) of the ICC Rules refers to challenge on the basis of lack of independence, but does not mention impartiality. Yves Derains and Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration*, 2nd edn (The Hague: Kluwer, 2005), p.109 explain that this is because independence is objectively verifiable, whereas impartiality is essentially a state of mind.

[21] See the similar terms of cl.13(5) of the Arbitration Bill 2002.

[22] And see cl.30 of the Arbitration Bill 2002.

While these provisions clearly seek to invoke the well-established principles of competence-competence and the separability of the arbitration agreement, the form of words employed by art.4.5 is rather curious. Legislation[23] and institutional rules[24] that deal with this issue tend to indicate that the invalidity of the main agreement should not render the arbitration agreement invalid. It is not clear what the above wording seeks to achieve. Nonetheless, the assertion of the principles of competence-competence and separability is helpful in a Scottish context, since while those principles would certainly apply to arbitrations in Scotland which are governed by the Model law, their place in Scots domestic law is much less certain.[25] Of course, the extent to which these principles can operate depends on the law of the seat. If that law does not countenance those principles, it is dubious whether that position can be altered by the agreement of the parties.

Article 4 is silent on the question of recourse to the courts, but it is clear that this is contemplated, since art.18.4, which looks to exclude the possibility of any sort of judicial review, is expressly stated to be subject to art.4. The fact that art.4 does not mention the relationship between the arbitrator's decision and the role of the court is no doubt due to the fact that this must depend in each case on the law of the seat. It would be a rare jurisdiction indeed which allowed an arbitral tribunal, especially a sole arbitrator, to be the final judge on jurisdictional or other challenges, and certainly in Scotland, whether under the Model Law or domestic law, the arbitrator's decision could be reviewed by the court.[26]

6. ARBITRATOR'S DUTY OF DISCLOSURE

Under art.3.4 a person who is approached to act as arbitrator has to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence or confirm in writing that no such circumstances exist. Should such circumstances arise during the course of the arbitration, he must promptly disclose them to the parties. This echoes art.12(1) of the Model Law, but goes further in pointing out that the relevant circumstances include (but are not limited to) bias, interest and past or present relationships with a party. Like the Model Law, however, there is no indication of the consequences of breach of such a duty.[27] Does it compromise his right to remuneration?[28] Should he be liable for the cost of any nugatory proceedings? Does it in that context amount to conscious and deliberate

[23] e.g. Model Law Art.16(1); Arbitration Act 1996 s.7.

[24] e.g. LCIA Rules Art.23.1.

[25] Thus it has even been suggested that an arbitration clause would not survive a repudiatory breach of contract in order to allow the arbitrator to rule on the effect of the breach—see Lord Shaw in *Municipal Council of Johannesburg v D Stewart & Co* 1909 S.C. (H.L.) 53 at 56. It is to be hoped that the Scots courts would now adopt the modern view of separability, which first appeared clearly in England in *Heyman v Darwins* [1942] A.C. 356; was extended in cases such as *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701; and was most recently stated by the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep. 254. The Arbitration Bill 2002 would follow the example of the 1996 Act in articulating the principles of separability and competence-competence in separate provisions—cll 6 and 30(1).

[26] See the Model Law Arts 16(3) and 34(2)(a)(iii); Lord President Dunedin in *McCosh v Moore* (1905) 8 F. 31 at 40. See also cll 14(4) and 30(9) of the Arbitration Bill 2002.

[27] It should, however, be mentioned that such duties are commonly imposed by institutional rules—see, e.g. UNCITRAL Arbitration Rules Art.9, ICC Rules Art.7, LCIA Rules Art.5(2). The LCIA Court is, however, entitled to decide upon the fees and expenses of an arbitrator removed for failing to disclose relevant circumstances—see r.10.1–2.

[28] Although the Arbitration Act 1996 does not impose a similar duty of disclosure, where an arbitrator is removed by the court under s.24(1)(a) on the basis that circumstances exist which give rise to justifiable doubts as to his impartiality, the court under s.24(4) may make such order as it thinks fit as regards his entitlement to fees and expenses or the repayment of fees and expenses already paid. Arbitration Bill 2002 cl.14(5) is in identical terms.

wrongdoing? (See "Arbitral Immunity" below.) The Code does not say and there is currently nothing in Scots law comparable to the power given to the court to determine a removed arbitrator's entitlement to fees under s.24(4) of the 1996 Act. Perhaps the rule is intended to be hortatory.

7. RESIGNATION

In terms of art.5.1 a person who accepts appointment as arbitrator is not entitled to resign except on certified medical grounds, nor to withdraw unless challenged by one of the parties. Again, however, the Code is silent as to the consequences if an arbitrator seeks to resign when not entitled to do so, and once more a Scots court has no inherent power to grant an arbitrator relief from liability and determine his entitlement to fees and expenses, such as exists under s.25(3) of the 1996 Act.[29] It has to be presumed that the Code's provisions regarding the appointment of a replacement arbitrator apply to the situation where an arbitrator has resigned wrongfully just as they apply where the arbitrator has resigned legally, although this is not made explicit.

8. ARBITRAL IMMUNITY

Importantly, under art.8 an arbitrator is not to be liable to a party "for any act or omission in connection with the arbitration" other than the consequences of "conscious and deliberate wrongdoing". Is failure to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence an act or omission in connection with the arbitration? Is wrongful resignation? Could either amount to conscious and deliberate wrongdoing? More importantly, while the article echoes similar provisions in other institutional rules[30] and cl.19 of the Arbitration (Scotland) Bill, what is the legal basis on which such provisions operate? The Code can only apply when the parties so agree, and thus is essentially contractual in nature, the contract existing between the parties. It is far from certain whether and for what an arbitrator might be liable to the parties under the law of Scotland,[31] since unless and until the Bill is enacted Scots law features nothing like s.29 of the Arbitration Act 1996. Nonetheless, assuming that liability might arise, on what basis might the arbitrator seek to avoid that liability on the basis of a contract to which he is not a party? The answer might lie in the form of art.3.6, which provides that by accepting appointment an arbitrator is deemed to be bound by the Code. Again, he can only be bound contractually, so that the provisions of the Code might be said to create a contract not only between the parties, but also between the arbitrator and each of the parties. Yet it may be added that the exclusion of liability under art.8 extends to any legal adviser and any nominating body or officer thereof. Unless it is argued that there is some sort of implied contract between such an individual and the parties under which they are exempted from liability, and this might be a difficult argument to sustain if it appears that the individual in question was unaware of the article when he acted, it is difficult to discern the basis on which he would be excluded from liability. Certainly, it is hard to say that the conditions for the application of the *jus quaesitum tertio*, under which a third party may enforce the term of a contract intended to benefit him, are met.[32]

[29] Arbitration Bill 2002 cl.16(1) would allow resignation in response to a challenge, or with the agreement of the parties, or where the court is persuaded that there is sufficient reason for doing so. Clause 16(3) would permit in that eventuality the parties and the arbitrator to agree on questions of liability and entitlement to fees and expenses, with an application to the court to decide on such matters being open under cl.16(4) in the absence of such agreement.

[30] See, e.g. Art.31.1 of the LCIA Rules, Art.34 of the ICC Rules.

[31] See Fraser Davidson, *Arbitration* (Edinburgh: W Green, 2000), para.10.06; Robert L.C. Hunter, *The Law of Arbitration in Scotland*, 2nd edn (Edinburgh: Butterworths, 2002), paras 8.49–8.55.

[32] See William W. McBryde, *The Law of Contract in Scotland*, 3rd edn (Edinburgh: W Green, 2007), Ch.10.

9. SUBSTANTIVE LAW

In terms of the application of substantive law to the resolution of the dispute, art.10.1 echoes art.14.1 of the 1999 Code (which in turn replicated Art.17.1 of the ICC Rules) in indicating that where the parties have failed to make a choice of law, the arbitrator shall apply such law or laws as he determines to be appropriate.[33] Leaving aside the question of implied choices of law, how does the arbitrator decide what is appropriate in this context? There is no suggestion that the arbitrator need follow any particular set of conflict of law rules in so doing, and indeed the reference to "laws" which the arbitrator may decide to be appropriate would suggest that the arbitrator is not so confined in his choice, since such rules would rarely suggest that more than one legal system could govern the substance of the dispute. Does the "law" applied by the arbitrator have to be an actual national law, or can the arbitrator have reference to concepts such as law developed by arbitral tribunals or *lex mercatoria*, standards which are not infrequently invoked in international arbitration? While this would seem unlikely on the face of it, art.10.2 which requires the arbitrator to take account of the provisions of the contract and trade usages applicable to the contract, is identical to Art.17.2 of the ICC Rules under which tribunals have often invoked such concepts.[34] No court challenge to the invoking of such standards under that provision has ever succeeded.[35] Whether the framers of the Code intended to be so liberal is another matter.

The terms of art.10.3 are worth quoting in full:

> "The Arbitrator shall not decide, or act as, a mediator between the parties nor reach a decision on a basis other than that founded in the law which applies by virtue of Article 10.1., unless the parties have expressly authorised the Arbitrator to do so."

The meaning of this curious provision perhaps becomes clearer if it is compared with its counterpart in the 1999 Code, art.14.3 of which runs:

> "The tribunal shall not decide as *amiable compositeur* nor *ex aequo et bono* unless the parties have expressly authorised it to do so."

This provision echoes Art.17.3 of the ICC Rules (and Art.28(3) of the Model Law[36]), and it must be presumed that the framers of the 2007 Code were anxious to communicate, without recourse to concepts which might be unfamiliar to likely users, the idea that an arbitrator may not have recourse to extra-legal standards such as fairness and justice without the express authority of the parties. Article 10.3, however, hardly makes this clear.

Also noteworthy in this context is the reference to the arbitrator acting as a mediator, and it is unfortunate that this idea could not have been made the subject of a separate provision. Again it is not clear what is being suggested here. Is the aim to seek to prevent the arbitrator

[33] Arbitration Bill 2002 cl.34(1) is to similar effect.

[34] See W. Laurence Craig, William W. Park and J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn (Oxford: OUP, 2000), para.17.03. See also Klaus P. Berger *et al*., "The Use of Transnational Law in International Contract Law and Arbitration" in Klaus P. Berger (ed.), *The Practice of Transnational Law* (The Hague: Kluwer, 2001); Christopher R. Drahozal, "Commercial Norms, Commercial Codes and International Commercial Arbitration" (2000) 33 *Vanderbilt Journal of Transnational Law* 79; "Contracting out of National Law: an Empirical Look at the Law Merchant" (2005) 80 *Notre Dame Law Review* 523. Arbitration Bill 2002 cl.34(2) is in identical terms.

[35] See *Societe Pabalk Ticaret Siketi v Norsolor SA* (1984) 9 Y.C.A. 159; *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1987] 2 All E.R. 769.

[36] And cl.34(1) of the Arbitration Bill 2002 is in identical terms.

taking any step which might help promote a settlement,[37] or is what is contemplated formal mediation/arbitration, whereby the same individual seeks to mediate between the parties, and then renders a binding decision as arbitrator if a settlement is not reached? While that institution is commonplace in Far Eastern jurisdictions and indeed has even been accorded legislative recognition,[38] it is not so common in the West and has been regarded as being attended with certain difficulties, notably the question of whether an arbitrator who has sought unsuccessfully to mediate between the parties can be regarded as entirely impartial.[39] Is the reference to mediation in art.10.3 meant to suggest that, if the parties expressly authorise mediation/arbitration, then there can be no question of the arbitrator subsequently being challenged in terms of lack of impartiality?[40] That would be an interesting position for the Institute to adopt.

10. THE CONDUCT OF THE PROCEEDINGS

As under the 1999 version, art.11.1 of the Code allows the arbitrator to conduct the arbitration as he sees fit, provided that the parties are treated equally and each given a fair opportunity to present its case.[41] There is no suggestion that the parties may restrict the arbitrator's discretion under the Code, but if the parties, having adopted the Code, then agreed that the arbitrator should conduct the proceedings in a particular way, the arbitrator would surely be guilty of misconduct if he declined thus to proceed. At the same time despite the prohibition on resignation in art.5.1, an arbitrator who agreed to act on the understanding that he would have power to conduct the proceedings as he saw fit would presumably be entitled to resign if that discretion were curtailed.

By virtue of art.11.4, the arbitrator's discretion includes the power:

> "[T]o direct the order of any hearings of evidence, split proceedings, exclude cumulative or irrelevant witness testimony or other evidence and direct parties to focus their presentation on issues the decision of which may dispose of all or part of the case."

In other words, the arbitrator may decide the issues on which evidence is required and how much evidence he wishes to hear. This provision does not appear to go so far as to permit the arbitrator to determine the sort of evidence he wishes to hear, unless this is implicit in his general power to conduct the arbitration as he sees fit, or his power under art.13.1 to determine the manner in which parties to present their cases. This interpretation is perhaps reinforced by the fact that, in terms of art.13.5, while a party may request an oral hearing,

[37] Many arbitrators regard this as acceptable practice, particularly those from civilian jurisdictions—see Christain Buhring-Uhle, Gabriele Scherer and Lars Kirchhoff, "The Arbitrator as Mediator: Some Recent Empirical Insights" (2003) 20 *Journal of International Arbitration* 50.

[38] Hong Kong Arbitration Ordinance 1996 Art.2B(3); Singapore Arbitration Act Art.17(3); CIETAC Arbitration Rules Art.51.

[39] See *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] B.L.R. 207; *Acorn Farms Ltd v Schnuriger* (2003) 3 N.Z.L.R. 121.

[40] See Yasunobu Sato, "The New Arbitration Law in Japan: Will it Cause Changes in Japanese Conciliatory Arbitration Practices" (2005) 22 *Journal of International Arbitration* 140, who argues that while Art.38(4) of the Japanese Arbitration Law of 2003 allows the tribunal or one of the arbitrators to seek to settle the dispute if the parties agree (arbitrators having previously sought to promote a settlement as a matter of course), the fact that Art.18(1)(ii) adopts the form of Art.12(2) of the Model Law probably means that the fact that an arbitrator may have learned confidential information during the conciliation process allows him to be challenged because justifiable doubts as to his impartiality exist.

[41] Arbitration Bill 2002 cl.26(1)(a) would demand that the tribunal act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent.

provided such a request is timeously made, such a hearing need not be held if the parties have agreed in writing to a documents only arbitration, or if the arbitrator deems the hearing not to be necessary. Equally, the arbitrator has discretion not only to limit the appearance of witnesses, but to refuse to allow witnesses altogether.[42] Moreover, under art.12.9, subject to any contrary agreement of the parties, he has the power to decide whether and to what extent he should take the initiative in ascertaining the facts and the law, and this certainly would allow him to decide the sort of evidence he wished to hear. Indeed, it would allow the arbitrator to drive the proceedings and adopt an entirely inquisitorial approach if he so desired.

It may be added that "written pleadings" as employed "in the Scottish courts" are specifically stated[43] not to be necessary unless, "the Arbitrator so orders, having been shown good cause for their use by one of the parties". Given that the terms of this provision are explicitly stated to be without prejudice to the arbitrator's discretion under art.11.1, it must be supposed that the arbitrator would be entitled to direct that pleadings be employed whether or not good cause for their use is shown. Nor are the rules of evidence to apply unless the arbitrator decides otherwise.[44] The arbitrator furthermore is to determine not only the admissibility, relevance, materiality and weight of the evidence offered, but also the applicability of any privilege or immunity.[45] Presumably, an arbitrator would be in breach of his duty to give each party a fair opportunity to present its case if he excluded relevant evidence, except on the basis that he had already heard sufficient evidence on the issue. More interestingly, is he entitled to override privileges recognised by the law of the seat, e.g. to demand to see communications between parties and their legal advisers, and to draw an adverse inference if such material is withheld? Would the law of the seat countenance such discretion? While Art.9(1) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration is in similar terms, Art.9(2) of those Rules seems to concede that questions of privilege are subject to the applicable legal rules.[46]

11. TIME LIMIT FOR MAKING AWARD

The arbitrator is enjoined by art.11.3 to seek the fair, speedy and efficient resolution of the dispute, and by virtue of art.13.3 is entitled to impose such time limits on each stage of the proceedings, including presentation of a party's case, as he considers reasonable. Yet this concern with expedition finds its most striking expression in the requirement under art.11.5 that the award must be made within six months of the arbitrator's appointment.[47] To ensure that the six-month time limit is adhered to the parties are placed under a duty to co-operate with the arbitrator, who under arts 12.6 and 12.7 may dismiss any claim or counterclaim or exclude any defence if a party has not adhered to any time limit laid down by the arbitrator, or else has been unduly dilatory in presenting that claim, counterclaim or defence. Given the very tight time limit, it will be interesting to see what "unduly dilatory" might mean in this context. Is it solely for the arbitrator to determine this question, or might he be subject to judicial review? In a well conducted arbitration a party will be made aware of the time

[42] Scottish Arbitration Code 1999 art.14.3.
[43] Scottish Arbitration Code 1999 art.11.1.
[44] Scottish Arbitration Code 1999 art.14.1.
[45] Scottish Arbitration Code 1999 art.14.1.
[46] Under cl.32(2)(b) of the Arbitration Bill 2002 the tribunal may similarly decide upon the admissibility, relevance, materiality and weight of any evidence, but cl.32(3) explicitly makes this power subject to any applicable enactment or rule of law.
[47] Scottish Arbitration Code 1999 art.21.4 indicated that the arbitral tribunal should use its "best endeavours" to make its award within 45 days of the closure of the proceedings, a form of words which surely imposed no actual time limit. The same is arguably true of art.20 of the London Maritime Arbitrators Association Arbitration Terms which state that the award should "normally" be available not more than six weeks from the close of proceedings.

frame within which claims and defences should be presented even if specific time limits are not laid down, and it might be expected that a party in danger of falling foul of this provision would receive some warning. However, what recourse is available to a party who unexpectedly is informed that its claim is dismissed or defence excluded?

Under art.11.6 the six-month time limit may indeed be extended by up to a further two months in cases which the arbitrator determines to be "complex", and one may presume that the arbitrator's determination of that point is unchallengeable. Moreover, by virtue of art.11.7 the parties may in any case extend the time limit by agreement. However, if for whatever reason[48] the six/eight-month time limit is not met, and the parties fail to agree on an extension, the result must be that the arbitrator no longer has the authority to make an award, and that any award which emerges thereafter is a nullity. Scots law currently lacks a provision like s.50 of the Arbitration Act 1996 which would allow the court to extend the time limit in such circumstances, and it is very doubtful whether the courts have such a power at common law.[49] While the aim of the provision is laudable, there are penalties for the unwary.[50]

12. EXCLUSION OF JUDICIAL REVIEW

As under the 1999 version, the Code seeks to render the award (and indeed any arbitral decision) immune from challenge. Thus art.18.5 excludes s.3 of the Administration of Justice (Scotland) Act 1972. That provision introduced the stated case procedure, which was modelled on the old English special case procedure.[51] There was little enthusiasm for the introduction of the procedure, and its abolition has long been advocated,[52] even by the judiciary.[53] Its stated aim was to permit appeals against arbitral awards on questions of law.[54] However, due to a drafting mishap it is not possible to challenge an actual award under the provision.[55] Rather, while the arbitral proceedings are ongoing, a party may request that a

[48] But the proceedings and the running of the time limit will be suspended if the arbitrator has to be replaced—Scottish Arbitration Code 1999 art.5.5.

[49] The court in *Blyth & Blyth's Trustees v Kaye* 1976 S.L.T. 67 reserved its opinion on this matter. Such a power would be conferred by cl.36 of the Arbitration Bill 2002.

[50] While Art.24.1 of the ICC Rules also prescribes a six-month time limit, some sort of safeguard is provided by Art.24.2 which permits the ICC Court to extend this limit where necessary. Equally, while under Sch.7 para.8 to the (now repealed) Agricultural Holdings (Scotland) Act 1991 an arbiter was required to make his award within three months of appointment, that period could be extended by the Secretary of State, and multiple extensions were commonplace—see Clerk Grant L.J. in *Dundee Corp v Guthrie* 1969 S.L.T. 93 at 98.

[51] See Robert L.C. Hunter, "Stated Cases in Contractual Arbitration in Scotland" (1972) 17 *Journal of the Law Society of Scotland* 168.

[52] See the Scottish Advisory Committee on Arbitration Law, *Report on Legislation for Domestic Arbitration in Scotland* (1996), para.5.22. But it was never the case that the provision was simply ignored—for an empirical analysis of actual stated cases see Fraser Davidson, "Stated Cases under the Administration of Justice (Scotland) Act 1972 s.3" (1989) *Scots Law Times* 89.

[53] See Lord President Hope in *ERDC Construction Ltd v H M Love & Co (No.2)* 1997 S.L.T. 175 at 178. Such repeal would be effected if cl.40 of the Arbitration Bill 2002 passed into law.

[54] *Hansard*, HL Vol.329, col.221.

[55] *Fairlie Yacht Slip v Lumsden* 1977 S.L.T. (Notes) 41. It would be interesting to see how a court would react if the parties by agreement sought to confer jurisdiction to set aside awards on the basis of error of law. While the position of Scots law has traditionally been that awards are not reviewable on this basis—see Lord Jeffrey in *Mitchell v Cable* (1848) 10 D. 1297 at 1309—the courts have never had to deal with a situation where the parties have actually agreed that it should have jurisdiction in that instance. The US Supreme Court in *Hall Street Associates LLC v Mattel Inc*, unreported, March 25, 2008 held that the parties were not entitled to extend the grounds on which an award could be reviewed under the Federal Arbitration Act

case should be stated for the opinion of the Court of Session on any question of law arising in the arbitration. So a draft award may be challenged under this provision, but not a final award. The Code in art.18.1 explicitly directs that an arbitrator is not obliged to issue awards in draft form. Section 3 is stated to be "[s]ubject to express provision to the contrary in an agreement to refer to arbitration". It remains to be seen whether an arbitration agreement which adopted the Code would meet this qualification.[56]

Article 18.4 separately indicates that the parties irrevocably waive their right to any form of appeal review or recourse to any state court or other judicial authority. Such clauses are to be found in many sets of arbitration rules.[57] The extent to which they are effective, if at all, depends upon the law of the seat. There are jurisdictions which allow the parties to exclude the possibility of review of certain types of award,[58] or to exclude the possibility of review on certain grounds,[59] while others are less willing to countenance the possibility that the parties may affect the basis on which awards may be challenged.[60] If Scotland is the seat, then much depends on the nature of the arbitration. If it is an international commercial arbitration, it will be subject to the Model Law. Article 34 of the Model Law lays down an exhaustive set of grounds upon which an award may be challenged and does not permit parties to vary the effect of the relevant provision by agreement.[61] Thus art.18.4 would be ineffective in this context. If the arbitration is not an international commercial arbitration, then domestic Scots law applies, with the result that the award would be liable to be set aside on a variety of grounds, some recognised at common law, others deriving from a 17th century statute.[62] The Scots courts have never had to address the question of whether any of these grounds might be excluded by agreement. Certainly, there would be an argument that certain such grounds should be capable of being excluded, perhaps those, such as excess of jurisdiction, which are themselves grounded in the agreement of the parties, but there would seem to be strong public policy grounds for resisting such exclusion in other areas.

13. CONCLUSION

As was said at the outset, this is not intended to be a thorough review of the Code. Indeed it undoubtedly does less than justice to the Code, which is a comprehensive and skilfully drafted set of Arbitration Rules, which, if invoked, would allow parties to arbitrate safely in Scotland without fear of falling foul of the traps which Scots arbitration law holds for the unheeding. The sorts of points raised by the article will not arise as practical issues in most cases. Nonetheless, it is hoped that the article has shown that the Code occasionally creates potential difficulties and raises questions to which there are no easy answers.

so as to include error of law. However, that decision is coloured by the purpose and history of that Act, while a minority of the Court dissented. Compare *Klein v Catara* (1814) 14 F. Cas. It is difficult to come up with strong policy objections against allowing parties to confer such jurisdiction on the court.

[56] See the discussion of the meaning of the provision in *Whatlings (Foundations) Ltd v Shanks & McEwan (Contractors) Ltd* 1989 S.L.T. 857 at 859.

[57] See ICC Rules Art.28.6, LCIA Rules Art.26.9.

[58] Thus in arbitrations held in Belgium if neither party is a Belgian national or resident or a legal person with its head office in Belgium, the parties may agree to exclude any possibility of judicial review. Previously in such circumstances the award was not subject to judicial review irrespective of the will of the parties.

[59] See Swiss Private International Law Act Art.192(1).

[60] See, e.g. *CBI NZ Ltd v Badger Chiyoda* (1989) 2 N.Z.L.R. 669.

[61] See *Methanex Motunui Ltd v Spellman* [2004] N.Z.L.R. 454.

[62] See generally Fraser Davidson, *Arbitration* (Edinburgh: W Green, 2000), Ch.18. The Arbitration Bill 2002, echoing to some degree the 1996 Act, would under cll 45 and 46 allow an award to be challenged on the basis of substantive jurisdiction or serious irregularity, but not otherwise.

POSTSCRIPT

It was noted above: first, that the Scottish Council for International Arbitration and the Scottish Branch of the Institute had drafted an Arbitration Bill in 2002, which would have remedied practically all of the deficiencies of the Scots law of arbitration; and secondly that, while this Bill remains unenacted, it was believed that arbitration law reform is on the agenda of the new Scottish Government. As this article goes to the publisher, the Government has just published a Consultation Paper on an Arbitration (Scotland) Bill. This closely resembles the 2002 Bill in many respects, although it is perhaps more wide-ranging. It remains to be seen whether the Bill survives the consultation process in its current form, but it may be that before long Scotland will at last be able to boast a comprehensive arbitration statute which provides a beneficial context in which the Code can operate.