Abstract

With the entry into force of Scotland’s cutting-edge Arbitration Act the stage is now set for Scotland to become a leading global centre for international arbitration. This article affords a contextual overview of arbitration in Scotland and evaluates the key features of the Scottish Act, highlighting notable differences and similarities between it and the arbitration regimes of its English and Irish neighbours. Against this backdrop, this article considers Scotland’s prospects of becoming a significant competitor on the international arbitral scene.

Introduction

Scotland is poised to become a competitive global venue for international arbitration, by virtue of its dynamic new arbitration regime. The Arbitration (Scotland) Act 2010 (the “Scottish Act”) received Royal Assent on January 5, 2010 and came into force on June 7, 2010.† This innovative piece of legislation codifies Scots law on arbitration into one streamlined, user-friendly document and creates a unitary, modern, efficient system.

Arbitration is the dispute-resolution method of choice in international commercial contracts. In recent years, the number of transboundary arbitral disputes has grown dramatically.‡ Despite this, and notwithstanding the success of international arbitration in key European jurisdictions, such as England, France, Switzerland and Sweden, Scotland failed to capitalise on the global arbitration phenomenon. In Scotland, domestic arbitration has been in decline and international arbitration barely featured. This is set to change by virtue of the Scottish Act, which comprehensively overhauls Scotland’s ancient arbitration regime, putting Scotland at the forefront of international arbitral practice.

This article provides a contextual overview of arbitration in Scotland and analyses the key features of the Scottish Act, highlighting notable differences and similarities between it and the arbitration regimes of its English and Irish neighbours. Against this backdrop, this article will evaluate Scotland’s prospects of becoming a leading global centre for international arbitration. As will be demonstrated, Scotland has all the ingredients needed to be a significant competitor on the international arbitral scene. Only time, coupled with the support of both Scottish and international players, will tell whether Scotland will fulfil its promise.

Arbitration in Scotland

Scotland has a long tradition of arbitration, which can be traced back to medieval times.† Despite this extensive history, until now, Scotland has had no coherent arbitration regime. Scots arbitration-law has been a hotchpotch of ancient case law and incomplete, out-dated statutes.§ Layer upon layer of archaic precedents, institutional authorities and fragmentary statutory law mixed together, resulting in an anachronistic regime riddled with deficiencies and uncertainties. Key pitfalls included:

- lack of accessibility of Scotland’s arbitration regime, rendering the status of Scots arbitration-law unclear on many points;
- uncertainty over whether confidentiality constituted an implied term of Scots law, in the absence of express provision in the arbitration agreement;
- inability of arbitrators to determine their own jurisdiction; and
- lack of express provision for an arbitrator to award damages, costs or interest;

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† The Arbitration (Scotland) Act 2010 (Commencement No.1 and Transitional Provisions) Order 2010 (SSI 2010/195) (the “Commencement Order”) art.2.

‡ Although there is no comprehensive record of the number of international arbitrations, the International Court of Arbitration of the International Chamber of Commerce (“ICC”) publishes yearly statistics in respect of ICC arbitrations. These figures, which are illustrative of the wider boom in international arbitration, reveal that ICC arbitrations have risen steadily for decades, rising sharply in recent years: see “2009 Statistical Report” (2010) 21(1) ICC International Court of Arbitration Bulletin. These findings are borne out by the study by Queen Mary, University of London and PriceWaterhouseCoopers (“PWC”) into international arbitration in 2008, which demonstrates that the volume of arbitrations in leading regional centres grew progressively over a five-year period, rising from a cumulative total of 3,023 arbitrations in 2003 to a combined total of 15,249 arbitration in 2008: see Queen Mary/PWC, International Arbitration—Corporate Attitudes and Practices 2008, available at http://www.arbitrationonline.org/docs/IAbstudy_2008.pdf [Accessed August 13, 2010].

In 1990, Scotland adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (the “Model Law”) in respect of international arbitrations only, creating a dual arbitration regime. Scotland’s adoption of the Model Law was not successful. This was largely due to the legislator’s failure to fill in the gaps in the Model Law, with the result that many of the uncertainties in Scotland’s underlying arbitration regime continued to apply to international arbitrations seated in Scotland. The Model Law is, of course, a framework document, intended to be supplemented by national law where required. For example, the Model Law makes no provision for arbitrators to award damages, costs or interest; Scots law did not rectify this. The inadequacy of Scotland’s adoption of the Model Law was compounded by Scotland’s failure to keep pace with change: Scotland did not incorporate the UNCITRAL amendments to the Model Law, which were made in 2006.

Unsurprisingly, given these problems, Scotland’s adoption of the Model Law did not lead to any real increase in international arbitration in Scotland. However, in today’s expanding global economy, the benefits of arbitration have never been more acute. Arbitration allows parties to tailor the dispute-resolution process to their specific needs. Commercial actors value the privacy that arbitration allows them, along with the opportunity it affords them to retain direct control of the process and to select the location, timing and language of the proceedings, the applicable law and procedural rules, and the decision maker (who will often have specialist expertise in the subject matter of the dispute). As a result, arbitration has the potential to be faster, cheaper and more flexible than the court process.

Without doubt, the overriding attraction of international arbitration is the fact that an arbitral award can be enforced across borders with more ease than a court judgment. The New York Convention provides an international framework for the recognition and enforcement of arbitral awards, and it now has 144 signatory states. Subject to very limited exceptions, the New York Convention provides for the mutual recognition and enforcement of arbitral awards in the courts of signatory states.

Consequently, the majority of international commercial contracts, particularly those with the potential for transboundary disputes, specify arbitration as their method of dispute resolution. Notwithstanding this proliferation of international arbitration, Scotland’s unwieldy arbitration regime failed to attract international commercial actors, because they seek a level of certainty and predictability in the operation of the arbitral process that Scots law has been unable to provide. Indeed, even domestic arbitration has declined in Scotland in recent years, in part due to the uncertainties of the arbitration regime. In that context, the growth of international arbitration in Scotland was doomed from the outset.

This is set to change. The enactment of the Scottish Act is a defining moment for arbitration in Scotland. The Scottish Act radically overhauls Scots arbitration law and takes it “from caveman to spaceman in one step”, placing Scotland in prime position to compete globally as an attractive jurisdiction for international arbitration.

The Arbitration (Scotland) Act 2010

Scotland’s new cutting-edge arbitration law creates a dynamic arbitration regime, encapsulated in one streamlined, user-friendly document. The Scottish Act is based upon and is fully consistent with Model-Law principles and the New York Convention. It is also broadly comparable to England’s Arbitration Act 1996 (the “English Act”). However, the Scottish Act contains various innovations that distinguish it from other national arbitration laws and place Scotland at the forefront of international arbitral practice.

The Scottish Act governs all arbitrations commenced in Scotland under contractual arbitration agreements on or after June 7, 2010, irrespective of when the arbitration agreement was made. Notably, this means that the Scottish Act applies to arbitration agreements made before June 7, 2010, unless the parties agree otherwise.
The Scottish Act was a collaborative endeavour. It was developed following an extensive consultation process, which included contributions from an unprecedented number of private parties, such as the Scottish branch of the Chartered Institute of Arbitrators, and incorporated comparative review of the arbitral regimes in around 30 other countries. As acknowledged by Hew Dundas:

“A key foundation underlying the act is the extensive research into arbitral law and procedures around the world carried out by the Chartered Institute of Arbitrators (CIARB) Scottish Branch through the CI Arb’s worldwide network of approximately 12,000 members in more than 105 countries. Few other countries have researched and consulted so widely before enacting an arbitration law.”

This thorough consultation allowed Scotland to incorporate the best features of international practice into the Scottish Act.

Scotland also had the advantage of observing the English Act in action over the past 13 years. This enabled it to create an arbitration law which draws on the English experience, but which seeks to rectify some of the ambiguities and omissions in England’s arbitral regime, which have become apparent through years of practice and experience.

The Scottish Act creates a unitary arbitral regime, applicable to international and domestic arbitrations. The Scottish Act has worldwide extra-territorial effect, thereby allowing non-Scottish parties to provide for an arbitration outside Scotland to be governed by the Act.

Scotland has repealed its enactment of the Model Law. As the Model Law is a framework document, its success is dependent upon national law to fill the gaps. Some countries possess underlying national laws (such as comprehensive civil codes) which are relied upon to plug these gaps. Other countries do not have an adequate underlying system, and need to enact substantial supplementary legislation to ensure the smooth operation of the Model Law.

For example, when enacting the Model Law, countries such as Singapore and New Zealand included extensive additional provisions. Ireland’s newly enacted Arbitration Act 2010 (the “Irish Act”) also follows this route.

Like Scotland, Ireland originally enacted the Model Law only in respect of international arbitrations. As in Scotland, Ireland’s new arbitral regime is unitary, ending the historical distinction between international and domestic arbitrations. The new Irish arbitral regime is also contained in one comprehensive statute, which repeals all of Ireland’s existing domestic legislation on arbitration. However, unlike Scotland, Ireland has re-enacted the Model Law, extending its application to domestic and international arbitrations and incorporating the 2006 amendments.

Schedule 1 to the Irish Act incorporates the entire text of the Model Law, while the main text of the Irish Act contains 32 sections of supplementary bolt-on legislation. This supplementary legislation augments the Model Law by addressing its omissions and seeking to assist its operation, but it is fundamentally faithful to the Model-Law system, introducing relatively few divergences or additions.

Scotland chose to take a different approach, by repealing its enactment of the Model Law and creating a comprehensive integrated arbitral regime premised on Model-Law principles. As will be demonstrated in this article, this leads to a system which may be more accessible to lay-users. As the Scottish Act has its roots in the Model Law, like its English counterpart, its underlying approach will be instantly recognisable to international practitioners. Accordingly, the next section of this article will not provide a comprehensive survey of the Scottish Act, but rather confine itself to highlighting its most noteworthy features and innovations.

Key Features of Scotland’s Innovative New Arbitration Regime

User-Friendly Format

The Scottish Act is user-friendly with a focus on party autonomy. In keeping with the Scottish Government’s plain English policy and commitment to accessible legislation, the Scottish Act is drafted in straightforward terms. Some of its provisions therefore differ from those in the English Act, although the substance may be the same.

Indeed, although much of it is directly analogous to the English Act, the Scottish Act has a distinctive, accessible format. In a key structural difference from its English counterpart (and the laws of most other jurisdictions), the Scottish Act separates procedure from law, siphoning the former into Sch.1 to the Act, which
In brief, the grounds for challenge under art.34 of the Model Law are: incapacity of the parties to conclude the arbitration agreement; invalidity of the arbitration agreement; a legal error appeal (Scottish Act r.69). Jurisdictions take that approach, but, interestingly Scotland has not done so, choosing instead to follow the English model and provide parties with a default right to make an appeal. Many commentators argue that the right of a party to appeal on point of law (English Act s.69) should not apply unless the parties have selected it expressly. Some Acts use the terminology “appeal on point of law” (s.69); however the substance of both provisions is essentially the same. Scottish Act Sch.1 rr.67 to 69; English Act ss.67 to 69. Pursuant to Scotland’s plain-English policy, the Scottish Act refers to “legal error appeals” (r.69), while the English Act restricts challenges of arbitral awards to three grounds: substantive jurisdiction, serious irregularity and legal error. As with the English Act, parties can agree to exclude the right to appeal on the basis of legal error, or retain it to allow an (optional) additional check on the arbitral award.

Challenges on these grounds are by way of appeal to the Outer House of the Court of Session, with limited right of appeal to the Inner House (which is similar to the Court of Appeal in England). The decision of the Inner House will be final. The permitted grounds of challenge and appeal are one of the main divergences between the Scottish and English Acts, respectively, and the arbitration laws of Model-Law jurisdictions, such as Ireland. The Irish Act adheres faithfully to the Model Law, providing that the only method of challenging an arbitral award is an application to set it aside on the specific grounds laid out in art.34 of the Model Law. The grounds for challenge in art.34 are extremely limited. However, notably, the English Act’s broad grounds of challenge have not undermined England’s status as one of the leading global arbitral jurisdictions. English courts have shown their reluctance to intervene in the arbitral process, seldom allowing challenge to international arbitral awards. Attention will now be focused on the Scottish courts to assess their approach. Precedent shows that traditionally the Scottish courts have been supportive of arbitration. For example, the Scottish courts have consistently upheld the right of

24 See fn.41 below and accompanying text.
25 Scottish Act ss.7 to 8.
26 Scottish Act s.9.
27 Mandatory rules are marked “M”; default rules are marked “D”.
28 Scottish Act s.9(4). Subject, of course, to the mandatory rules in the Scottish Act, from which parties cannot derogate.
29 Scottish Act s.1; the same principles also underscore the English Act (s.1). In contrast, the Irish Act/Model Law does not set out founding principles as such; however, it does incorporate the principles of party autonomy (Irish Act Sch.1 art.19) and non-intervention by courts except in the circumstances set out by the Act (Irish Act Sch.1 art.5).
30 Scottish Act Sch.1 rr.24 and 25 (mandatory, respectively); English Act ss.33 and 40, respectively.
31 The Model Law contains no such explicit duties, so they are absent from Model-Law jurisdictions unless they have been added on by supplementary domestic legislation. Ireland has not enacted duties such as these.
32 Scottish Act Sch.1 rr.67 to 69; English Act ss.67 to 69. Pursuant to Scotland’s plain-English policy, the Scottish Act refers to “legal error appeals” (s.69), while the English Act uses the terminology “appeal on point of law” (s.69); however the substance of both provisions is essentially the same.
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34 Scottish Act Sch.1 s.71(5).
35 Irish Act Sch.1 Art.34.
36 In brief, the grounds for challenge under art.34 of the Model Law are: incapacity of the parties to conclude the arbitration agreement; invalidity of the arbitration agreement; failure to give a party proper notice of the arbitration or inability of a party to present its case; award going beyond the terms of the submission to arbitration; improper constitution of the arbitral tribunal or improper arbitral procedure; non-arbitrability of the subject matter of the dispute or violation of public policy.
parties to agree to arbitrate. As acknowledged by the distinguished Lord Dunedin in 1922, “[i]f the parties have contracted to arbitrate, to arbitration they must go”.37

The arbitration-friendly approach of the Scottish courts can only intensify by virtue of the Scottish Act, which is founded on the principle of minimal court interference, and which—for the first time in Scottish history—clearly delineates the court’s role to assist the arbitral process.38 Indeed, as many provisions of the Scottish Act are directly analogous to those in the English Act, many decisions by the English courts will be persuasive upon the Scottish courts.

The Scottish Act also serves to constrain the powers of the Scottish courts by abolishing the anachronistic stated-case procedure.39 This procedure allowed a party to request that the arbitrator refer a question of law to the Court of Session at any stage during the arbitration process. Given the ease with which it could be invoked, it was liable to abuse by parties seeking to obstruct the arbitration process, leading to delays and extra expense. A preferable, more-restricted alternative has been enacted, which follows the English model.40 Similarly, Ireland has decided to repeal its comparable “case-stated” procedure, pursuant to which arbitrators could refer a question of law arising during the arbitration to the Irish High Court.

One key Scottish innovation is the creation of “arbitral-appointments referees”, who will rectify failures in the arbitrator-appointment process.41 This reduces the role of the courts in comparison to England’s regime. Under the English Act, this role is given to the courts, which can lead to increased costs and delays.42 Similarly, the Irish Act gives the court default competence to appoint arbitrators in the event of breakdown of the appointment process.

In Scotland, various bodies are now authorised to act as arbitral appointments referees, namely: the Agricultural Industries Confederation Ltd, the Chartered Institute of Arbitrators, the Dean of the Faculty of Advocates, the Institution of Civil Engineers, the Law Society of Scotland, the Royal Incorporation of Architects in Scotland, the Royal Institution of Chartered Surveyors and the Scottish Agricultural Arbiters and Valuers Association.43 It is also open to the parties to designate an appointing authority to be used as an alternative.

As in England, under the Scottish Act, the court’s main function is to assist the arbitral tribunal. For example, the court can order the attendance of witnesses or the production of documents.44 The Scottish Act also grants the court various default powers, such as the authority to grant interim measures provided it is satisfied that a dispute has arisen (or might arise) which is subject to an arbitration agreement.45

Powers of the Arbitral Tribunal

The arbitral tribunal has wide discretion to determine the conduct of the proceedings, subject to the freedom of the parties to agree otherwise. For example, the arbitral tribunal may select the procedure for the arbitration, including the pleadings schedule, the format, timing and location of proceedings, the evidentiary rules to apply and the timing and extent of disclosure.46

Parties must comply with the arbitral tribunal’s directions.47 As with the English Act, in the event of non-compliance, the arbitral tribunal has a range of sanctions at its disposal.48 For instance, the tribunal may order that the recalcitrant party cannot rely on any allegation or material which was the subject of the direction.49 The tribunal is also entitled to draw adverse inferences from the party’s non-compliance; proceed with the arbitration and make its award; or make any provisional award that it considers appropriate.50 These sanctions also apply in relation to a party who violates the arbitration agreement or fails to comply with the mandatory duty upon the parties to conduct the arbitration without unnecessary delay or expense.51 Indeed, where a party unnecessarily delays with its claim without good

38 The Rules of the Court of Session have been updated in order to streamline the court’s role in facilitating the arbitral process: the Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Miscellaneous) 2016 (SSI 2016/205), which came into force on June 7, 2010 (art.1).
39 The stated-case procedure was introduced in Scotland by virtue of the Administration of Justice (Scotland) Act 1972 s.3.
40 Scottish Act Sch.1 r.41 (default), 42 (mandatory); this is broadly comparable to s.45 of the English Act and allows a point of law to be referred to the court to decide, subject to safeguards which will prevent this procedure from being used to obstruct and delay the arbitral process.
41 Scottish Act Sch.1 r.7 (mandatory).
42 English Act s.18.
43 Irish Act Sch.1 art.11(3). Indeed, this provision in the Irish Act illustrates how the interaction can sometimes be unwieldy between the Model Law itself and the bolt-on legislation that is often necessary for its operation. For example, a party arbitrating under the Irish Act, seeking to determine the process for appointment of an arbitrator (in the absence of party agreement), should first look to art.11(3) of the Model Law (Irish Act Sch.1 art.11), which provides that failures in the appointment process should be rectified, “by the court or other authority specified in article 6”. Turning to art.6 of the Model Law (Irish Act Sch.1 art.6) reveals that the state enacting the Model Law is to specify the court or other body authorised to rectify failures in the appointment process. Accordingly, a party must then examine the main text of the Irish Act, to determine that Ireland has designated its High Court as the competent authority to carry out this function (Irish Act s.9(1)(a)). In contrast, a party arbitrating under the Scottish Act need only turn to r.7 to find the correct procedure in the event of a failure in the appointment process. This exemplifies how the approach in Model Law jurisdictions can be less accessible to lay-users than the innovative new style adopted in the Scottish Act.
44 Schedule to the Arbitral Appointments Referee (Scotland) Order 2010 (SSI 2010/196), which came into force on June 7, 2010 (art.1). Scottish Ministers are authorised to designate entities to serve as arbitral appointment referees by virtue of s.24 of the Scottish Act.
45 Scottish Act Sch.1 r.45 (mandatory).
46 Scottish Act Sch.1 r.46 (default).
47 Scottish Act Sch.1 r.28–29 (default); both the English and the Irish Acts grant arbitral tribunals similarly broad default powers (e.g. see English Act ss.34–38; Irish Act Sch.1 arts 19–24).
48 Scottish Act Sch.1 r.31 (default).
49 See Scottish Act Sch.1 r.37–39 (default); English Act s.41.
50 Scottish Act Sch.1 r.39(2) (default).
51 Scottish Act Sch.1 r.39(2) (default).
52 Scottish Act Sch.1 r.25 (mandatory).
reason, to the extent that it seriously prejudices the other party or creates a risk that the issues cannot be resolved fairly, the tribunal is obliged to end the arbitration and make whatever award it considers appropriate.\(^5\)

The Scottish Act brings Scots arbitration law up to date with international arbitral practice by permitting arbitrators to rule on their own jurisdiction (kompetenz-kompetenz).\(^6\) Similarly, the Scottish Act now expressly grants the arbitral tribunal mandatory power to order payment of a sum of money (including damages), with or without interest.\(^7\) The tribunal may also award non-pecuniary remedies, for example, by ordering a party to do or refrain from doing something.\(^8\) The tribunal has default power to make an order on costs (subject to the principle that costs should generally follow the event, except in circumstances where this would be inappropriate).\(^9\) The Scottish approach to damages, costs and interest is now broadly comparable to the English and Irish positions.\(^10\)

In addition to granting these powers, Scots arbitration-law also subjects the arbitral tribunal to certain duties. For example, as in the Model Law but in contrast to the position in England, Scottish arbitrators have a clear and continuing duty to disclose any conflict of interest.\(^11\) The Scottish Act also imposes a mandatory duty on the arbitral tribunal to be fair and independent and conduct the arbitration without unnecessary delay and expense.\(^12\) Non-compliance by the tribunal may allow the parties to challenge the arbitral award on the grounds of serious irregularity.\(^13\) In Scotland, the arbitral tribunal’s fees may be subject to scrutiny by the parties, the arbitral appointment referee or the Auditor of the Court of Session.\(^14\) Ultimately, the auditor of the Court of Session has authority to order repayment of fees from the tribunal to the parties if they are considered excessive.\(^15\)

Streamlined Amendment-Process

The Scottish Act features a streamlined amendment-process, which will allow Scots law to keep pace with any future amendments to the Model Law, the UNCITRAL Arbitration Rules and the New York Convention. Following Singapore’s lead, Scotland has adopted a dynamic provision allowing Scottish Ministers to amend the Scottish Act by order to incorporate amendments to the Model Law, the UNCITRAL Arbitration Rules and the New York Convention.\(^16\)

Amendments by order are subject to a parliamentary process (affirmative resolution procedure in the Scottish Parliament),\(^17\) which is significantly faster and simpler than the process required to effect amendments by primary legislation. This will allow the Scottish Act to be amended speedily, in light of developments in international arbitral practice.\(^18\)

Other Notable Innovations

In addition to incorporating the best of international arbitral practice, the Scottish Act draws on the wealth of experience under the English Act, which has been in place for 13 years. The Scottish Act addresses various ambiguities and rectifies omissions in the English Act. For example, in addition to the progressive features of the Scottish Act demonstrated already (such as its distinctive, accessible format; creation of arbitral appointment referees; and streamlined amendment process), it also incorporates the following elements:

- The Scottish Act provides clarity by including confidentiality as an express default obligation, unless the parties agree otherwise.\(^19\) This is an improvement on the previous Scottish position. Formerly, it was unclear whether confidentiality was an implied term of Scots law, in the absence of express provision in the arbitration agreement. Scotland’s express default confidentiality obligation will likely comfort international actors seeking unambiguous assurance that arbitration proceedings may be kept private. In contrast, most national arbitration laws do not explicitly provide that confidentiality attaches to arbitration proceedings. For example, in England confidentiality is implied into an arbitration agreement by English common law,\(^20\) but it lacks a statutory basis. The position in many Model-Law jurisdictions is similar. Ireland,
for instance, has no express statutory provision explicitly providing for the confidentiality of arbitration proceedings, but such a duty is usually implied. However, in certain other jurisdictions, in the absence of express agreement by the parties, there is no implied obligation of confidentiality.\textsuperscript{69}

• Broad immunity provisions are contained in the Scottish Act. These provisions expressly grant immunity to the tribunal and its appointing institution together with experts, witnesses and legal representatives in relation to their acts and omissions to the same extent that they would be afforded if the arbitration were civil proceedings.\textsuperscript{70} In contrast, the English and Irish Acts provide more limited immunity provisions.\textsuperscript{71}

• The Scottish Act clearly sets out the rules to determine the substantive law that will apply to an arbitration agreement. If an arbitration is seated in Scotland and the arbitration agreement does not provide which substantive law is to govern it, unless the parties agree otherwise, Scots law will govern the arbitration agreement.\textsuperscript{72} This allows the parties to benefit from a more predictable framework for the arbitration. In contrast, the majority of arbitral regimes do not to take such a definitive position on the applicable substantive law. For example, the English position on the applicable substantive law is contradictory.\textsuperscript{73} In Ireland, as with other Model-Law jurisdictions, if parties fail to designate the applicable substantive law to govern the arbitration agreement, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers to be applicable.\textsuperscript{74} In contrast to the Scottish approach, this affords the tribunal considerable discretion to determine the rules which will serve as a basis for the determination of the applicable substantive law, which can lead to uncertainty for the parties to the arbitration.

• In distinction to the English Act, the Scottish Act extends to oral as well as written arbitration agreements.\textsuperscript{75} However, this feature is unlikely to have a significant practical impact in terms of international arbitrations, as the New York Convention only extends to arbitration agreements in writing.\textsuperscript{76}

• Unlike its English counterpart, the Scottish Act puts in place procedure for resignation of an arbitrator.\textsuperscript{77} In contrast, the English Act details the consequences of resignation of arbitrators but omits to provide procedure to regulate the process itself.

Thus, Scotland has learnt from the English experience and sought to replicate and augment the successful English model for arbitration, while pioneering some progressive features.

\textbf{Scotland's Prospects as a Leading Global Centre for Arbitration}

Choosing where to seat an arbitration has significant ramifications. The seat determines the legal framework within which the arbitration will take place. By seating an arbitration in Scotland, parties agree to be governed by Scottish procedural law (the \textit{lex loci arbitri}) and to be subject to the supervisory jurisdiction of the Scottish courts.

Due to the legal importance of the seat, parties look to seat their arbitration in a jurisdiction that is “arbitration-friendly”. Repeatedly, parties opt to arbitrate in one of the established global jurisdictions, such as England, France, Switzerland, Sweden or New York. With the advent of the Scottish Act, Scotland will now go head-to-head with these leading international players. Has Scotland got what it takes to become a significant centre of international arbitration?

Scotland is an arbitration-friendly seat. Like England, it has an arbitration law based upon and fully consistent with the Model-Law principles and the New York Convention. Scotland’s emphasis on party autonomy allows parties to choose to apply the Model Law instead of the default provisions in the Scottish Act, subject to the Act’s mandatory provisions (many of which are not addressed in the Model Law and therefore supplement it).

\textsuperscript{69}This is the position in Sweden, for example, as confirmed in \textit{Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc} (T-1881-99) Unreported October 27, 2000 Swedish Supreme Court.

\textsuperscript{70}Scottish Act Sch.1 r.r.73 to 75 (mandatory).

\textsuperscript{71}The English Act provides immunity for arbitrators (s.29) and appointing institutions (s.74); the Irish Act provides immunity for arbitrators, appointing authorities and experts (s.22).

\textsuperscript{72}Scottish Act s.6.

\textsuperscript{73}See \textit{Sonatrach Petroleum Corp v Ferrell International Ltd} [2002] 1 All E.R. (Comm) 627 (where it was held that the law of the contract should govern the separable arbitration agreement, in distinction from the law that the parties had agreed would govern the arbitration process); contract C v. D [2007] EWCA Civ 1282; [2008] Bus. L.R. 843 (upholding decision that the law of the seat should govern); for further discussion see Hew Dundas, “The Arbitration (Scotland) Act 2010: Converting Vision into Reality” (2010) 76\textit{Arbitration} 1, 12.

\textsuperscript{74}Irish Act Sch.1 art.28(2).

\textsuperscript{75}The definition of “arbitration agreement” in s.4 of the Scottish Act does not require that it must be in writing; thus, by operation of the Requirements of Writing (Scotland) Act 1995, oral agreements are also covered. By comparison, the Irish Act/Model Law provides that an arbitration agreement must be in writing (Sch.1 art.7(2)), but it could be made orally provided it is then recorded in some format (Sch.1 art.7(3)).

\textsuperscript{76}New York Convention art.11.

\textsuperscript{77}Scottish Act Sch.1 r.r.15 to 16 (mandatory).
Scotland’s repeal of the Model Law is unlikely to undermine Scotland’s viability as a location for international arbitration. The popularity of the leading non-Model-Law jurisdictions, England, France, Sweden, Switzerland and New York, evidence that success as an arbitral seat is not predicated on enactment of the Model Law. Indeed, the Scottish Government acknowledged that one of its driving factors in repealing the Model Law was that:

“Non-Model Law venues such as London, Paris, Stockholm, Geneva/Zurich and New York are thriving [while] Model Law jurisdictions such as Germany, Australia, New Zealand, Norway and Denmark are not successful as a result and therefore the Model Law alone cannot be considered to be a panacea for attracting international arbitration business.”

In addition to Scotland’s appeal as an arbitration-friendly seat, over time the following five key advantages may set Scotland apart from many other jurisdictions and give it a competitive edge:

**Fair and Neutral Legal Tradition**

First, Scotland has a mature and distinguished legal system, which is supportive of arbitration. As demonstrated above, Scotland has a cutting-edge arbitration law, which encapsulates and builds upon the best of international practice. Commercial parties seek autonomy in the arbitration process, within a framework that provides certainty and predictability, all of which Scotland’s new arbitral regime can offer.

Another imperative for commercial parties is a neutral legal and institutional framework to govern the arbitration. The neutrality of Scotland’s legal tradition could be a key draw. Scotland has a legal system which is distinct from that of England. This could be an attractive to international parties domiciled in France and England, for example, seeking a mutually acceptable venue which provides an opportunity for neutral dispute resolution.

Scotland is one of the very few jurisdictions with a mixed legal system, which has its origins in the civil-law tradition but features a strong common-law influence. As such, it is ideally placed as a neutral ground for international arbitration. Scots law has qualities to appeal to the cultural perspectives of both civil-law and common-law practitioners seeking to conduct arbitration in an impartial forum. For instance, seating an arbitration in Scotland may be a suitable compromise in transatlantic arbitrations, which involve North American and continental European parties.

A particularly striking element of Scots law, which could be attractive to parties seeking expeditious arbitral proceedings, is that it does not have a system of discovery of evidence. This distinguishes Scotland from common-law jurisdictions such as England and the United States, which permit parties to obtain disclosure or discovery of documents relevant to proceedings from the other party. As noted above, pursuant to the Scottish Act, the arbitral tribunal has broad default discretion to select the procedure for the arbitration, including the extent of disclosure. The Scottish Act also empowers the court to assist the arbitral tribunal by ordering the production of documents. However, the court cannot compel a person “to disclose anything which the person would be entitled to refuse to […] disclose in civil proceedings.”

The underlying rationale of Scots civil procedure law is that recovery of documents is permitted only if the documents would be directly relevant to an issue which has already been pleaded by the requesting party in detail. The predisposition of Scots law to guard strongly against “fishing expeditions” for document recovery, may have the corresponding benefit of reducing the overall time and cost of Scottish arbitration proceedings.

**English-Speaking Jurisdiction**

Secondly, international commercial actors often prefer to conduct arbitration proceedings in English. Its status as an English-speaking jurisdiction could render Scotland more attractive than many other international jurisdictions.

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78 Subordinate Legislation Committee Report on Arbitration (Scotland) Bill at Stage 1 (March 27, 2010), see the Response from Scottish Government at annexe 2, available at http://www.scottish.parliament.uk/k3-committees/sub/e/reports/08/w09_ArbitrationScotlandBill.htm.htm2 [Accessed August 13, 2010].
79 There is no barrier in Scots law to prevent foreign lawyers representing a party in arbitration proceedings in Scotland. Generally, Scots law allows foreign lawyers to work in Scotland, provided that they do not describe themselves as “solicitors” and do not engage in certain types of work reserved for Scottish qualified solicitors pursuant to the Solicitors (Scotland) Act 1980. Indeed, the Scottish Act permits parties to an arbitration to be represented by “a lawyer or any other person” without including any restrictions on the jurisdiction in which the lawyer should be admitted (r.33 (default)).
80 Scottish Act, Sch.1, r.28 (default).
81 Scottish Act, Sch.1, r.45(2) (mandatory).
82 Scottish Act, Sch.1, r.45(2) (mandatory).
83 Under Scots law, if the party from whom recovery is sought does not consent to disclose the documents, the other party can request recovery pursuant to a “specification of documents” seeking “commission and diligence”; this process involves appointment of a special commissioner to recover the documents in question and file them with the court. Leading commentary emphasises that “[a] call in a specification of documents will not be approved unless you have averred facts which lay a foundation for the recovery of the documents in question”: see Robert Black, Introduction to Written Pleading (Law Society of Scotland, 1982), 16. As summarised by Elizabeth Thornburg, “Detailed Fact Pleading: The Lessons of Scottish Civil Procedure” (2002) 36 The International Lawyer 1185, 1195: “[t]raditionally, the court’s power to order production of documents is limited to documents that would help a party prove a case she had already pleaded, and only then after proof [i.e., hearing] has been allowed (in other words, in cases in which the party has already survived challenges to the relevancy and specificity of the pleadings).”
84 As cautioned by Lord Macphail, “[i]t is obviously necessary to guard against the granting of a fishing or speculative diligence for the recovery of documents which a party hopes will disclose material for a case he has not averred in his pleadings when he has no reason to believe that the documents exist or that there is any foundation for the unpleaded case” (Williamson v The Advocate General for Scotland 2006 SC 61). See also Civil Service Building Society v MacDougall 1988 SC 58, 62, where Lord Justice Clerk Ross held that “[a] fishing diligence is one for which there is no basis in the averments or one which involves too wide a search among all the papers of the haver [i.e., the party with control of the documents]”; and Boyle v Glasgow Royal Infirmary and Associated Hospitals 1969 SC 72, 79, where Lord President Clyde defined a fishing diligence as “an attempt to recover documents in the hope that they will disclose material which will enable the party to make a case not yet averred on record.”
**Favourable Environment for Arbitration**

Thirdly, Scotland boasts a favourable environment for arbitration. As noted above, traditionally the Scottish courts have been supportive of arbitration. The arbitration-friendly approach of the Scottish courts is likely to intensify and consolidate under the Scottish Act which is founded on the principle of minimal court interference.

Scotland’s new arbitration regime also has unanimous political backing and the broad support of civil society. The Scottish Act was drafted following extensive collaboration with key external institutions, such as the Scottish Branch of the Chartered Institute of Arbitrators, the Law Society of Scotland, the Scottish Faculty of Advocates and the Royal Institution of Chartered Surveyors. Scottish Minister for Enterprise, Jim Mather, has hailed the Scottish Act as, “setting the scene for a renaissance of Scottish arbitration”. It reflects the commitment of the Scottish Government, and all the political parties, to establish Scotland as a leading international centre for arbitration. Indeed, the Scottish Government has expressed its interest in founding a Scottish Arbitration Centre in a bid to improve Scotland’s prospects as an attractive location for international arbitration.

Under this impetus, civil society has already galvanised in an effort to enlarge Scotland’s existing pool of qualified and proficient arbitrators. The Business Experts Law Forum has recommended that the Law Society of Scotland and the Faculty of Advocates should encourage members of the legal profession to train as arbitrators. Reports indicate that more arbitrators are set to take up work in anticipation of a rise in arbitration in Scotland. For example, in early 2009, the Scottish branch of the Chartered Institute of Arbitrators established a new section in the north of Scotland in anticipation of a rise in Scottish-based arbitrations in the oil and gas sector, as a result of the passing of the Scottish Act.

Indeed, as noted at a recent international arbitration conference which focused on the Scottish Act, Scotland is particularly well placed to develop specialisation in international arbitrations related to the energy sector. In addition to Scotland’s abundance of fossil fuels, Scotland also has the potential to be a global leader in the provision of renewable energy. Reports indicate that Scotland has: “25% of Europe’s wind resource, and even greater proportions of its wave and tidal resources. There is also an abundance of streams, rivers and lochs filled withScottish rainfall that can be used to generate hydropower, surplus wood fuel reserves to supply fuel for electricity generation and heating”. Indeed, Scotland is now home to the world’s largest tidal turbine. As climate change concerns intensify and demands for renewable energy grow, Scotland’s specialisation in this area combined with its cutting-edge arbitration law will render it uniquely placed to be the premier venue for international disputes between commercial parties in the energy sector.

**Attractive Location**

Fourthly, Scotland is conveniently placed and easily accessible for international travellers. It has excellent transport links and hosts cosmopolitan cities that offer a vibrant mix of history and culture, with all the requisite amenities and facilities.

**Cost-Effectiveness**

Finally, another factor which may put Scotland above its competitors is in terms of cost. Scotland offers a less expensive alternative to the other leading centres. It is estimated that arbitration in Scotland is around 40 per cent of the cost of an equivalent arbitration in London or New York. This is borne out by a report released in July 2009, which ranks the leading locations for international arbitrations, such as Geneva, New York, Paris and London, as among the most expensive cities to live in. This indicates that outlays and expenses in Scotland would be significantly less expensive than in other popular centres.

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Conclusion

The new Scottish arbitral regime represents a fundamental turning point for Scotland. The Scottish Act comprehensively overhauls the chaotic, anachronistic position that preceded it, creating a modern and dynamic system.

In line with its English and Irish neighbours, Scots arbitration law has a variety of features to commend it to those seeking a seat for arbitration. Scotland is an arbitration-friendly jurisdiction, which provides for arbitration based on Model-Law principles and enforcement of arbitral awards in accordance with the New York Convention. But Scotland offers more. Its new arbitral regime is streamlined and efficient, with a focus on party autonomy, procedural flexibility and non-interference by the courts. It was developed following an extensive consultation process, which allowed Scotland to incorporate the best features of international practice. The Scottish Act also draws on the English experience, but seeks to rectify some of the uncertainties and omissions in England’s arbitral regime, which have become apparent in practice. Accordingly, Scotland now boasts one of the world’s most progressive arbitral regimes, which includes a host of innovative features, such as a distinctive, accessible format; the creation of arbitral appointment referees; a streamlined amendment process; and inclusion of an express default confidentiality obligation and broad immunity provisions.

Scotland’s status as a competitor on the international arbitral scene is compounded by several advantages which set Scotland apart from other jurisdictions. These include its mature and distinguished legal tradition, which is distinct from the English legal system and offers a mixed civil-law/common-law culture and a neutral forum for international dispute-resolution. In addition, Scotland is an English-speaking jurisdiction, which offers a favourable, supportive environment for arbitration, an attractive location, and a cost-effective alternative to the other leading centres.

The Scottish Act represents a significant step in the right direction to establish Scotland as a popular global venue for arbitration. Of course, much will now depend on the operation of the Scottish Act in practice. The onus will now be on Scottish practitioners, arbitrators and courts to lead the way in demonstrating the efficiency of Scotland’s arbitral regime. Civil society also has a role to play. The establishment of a Scottish International Arbitration Centre would confirm Scotland’s genuine commitment to the arbitral process. Scottish commercial actors should also take the initiative by selecting arbitration seated in Scotland as their dispute-resolution method of choice, particularly in transboundary contracts. Once Scotland begins to establish its credentials as a cost-effective and streamlined venue for arbitration, this will place Scotland on the map as a serious contender as a neutral arbitral forum and allow Scotland to realise its global potential.