

e-bulletin

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On 18 November 2009 the Arbitration (Scotland) Bill was formally passed by the Scottish Parliament. On receipt of the Royal Assent the Bill will become an Act and formally enter the law of Scotland. The question is what does this mean for dispute resolution?

There are significant changes to the law of arbitration in Scotland afoot and it would be churlish not to comment on some (if not all) of the relevant issues.

Arbitration has formed part of the law of Scotland for hundreds of years yet there has never before been a codified law. The rules and regulations related to this form of dispute resolution have rather developed over the years based on decisions of the court and the development of the common law. Arbitration was historically seen as an alternative to court with the benefit of being a private process and with parties free to choose the decision maker or Arbitrator allowing someone with the appropriate skill set to be appointed to decide any dispute. These benefits were countered by some very serious perceived drawbacks related to cost and time. Also Arbitrators were traditionally constrained in what orders they could make with no provision for an award of damages, interest or expenses unless jurisdiction to make such an order was expressly given by the parties to the arbitration.

As a result of these issues coupled with the introduction of adjudication for construction disputes and the rise in popularity of expert determination and mediation, arbitration has rather fallen out of favour as a dispute resolution mechanism.

All that is set to change. The introduction of the new Act codifies and clarifies the scope of the Arbitrator and the mechanism to be utilised by the parties in conducting arbitrations. The Act will provide that the Scottish Arbitration Rules set out in Schedule 1 to the Act will apply to all arbitrations with a distinction between mandatory rules and default rules. Mandatory Rules will apply to each and every arbitration and cannot be contracted out of. Default Rules will apply unless parties have agreed to modify or disapply them. Whether or not to apply the Default Rules is something which those drafting contracts with arbitration clauses ought to consider very carefully.

Under the old law an Arbitrator could not make certain awards for damages or interest unless parties expressly gave him the power to do so. There are now mandatory provisions at rule 44A (damages) and rule 46 (interest) correcting what was seen by many to be a great failing in the arbitration process in Scotland. The new law will also give a discretionary power for an Arbitrator to make orders of a declaratory nature, order parties to do something or refrain from doing something and order the rectification or reduction of a deed or other document (rule 47). These powers were traditionally only held by courts particularly in relation to the rectification of deeds and positive or negative orders which can be, when granted by a court and breached, subject to criminal sanction.

If an Arbitrator's award (or decree arbitral) has been issued, at the conclusion of an arbitration, the current rule of thumb is that where parties are unhappy with its terms there is not very much they can do about it. The decision of an Arbitrator is final and binding and can only be challenged through the courts in certain

circumstances. In practice Arbitrators tend to issue draft awards in order that parties have an opportunity to review and consider any clarification or amendment to the proposed award before it becomes final. This practice is now provided for at rule 52 which is default only. The Arbitrator may, under the new law, and if it so chooses issue a draft award. There is also a further default rule (rule 56) for correction of an award to deal with typographical errors and to clarify or remove ambiguity. It is the latter which may cause some issues to those well versed in the traditional practice of arbitration to whom a final award is a final award.

Previously an arbitrator's award could only be challenged on very specific grounds. Parties could seek to reduce awards on the basis that the award failed to give effect to the judgement of the arbitrator, there was a breach of natural justice, or there were allegations of bribery, corruption or misconduct. The rather unwieldy stated case procedure where an application could be made to the court to review the decision of an Arbitrator where it has made a patent error in law is to be repealed. The new rules related to challenging an arbitrator's award are found at part 8 of schedule 1 to the Bill. Mandatory bases for challenge are lack of jurisdiction and serious irregularity with a default basis for challenge as a result of legal error. This serves to clarify the complex (and sometimes conflicting) common law position which is currently in place.

It should be noted that when the Bill achieves Royal Assent, and by virtue of that becomes an Act of Parliament, it will apply to all arbitration agreements whether entered into before or after commencement of the legislation. All of those old arbitration clauses in construction contracts, leases etc will therefore be caught by the legislation. Any arbitration commenced before the Royal Assent is granted will not be covered.

This is an exciting time for dispute resolution in Scotland. The codification and clarification of the law related to arbitration is eagerly anticipated and will, one hopes, serve to make arbitration a more popular form of dispute resolution once more.

For more information on alternative dispute resolution, arbitration or contentious construction please contact

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