

Arbitration (Scotland) Act 2010

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The Arbitration (Scotland) Act 2010 ("**the Act**"), which has been passed by the Scottish Parliament and received Royal Assent on 5 January 2010, aims to clarify, consolidate and improve on the existing framework of arbitration in the hopes of making Scotland into a venue of choice for conducting arbitrations. The Act is expected to come into force in or around April of this year and will apply to all Non-Statutory arbitrations (for example Construction and Property arbitrations) conducted in Scotland after this date.

It is seen as essential for a modern economy to have clear arbitration procedures in place to offer a viable alternative to the court system. The Act attempts to achieve this by placing the entirety of arbitration law into a single, easy to understand statute.

Background

The law of arbitration is currently derived from numerous sources, some dating as far back as the 17th Century. The nature of arbitration law as it currently stands can create a level of uncertainty for clients and practitioners alike when approaching arbitration, and often affects the decision on whether arbitration would be the best means for resolving disputes as opposed to other, more predictable and certain, methods.

There have been previous attempts to consolidate the law of arbitration. As recently as 2002, an Act was produced by the Dervaird commission, which had the task of reforming arbitration law but failed to make the statute book.

In recent decades the popularity of arbitration has declined significantly. For example, arbitration was common in construction matters, but since the advent of adjudication by virtue of the Housing Grants, Construction and Regeneration Act 1996, and its enthusiastic support by the entire construction industry, the use of arbitration for construction disputes has drastically reduced.

Aims of the Act

By placing the entire law of arbitration into a single uniform piece of legislation the Scottish Government

hopes to turn arbitration into a more attractive alternative method of dispute resolution. This will provide much needed certainty when parties contemplate arbitration as a means of resolving their disputes and may be used across all sectors of business.

But beyond the certainty created, the Act attempts to turn Scotland into a world leader in arbitration. The Act attempts to do this by harmonising Scots law with other jurisdictions while at the same time improving on the perceived deficiencies in other jurisdictions. One of the deficiencies with other systems is that arbitrators do not have an implied power to rule on their own jurisdiction. This has the effect that an arbitration may be subject to spurious and frivolous challenges in relation to the arbitrator's power to hear the dispute, raised by an uncooperative party. The Act fixes this. It also gives arbitrators the power to award damages and interest, a power which they currently do not have without both parties' agreement.

To add further impetus, the Scottish Government intends to create a Scottish Arbitration Centre in the effort to attract international arbitrations to Scotland as well as improving the facilities available for domestic arbitrations. Public money is tight and so private sponsorship of such a centre will probably be sought.

Comparisons with English Law

The Act contains many provisions that are in keeping with English Law. Many sections of the Act are directly analogous to the provisions contained in the Arbitration Act 1996, an act that applies to England, Wales and Northern Ireland.

There is an obvious benefit in that organisations who operate throughout the UK will face similar provisions in relation to arbitration both north and south of the border. An additional benefit is that a vast amount of highly developed case law decided by the English Courts will be persuasive in Scotland.

Interaction with Court Procedure

To allow arbitration to be an effective means of final dispute resolution, reference to the courts must be strictly limited. Gone is the 'stated case' procedure which allowed the arbiter to refer a question of law to the Court of Session at any stage during the arbitration process. The stated case procedure was seen by many to add significantly to the time and expense involved in arbitration. Instead, the Act provides for three means of challenging the arbitral award (all which feature in English law), but only after an award is made.

The first method is a challenge to the 'substantive jurisdiction' of the arbitration tribunal. This is a challenge to the appointment of the arbitrator to hear the matter. Such objections can be on the basis that there is no applicable arbitration agreement, or that the arbitrator has not been properly appointed, or that the appointment was flawed because the dispute lies outside the terms of the arbitration agreement.

The second method is a challenge of 'serious irregularity'. This concept is taken from English law, the test being set out in *Lesotho Highlands Development Authority v Impreglio SpA and others 2005*. Serious irregularity must result in substantial injustice to the affected party and is considered a high threshold to satisfy. A challenge under this rule will examine the way in which an arbitrator came to his decision and will specifically not look at whether the decision was correct or not.

The third method of challenging an award is by way of a 'legal error appeal'. If either party feels that an arbitrator has made an error on a point of Scots law in reaching the award, they may refer this to the Outer House of the Court of Session. It should be noted that this method is

not mandatory and parties may at the outset agree not to include this rule in their arbitration. As with the other challenges, this appeal can only be made after an arbitrator has made his award.

Other benefits

One of the key benefits of arbitration is that the decisions made by arbitrators may be enforced internationally. The 'New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958', requires the courts of contracting states to recognise and enforce arbitration awards made in other jurisdictions.

Another benefit is that by refining the procedures in relation to arbitration, the expenses involved to resolve a dispute will be significantly reduced. As opposed to legal proceedings, arbitration allows parties to a greater degree; control the timing, location, and conduct of the arbitration itself.

Conclusion

The reform of Arbitration Law in Scotland is long overdue. By consolidating the current law, and bringing arbitration provisions in line with other jurisdictions, the Act, will make Scotland a competitive and attractive jurisdiction for conducting arbitrations.

CONTACT US

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:

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