

Arbitration – Duties and Opportunities for Lawyers

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Arbitration Duties and Opportunities for Lawyers

- The Arbitration (Scotland) Act 2010
- A lawyer's duty to advise clients about arbitration and ADR
- Domestic and international opportunities

Advantages of Arbitration

- Confidentiality
- Commerciality
- International enforceability
- Limited rights of appeal
- Control of costs

Confidentiality

- Arbitration is a private process
- In Scotland, under the Arbitration (Scotland) Act 2010, arbitration is confidential
- A breach of confidentiality is actionable
- Litigation is a public process
- Court reports are published online and in legal journals

Commerciality

- Arbitrators can be selected on the basis of industry experience
- An industry arbitrator comes to the process with an understanding of the wider commercial context
- Judges, whilst expert in the law, are unlikely to have day to day experience of the issues

International Enforceability

- Arbitration
 - New York Convention 1958
 - Every significant commercial country in the world is a party to the Convention
 - Sovereign states can submit to arbitration
- Litigation
 - Few countries have a comprehensive system of reciprocal enforcement treaties
 - Some sovereign states will claim immunity from litigation

Limited Rights of Appeal

- Arbitration under the 2010 Act
 - Parties can agree to limit appeals
 - Appeals in respect of points of law can be excluded
 - Where an appeal is competent the Court must consent
 - No appeal to London
- Litigation
 - An unsuccessful party can appeal as of right to the Court of Session, and with the leave to the UK Supreme Court

Control of Costs

- Arbitration
 - Parties can agree to cap recovery of costs
 - Parties can agree to exclude recovery of legal costs
 - The lack of a right of appeal will necessarily restrict cost
- Litigation
 - Expenses follow success
 - There is no cap on recoverable expense
 - Appeal processes can have a major impact on cost

A Scenario

- A Service Company sues your client's organisation for £14m in the Commercial Court
- The subject matter of the dispute is highly commercially sensitive
- The contract contains no arbitration clause and the Service Company won't agree to arbitrate – so the litigation proceeds
- What if there had been a properly drafted arbitration clause?

Bad Publicity v No Publicity

- Court
 - Public Process
 - Case appears on the rolls of Court
 - Press alerted
 - Hearings are open to the public
 - Decisions of the court are published online
- Arbitration
 - Private Process
 - No public announcement of the existence of the case
 - Duty of confidentiality
 - Breach of confidentiality is actionable
 - Can be interdicted
 - Damages if it causes loss

Success

- Court
 - The Court rejects the Service Company's claim against your organisation
 - Awards costs on the judicial scale in favour of your client – typically 40 to 70% of actual costs
- Arbitration
 - If this had been an arbitration the arbitrator could have awarded expenses on an indemnity basis if those expenses were considered reasonable
 - 100% recovery

Success?

- Court
 - The Service Company appeals to the Inner House of the Court of Session
- Arbitration
 - If Rule 69 of the Scottish Arbitration Rules is excluded, no appeal on an error of law is allowed
 - Even if Rule 69 is left in place, and appeal on an error of law is only allowed if parties agree or if the Court consents

Appeal

- Court
 - Delay of 12 to 18 months to get an appeal hearing in the Inner House
- Arbitration
 - If appeals are excluded, the matter is at an end
 - If not excluded and the Court permits an appeal (which it will be slow to do), the appeal goes to the Outer House – a single judge

Further Appeal?

- Court
 - The Inner House rejects the Service Company's appeal and upholds the decision of the judge
 - The Service Company can still appeal to the UK Supreme Court
- Arbitration
 - If appeals were excluded by contract: no further procedure
 - if not excluded, and an appeal to the Outer House was allowed and refused, there is a right of appeal to the Inner House with leave
 - No appeal to the UK Supreme Court

Final Victory?

- Court
 - Decision of the UK Supreme Court is final, but ...
 - The process will have taken two to four years at enormous expense in the full glare of the public eye
- Arbitration
 - If appeals have been excluded in the arbitration clause the arbitration would have concluded at stage one, at a fraction of the cost, with no adverse publicity
 - Even with the limited right of appeal allowed by the act, the process would have been quicker and cheaper

A duty to advise

- Solicitors in Scotland have a duty to consider arbitration as a serious alternative to litigation
- A failure to advise of the potential advantages of arbitration at the contract stage, and at the stage that a dispute arises is at best a failure to give full advice, and at worst a failure to comply with professional standards which may give rise to a claim for negligence

Rule B1.9: Effective communication

- 1.9.1 You must communicate effectively with your clients and others. This includes providing clients with any relevant information which you have and which is necessary to allow informed decisions to be made by clients. It also includes accounting to clients for funds passing through your hands. Information must be clear and comprehensive and, where necessary or appropriate, confirmed in writing.

Rule B1.9: Effective communication

- 1.9.2 You must advise your clients of any significant development in relation to their case or transaction and explain matters to the extent reasonably necessary to permit informed decisions by clients regarding the instructions which require to be given by them. In particular you must advise clients in writing when it becomes known that the cost of work will materially exceed any estimate that has been given and must also advise the client in writing when the limit of the original estimate is being approached.

Law Society Guidance on B1.9

- Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives.

Law Society Guidance on B1.9

- A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly.

Law Society Guidance B1.9

- A solicitor providing advice on dispute resolution procedures is also expected to be able to identify where alternative methods of dispute resolution may not be in the best interests of the client. For example, this may be a particular consideration for mediation or arbitration in the context of family disputes or other situations where one party may be at risk of violence or intimidation by the other.

Arbitration

- Domestic opportunities
- International opportunities

Current Scottish Market

- Reduced economic activity
- Recovering commercial property market
- Reduced corporate activity
- Reduced demand for legal services
- Pattern of takeovers and firm failures
- Pressure on fees
- Pressure on legal aid budget

New sources of work

- New types of work within the existing market
- Existing work types in new markets
- New types of work in new markets

New Work in Existing Market

- The civil dispute market
- Disputes that are currently resolved in court
- Disputes that are not currently formalised or pursued
- Trends
- Threats and opportunities

Disputes resolved in court

- Commercial
- Consumer
- Matrimonial
- Personal injury

Disputes that don't proceed to court

- Barriers to pursuing rights
 - Cost
 - Lack of knowledge
 - Physical constraints
 - Language barriers
 - Online purchases
 - Publicity

Cost

- Potential to agree that fees are capped or excluded when a dispute has arisen
- EU ADR Directive may provide schemes that restrict or exclude the recovery of costs in consumer disputes

Lack of Knowledge

- EU ADR Directive requires consumer ADR schemes to be in place to cover a wide variety of consumer activity

Physical constraints

- Court closures
- Arbitration offers the most 'local' justice possible
 - Solicitors' offices
 - Local venues
 - Parties' houses if needs be

Language barrier

- More scope for the decision maker to be fluent in the language of the dispute
- Decision maker can be selected by the parties

Online Purchases

- EU ADR Directive
- EU ODR Portal
 - EU wide consumer ADR portal
 - Translation software
 - Backed up by local schemes

Publicity

- Arbitration is confidential (unless parties agree otherwise)
- Court proceedings in relation to the process are anonymised, and parties can try to persuade the court that the decision should be redacted or left unpublished if that is necessary to preserve confidentiality

Publicity/confidentiality

- Confidentiality
 - The rules
 - Application in case law
 - Practical consequences

Confidentiality

- Rule 26 (Default)
- (1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be **actionable** as a breach of an obligation of confidence unless the disclosure—
 - (a) is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised),
 - (b) is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration,

Confidentiality

- What if there is a court application/challenge?
- How is confidentiality maintained?

Confidentiality

- S.15 (1) A party to any civil proceedings relating to an arbitration ... may apply to the court for an order prohibiting the disclosure of the identity of a party to the arbitration in any report of the proceedings
- Does not apply to proceedings to enforce an arbitrator's award

- **Anonymity in legal proceedings**
- **100.9—(1)** Where a petition or note is lodged under the 2010 Act, any application to the court under section 15 of the 2010 Act (anonymity in legal proceedings) shall be made not later than the hearing of a motion for further procedure under rule 100.5(5).

- R100.9(2) Until an application under section 15 of the 2010 Act has been determined or, where no such application has been made, the time at which a motion for further procedure is made under rule 100.5(5) and, thereafter, if the court grants an order under section 15 of the 2010 Act—
 - (a) the petition or note shall not be available for inspection, except by court staff and the parties;
 - (b) the petition or note shall be referred to publicly, including in the rolls of court, as “Arbitration Application” or “Arbitration Appeal” (as the case may be) and by reference to a number and the year in which it was lodged;
 - (c) the court proceedings shall be heard in private.

- (3) Unless the court grants an order under section 15 of the 2010 Act, all applications and appeals made under the 2010 Act shall be heard in public.

Application No 3 of 2011

- Lord Glennie
 - Anonymity

In giving my decision I have tried to avoid setting out any details which might betray the identity of the parties. Explanation of the points at issue is necessarily lacking in particulars.

Application No 2 of 2011

- Lord Glennie

In setting out an explaining my decision, I have attempted to respect both the letter and spirit of this requirement for anonymity

Application No 2 of 2011

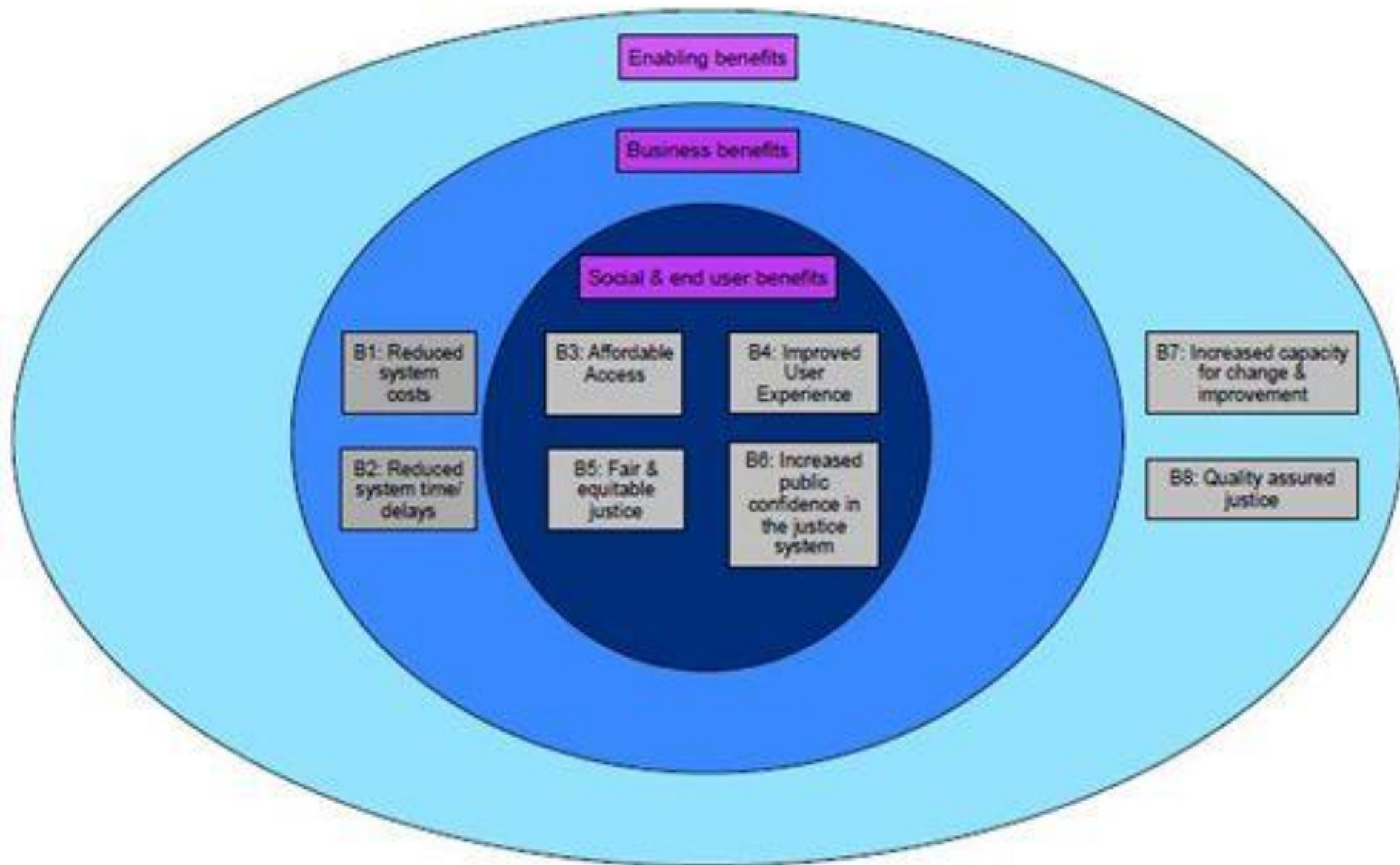
- Lord Glennie:

It was agreed at the end of the hearing that in the first instance I should issue my Opinion to the parties without publishing it more widely, to enable them to make representations as to whether there should be publication and, if so, whether any details could be omitted without removing from my decision such sense as it might otherwise have

Trends

- Making Justice Work
- Civil Court Reform
- ADR Directive - ODR Regulation

Making Justice Work - Benefits



EU ADR Directive

- The Directive on Alternative Dispute Resolution (ADR) will ensure that quality out-of-court entities exist to deal with any contractual dispute between a consumer and a business. Under the Directive:

EU ADR Directive

- ADR entities will have to meet certain quality criteria, ie be well-qualified impartial, transparent, effective and fair;
- businesses will inform customers about the ADR entity which can deal with a potential contractual dispute with them;
- ADR entities will resolve the disputes within 90 days.

Scottish Government Contracts

"We have been determined in our commitment to provide businesses and lawyers with the infrastructure they need to make Scotland an international centre for arbitration and enhance this country's global competitiveness. As part of our efforts, this government is actively inserting Scottish arbitration clauses in all Scottish government contracts"

– Legal Affairs Minister, Roseanna Cunningham, 16th
April 2014

European ODR Regulation

- Europe wide portal
- Translation
- Will be linked to national schemes

ODR Regulation

- The Regulation on Online Dispute Resolution will create a EU-wide online platform providing consumers and businesses with a single point of entry for resolving disputes concerning purchases made on-line in another EU country. This single European point of entry will:

ODR Regulation

- automatically send the consumer's complaint to the competent national ADR entity;
- facilitate the resolution of the dispute within 30 days.

Opportunities

- Need for:
 - Neutrals
 - Consumer schemes
 - Advisors to consumers businesses and business organisations
- Work likely to be low value in most instances
 - Volume work could be profitable
 - Opportunities to move on to larger scale commercial work

New Work in the existing market

- ADR and arbitration in particular is set to grow
- Need for arbitrators to deal with the volume of business

Existing work types in new markets

- Exporting the expertise of Scottish lawyers
- Difficulties
 - Lack of external knowledge of Scottish legal expertise
 - (Lack of knowledge of Scotland as a distinct legal system and profession)
 - Constraints on the exportability of some types of work

New work types in new markets

- International arbitration
- Energy arbitration
- Investment treaty arbitration

International Arbitration

- Arbitration is the norm in international business
- ICC/LCIA/AAA/CIETAC
- Existing Scottish international business?

International Arbitration

- Existing Scottish work going abroad
- Promotion of the new Act to Scottish business with international contracts
- Bringing work for Scottish companies home

Energy Arbitration

- Prime example of Scottish disputes being dealt with furth of Scotland
- Scottish Arbitration Centre/CEPMLP joint Energy Arbitration Project
- International Centre for Energy Arbitration



Investment Arbitration

- Scotland is not a party to international treaties in its own right
- No investment arbitration business in Scotland at present (although Sir David Edward QC is one of the UK's ICSID Arbitrators)

Exporting Scottish Expertise

- Opportunities for Scots lawyers
 - To represent Scottish clients in international arbitration
 - To represent non-Scottish clients in international arbitration
 - To sit as arbitrator in international arbitrations

Advantages

- Cost base
- Affinity with civil law jurisdictions
- Scottish procedural culture similar to the norm in international arbitration

Advantages of an arbitration culture

- A strong arbitration culture could provide:
 - Choice for parties
 - Flexibility
 - Confidentiality
 - Identity of arbitrator
 - New streams of work for lawyers
 - As arbitrator
 - As tribunal secretary
 - As party representative
 - As specialist in incidental court actions

Additional advantages

- Arbitration retirement plan for senior lawyers
 - Gradual move from client work to arbitrator appointments
- Long term raising profile of Scots law and Scotland as a jurisdiction
- Increased visibility for Scotland as a place to do business
- Increased confidence of Scottish business in Scottish lawyers and justice system

Next steps

- Raise the profile of Scottish arbitration
 - The Act
 - Our courts
 - Our lawyers
- Scottish Arbitration Centre
- International Centre for Energy Arbitration

Becoming an arbitrator

- Solicitor path
- Chartered Institute of Arbitrators Path

Solicitor

- Accreditation as a specialist in arbitration law
 - 5 years experience 10-12 matters
- Specialists with relevant experience admitted to panel as Accredited Solicitor-Arbitrator

Chartered Institute of Arbitrators

- Pathways to Fellowship programme
 - ACI Arb
 - MCI Arb
 - FCI Arb
 - Chartered Arbitrator

Gaining experience

- Consumer schemes
 - ABTA, CEDR
 - ADR Directive
- Pupillage

Training

- Scottish Arbitration Centre Arbitrator Panel Training Day
– www.scottisharbitrationcentre.org



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Conclusion

- Scotland has a world class system of arbitration
- Scottish solicitors have a duty to understand the system and advise their clients accordingly
- The threat to civil litigation norms are an opportunity for ADR practitioners
- Government policies at Scottish, UK and EU level are bringing Arbitration to the fore
- There is a huge international arbitration industry that Scotland can tap into as an arbitration destination, but also as a provider of arbitrators and arbitration counsel

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