



Scottish  
Branch

**CI Arb**

www.scottish-arbitrators.org

**Special points of interest:**

- Northern chapter up and running
- A 21st century website for the CI Arb
- Further initiatives in developing the Scottish Branch
- Branch events to stimulate all members

Summer 2009

Patron: the RT HON LORD HOPE OF CRAIGHEAD

THE CHARTERED INSTITUTE OF ARBITRATORS

# Scottish Branch Newsletter

## Chairman's message

By **Brandon Nolan, FCI Arb.**

It is with great pleasure that I welcome you to this edition of our newsletter. As I mentioned at our AGM in April, following in the footsteps of our esteemed past Chairman, Len Bunton, is indeed a daunting prospect. However, the good news is that Len remains as active as ever within the Scottish Branch and has taken over as our Education Convener. You will see the names of the conveners of our various committees under Branch Contacts below. My thanks to all of these hardworking individuals and a special thanks to John Hunter who has taken on the role of Vice Chairman. If you have any comments, suggestions, ideas or feedback please do raise these either with myself or with the relevant individuals. Contact details have been provided.

The key aims that I see for the Scottish Branch over the next year are to continue on the path to broaden and diversify the membership in terms of discipline/sector, age groups, gender and geographical coverage. With this in mind you will see that in our next newsletter we will be focusing on the financial sector. See also the report from our Development Officer, Bob Shorter.

### In this edition...

By **Donny Mackinnon FCI Arb, Honorary Editor**

Summer (what summer?) is over and we welcome the stewardship of our new Chairman in this newsletter. Brandon Nolan has been a stalwart and dedicated member of the Branch committee for a long, long time.

The northern chapter has been established, holding its first event, and Bob Shorter continues his exemplary work in spreading the 'good news' of ADR throughout Scotland.

The Arbitration Bill makes steady progress through Parliament and, by the time for our next newsletter, we anticipate its momentous passing into the laws of Scotland.

Please take note of the forthcoming events and put them into your diary; they are not to be missed! Our heartfelt thanks go to all our writers and speakers, for their professional contributions to the promotion of the Branch.

I would also like to see us engage energetically with the wider CI Arb family both in the UK and internationally. I know our current President, John Campbell QC, would give us every encouragement to do so as indeed would past President Hew Dundas (a man with more airmiles than anybody else that I know). I am looking forward to attending the CI Arb UK Branch Chairman's meeting in September in London and will provide a full report on this in due course.



In relation to geographical coverage the launch of our Northern Chapter earlier this year has already resulted in a flow of seminars in Aberdeen and it was good to see coverage of this in the August edition of The Resolver as well as in this newsletter.

You will see various events below which have been organised thus far. I encourage you to diarise these and I look forward, very much, to meeting many of you at them.

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## The northern report

By Chris Arnold

The second meeting of the newly formed Northern Chapter of the Scottish Branch took place on 28<sup>th</sup> April at the offices of Paull & Williamson in Aberdeen. The

speaker was David Isenegger who is managing counsel of Shell UK Limited who spoke on dispute resolution within the upstream oil and gas industry.



Pictured above left to right: Chris Arnold of Paull & Williamsons LLP, David Isenegger of Shell UK and Derek Auchie, Chairman of the Northern Chapter.

**“the construction industry... can learn a lot from the oil and gas industry in terms of behaviours and dispute avoidance”**

The thrust of David’s talk was that in most cases preserving relationships and working collaboratively took precedence over strict enforcement of legal rights, and therefore the incidence of formal dispute resolution was very low. Disputes did arise but they were generally settled early on.

David also spoke about risk sharing in joint operating agreements and the very limited contractual liability of the appointed operator.

Another potential area of dispute was between the investing oil and gas companies and the national governments of the countries where they were exploring. In

this case arbitration or litigation was used more as a deterrent which would hopefully encourage settlement of any disputes. In practice it was somewhat risky and commercially unwise to sue a host state before the relevant project was completed and it was time to leave the country!

Whilst the construction industry has a rather different structure it would seem that it can learn a lot from the oil and gas industry in terms of behaviours and dispute avoidance.

The talk was well attended and was followed, at the next chapter meeting on 22 June, with a discussion on the Arbitration (Scotland) Bill.

## Net contribution clauses

by Ann O'Connell, Partner BTO Solicitors

The judgement of Lord Glennie, following a preliminary proof, was issued in the case of *Langstane Housing Association Ltd v Riverside Construction (Aberdeen) Ltd and Others* [2009] CSOH 52 Numbered CA66/06 on 3 April 2009. This is a Scottish case and the judgement explores the untested topic of net contribution clauses. The interest in the subject is welcomed throughout the UK, notwithstanding that the other jurisdictions are not bound to apply it. To date the absence of judicial approval has created uncertainty as to whether such clauses are enforceable. It is likely this decision will be applied on the basis of its own particular facts.

Langstane is a housing association that employed consultants and contractors to renovate buildings purchased by them in Aberdeen. During the course of the renovation works, a partial collapse of the property occurred. Langstane claimed against the contractors, the architect and the consulting engineers on the basis of their breach of contract on and/or negligence. The claim for an amount in excess of £3m is made against the defendants jointly and severally. The judgement relates to the terms of the engineer's contract and is of interest in relation to which contract terms were incorporated by reference and the extent to which the engineer is entitled to rely on these terms which include a net contribution clause.

Net contribution clauses or proportionate liability clauses feature in consultants' appointments and more commonly in collateral warranties. A number of professional bodies such as the ACE publish standard terms of contract which incorporate these clauses. JCT and SBCC include them in their styles of warranties and third party rights. They are relied upon by consultants, and more importantly, their professional indemnity insurers to pass the risk of insolvency of other



liable parties away from the consultant or contractor and on to the employer. These clauses arose as a response by warrantors to the invention of collateral warranties in the 1980s. The courts have restricted an injured party's ability to recover economic loss to contract. Such contracts or warranties are usually subject to a negotiation process with employers seeking to expand the warrantors' liability while at the same time warrantors try to limit or exclude their liability.

The common law has always provided joint wrongdoers with an entitlement to apportion liability by way of contribution. This removes the risk of insolvency from the employer. Typically, net contribution clauses are drafted using the language of limitation of liability clauses. They provide that the liability of a party is limited to such a portion of the injured party's loss or damage as it is fair and reasonable for it to pay, having regard to the extent of its responsibility for such loss or damage and on the assumption, first, that contractual remedies in the same terms are available to the injured party against all other wrongdoers and secondly that the other wrongdoers have paid their fair and reasonable contributions to the injured party.

*Langstane* deals with one of the main

"Net contribution clauses... feature in consultants' appointments... They are relied upon by... professional indemnity insurers to pass the risk of insolvency"

## Net contribution clauses (continued)

concerns about net contribution clauses, namely whether they would fall foul of the Unfair Contract Terms Act 1977 (As Amended) (“UCTA”). The case also addresses the issue of what terms were incorporated by reference into the contract between the pursuer and the engineer.

### Incorporation of contract terms

The engineers were on the Housing Association’s panel of consultants for a number of years. Typically they were appointed on a job by job basis and by incorporation of the ACE Conditions of Service. In relation to this project their appointment was in the form of a letter which stated that the basis of the appointment was the Current ACE Conditions of Service. The parties had not completed a Memorandum of Agreement which ACE intend to form part of the engineer’s appointment.

“where the condition sought to be incorporated into the contract was unusual or unduly onerous... it is necessary for the party seeking to incorporate it to take reasonable steps to have brought it to the attention of the other party”

The court was in no doubt that the parties’ contract was based on the engineer’s letter of offer and the ACE Conditions of Engagement Agreement – B1, the version of the Conditions was that current at the date of the letter of offer. The court considered it’s opinion was reinforced by the fact that these are professional terms and conditions. Accordingly, the 1998 revision of the 1995 ACE Conditions of Engagement was held to apply. There was no course of dealing between the parties to suggest otherwise. The court then decided whether the whole of the Terms of the Conditions of Engagement were incorporated and in particular the net contribution clause (Clause B8.2) Lord Glennie gave detailed consideration of the *Interfoto v Stiletto* [1989]1QB433 case argued by the pursuers as authority for the approach that where the condition sought to be incorporated into the contract was unusual or unduly onerous that it is necessary for the party seeking to incorporate it to take reasonable steps

to have brought it to the attention of the other party. The *Interfoto* case was not concerned with a written contract. In the *Interfoto* case it was necessary to decide if sufficient notice of the terms sought to be incorporated had been given. The important characteristic to consider was whether the condition departs in a material way from the terms which could reasonably be expected to apply to that type of contract. Lord Glennie doubted that the principle in *Interfoto* applied to a case of a written agreement between commercial parties where the parties have had the opportunity of considering the proper terms before deciding whether or not to proceed. The court therefore held that the whole of the conditions in the 1995 ACE Conditions of Engagement (Second Edition 1998) should apply save where the parties by act or omission have indicated that a particular condition should not. In this case, the parties did not complete the Memorandum of Agreement and in particular, paragraph A10 on Limitation of Liability and A11 relating to the time limit for bringing claims. These two clauses were therefore not effective. The court did not accept the arguments made that the failure to complete the Memorandum of Agreement rendered incorporation of the ACE Conditions inoperative. It held that the question is ultimately one of contractual intention and is not ruled by guidance. However if failure to complete the Memorandum of Agreement results in some essential part of the proposed agreement not being agreed, then there might be scope for an argument as to whether the contract was concluded at all. This was not the position here. The court considered that even if the *Interfoto* principles were to apply to this case, the pursuers could not successfully contend that the net contribution clause was not incorporated into the contract as, first, the parties had always dealt on the basis that the defenders would carry out work and be paid according to the ACE

## Net contribution clauses (continued)

Conditions and were familiar with them and there was no need for either to bring to the attention of the other any particular term whether unusual onerous or otherwise. Secondly it did not seem to the court that the net contribution clause could properly be categorised as either unusual or onerous and anyone contracting on the basis of the ACE Conditions would have been well aware of the existence of the clause.

### The Unfair Contract Terms Act 1977

Section 16 of UCTA 1977 indicates that terms of contract which purport to exclude or restrict liability for breach of duty shall have no effect if it was not fair or reasonable to incorporate the terms.

Section 17 of UCTA 1977 relates to standard form contracts and turns on the definition of 'customer' – there must be one party trading as customer on the other party's written standard terms and conditions.

In relation to Section 16(1), the Court was attracted to the Defender's argument that the net contribution clause did not seek to exclude or restrict liability for breach of duty, it simply sought to ensure the second defenders were only held liable for the consequences of their own breach of duty and were not liable by the doctrine of joint and several liability for the breaches of duty by other contractors and consultants. The Court therefore held Section 16(1) does not apply to impose the "fair and reasonable" test in the present case.

In relation to Section 17(1) Lord Glennie did not consider that the pursuers were dealing on the basis of the written standard terms of business of the engineers as, first, the ACE Conditions are drafted and promulgated by the Association of Consulting Engineers and secondly it was

the pursuers who put forward the ACE Conditions.

The court therefore held that the question of whether or not the engineers can prove that it was fair and reasonable to incorporate the net contribution clause in the contract does not arise. Lord Glennie however indicated that were he wrong in that opinion he had already held the net contribution clause was by no means unusual or onerous and would now hold it to be fair and reasonable.

The court attached greatest importance to the fact that it was open to the pursuers who chose their contractors and consultants to ensure that proper insurance is in place in the event that one or more of them is in breach of contract. In the court's view, if insurance is in place, then it should be possible in the event of insolvency of the contractor or consultant to go against the insurer. Lord Glennie saw nothing unfair or unreasonable in the client taking the risk that he has adequately covered himself against the possible insolvency of those whom he himself has appointed. This however presupposes insurance continues in the event of the insolvency but this is not necessarily the case.

### Summary

Failure to complete the Memorandum of Agreement would render clauses ineffective but not result in failure to incorporate the terms and conditions.

Clause B8.2 of ACE 1995 (1998 Revision) cannot be categorised as either unusual or onerous.

Familiarity with the ACE Conditions meant there was no need to bring any particular term whether unusual, onerous or otherwise to the attention of the other party.

**"Clause B8.2 of ACE 1995 (1998 Revision) cannot be categorised as either unusual or onerous"**

## Mediation: speaking confidentially...

By Kahleen Crawford, CDR

Those of you interested in mediation may have heard about the decision in the case of Farm Assist Limited (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2) [2009] EWHC 1102 (TCC).

In brief, a mediator had been involved with the parties named and a mediation agreement had been reached and signed. Farm Assist Limited then tried to have the agreement set aside arguing that the settlement was entered into under economic duress. The mediator was summoned to give evidence and made application not to.

The mediator gave several reasons as to why such evidence may not be helpful but importantly mentioned the terms of the Mediation Agreement which provided that both parties had agreed not to call the mediator as a witness and also raised the aspects of confidentiality and without prejudice privilege. All to no avail! In the interests of justice, and balancing the various considerations, the judge dismissed the mediator's application and

concluded that evidence should be given.

Confidentiality and without prejudice privilege are part and parcel of the mediation process and feature in most mediator's terms of appointment. The background to the case itself is perhaps unusual and those of you interested in mediation must read the judgement to get full understanding of the case but food for thought for us all!

Finally, those of you who have expressed an interest in applying to join the Scottish Panel of Civil and Commercial Mediators will be hearing from us shortly. Those of you who are interested but have not yet enquired should take note and get in touch. We are keen to build up the Panel to respond to the increasing interest in mediation as one further option in dispute resolution.



"Scottish arbitration law suffers from numerous inherent problems, not the least of which is the difficulty of ascertaining what the law in fact is in some respects"

## News stand

By Donny Mackinnon

### SCL Inaugural Lunch in Scotland

Friday, October 9, 2009 12 noon for 12.30pm at The Supper Club, 29 Royal Exchange Square, Glasgow.

SCL members and their guests are invited to this lunch, the guest speaker is Rona Cant, explorer and adventurer.

Bookings (£50pp) can be made [online](http://www.scl.org.uk/node/7950) (<http://www.scl.org.uk/node/7950>).

Past Chairman Len Bunton has been listed as an arbitrator with the Dubai International Arbitration Centre and has been appointed as a professional Dispute Board Member by the Dispute Board Federation.

Ian Strathdee has set up his own practice. He can be contacted on [ian.strathdee@ntlworld.com](mailto:ian.strathdee@ntlworld.com).

It is anticipated that the Branch website update take place very soon. Go to [scottish-arbitrators.org](http://www.scottish-arbitrators.org) to see how it has gone and for many, many useful links.

Progress on the Arbitration Bill may be found at <http://www.scottish.parliament.uk/s3/committees/eet/reports-09/eer09-05-00.htm>.

## Update on development proposals for the Scottish Branch

By Bob Shorter

Readers may recall that my brief on appointment by the Scottish Branch committee in September 2008 was to extend the influence of the Chartered Institute of Arbitrators in Scotland over alternative dispute resolution, and increase the Scottish membership. In support of this aim, representatives from new organisations were welcomed to the Branch's annual dinner

This article gives an update on the position since I described the opportunities in the previous newsletter.

### New Opportunities

#### Financial Sector

The Branch committee considers that there may be scope for CI Arb in Scotland to help resolve disputes in the financial sector through training aligned to other institutes' continuing professional development requirements

Further liaison with the Chartered Institute of Bankers in Scotland and the Institute of Chartered Accountants of Scotland in particular will be pursued.

This is a potentially exciting opportunity for CI Arb in Scotland to be involved more directly with financial services professionals. The Scottish Branch currently has 9 members working in financial services who I will contact again to assess their interest in this proposal

#### Procurement Sector

Len Bunton presented to members of the Chartered Institute of Purchasing and Supply (CIPS) East of Scotland Branch in February.

Len described the world wide organisation of CI Arb, with Scotland taken as an overseas branch, and the benefits of



membership including training, events and links with Scottish Universities. He set out the pathways to membership, and gave a resume of the current state of play around arbitration, adjudication and mediation, and other forms of ADR.

A significant part of the evening meeting comprised a plenary session discussing the nature of dispute resolution in procurement. It seemed that many procurement disputes are settled through negotiation rather than referral to more formal dispute resolution. However there seemed to be some possible interest in embedding arbitration and mediation into procurement contracts so that disputes could be referred to independent third parties if they could not be resolved through negotiation

There is the prospect of CIPS and CI Arb looking at shared education of common parts of each Institute's membership examinations, and thus a potential opening to explore working with other institutes

#### Consumers and Small Businesses

The Branch has asked IDRS Ltd (a wholly owned subsidiary of CI Arb) to act on its behalf to provide an adjudication service as required for the Angus Reputable Trader Scheme (ARTS). The scheme

"This is a potentially exciting opportunity for CI Arb in Scotland to be involved more directly with financial services professionals"

## Update on development proposals for the Scottish Branch

By Bob Shorter

was launched in April in Arbroath.

Although there is a range of views amongst Councils' Trading Standards Officers about the role of a formal adjudication scheme within Reputable Trader Schemes, and also range of views within the Branch, there may be scope to liaise further with Councils through Trading Standards Officers and the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR), and IDRS Ltd about further involvement in consumer dispute resolution. This may lead to an opportunity for new members to gain initial experience of dispute resolution, and for retired members to continue to use their considerable experience.

### IT

Although disputes can be minimised through sound contract governance, IT contracts may be a particularly good example of where dispute resolution by an expert would be helpful to the industry. An event was held in February on dispute resolution co-hosted by the Scottish Branch and the Scottish Society for Computing and Law.

"This may lead to an opportunity for new members to gain initial experience of dispute resolution"

### IDRS Ltd.

By Catherine Hammond, IDRS.

IDRS Ltd are present in a variety of commercial and consumer sectors. The list, produced at [www.idrs.ltd.uk/consumer/IDRSListofSchemes.asp](http://www.idrs.ltd.uk/consumer/IDRSListofSchemes.asp), illustrates their wide-ranging customer base.

The list shows the names of businesses, trade and professional bodies who have

### Support for members; Northern Chapter

The Scottish Branch set up a chapter based in Aberdeen to provide a more responsive service to members.

The inaugural meeting was held on 26<sup>th</sup> February at the Aberdeen Business School of The Robert Gordon University preceded by the first interim committee meeting

The vigorous interim committee has consulted members in the North of Scotland about the make up of the committee and the programme of events.

Work is in hand by the Branch with CI-Arb HQ to ensure that information about the Branch and Northern Chapter should be directly accessed from the CI-Arb web site

### Conclusion

With thanks to those who commented on my previous article, I would welcome feedback on the proposals above. I can be contacted by email at [r.shorter@freenetname.co.uk](mailto:r.shorter@freenetname.co.uk).

had bespoke ADR services tailored to resolve disputes involving them/their members and business and consumer customers. It also shows that more than 125 services are provided in more than 20 sectors, covering thousands of businesses and millions of customers worldwide.

## IDRS Ltd. (continued)

In addition to dispute resolution services, IDRS also provide services in dispute avoidance and in managing systems to address multiple claims. They offer a substantial level of experience and have the resources to ensure that these services are managed efficiently, with the minimum of

PTO.../

disruption, in what can often be lengthy, complex procedures.

For further information about any of the services listed please contact Yvette Yates, Service Delivery Manager, at [yyates@idrs.ltd.uk](mailto:yyates@idrs.ltd.uk). For information about how IDRS can develop a service to meet the needs of your business or sector, please contact Catherine Hammond at [cmhammond@idrs.ltd.uk](mailto:cmhammond@idrs.ltd.uk).

The list was correct on 16 January 2009. For regular updates please visit our website at [www.idrs.ltd.uk](http://www.idrs.ltd.uk).

## Chartered Institute Courses

By Len Bunton FCI Arb

**"The Entry Course is an Introduction to Arbitration, Adjudication and Mediation."**

The Scottish Branch is pleased to confirm that the Next Entry Course will be held on Friday 6 November 2009 at McGrigors LLP new offices, Bothwell Street, Glasgow commencing at 9.30 am and concluding at 3.30 pm.

The Entry Course is an Introduction to Arbitration, Adjudication and Mediation. Following the course, candidates are required to submit an Assignment and the successful conclusion of that will take delegates to Associate Membership status. The course cost is £250 per delegate.

The Scottish Branch is also pleased to launch the first Pathways to Fellowship Course in Scotland.

The course is designed to take Associates to Member status. The Course will commence in early October 2009, with Module 1 on the Law of Contract, Delict and Evidence. Module 1 will run from October to early April 2010 and if candidates

successfully complete the examination they proceed to Module 2, Arbitration.

After successful completion of the Arbitration examination, then candidates can apply to become Members of the CI-ARB.

Both Modules comprise distance learning, assignments and attendance at two tutorial days.

The course cost is £1000 plus VAT.

To register for either course, or for further information, please contact Past Chairman Len Bunton on [len@buntonconsulting.co.uk](mailto:len@buntonconsulting.co.uk) or on 01786 880751 or 07769 670089.

## Branch Secretary

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## Some Branch contacts:

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## Forthcoming events

DATE:	EVENT:	SPEAKERS:	HOST/VENUE:
24 September 2009	Case law update	Colin Fraser, partner, McGrigors.	McGrigors, Edinburgh
6 October 2009	“Do’s and don’ts”	Burness	Burness, Edinburgh
17 November 2009	Expert witnesses	Alexander Nissen	T.b.c. Glasgow
1 December 2009	T.b.a.	Lindy Patterson, Dundas & Wilson	Dundas & Wilson, Edinburgh
14 January 2010	The Arbitration (Scotland) Act	John Campbell (President) & Hew Dundas (past President)	DLA, Glasgow

All events are timed 5.30pm for a 6.00pm start.

Brandon Malone (Events Convener), Len Bunton, and Bryan Porter are thanked for their excellent work in arranging this schedule.