



Scottish  
Branch

**CI Arb**

www.scottish-arbitrators.org

### Special points of interest:

- John Campbell QC becomes Institute President for 2009
- New avenues of involvement for the Branch open
- The Arbitration (Scotland) Bill 2008
- North East Chapter is set up

Winter 2009

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THE CHARTERED INSTITUTE OF ARBITRATORS

# Scottish Branch Newsletter

## Chairman's message

By Len CH Buntun, FRICS, FCI Arb.

My comments for the January 2009 newsletter are being penned in mid December 2008 when our country is in recession and where the UK construction industry is suffering across all sectors and disciplines. Anecdotally our panel of Adjudicators are very busy as parties fail to resolve disputes amicably, and the inevitable dispute resolution process appears to be the only answer.

The level of activity in the Scottish Branch has remained very high. I am very pleased to report that the Scottish Branch had a major input into consultation, with the Justice Department, on the *Arbitration [Scotland] Bill 2008* and I thank Hew Dundas and John Campbell for their excellent contributions. We are also looking at the promotion of various consumer dispute resolution schemes in Scotland, and the first of these is likely to be the *Angus Reputable Trader Adjudication Service*, promoted by Angus Council, and hopefully other Scottish local authorities will follow.

Since we appointed Bob Shorter as our Development Officer we have made significant progress in identifying other organisations in Scotland who are interested in membership of the CI Arb, and who will benefit from the training services we can offer and also our educational programme. Progress has also been made with the formation of the *Chair-*

*man's Mediation Panel* and regular training in mediation techniques will be developed during 2009. We hope also to establish a new Chapter in Aberdeen, and our launch of this takes place on 26 February 2009 in Aberdeen at Robert Gordon's University.

Internationally we were represented at the 2008 Congress by past Chairman Ian Trushell, and we are delighted that another past Chairman, John Campbell QC, will be the CI Arb President in 2009. We are also making a submission to host the 2010 Congress in Edinburgh.

On the Events front we have again had a balanced programme with interesting topics and speakers and numbers attending our meetings are 40+ on average. In this Newsletter you will find details of our events programme through to the *AGM on 20 April 2009*. Bookings for the *Annual Dinner* to be held in the Glasgow Hilton on *20 March 2009* are very encouraging - don't delay!

You will see we have a new editor, Donny Mackinnon, and there has been no drop off in quality so thank you to all of our contributors.

Finally I am very pleased to record an increase in the number of adjudication & arbitration appointments I am making and as I have indicated before I remain convinced that the introduction of the 2007 Code gives a solid platform for a cost and time efficient dispute resolution process.

## In this edition...

By Donny Mackinnon, Honorary Editor

We are fortunate, yet again, to have a Scottish Branch member elected to the Presidency of the institute: John Campbell took up the reins from Teresa Cheng on the 1st of the month. Our best wishes will follow him throughout the year.

Bob Shorter explains his role and informs us of the many avenues he has explored in his first 3 months as the Branch Development Officer. We are provided with Hew Dundas' and Brandon Nolan's views on, respectively, the Arbitration (Scotland) Bill and delay and causation. Fiona Raitt outlines new areas of collaboration, developed with Dundee University; programmes commended to you. Kahleen Crawford updates us on the mediation panel front and Brandon Malone advises of the forthcoming events for the next quarter. We conclude with an interview with the Branch Chairman.

A big *'thank you'* to all contributors, who maintain a very high standard of quality in their articles for us. And to Bryan Porter for his dedication and support as the previous Honorary Editor. If you have anything you wish to include, or to have included, in future editions, please contact me at the email address on the last page.

### Inside this issue:

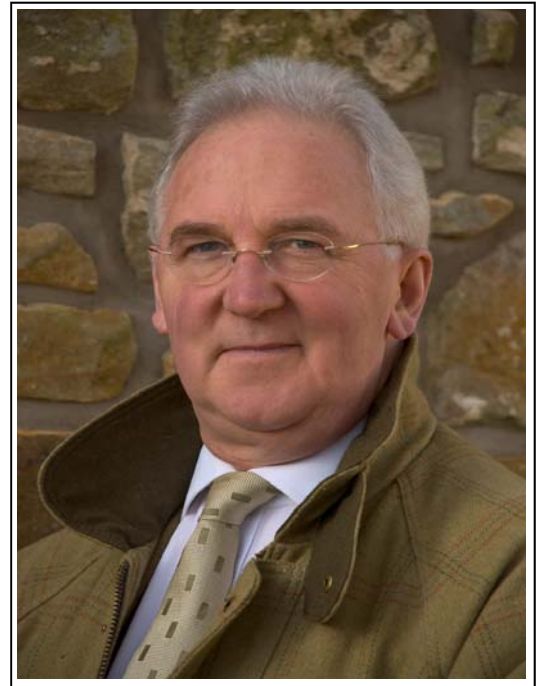
New President	2
Library relocation	2
Branch development	3
New Fellows	5
The Arbitration Bill	6
Training collaboration	9
Law article	10
Mediation panel	12
Forthcoming events	12
Interview with Chairman	13

## New Institute President: John Campbell QC

In January 2009, our very own John Campbell QC took up the mantle of President of the Chartered Institute of Arbitrators from Mrs Theresa Cheng. We are grateful to Mrs Cheng for her hard work and efforts over the past year in promoting the activities of the institute.

John is an advocate (since 1981) who specialises in Town and Country Planning, Energy, Agriculture and rural issues. He took silk in 1998, and has been a member of the Institute since 1990. He is a founder-member of Scotland's first independent Advocates' Chambers. As Chairman of the Institute's Scottish Branch he worked on the 1999 Code, and as Chairman of the former Executive Board, then Board of Management and the first Chairman of the Board of Trustees, he worked with many others on the Royal Charter changes, and now on the Scottish Bill. He says that he knows the Institute inside out. *[and so he should by now! Ed]*

He says "The key thing now is that since the Charter changes we have a much leaner administrative structure, headed by the D-G, which actually gets things done, both domestically and internationally. In 10 years the Institute has gone from being a slightly venerable home for those with construction law skills, to being the natural home for ADR practitioners of every kind from all over the world. Our Arbitration, Mediation and Adjudication courses and training are second to none, and we hope to see yet more expansion in the years to come. By focussing our attention on smaller countries where dispute resolution is less well-advanced, we can cultivate a huge following



in so many diverse cultures, and try where we can to find common ground for practicing what we preach. A year seems hardly long enough to even begin what is necessary, but 12,000 members in more than 90 countries is a great start.

"I am very proud to have been elected to this position by my peers, and I will do my very best to bring the message to as many as possible. My vision for this year is that every member of the Institute recruits one more member, so that we become truly a global force to be reckoned with."

"The Maugham Library holds all the law reports and journals which the CI Arb did"

### Library relocation

In the latter quarter of 2008, the CI Arb library (consisting of some 20,000+ items) was relocated to the Maugham Library and Information Services Centre (more commonly known as The Maugham Library) at Kings College London.

The Maugham Library is a 19<sup>th</sup> Century Gothic building located on Chancery Lane in the City of London. It was formerly home to the Public Record Office and is now the main library of King's College London, forming part of their Strand Campus. Designed by Sir James Pennethorne and built between 1851 and 1858 it is a Grade II listed building. Inside the Library is the octagonal Round Reading Room, inspired by the reading room of the British Museum, and the former Rolls Chapel (renamed the Weston Room following a donation from the Garfield Weston Foundation) with its stained glass windows,

huge mosaic floor and three monuments. The library was named after Sir Deryck Maughan, himself a King's alumnus, who made a £4m donation towards the new College library.

It holds more than 750,000 items including books, journals, CDs, records, DVDs, theses and exam papers. These items cover four of the college's Schools of Study - Humanities, Law, Physical Sciences & Engineering and Social Science & Public Policy.

For navigating the building the userguide is helpful (found at this weblink): <http://www.kcl.ac.uk/content/1/c4/15/01/chanplanfirst3.pdf>

The Maugham Library holds all the law reports and journals which the CI Arb did, including but not limited to:

- American Review of International Arbi-

## Library relocation (continued)

- tration
- Arbitration
  - Arbitration Law Monthly
  - Building & Construction Law
  - Building Law Monthly
  - Construction Industry Law Letter
  - Environmental Law Monthly
  - International Construction Law Review
  - Journal of International Arbitration
  - Mealey's International Arbitration Report
  - Lloyd's Maritime Law Newsletter
  - World Arbitration and mediation review
  - Shipping and Trade Law

To see if the library holds an item members are encouraged to look at the library catalogue:

<http://library.kcl.ac.uk/ALEPH/-/start/kings>

In order to obtain access to the library, members need to fill out an application form which may be found at the following weblink:

[www.kcl.ac.uk/download/iss/visitorform.pdf](http://www.kcl.ac.uk/download/iss/visitorform.pdf)

This relocation is a considerable benefit to members in that access is now afforded to them to the whole depository, although an annual charge (£100) is levied for loaning.

The library of the Scottish Branch (which consists of over 100 books) has also been transferred - to Glasgow Caledonian University Library.

Presently, access to this library is obtained by contacting either Ian Trushell (room M536C) on 0141 331 3890 in the first instance or John Powell in the library.

The Branch is looking for a full set of the *Arbitration* journal. If anyone has one, which they are willing to find a new home for, please contact Ian Trushell above.

## Development proposals for the Scottish Branch By Bob Shorter

My brief on appointment by Len Bunton, Brandon Nolan and Alistair Dean of the Scottish Branch committee was to extend the influence of the Chartered Institute of Arbitrators in Scotland over alternative dispute resolution, increase the opportunities for CI-Arb members to earn fees for ADR work, and increase the Scottish membership. I have endeavoured to look at this from the perspective of members who are ADR practitioners, users of ADR, and those who act as gatekeepers to various forms of dispute resolution.

I started at the September Branch committee meeting working two days a week and reported on progress so far to the December meeting. This is a new challenge for me after spending the last 30 or so years with the NHS as a manager in Paisley, Aberdeen, Inverness and Lanarkshire, managing capital programmes in earlier days and latterly developing and implementing strategies to improve palliative care and support for unpaid carers. The last three months working for the Branch have been stimulating with new people to meet and new areas to learn. I attended the entry level course in October delivered by Kahleen Crawford, John Hunter and Ian Trushell to help me gain an understanding of

CIArb and ADR. Reaction from those I have met outwith CIArb suggests that members are held in high regard and this gives me a good starting point for my discussions.



### Opportunities

There are some key opportunities at present for the Scottish Branch. The Arbitration (Scotland) Bill is included in the Scottish Government's 2008/9 legislative programme and will position Scotland to be a locus for international arbitration amongst other things. It is intended to herald a renaissance of domestic arbitration offering privacy, simplicity, speed and economy to disputing parties. There is a political wish to support small businesses and consumers to have more accessible justice than that offered by the small claims system, and the Branch is well placed with support from the CIArb Executive and Scottish members to play a key role. There is also a growing recognition of mediation by parties as an appropriate way to resolve dis-

"My brief was to extend the influence of the Chartered Institute of Arbitrators in Scotland"

## Development proposals for the Scottish Branch (continued)

putes which makes it easier to continue with a productive commercial relationship.

### Membership

57% of Scottish members are in the construction sector, and 67% are located in or around Edinburgh or Glasgow. However members are to be found all over Scotland from Orkney, Stornoway and the Highlands in the north, to Dumfries and Galloway, and the Borders in the south. 5% of members are in agriculture, banking and finance, marine and insurance sectors. Another 5% give no particular sector. This indicates the profound experience and strength of many members in the construction sector which will provide credibility for the Branch as it develops into other sectors. Also the spread of the existing membership sectorially and geographically presents a sound basis for development. 45% of members are aged between 48 - 62, with 16% being older, and 39% younger. This information is drawn from the CI Arb's HQ data base for the Scottish Branch.

### Construction

Any development should consolidate the Branch's successful track record in resolving disputes in the construction sector.

The Branch will promote the advantages of including CI Arb as an adjudicating nominating body. We have an opportunity to inform LLM students about CI Arb, and to survey LLM alumni. This may inform how the Branch should recruit new and younger members. I will be continuing discussions with the Institute of Civil Engineering Surveyors about a mutually beneficial link.

### Financial Services

There may be scope for CI Arb in Scotland to help resolve disputes in the financial sector.

The Chartered Institute of Bankers in Scotland and the Institute of Chartered Accountants of Scotland suggest that CI Arb make a presentation to a meeting of the Lothian ICAS/CIBS/Law Society group. CI Arb may wish to consider having a presence at the annual ICAS construction conference, and whether to offer a signposting service to ADR practitioners. I am meeting with the Scottish Finance Enterprise in January to

gain SFE's perspective and advice. I have also made approaches to the Chartered Institute of Insurers and The Actuarial Profession in Scotland. Some discussion with corporate legal departments may be appropriate in 2009.

We should be aware of the service (and standards) provided to consumers by the Financial Services Ombudsman as we consider supporting dispute resolution in the financial services sector.

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

### IT

IT contracts may be a particularly good example of where arbitration by an expert would be helpful to the industry.

Through the Glasgow branch of the British Computer Society I am having initial discussions about the potential for the Scottish Branch to play a role in resolving commercial IT disputes. Thinking will be developed at the February event being co-hosted by the Scottish Branch and the Scottish Society for Computing and Law. The Branch has one member in the IT sector.

### Procurement

Efficient and reliable supply chains are crucial to many businesses, and may present an opportunity for the Branch.

We have an invitation to present to a meeting of the Chartered Institute of Purchasing and Supply early in 2009. CIPS are regularly quoted in the Herald business section.

### Forestry

The Institute of Chartered Foresters already refers its members to the 2007 Arbitration Code as a guide on conducting arbitration. ICF suggest that the Branch make a presentation to north and south ICF branches on how to conduct an arbitration, use of the 2007 code, and the implications of the Arbitration Bill. The ICF is designated as nominating body in government contracts for forestry planting. Foresters are involved also in

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

## Development proposals for the Scottish Branch (continued)

settling disputes around timber valuations, and damage and injury caused by trees. At present we have no members designating forestry as their sector.

### Consumers and Small Businesses

Sound dispute resolution should be an integral part of a trader's service delivery. Scottish Consumer Focus would welcome moves to help consumers settle disputes fairly and swiftly.

I have had initial discussions the Federation of Small Businesses. For many small businesses maintaining cash flow is a key issue Angus Council's Trading Standards department designed a reputable trader adjudication service two years ago with advice from CI-Arb HQ. Angus Council now have funding to implement the service and are asking the Branch to provide adjudicators. If the proposals for a national trusted trader framework in the Housing (Scotland) Act 2006 are implemented, then all local authorities in Scotland would follow this example in Angus. Some local authority Trading Standards departments have schemes already in mind.

When considering opportunities around consumer and small business disputes, it is important to remember the very significant expertise and track record of CIArb's Independent Dispute Resolution Service.

Mediation by an appropriate expert has been mentioned by a number of contacts as being appropriate for consumer disputes.

### Mediation

Regarding interest in mediation, Kahleen Crawford is taking a lead to set up a mediation panel. The Branch has a strong link with the Scottish Mediation Network.

## New Fellows and Prize Winner

CONGRATULATIONS are offered to: Professor Peter Cameron, David R. McLeod, and Dr. David Parratt; all of whom have recently graduated to the dizzy heights of Fellowship. Similar congratulations are also offered to Roddie Cowan, who was last year's winner of

### Arbitration Bill

The Branch has offered extensive and thoughtful comments to the Scottish Executive on the draft Bill. The Branch has also offered a view on one part of the Economic Impact Assessment which is required as part of setting out the rationale for proposing the Bill.

I will be exploring whether a briefing on the Arbitration Bill, the 2007 code, and ADR techniques would be welcomed from a range of potentially interested parties in various sectors.

### Support for members

Reflecting the significant number of members in the north east, the branch is setting up a North East chapter which will be launched on 26 February in Aberdeen.

The Branch will also consider whether to discuss with CIArb HQ the benefits of offering affiliate membership in Scotland, how best to encourage younger members, and setting up "networks of interest" to link members who are in the same sectors. I will be seeking CIArb HQ advice on these points and am also contacting the Irish Branch of CIArb to learn from their experience.

### Conclusion

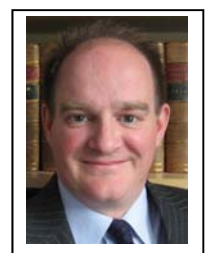
I am very aware that all members of the Scottish branch are busy, but would welcome advice and comment from any member on the proposals above. (contact details on last page)

I thank Branch Committee members, and Len Bunton in particular for their support, and all the helpful contacts mentioned above for their time and advice.

"a North East chapter ... will be launched on 26 February in Aberdeen"

the CIArb Scottish Branch prize for the highest marks in the Dispute Resolution Module in the quantity surveying course at Glasgow Caledonian University.

Well done.



David Parratt

## The Arbitration (Scotland) Bill 2008

By Hew Dundas, Past President

### Introduction and Background History

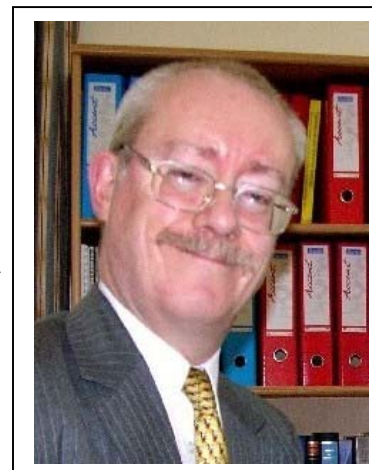
“Here’s tae us, wha’s like us ...”; one of the real joys of being Scottish is to share in the national belief that we can do anything and can be the best at anything. After all, we invented the steam engine, tarmac, pneumatic tyres, the telephone, television, penicillin, haggis, the Arbroath Smokie, the deep-fried Mars bar etc. We gave birth to Eric Liddell, Chris Hoy, Stephen Hendry and Jimmy Johnstone; we won the European Cup in 1967 before any English team did. However, we do occasionally miss the target e.g. in 1978 when Ally’s (disastrous) army had (mentally) won the World Cup before the team had even left Scotland. So it is with the law where there is a belief, at least in some quarters, that Scots Law is superior (or, at least, not inferior) to those of other jurisdictions. That belief was called into serious question by, for example, the Camp Zeist trial (opinion of the UN observer) and that belief is wholly contradicted by the lamentable state of Scottish domestic arbitration law. Further, while there may well be commendable aspects of Scots law, yet there are also many areas where it seems to have fallen behind the times; the language of the courts is a mixture of Latin, old Scots, English and other influences and is, linguistically at least, not readily accessible to the general public.

Arbitration law is more inaccessible than most areas of law since Scotland is one of the few countries in the world lacking a modern domestic arbitration statute, the law being a mixture of out-of-date, old, very old and truly ancient case law (dating back at least to 1207) and piecemeal statute (back to 1598 and 1695) and is riddled with anomalies and uncertainties. A CI Arb team led by Lord Dervaird drafted, privately, the Arbitration (Scotland) Bill 2002 (the “Dervaird Bill”) substantially consistent with the Model Law and drawing on the best features of the “English” Arbitration Act 1996 but our political masters displayed no vision and ignored it. Astonishingly, in 2004 the then Deputy Justice Minister trumpeted his government’s “commitment to arbitration” just as he and his colleagues were consigning the Dervaird Bill to a dusty oblivion.

The political landscape of Scotland changed

dramatically in May 2007 and, inter alia, a minority Government has to focus on non-contentious legislation.

The Arbitration (Scotland) Bill 2008, published on 27<sup>th</sup> June 2008, is not only non-contentious, it has all-party support since “everyone’s a winner”. Even better, the relevant Minister, Fergus Ewing MSP, has (in contrast to his disinterested predecessors) a clear understanding both of the necessity for legislation and of the principal issues and is driving the Bill forward with commendable support from an excellent Justice Department team. The Scottish Branch not only responded to the Consultation Questionnaire but provided very extensive and detailed drafting and other comments covering the entire Bill. A drafting sub-committee comprising the undersigned, Professor Fraser Davidson MCI Arb (Stirling University) and David Bartos FCI Arb (Advocate) was assisted by valuable contributions from members of the Branch Committee and from CI Arb Deputy President John Campbell QC. HRD/JDC briefed the Minister on 6<sup>th</sup> October (see attached photo) following which a very constructive and harmonious all-day drafting meeting was held with the Justice Department team, headed by Hamish Goodall, at which substantial progress was made. It is presently expected that the Bill will go before Parliament early in the New Year.



“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”

### The Problems: the Present State of Domestic Arbitration Law

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 so that some Scots arbiters sit with a solicitor as clerk to advise on the law, a process unknown in England and sometimes portrayed internationally as akin to Tiger Woods hiring someone to hit his golf ball for him. An article in ARBI-

## The Arbitration (Scotland) Bill 2008 (continued)

TRATION Vol. 70/2 details the many shortcomings, some serious (e.g. in that they cannot be contracted out of), in Scottish arbitration law (with full citations and references) so I will limit myself to a selection here:

1. there is no inherent power in Scots law for an arbiter to award any of damages, expenses or interest;
2. it is unclear whether an arbiter has immunity from suit;
3. It is unclear whether an arbitration agreement is severable from its container contract; the importance of severability is seen in the recent House of Lords case *Fiona Trust v Privalov*
4. a party or his agent can be appointed sole arbiter;
5. the internationally accepted principle that an arbiter can determine his/her own jurisdiction (*kompetenz-kompetenz*) is expressly rejected in Scotland;
6. there is no legal presumption in Scots law that an arbiter may make a part (partial) or interim award; typically, the relevant precedents date from the early 19th century;
7. the position regarding privacy or confidentiality of arbitration is unclear;
8. the applicability of court rules of evidence is uncertain;
9. the currently-in-force Stated Case Procedure is not only an anachronism but one expressly rejected in England by the Arbitration Act 1979.

**"The Bill has a number of features which, in our most humble view, improve on our most obvious rival"**

### The Arbitration (Scotland) Bill 2008

The following comments are based on the CI Arb's annotated version of the Bill dated 18<sup>th</sup> September 2008; of course, the final shape and detail of the Bill is presently unknown and there is no certainty that the CI Arb's comments will be adopted – we are aware of vigorous (yet healthy) disagreement with some of our colleagues from other bodies!

The Bill has a different shape from other countries' legislation in that it collects together all the procedural aspects in the "Scottish Arbitration Rules" (the "SAR", set

out in Schedule 1 to the Bill) so that the commercial user (and arbitration practitioner) effectively need only consider the Rules, ignoring the "legal stuff". The Rules are of two types (a) mandatory rules which apply in all cases and (b) default rules which will apply absent agreement to the contrary by the parties so that if the parties agree nothing or do nothing, they acquire a complete and comprehensive set of rules. If they have already agreed something else (except as to the mandatory rules) either by express agreement or by adoption of some other set of rules (e.g. ICC, LCIA or the Scottish Arbitration Code 2007 ("SAC07")), then that agreement will supersede the default rules in the SAR.

All the weaknesses, omissions, grey areas, imprecisions, anomalies etc of the present domestic law have been dealt with by modern provisions, drawing on what were assessed as the most relevant and/or effective features of the Dervaird Bill, the UNCITRAL Model Law, the 1996 Act and other sources. Many of the provisions of the Bill replicate international norms in arbitration so will not be covered in this short article. However, importantly and as with the 1996 Act, the Bill rests on three founding principles which govern the operation of the Bill, the third being the minimisation of the role of the Court (e.g. see (ii) and (vii) below). The process of challenging awards broadly follows the very successful English model including challenges on questions of law; the 10-Year Survey of the 1996 Act showed a clear majority for retaining the present s.69 regime in England so we saw good reason to follow the market's preferences in this contentious area.

The Bill establishes a single regime covering all arbitration and therefore repeals the UNCITRAL Model Law which has not been a success in its 18 years on the statute book. An informal survey of leading international arbitrators led to an 8-point list of the key features that a successful arbitration jurisdiction has or should have; the Model Law did not feature on the list and there is no causal link between the Model Law and the success of an arbitral venue. London, Stockholm, Geneva/Zurich and New York are all successful arbitral venues but are non-Model

## The Arbitration (Scotland) Bill 2008 (continued)

Law; Singapore, Hong Kong and Vienna (all Model Law) are successful but for other reasons. Germany, Australia, Malaysia, Denmark and Cyprus are all Model Law but see little international arbitration.

The Bill has a number of features which, in our most humble view (“Here’s tae us, wha’s like us ...”), improve on our most obvious rival, the 1996 Act:

(1) It is proposed that there be an express confidentiality/privacy obligation as a default rule (i.e. from which the parties can opt out), as is given in England by case law but the drafters of the 1996 Act considered this area too difficult to draft; the proposed Scottish solution (drafted by the CI Arb team) is wholly novel and has been seen and warmly approved by two members of the 1995/96 DAC and by international colleagues.

(2) S.18 of the 1996 Act brings in the Court to deal with any failure of the appointment process but what, with respect, do the judiciary know about appointing arbitrators? Would it not be more logical to have an experienced appointing body sort out such failures? The Bill creates “Arbitral Appointments Referees” who will resolve such failures and the CI Arb will apply to be registered as an AAR.

(3) Mindful of the excellent example of Singapore where the legislature has in the past responded with remarkable speed to rectify anomalies in its arbitration law, under the Bill Ministers may *by order* make any provision which they consider appropriate for the purposes of giving full effect to any provision of the Bill. This will preclude the need to go back to Parliament to rectify any problems that may arise, thereby permitting rapid response. We intend to beat the Singaporean record of 42 days!

(4) The Bill covers oral arbitration agreements, excluded from Part 1 of the 1996 Act, since these do occur from time to time (of course proving such an agreement is another matter).

(5) Reflecting ECHR Article 6 and extensive recent international developments, the Bill will require arbitrators to be independent as well as impartial.

(6) The Bill expressly requires arbitrators to be wholly neutral irrespective of who appointed them; while this might appear obvious, (a) UK users of arbitration sometimes think that “their” arbitrator is on their side and (b) party-appointed arbitrators (e.g. in the USA) can be non-neutral.

(7) Challenges to arbitrators will be dealt with at first instance by the appointing body or, if none, by the AAR as opposed to rushing off to court.

(8) In a number of areas, the arbitrator’s discretion has been reinforced e.g. as to whether or not there should be a hearing and there is a proposed power for the arbitrator to consider the necessity of any hearing when assessing the recoverability of expenses. With a view to limiting cost and time, there is expressly no inherent presumption that a party is entitled to a Hearing.

(9) Following *Cetelem v Roust*, the Court will have the power to grant interim measures given only the existence of an arbitration agreement and a (prima facie) relevant dispute;

(10) the Bill expressly deals with the *Gan-net v Eastrade* issue where, following application of the slip rule to correct a miscalculation, the arbitrator revisited his/her expenses award to make consequential changes;

(11) the confusing and often mis-used terminology “interim”, “part/partial” and “provisional” awards is made precise; “interim” will drop out of usage, “part/partial” will refer to a final and binding award on one or more issues in the arbitration, and “provisional” will mean an award, e.g. a payment on account, but binding only until superseded by a partial or final award on the same issue.

One matter has been omitted from the Bill and that concerns express provisions to deal with smaller cases, e.g. those involving consumers and small businesses. Politically it is essential that the Bill be seen to benefit the entire community at all levels and be seen as a user-friendly process (there was a case in England concerning a house extension for a new kitchen; the arbitration was held in the kitchen, in a shirt-sleeve environment and with everyone sitting around the table). The

“We stand at the threshold of ... the Golden Age of arbitration in Scotland”

## The Arbitration (Scotland) Bill 2008 (continued)

Scottish Branch will draft new Short-Form Rules to cover smaller arbitrations and these will be launched in parallel with the Bill and will form a key element of the marketing (see Bob Shorter's article elsewhere in this Newsletter).

### Training collaboration with Dundee University

By Fiona Raitt

#### International Dispute Resolution by distance learning: New programmes

The CI Arb Scottish Branch is delighted to announce a new route to professional qualification in which it has played a major role in facilitating: in January, Dundee Law School (DLS) launches a new suite of modules designed to develop practical skills and knowledge in core aspects of dispute resolution.

The teaching team comprises four internationally renowned academics from DLS and three experienced external practitioners. The modules will be taught primarily by distance learning. However, the Negotiation and Mediation modules will incorporate residential training sessions to allow candidates to develop practical skills.

Applicants must possess an LLB and will most likely be in legal practice.

Three modules have Recognised Course Provider status from professional bodies:

- The module in International Commercial Arbitration has been granted Recognised Course Provider status by the Chartered Institute of Arbitrators
- The modules in Negotiation and Mediation have been granted Recognised Course Provider status from Mediation Scotland LLP

Each of these modules is also available as stand alone CPD.

For those who wish to up-skill and diversify in their careers, DLS offers a unique set of qualifications:

- A choice of pathways leading to the completion of a Certificate, Diploma or LLM in International Dispute Resolution
- Eligibility for Membership of the Chartered Institute of Arbitrators
- Accreditation in Advanced Negotiation

#### Summary

We stand at the threshold of what should prove to be the Golden Age of arbitration in Scotland. The Scottish Branch has played (and will continue to play) a key role in the development of this Bill, arguably the most important, purely Scottish, commercial legislation in our beloved country's long history.



#### Skills for Lawyers

- Certificate in Mediation Skills
- Accreditation in Mediation Implementation for Lawyers

#### Why Dundee?

The University of Dundee is internationally renowned for its teaching and research excellence and for the quality of the postgraduate experience. It provides a dynamic e-learning environment with a high level of one-to-one support. Both DLS and the University regularly feature in league tables. The Times newspaper's 2009 *Good University Guide* ranks the Law School 9th of all Law Schools in the United Kingdom, while the University was shortlisted for 'University of the Year' in the *Times Higher Education Awards* 2008.

**Fees** (inclusive of core materials; VAT is not chargeable):

LLM	£7800
Diploma	£5600
Certificate	£4600

International Commercial Arbitration: £2750

Negotiation: £2450

Negotiation and Mediation: £4750  
(involves 8 residential days)

For further information see

<http://www.dundee.ac.uk/law/dl/idr/index.htm>

or contact: Professor Fiona Raitt

email: [f.e.raitt@dundee.ac.uk](mailto:f.e.raitt@dundee.ac.uk)

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## Delay Analysis, Causation and Concurrency

By Brandon Nolan

It is unsurprising that Lord Drummond Young's decision in *City Inn Ltd v. Shepherd Construction Ltd [2007] CSOH Number CA101/00* which was handed down towards the end of 2007 has attracted massive attention from commentators. Delay analysis is of course of central importance in assessing entitlement to an extension of time. The paucity of landmark cases in recent years is probably more of a testament to the success of adjudication as a dispute resolution technique rather than any fall off in the number of extension of time disputes.

Whilst *City Inn* was concerned with JCT 1980 the principles apply to most of the forms commonly used in the UK. Lord Drummond Young's starting point was the seminal decision of Coleman J in *Balfour Beatty Building Ltd v. Chestermount Properties Ltd [1993] 62 BLR 1*. It is worth reminding ourselves that Coleman J at p.25 identified that:

"The underlying objective is to arrive at the aggregate period of time within which the contract works as ultimately defined ought to have been completed having regard to the incidence of non-contractor's risk events and to calculate the excess time if any, over that period, which the contractor took to complete the works."

Coleman J went on to state at p.29:

"...in both cases [the Architect's] objective must be the same: to assess whether any of the relevant events has caused delay to the progress of the works and, if so, how much. He must then apply the result of his assessment of the amount of the delay caused by the relevant event by extending the contract period for completion of the works by a like amount and this he does by means of postponing the completion date."

It will be seen that causation is at the heart of delay analysis and assessment. But what happens when more than one cause of delay occurs at the same time? The old chestnut of concurrency.



Lord Drummond Young did go on to examine the two cases which are normally cited in this context, namely, *Henry Boot Construction (UK) Ltd v. Malmison Hotel (Manchester) Ltd (1999) 70 Con LR 32* and *Royal Brompton Hospital NHS Trust v. Hammond and Others (No.7) (2001) 76 Con LR 148*. In the former case Dyson J recorded (p.37) that it was agreed between the parties that:

"..if there are two concurrent causes of delay, one of which is a relevant event, the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event."

The example which Dyson J used was the situation where no work was possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor had a shortage of labour (not a relevant event) and the failure to work during that week was likely to delay the completion of the works beyond the completion date by one week.

In the *Royal Brompton* case, Seymour J considered Dyson J's opinion and drew a distinction between delay caused by a labour shortage with a relevant event then occurring and a case where both a relevant event and a shortage of labour occur more or less simultaneously. Seymour J considered that Dyson J had only been concerned with the latter situation and not with the former. Lord Drummond Young indicated at para [16] that he had some difficulty with this distinction:

"It seems to turn upon the question whether the shortage of labour and the relevant event occurred simultaneously; or at least it assumes that the shortage of labour did not significantly predate the relevant event. That, however, seems to me to be an arbitrary criterion. It should not matter whether the shortage of labour

"causation is at the heart of delay analysis and assessment"

## Delay Analysis, Causation and Concurrency (continued)

developed, for example, two days before or two days after the start of a substantial period of inclement weather; in either case the two matters operate concurrently to delay completion of the works. In my opinion both of these cases should be treated as involving concurrent causes, and they should be dealt with in the way indicated in clause 25.3.1 by granting such extension as the architect considers fair and reasonable."

Lord Drummond Young goes on to mention the well known decision in *Wells v. Army and Navy Co-operative Society 1903 86 LT 764* where it was decided that delay caused by a matter for which a contractor was responsible would not deprive the contractor of his right to claim an extension of time for delay caused by a relevant event. Lord Drummond Young then moves to the heart of the matter (para [18]):

"While delay for which the contractor is responsible will not preclude an extension of time based on a relevant event, the critical question will frequently, perhaps usually, be how long an extension is justified by the relevant event. In practice the various causes of delay are likely to interact in a complex manner... What is required by clause 25 is that the architect should exercise his judgement to determine the extent to which completion has been delayed by relevant events. The architect must make a determination on a fair and reasonable basis. Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case."

Lord Drummond Young recognised at para [22] that:

"In practice causation tends to operate in a complex manner, and a delay to com-

pletion may be caused in part by relevant events and in part by contractor default, in a way that does not permit the easiest separation of these causes. In such a case, the solution envisaged by clause 25 is that the architect, or in litigation the court, must apply judgement to determine the extent to which completion has been delayed by relevant events. In an appropriate case apportionment of delay between relevant events and contractor's risk events may be appropriate. Precisely when and how that should take place is a question that turns on the precise facts of the case."

There is little doubt that causation does tend to operate in a complex manner as observed by Lord Drummond Young. It is for this reason that various critical path analysis techniques have been developed with the aim of identifying what it is that causes delay which has the effect of pushing the completion date back. What emerges and indeed is novel in relation to Lord Drummond Young's analysis is that apportionment in his view may be appropriate where there is concurrency between a relevant event and a contractor default in the sense, as Lord Drummond Young puts it, that both existed simultaneously regardless of which started first, the apportionment being in relation to responsibility for the delay between the two causes. Such apportionment must, according to Lord Drummond Young, be fair and reasonable being the words used in clauses 25.3.1 and .3 of the JCT Conditions which were applicable in that case.

It was observed in the Society of Construction Law Delay and Disruption Protocol, October 2002 at para 1.4.4 that "True concurrent delay will be a rare occurrence". If we accept that this is correct Lord Drummond Young's approach may have a limited application even leaving aside the question of legal principle which the approach raises. The City Inn case is the subject matter of an appeal to the Inner House of the Court of Session. The next judicial pronouncement on this area of law may therefore come from the Inner House.

*(This article also appears in the Institution of Civil Engineering Surveyors Construction Law Review 2008.)*

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## CIArb Scottish Branch Mediation Panel

By Kahleen Crawford

Those interested in mediation will be aware from a previous Newsletter that the Scottish Branch intends to launch the Chairman's Panel for Mediators. This is to respond to the increasing interest in mediation and related skills in Scotland and promote the standing of the Scottish Branch in this field as an already well respected nominating body in ADR.

Following a period of consultation, eligibility criteria have been agreed and members of the Scottish Branch with the approved accreditation and experience can apply. An interview will be necessary. Those members who are already included on the CIArb Presidents Mediation panel and who wish to be on the Scottish Mediation Panel will automatically be included if application is made. Members of all skills and disciplines will be considered. The entry criteria and other relevant information will be available on the Scottish Branch website early in the New Year. There will be regular training courses for those appointed to the Chairman's Panel of Mediators.

For members interested in mediation but

who do not have the necessary accreditation, or indeed those who simply wish to extend their skills, Scottish based introductory and accreditation courses in Mediation will be available. CPD will be an ongoing requirement for all members of the Panel.

Details of the forthcoming Scottish courses will also be published in the New Year.

A pathway to Fellowship includes mediation and we will be embracing that in the policy. Members wishing to join the panel should contact the Branch Chairman. (contact address on last page)

We look forward to members' support in this new initiative. Continuing financial pressures in these times of "credit crunch" make mediation an attractive option and the Scottish Branch wishes to actively promote and support its use in Scotland as part of the ADR armoury.



"Continuing financial pressures in these times of "credit crunch" make mediation an attractive option "

### Forthcoming events

DATE:	EVENT:	SPEAKERS:	HOST/VENUE:
27 January 2009	Enforcement of adjudication awards	Roger Button, partner, Shadbolt & Co.	Brodies LLP, Edinburgh
18 February 2009	I.T in arbitration	From the Society for Computers and Law	Burness, Glasgow
26 February 2009	Inaugural meeting of the North East Chapter of the Scottish Branch, followed by a lecture on "What is the purpose of ADR?"	Peter Aeberli, Barrister	Robert Gordon University, Aberdeen
17 March 2009	<b>Have your say !!</b> An interactive discussion on changes in the UK construction industry over the past 30 years, and what does the future hold for ADR in our country?	Chaired by Past Chairman Ian Trushell with discussion leaders Len Bunton & Brandon Nolan.	Teacher Building, St Enoch's Square, Glasgow
20 March 2009	Branch Annual Dinner	Tony Bingham, Barrister	Hilton Hotel, Glasgow
20 April 2009	AGM (6pm – 6.45 pm) followed by the Annual Lecture: "The implementation of the EU Directive on certain aspects of Mediation" (7.00pm - 7.45 pm) and	David Cornes, solicitor and leading figure in mediation.	Teacher Building, St Enoch's Square, Glasgow

## Interview with the Branch Chairman (Len Bunton)

*You are now into the 2nd year of your tenure as Chairman – how has it been for you?*

It has been a tremendous experience I have to say. I had a good grounding as Education and Examination Convenor, and then for two years as Vice Chairman, and as I indicated at the AGM in 2007, when I took office, our policy was going to be **“more of the same”** because we had achieved a great deal between 2005 and 2007 and we just needed to keep going.

*What would you say has given you the most satisfaction?*

Many, many, things. Primarily our ability to get things done.

First we had a clear policy and direction, we knew what had to be achieved, and we set out to do just that – and we did. The introduction of the **2007 Arbitration Code** was a real landmark for us; then a clear education programme was developed; we improved the quality of everything we produced – the events, the Newsletter, a superb Annual Dinner etc, and most importantly feedback from the members. It is not how I or my committee view things, it is the views of the membership that count in terms as to how they perceive the CI Arb in Scotland, and what they get out of it.

Also our move to appoint Bob Shorter as our Development Officer in Scotland was both necessary and timely. Bob has been my legs by getting out into the market to open up opportunities for membership growth outwith the construction sectors etc, and identifying opportunities. In the longer term I see us having a permanent secretariat in Scotland.

*How has your career evolved?*

A long time ago as a QS in private and public sector; set up own firm in 1978 and was involved in my first adjudication around then; developed the firm into a multi disciplinary set up and sold out to a major London-based firm; had the opportunity to work on some very major projects, and kept getting involved in sorting out disputes in the UK and internationally as well; last ten years has been a roller coaster on dispute resolution.

*You appear to be a person who gets a lot done – what’s the secret?*

A triple cardiac bypass in 2002 was a wakeup call in terms of work ethic, life

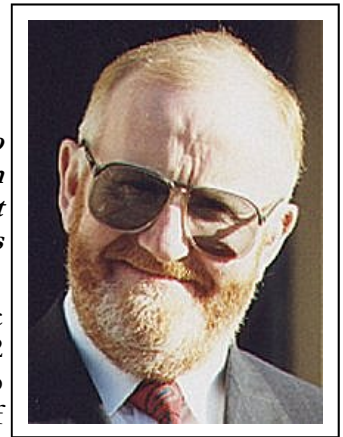
style and diet so I do keep myself very fit. It is however all about your approach to life, and firstly I still thoroughly enjoy my career as a dispute resolver and a general sorter-out of construction industry problems. I am a great believer of getting on with things in life, and as my colleagues are aware a **“can do”** attitude has prevailed in the Scottish Branch for the last 4 years.

*Life outwith work?*

As an Adjudicator, you need to work hard when you have a number of cases on and sometimes life does not recognise a normal 5 day working week, followed by a weekend off. It is just not like that anymore. So taking time off between cases is critical for the body clock and the family. Sheila and I have a very big family including 10 grandchildren, ranging from the very big to the very small, so our life is very busy!!

*Hobbies?*

Love golf, gym four times a week, became a gardening labourer over the last 4 years, but real relaxation is reading. We have a library at home [that sounds grand] but I have collected books for years. on biographies, management skills, history and sport – particularly golf. I have read most of the recent books on Tony Blair; I have just finished Martin Bells ***The Truth that Sticks*** – a brilliant uncovering of the real political issues in this country; currently reading ***The Looming Tower Al-Qaeda's Road To 9/11***; short stories are good if you are regular flyer and/or train traveller which I am. Again you need to keep up to date on legal cases, solicitors Newsletters etc, so reading takes up much of my spare time.



**“I tell them to turn down the noise, tidy up the house, and get them to go to bed far too early”**

## Branch Secretary

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## Interview with the Branch Chairman (continued)

### *What are you going to do for the CI Arb after the AGM?*

I intend to continue with the various initiatives that are outlined in my remarks on the first page, and detailed within this Newsletter.

### *What would your epitaph be?*

I really don't know.

I have ten very close friends who I have known and worked with in the construction

industry/legal profession for over 20 years, so their opinions I value greatly.

What my wonderful wife and my kids think about me is most important. I wouldn't ask my grandchildren as they will say I tell them to turn down the noise, tidy up the house, and get them to go to bed far too early.

## Website update

The Branch website ([www.scottisharbitrators.com](http://www.scottisharbitrators.com)) has recently been updated.

The Scottish Branch committee has approved the Chairman's criteria for the ap-

pointment of an Adjudicator which is now available on the website. The objective is to ensure the Scottish Branch has a fair, clear and transparent procedure available to users of the adjudication process.