ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 20 May 2009

Session 3

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CONTENTS

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ECONOMY, ENERGY AND TOURISM COMMITTEE
16th Meeting 2009, Session 3

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

*Rob Gibson (Highlands and Islands) (SNP)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Gavin Brown (Lothians) (Con)
*Christopher Harvie (Mid Scotland and Fife) (SNP)
*Marilyn Livingstone (Kirkcaldy) (Lab)
*Lewis Macdonald (Aberdeen Central) (Lab)
Stuart McMillan (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

*Nigel Don (North East Scotland) (SNP)
Alex Johnstone (North East Scotland) (Con)
Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)
David Whitton (Strathkelvin and Bearsden) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Alison Dewar (Scottish Government Constitution, Law and Courts Directorate)
Graham Fisher (Scottish Government Legal Directorate)
Hamish Goodall (Scottish Government Constitution, Law and Courts Directorate)

CLERK TO THE COMMITTEE

Stephen Imrie

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Gail Grant

LOCATION

Committee Room 3

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 20 May 2009

[THE CONVENER *opened the meeting at 09:30*]

Decision on Taking Business in Private

The Convener (Iain Smith): Welcome to the 16th meeting in 2009 of the Economy, Energy and Tourism Committee. I give the traditional reminder that everyone should turn off their mobile phones. Please do not leave them on silent, as that can still interfere with the sound system.

We have apologies from Stuart McMillan, so I welcome Nigel Don, who appears on this occasion in his role as substitute member rather than just as an additional member.

Under agenda item 1, I ask the committee to agree to take item 4, and any future consideration of our draft energy inquiry report, in private. It is normal practice for committees to deal with such reports in private, so as to allow full discussion of the matters. Do we agree to do so?

Members *indicated agreement.*

Arbitration (Scotland) Bill: Stage 1

The Convener: Item 2 is consideration of the Arbitration (Scotland) Bill at stage 1. With us today we have members of the Scottish Government's bill team, who will explain the background to the bill and the policies that are being proposed. I invite them to introduce themselves. Hamish Goodall will then make a brief opening statement.

Hamish Goodall (Scottish Government Constitution, Law and Courts Directorate): I am the bill team manager.

Graham Fisher (Scottish Government Legal Directorate): I am from the Scottish Government legal directorate.

Alison Dewar (Scottish Government Constitution, Law and Courts Directorate): I am from the bill team.

Hamish Goodall: I start by putting the bill into context. Ministers' key priority is to develop and enhance sustainable economic growth in order to generate wealth and prosperity in Scotland. They want to make Scotland a good place in which to do business. Any country with thriving economic activity or aspirations to increase its economic activity also requires efficient, affordable and just systems for dispute resolution.

Firms might trade and transact with each other to their mutual benefit and profit, sometimes for many years, before some incident or change of circumstances causes them to disagree. In the interests of continuing and increasing economic growth, Scotland needs the means to facilitate the speedy and effective resolution of those disputes at a cost that is economically viable. Arbitration is one of those methods.

Arbitration is a private form of dispute resolution, outside the public civil courts, in which one or more arbitrators give a binding ruling on a dispute that the parties to the dispute have agreed to refer for decision. In choosing arbitration, parties give up their right to go to court, and any court proceedings arising from the dispute are suspended. Arbitration therefore complements other forms of alternative dispute resolution, such as mediation.

In times gone by—particularly in the 19th and early 20th centuries—arbitration was the method of dispute resolution of choice in Scottish commerce. The popularity of arbitration has, however, been eroded in more recent years, partly as a result of the unsatisfactory state of the law, and also because of the recent success of adjudication in the construction sector.

However, arbitration has a number of advantages over court proceedings, which explains its greater use in Scotland previously and its increasing popularity in other parts of the world.

The first advantage is the fact that the arbitrator's decision or award is final and binding, without further court hearings on the issues.

The second advantage is that the binding nature of the outcome may offer attractions over other forms of alternative dispute resolution such as mediation, which is not binding unless the parties so agree.

The third advantage is that arbitration is a private means of dispute resolution. That is another major advantage to commercial parties who might not want the nature of their dispute, or any sensitive commercial information, debated openly in the courts.

The fourth advantage is that the parties can choose their arbitrator, which is not possible in the courts. If a technical expert is appointed as arbitrator, that might reduce the need to lead technical evidence, which means that arbitration can be quick, cost effective and efficient.

The fifth advantage is that the arbitration process can provide flexible procedures because it is privately funded and initiated and because it is within the parties' control, which means that the location, timing and other arrangements can be planned to suit their particular needs.

The sixth advantage is that an award may be enforced like a court decree. For foreign awards from countries that have ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards, agreements and awards that have been made in other countries will be recognised with no need for further substantive review. Thus, arbitration offers major advantages to those engaged in international or cross-border trade.

At present, the unsatisfactory state of the law on arbitration makes Scotland an unattractive place in which to use arbitration. Domestic arbitration law currently derives primarily from case law that is neither clear nor readily accessible and which has gaps. For example, there is at present no implied power for an arbitrator to award damages or interest. Further, current Scots law does not reflect modern practice in arbitration. The absence of a modernised, codified law is therefore a real drawback to the use of arbitration in Scotland.

The bill puts the majority of the general Scots law of arbitration into a single statute. It replaces most of the few existing statutory provisions on arbitration in Scotland, and restates and codifies the existing law, both common and statutory. In future, anyone in Scotland, or seeking to do business in Scotland, will be able to access relatively easily the principles and rules governing the law of arbitration in Scotland in language that can be readily understood. That will bring Scotland into line with the rest of western Europe and major commercial countries in the rest of the world.

The primary objectives of the bill are to clarify and consolidate Scottish arbitration law, filling in gaps where those exist; provide a statutory framework for arbitrations that will operate in the absence of agreement to the contrary—although some elements will be mandatory, as with the United Kingdom Arbitration Act 1996—which will provide a guide for arbitrators and parties alike; ensure fairness and impartiality in the process; and minimise expense and ensure that the process is efficient.

In relation to the last point, rules 23 and 24 of the Scottish arbitration rules in schedule 1 to the bill impose an explicit mandatory duty on the arbitrator and the parties to a dispute to conduct the arbitration without unnecessary delay and without unnecessary expense. That is designed to address the criticism that arbitration has been too slow.

The approach to arbitration that is taken in the bill aims to be consistent with that in the rest of the UK, where appropriate. The bill is similar in approach to the Arbitration Act 1996 but is considered by the Scottish branch of the Chartered Institute of Arbitrators to be superior to the 1996 act in a number of respects. Ministers intend that the same rules will apply in principle to domestic, cross-border and international arbitrations whose seat is in Scotland—in other words, those arbitrations that are governed by the Scots law of arbitration.

Members will see from a glance at the bill that the Scottish arbitration rules that govern the conduct of arbitration are set out together in schedule 1. Having the procedural rules together in one place is designed to be user friendly for arbitrators and other users of the legislation. That approach was welcomed by a strong majority of respondees to the consultation, including working arbitrators and those in the wider business world.

The use of arbitration is increasing in other parts of the world, but it will obviously have to prove its worth to potential users in Scotland. To a large extent, the success or otherwise of the bill rests not just on its detailed provisions, although they are obviously essential, but on, first, how arbitration is marketed by those who wish to offer arbitral services and, secondly, the extent to which potential customers can be attracted. In the commercial sphere in particular, customers will be attracted if there are sound economic reasons for using arbitration rather than another method of dispute resolution.

Ministers believe that such economic arguments exist, but arbitration undoubtedly starts from a low base. The Chartered Institute of Arbitrators estimates that there are around 300 arbitrations in Scotland per annum. Of those, 250 are likely to be consumer arbitrations, with commercial arbitrations making up the remainder. The Royal Institution of Chartered Surveyors has indicated that its members conduct around 180 commercial rent reviews per annum as arbitrations, so that figure should be added to the CIArb's figure of 300. However, those are not high numbers, so there appears to be huge scope for increasing arbitration work in Scotland.

We understand that the CIA intends to undertake a major marketing exercise if the bill is passed, and no doubt other providers of arbitral services will do likewise. We know that the Faculty of Advocates is instituting a new dispute resolution service, and the recommendations from the business experts and law forum suggested that both the faculty and the Law Society of Scotland should encourage their members to train to undertake arbitration work.

Ministers believe that the bill, once enacted, will encourage the domestic use of arbitration and that it will also attract international arbitration business to Scotland. A study in 2004 reported that adopting new arbitration legislation or significantly revising an arbitration regime leads to a very significant increase in the number of arbitrations held in a country. Ministers hope that the bill may encourage industries and professions to set up their own low-cost arbitration schemes, such as those operated by the Association of British Travel Agents, the Scottish Motor Trade Association and the Institute of Chartered Accountants in Scotland, so that consumers in dispute with such bodies are not faced with the stress and expense that are associated with raising an action in court.

Arbitration has mainly been used in the commercial sphere, often because the parties were attracted by the confidentiality that arbitration offers, and ministers believe that there is scope for a huge range of commercial disputes to be arbitrated. It is believed that many smaller firms often do not pursue bad debt, for example, because they cannot afford the time and expense of pursuing a case through the courts. A great deal of management time can be spent on pursuing disputes and, particularly in smaller businesses, such resource cannot be spared. Dispute resolution involves loss of productivity for a firm, but as disputes are inevitable in commerce, there must be an efficient and cost-effective method of resolution.

Arbitration is the choice of commerce in many parts of the world and, with mediation, is the main alternative to the courts. The advantages of arbitration, which I mentioned earlier, are particularly relevant in times of economic recession. Commercial bodies want to have disputes resolved confidentially and privately by an arbitrator who has experience of the subject matter of the dispute. The arbitration procedures can be adapted to suit the circumstances of the dispute, which means that parties are not tied to rigid court structures and procedures, and the matter can be dealt with in a cost-effective and time-effective manner.

Ministers cannot guarantee that simply reforming the law on arbitration in Scotland will have the effect of increasing the domestic use of arbitration or attracting international arbitration business to Scotland, because that is largely up to arbitration practitioners and those who see benefits in using arbitration as a method of commercial dispute resolution. However, if the bill is not enacted, arbitration in Scotland may die out completely, at a time when the use of arbitration in other parts of the world is increasing—dramatically so in some places.

Finally, members may be interested to know that alternative dispute resolution is attracting increasing attention in the academic world, partly because of the economic situation.

The University of Dundee has announced a masters course on international dispute resolution, including arbitration. In a press release, the university noted that alternative means of dispute resolution

"are becoming increasingly prominent in the legal world at every level from international investment disputes to intellectual property claims."

It also noted:

"As economic circumstances worsen internationally, clients increasingly are unwilling to commit large sums to litigation where the risk of success and the overall costs are unknown or unascertainable."

It observed that methods such as arbitration

"can be deployed for different types of cases and at different times, so the client can have a bespoke service as opposed to forcing them into the 'one shape fits all' litigation which takes considerable time, expense and rarely preserves the business or other relationship between the parties."

That applies equally to domestic and international or cross-border disputes.

The universities of Edinburgh and Aberdeen have also announced new masters courses in the same area. The Edinburgh course, which was announced only last week, will centre on international commercial arbitration and will be based on the bill—assuming, of course, that it is enacted.

That is all that I wish to say for now. We are happy to try to answer any questions that members might have.

09:45

The Convener: Thank you very much for those opening comments. Given that the committee has been advised by the Government that it is an economic rather than a legal bill, I will begin by asking about the bill's potential value to the Scottish economy. What evidence is there that people are discouraged from using arbitration because the current legal framework is not satisfactory?

Hamish Goodall: The evidence lies in the extent to which arbitration is underused at the moment. The Chartered Institute of Arbitrators estimates that there are only 300 arbitrations per annum, which I presume are run by its members. The RICS says that 180 commercial rent reviews are run as arbitrations. Those are very small numbers. The figure of 300 relates mainly to consumer arbitration work. Only about 50 of what might be called proper commercial arbitrations are carried out each year. There would appear to be huge scope for greater use of arbitration in the commercial sphere. Part of the problem is that companies in many areas of commerce are simply unaware of arbitration as a method of dispute resolution, so there is a huge job to be done, not only in educating them about the advantages of arbitration, but in persuading them to use that form of dispute resolution rather than litigation or another method of dispute resolution such as mediation.

The Convener: Is there any information about the use that is made of the alternatives to arbitration, including the courts, which are the ultimate arbiters? What proportion of dispute resolution cases could be attracted to arbitration?

Hamish Goodall: I am unaware of the level of the use of mediation, as mediation is not part of the bill. We have concentrated solely on arbitration.

However, you might be interested to know that research by our analytical services division into use of arbitration found that 50 per cent of respondents considered that the current state of arbitration law in Scotland was a major disadvantage and that 43.8 per cent of them expressed concern about the potential length of the arbitration process. Both those factors are working against arbitration, but we hope that the bill will sort that out.

The Convener: Before I invite questions from other members, I have a question about international arbitration. What is your best guess of the amount of international arbitration work that could be attracted to Scotland? How would we go about attracting it?

Hamish Goodall: At present, virtually no international arbitration takes place in Scotland. When Fergus Ewing was the minister in charge of the bill, he met Lord Dervaird and Lord Coulsfield from the Scottish Council for International Arbitration. Lord Dervaird indicated that, since 1990, he had conducted about 20 international arbitrations in Scotland using the model law. That is 20 in 19 years, and we do not think that many other people are conducting international arbitrations in Scotland. The position is completely different in London, where around £250 million of arbitration work is carried out annually. If a proportion of that work could be attracted to Scotland, it would mean a serious amount of money coming into the Scottish economy.

The first way in which that work could be attracted would be by proving that domestic arbitration is efficient and effective here. After that, international bodies might be more inclined to come to Scotland. A second attraction that could bring international bodies to Scotland is the fact that arbitration here will be much cheaper—we estimate up to a third cheaper—than in London. There is a mature legal system here that is distinctive from the system that is used in London. Therefore, if a foreign company were in dispute with an English company, it might be inclined to come to Scotland, which it might see as a neutral venue.

However, I cannot give you an estimate of how much business would come to Scotland; we will simply have to wait and see.

The Convener: But you expect the international arbitration to happen a few years down the line, after the domestic system has bedded in.

Hamish Goodall: Yes, I think so. I imagine that it will be a gradual process. Nevertheless, the Chartered Institute of Arbitrators is already making great efforts to publicise the bill internationally in order to attract business to Scotland.

Gavin Brown (Lothians) (Con): I want to say a couple of things before I ask my questions. First, I declare that, as a solicitor—I am still on the roll of solicitors—I used to conduct arbitrations, although I have not done an arbitration since 2002, and I can confirm that I have absolutely no plans to do any in the short, medium or long term. Secondly, I put on record the fact that I strongly support the principles of the bill, so my questions will revolve around the bill's content.

Arbitration used to be quite popular in Scotland because it was thought to be faster and cheaper than the courts and because one got a decision from an expert. Although decisions are still made by experts, the use of arbitration has fallen off the

edge of a cliff because it is not faster or cheaper—it turns out to be more expensive. In what way will the bill make arbitration faster? Which specific provisions will make arbitration faster?

Hamish Goodall: There are a number of provisions in the bill that will make arbitration faster. Recourse to the courts will be reduced as much as possible—there will be only very limited circumstances in which parties will be able to delay matters by taking issues to the courts. However, the main way in which we hope that the bill will make arbitration faster is by placing the arbitrator and the parties specifically under mandatory duties to conduct the arbitration without unnecessary delay and expense.

Ministers considered imposing time limits in the bill but decided against that approach because, as soon as time limits are imposed, a provision must automatically be included to allow for some appeal to extend the time limit. If that were done, the courts would become chock-a-block with people making applications to extend the time limit. For example, as you may know, there is a time limit of 28 days for adjudication. However, it will simply not be possible to resolve some disputes within such a short period. Even if the time limit were set at six months, it would not be possible to resolve some disputes within that period.

We hope that the duty on arbitrators and the parties to conduct matters proactively will get things moving. Indeed, there is provision in the bill for sanctions to be placed on arbitrators and the parties if they do not keep things moving.

Gavin Brown: I can see how reducing the ability to go to the courts would save time, particularly in stated-case procedure arbitrations. However, in connection with simply placing a duty on people, is it the Scottish Government's view that there is a lot of unnecessary delay in arbitrations at the moment?

Hamish Goodall: We went out to speak to practitioners as part of the consultation process. One person told us that some arbitrators adopt virtually the same procedures as the court would in order to conduct arbitration. That seems completely counter-productive to us. The whole point of arbitration is that it is used when people do not want to go to court because they do not want to be bound up with the inherent delays and expense. It is therefore difficult to imagine why an arbitrator would want to follow court procedures. It was suggested that arbitrators who do that are perhaps inexperienced or simply lack confidence in their ability to conduct the arbitration.

The whole point is to get away from court procedures and to have a bespoke procedure that suits the circumstances of the individual dispute. For example, depending on the subject matter, it might be possible for an arbitrator to conduct arbitration on the basis of documents alone, rather than holding expensive hearings.

Gavin Brown: Okay, but that is possible in adjudication as well, although in reality, if the matter is complex, it is unlikely that the dispute will be resolved by documents alone. Some arbitrators conduct the arbitration as if they were in the sheriff court or the Court of Session—some good arbitrators do that. Would the rules in the bill prevent them from conducting the arbitration in that way?

Hamish Goodall: The rules say that the arbitrator should choose the procedure that is most suitable to the circumstances of the dispute. Frankly, I would not have thought that adopting court procedures would be appropriate in many cases—in fact, it would be appropriate in no cases. The whole point of people going to arbitration is that they want to get away from court procedures.

Gavin Brown: Some experienced arbitrators do not mirror exactly the Court of Session rules, but they follow that kind of procedure if they think that that is appropriate. Would the bill's provisions prevent them from doing so?

Graham Fisher: No. Basically, the arbitrator will be given a choice of procedure, as at present, but they will have a wide discretion to choose, for instance, the rules of evidence that will apply in the particular arbitration. Arbitrators will therefore be able to do what you suggest, subject always to their duty to avoid unnecessary delays.

Gavin Brown: I will not dwell on this for long, but—

Hamish Goodall: I am sorry to interrupt, but I imagine that there will be a lot of training for arbitrators over the next few years in Scotland. It is difficult to imagine that that training would suggest to those people that they should adopt court procedures—quite the reverse.

Gavin Brown: Okay, but there has been a lot of training for arbitrators in Scotland over hundreds of years. You said earlier that you did not think that people knew about arbitration, but it has been around for hundreds of years.

Hamish Goodall: Yes, it has, but I am afraid that the facts suggest that bodies such as the Confederation of British Industry, the Scottish Chambers of Commerce and the Federation of Small Businesses do not know much about arbitration, and so they do not know what advantages it can offer.

Gavin Brown: That is true. Arbitration used to be very popular, so people used to know about it, and now it is not. However, I do not want to dwell on that point. The message that I want to get

across to the Government is that, if the bill is to make a tangible difference, arbitration will have to be faster. From what I have heard, it might be a little bit faster, in that the number of applications to court might be reduced, but so far I do not see the big knock-out punch, if you like, that will make arbitration faster. There is time to play about with the bill, but it is not crying out to me that it will make arbitration much faster.

10:00

Hamish Goodall: All I can say is that the respondents to the consultation seemed quite content on that point. They consider that arbitration will be faster in future.

Research suggests that, at the moment, arbitration is quicker than going to court. The analytical services division research, which was conducted last year, found that 65 per cent of those interviewed said that they thought that arbitration was quicker than going to court, even under the present law. I hope that that figure will rise dramatically if the bill is passed.

Gavin Brown: Arbitration has to be faster, but it has to be cheaper, too. In what way will the provisions in the bill make arbitration cheaper?

Hamish Goodall: That ties into the point about making arbitration quicker. Parties will be able to choose their arbitrator, who will be able to organise the arbitration to make it efficient and effective, so it should be much cheaper than going to court. It has been suggested to us that no arbitration will take longer than two years. I suspect that Mr Brown might have come across a case that has lasted longer than that, but that is still much quicker than some of the cases that are going through the Court of Session, which seem to take a year to get to a proof, for example.

Gavin Brown: I have not seen many cases that have been conducted and completed in less than two years; that is rare in commercial arbitrations. From what you have said, I cannot see how arbitration will necessarily be cheaper. If you go to the Court of Session, you do not pay for the judge, but you might have to pay £200, £300 or £350 an hour for an arbitrator's time.

Hamish Goodall: I do not think that it would normally be as expensive as that in Scotland; £150, or perhaps £250 for senior counsel, seems to be about the going rate.

Gavin Brown: Okay, let us call it £150. If the rate is £150 an hour for the arbitrator's time, that in itself adds an expense that the parties have to cover. When I asked what would make arbitration cheaper, you said that the parties will be able to choose the arbitrator to set up the procedures. However, they can do that now, can they not?

Hamish Goodall: Yes. The provisions in the bill are intended to produce more effective and quicker procedures. So far, the consultees have agreed that that will be the effect of the bill.

Gavin Brown: What specific provisions will make arbitration cheaper?

Graham Fisher: There is provision for taxation of the expenses by the auditor of the Court of Session, which should make a difference. As Hamish Goodall indicated, if the bill as a whole manages to expedite arbitrations, that should result in savings for the parties.

Gavin Brown: I want to move on to international arbitration. Some of the people who submitted written evidence are in favour of the bill, but they suggested that all that it will really do is bring us into line with south of the border. I think that Mr Goodall used the expression "bring Scotland into line." However, those people are a little disappointed that we are not leap-frogging south of the border, which would give us a better selling point, as it were. Do you think that we are leap-frogging south of the border, or are we only being brought into line with south of the border?

Hamish Goodall: The point of the bill is partly to bring Scotland into line with modern arbitral practice. However, we think that the bill is superior in a number of respects to the 1996 act that applies south of the border, and the Chartered Institute of Arbitrators has indicated that it agrees.

A confidentiality rule has been introduced in the bill, whereas in England there is no statutory rule on confidentiality—it is simply a matter of common law. The bill introduces arbitral appointments referees who will resolve failures in the appointment process for arbitrators, which would reduce the need for recourse to the courts. In England, one has to go to court to get an arbitrator appointed if there is no agreement between the parties. The bill will cover oral as well as written agreements, whereas in England oral agreements are excluded.

In our bill, Scottish ministers are given the power—subject to affirmative resolution procedure—to amend and update the legislation in consequence of changes to the model law or the New York convention. Prospective and post-appointment arbitrators are placed under a continuing disclosure requirement concerning conflicts of interest. All those areas are not covered in the 1996 act, and we think that their inclusion in our bill is an improvement.

I have a much longer list of the areas of improvement here, but I will not read it out.

Gavin Brown: Okay. Those improvements are good, particularly the proposal to introduce referees so that parties do not have to go to court

if they cannot agree. Is it the Government's serious credible view, however, that all those changes added together will attract more international arbitration to Scotland?

Hamish Goodall: The Chartered Institute of Arbitrators and some others agree that it will.

Gavin Brown: You referred in your opening statement to the Scottish Council for International Arbitration, with which Fergus Ewing has held meetings. I think you suggested that its members are possibly the only people who conduct international arbitrations.

Hamish Goodall: Few people conduct international arbitrations in Scotland at present—the SCIA is probably among the very few.

Gavin Brown: The SCIA does not hold back in its written evidence to the committee: it is adamant that the bill will not improve international arbitration in Scotland.

Hamish Goodall: The SCIA takes that view because ministers have proposed in the bill that the United Nations Commission on International Trade Law model law should be repealed. There are a number of reasons why ministers believe that it is correct to repeal the model law, and why that will have the effect of attracting more arbitration to Scotland.

If we do not repeal the UNCITRAL model law for Scotland, we will perpetuate the position in which there are two laws for arbitration in Scotland: one for domestic arbitration, and one for international commercial arbitration. We believe that that is wrong. Furthermore, there is a suggestion that if we keep the two systems, discrimination claims could arise under European Commission law.

The model law is incomplete—it does not, for example, contain powers that enable an arbitrator to award damages or interest—and therefore it does not provide a comprehensive arbitration regime. However, the bill provides such a regime because everything that is in the model law has been included in the bill and, in addition, we have covered all the gaps in the law.

There is no evidence that the model law, which the SCIA wants to keep, has produced very much international arbitration business in Scotland. As I mentioned, Lord Dervaird said that he had conducted about 20 arbitrations in 19 years. The evidence from abroad suggests that the model law is neither a prerequisite nor a panacea when it comes to attracting international arbitration business. London, Paris, Geneva, Zurich, Stockholm and New York are all successful international arbitration centres, but none of them has the model law.

There are some successful model law jurisdictions in the world, including Hong Kong, Singapore and Vienna, but we understand that those places are successful for reasons other than their use of the model law. Hong Kong, for example, attracts a lot of business from the People's Republic of China. Vienna is the traditional centre for arbitration in central and eastern Europe. Singapore gets a lot of support for its arbitration from the Government and the courts. On the other hand, there are arbitration regimes in the world that have the model law but are not so successful, including Australia, New Zealand and Germany. The model law is not a panacea in attracting international arbitration business.

The Law Society expressed concern over the dropping of the model law, but it has reconciled itself to the repeal, because we have assured it that, under the bill, parties will still be able to adopt the model law as the basis for their arbitration should they wish to do so.

Gavin Brown: I accept the argument that some countries have the model law and are successful, whereas others do not have the model law and are equally successful. However, if the primary group that has conducted international arbitrations tells the committee, blatantly, that the measures will not make any real difference to international arbitration, is there not some obligation on the Government to listen to that view and to come up with something to address it? The Government might take a view on the model law, but if the SCIA says that the bill as it stands will not make any great difference to international arbitration, do you not think that there is an obligation on the Government to do something so that the SCIA can say that the bill will make a difference?

Hamish Goodall: The SCIA is the only group that has taken that view. On consultation, the overwhelming body of opinion was that the model law should be repealed. Among those who took that view was the Chartered Institute of Arbitrators, whose past president is an international arbitrator; the Royal Institution of Chartered Surveyors; and the judges of the commercial court of the Court of Session, whose view was endorsed by the judges legislation committee. The body of opinion was definitely in favour of repealing the model law. Although the SCIA has taken a different view, there are lots of international arbitrators who, we understand, believe that the model law is not a prerequisite to attracting international arbitration. As I have said, there are big international arbitration centres that do not have the model law.

Gavin Brown: I accept that point. I think you said that the Law Society has reconciled itself to the repeal of the model law.

Hamish Goodall: Yes.

Gavin Brown: In the written evidence that the committee received—our call for evidence closed only on 15 May—the Law Society stated:

"The Society believes that section 66 of the 1990 Act, which adopts the Model Law, should not be repealed."

Hamish Goodall: I think you will find that the society has submitted an amended version of that evidence, which we saw only this morning.

The Convener: I should clarify that we received a revised version of the Law Society's written evidence yesterday. Rather than opposing the repeal of the model law, that section has been changed to read:

"The Law Society believes that parties to arbitration should be permitted the option of applying the UNCITRAL Model Law if they so wish".

Gavin Brown: Thank you for clearing that up, convener. There has been a debate about the model law.

However, my question remains: if the main group that has conducted international arbitrations in Scotland says that the bill does not achieve what it set out to achieve on international arbitrations, can the Government do something else to persuade that group of experts that the bill will achieve greater success? The debate is not purely about the model law; there must be other things in the armoury.

10:15

Hamish Goodall: We have amended the bill in two ways. First, we have made it clear that parties will still be free to adopt the model law if they wish. Secondly, ministers will be given the power to make orders to amend the legislation to take into account any future changes in the model law. The model law is not a comprehensive arbitration regime, because it has gaps. In the future, we will have a comprehensive regime that is based on model law principles. Everything in the model law is in the bill except, of course, the gaps.

There is no conflict between the model law and the bill, and ministers will be able to amend the rules to take into account any future changes in the model law. We think we have covered all the bases, so we do not understand why the SCIA is insistent that we must use a set of rules that has considerable gaps and which needs to be supplemented by domestic law.

Gavin Brown: Another plank of the Government's aims is low-cost arbitrations. Some trades and professions already have their own low-cost arbitration schemes—you mentioned the ABTA scheme—but have any others committed to introduce such schemes?

Hamish Goodall: We are not aware of any that have committed to do so, but we understand that the Chartered Institute of Arbitrators, which runs about 30 or 40 low-cost consumer schemes throughout Britain, will produce short-form rules based on the bill for use when industries, professions or trades want to start up such schemes in the future.

Gavin Brown: There are some low-cost arbitrations at present. For example, the Society of Motor Manufacturers and Traders Ltd, from which we received written evidence, has a simple, straightforward scheme. Will the bill make low-cost schemes more complicated? Will the 25 or 26 mandatory rules suddenly be applicable to existing low-cost schemes?

Hamish Goodall: That is a good question.

Graham Fisher: There is no commencement provision in the bill. Detailed provision will be made by commencement order under the bill, so that is not clear at present. In the future, however, if low-cost arbitration schemes are used in particular arbitrations, the rules in the bill will apply to them. They will certainly have to take account of the mandatory rules but they will be able to vary the default rules. The Chartered Institute of Arbitrators says that it will prepare short-form contracts for use under the bill, which might help to simplify the process.

Gavin Brown: I do not want to press you too much on that, but it would be helpful if the Government could clarify the position on existing schemes. The bill might kill off or overcomplicate effective low-cost schemes that are up and running. We do not want to land such schemes with the 25 mandatory rules, which include all sorts of provisions. For example, they state that the person cannot get a result until they have paid the arbitrator's expenses, which have to be shared out between the parties.

Mr Fisher said that the rules will apply to schemes that are set up in the future, but they will also apply to current schemes. They will not apply to contracts that have already been signed, but if a contract is signed after the bill comes into force, even though the scheme was already up and running, I presume that it will apply to that contract. Has the Government considered whether the bill will impact on existing schemes and accidentally complicate them? Perhaps the Government could provide a written submission on that in due course.

Hamish Goodall: We will take that away.

Gavin Brown: I have a couple of narrow points on some of the rules.

The Law Society states that one of the weaknesses of arbitration is that arbitrators do not

have the power under common law to award damages. Rule 45 explicitly inserts that into the bill, which is helpful, but it is a default rule as opposed to a mandatory rule. The Law Society questions whether that should be a mandatory rule, because the bargaining powers of various parties entering into a contract are different. If a case involved construction, for example, and the person who wanted the building to be built put out a tender to four or five different contractors, that person could easily stipulate that rule 45 would have to be excluded if the contractors wanted the contract. Does the Government have a view on the Law Society's concern?

Hamish Goodall: We will have to take that away and think about it. We received the Law Society's comments only yesterday.

Gavin Brown: Okay. I cannot expect you to have an answer so soon.

Hamish Goodall: However, I can give you a view on the Law Society's comment on rule 46, regarding interest.

Gavin Brown: I was about to come to that.

Hamish Goodall: We would not want to make rule 46 a mandatory rule, as Muslims would then be unable to arbitrate because, under Islam, they could not charge interest.

Gavin Brown: Would that not cause the same difficulty, though? Once the decree arbitral is pronounced, the interest on that will run from the very next day. How will you get round that?

Hamish Goodall: For Muslims?

Gavin Brown: Yes.

Hamish Goodall: Again, we will take that away and think about it.

Gavin Brown: Okay.

Section 9 deals with sisting for arbitration. Traditionally, the parties raise a court action, the court sees that there is an arbitration clause in the contract and the matter is paused—or sisted, to use a legal term—while the parties go and arbitrate. In the bill, you have narrowed the reasons for refusing a sist, which is perfectly sensible. However, the commercial judges of the Court of Session make the point that some contracts may have arbitration clauses and some may not. There is a whole web of issues in contracts—construction contracts are particularly strange.

At the moment, courts can refuse a sist to arbitration if there is more than one dispute and it would be clearer to have them all conjoined in one court action. That possibility would be removed under the bill, and the commercial judges of the Court of Session have raised concerns about that. Half the court action might go ahead because there is no arbitration clause while the other half might go off to arbitration, creating a real legal mess. Does the Government have a view on what the commercial judges said?

Hamish Goodall: Again, we need to take that away and think about it. Sorry.

Graham Fisher: We were not sure that the commercial judges had fully realised that section 86 of the 1996 act, which applies in the rest of the United Kingdom, had not come into force. For the rest of the UK, there is no discretion for domestic arbitration—to sist or not to sist. As Hamish Goodall says, we will think about whether there is some basis for discriminating between domestic arbitrations and international arbitrations.

Gavin Brown: The Court of Session judges have raised another valid concern. The point of the bill is to consolidate Scottish arbitration law into one document that is clear and easy to use. They point out that sections 87 and 88 of the 1996 act are applicable to Scotland and suggest that, to keep the bill clear and easy to use, those sections should simply be re-enacted in the bill. Does the Government have a view on that?

Graham Fisher: We basically agree with that, in principle. The difficulty is that consumer protection measures are reserved to Westminster. We would have to work out a way—say, by creating an order under section 104 of the Scotland Act 1998—to amend the provisions in the bill once it was passed. Unfortunately, it is not possible to do that in the bill as it stands.

Gavin Brown: So, the Court of Session judges raise a valid point, but—

Graham Fisher: Yes. We would like to do that. It would make perfect sense to have as many of the rules as possible in one place.

Gavin Brown: I have two final questions. First, anonymity is one of the reasons why people go to arbitration. Currently, if there is an appeal to the Court of Session on a matter of law, anonymity is lost and the matter is reported in *Session Cases* and the *Scots Law Times*. Under the bill, the court would not be able to report the names of the parties involved in the action; however, I presume that it would have to report the action itself. Would it have to call the case something like "X against Y", as is done for child protection cases?

Graham Fisher: Yes. That is the intention.

Gavin Brown: There is a slight danger, though, is there not? Child protection cases can be kept anonymous, because people might not know who is involved. However, in a case about the building of a stadium, for example, it would be apparent what the dispute was, especially if people knew the sums of money that were involved and the

nature of the dispute. Is there any point in having that anonymity rule for when cases go to court if it will be obvious who is involved anyway?

Graham Fisher: I suppose that it will not be obvious in all cases, so there will be a point for some cases. As you say, in some cases, it will probably not be possible to guarantee that the matters are entirely confidential.

Gavin Brown: I have a final, narrow point. The Law Society of Scotland raised concerns about what it calls retroactive effect. If memory serves me right, the Housing Grants, Construction and Regeneration Act 1996 stated explicitly that the adjudication provisions applied only to contracts that were signed after 1 May 1998. The Law Society argues—probably correctly—that, although the bill will not apply to arbitration that has started before the provisions come into force, it is not clear whether the bill will apply retroactively where a contract has been signed and parties have agreed to go to arbitration but have not yet done so. There must be quite a lot of contracts like that. Can something be done to tidy that up and clarify the issue?

Graham Fisher: As I said, the detailed transitional arrangements are not in the bill. For the reasons that have been raised, we will have to consider carefully how the bill will apply to future contracts. Some consultees expressed the view that it would be easier for arbitrators to take a view across the board on whether the provisions apply to arbitration agreements that are signed before the bill comes into force. However, there are arguments the other way, too. We will have to consider the detailed arrangements carefully. We are happy to consider that as the bill progresses.

Gavin Brown: Thank you.

The Convener: Our committee expert has finished—we will move on to other members.

Lewis Macdonald (Aberdeen Central) (Lab): I am interested in the relationship between the present arbitration system and the system that is envisaged, and also between the different types of arbitration. I was struck by the point in Hamish Goodall's introduction that, of 300 arbitration cases per annum, only 50 are proper commercial arbitrations and the majority are consumer focused. The committee has an interest in economic benefit, but we must also consider the consumer interest. What will be the impact on consumer arbitration cases of attracting a larger number of commercial cases?

Hamish Goodall: Are you asking about the impact on consumer cases?

Lewis Macdonald: Yes. In other words, how will the current balance of arbitration cases, which you described, be affected if the bill achieves its objective of attracting more commercial arbitration?

Hamish Goodall: It will be just that—there will be much more commercial arbitration, although it is expected that there will be a lot more consumer arbitration, too. Based on levels of arbitration in England, the Chartered Institute of Arbitrators estimates that, once the bill is enacted, each year in Scotland there will be about 500 consumer cases, 250 commercial cases and 200 small business cases.

Lewis Macdonald: That would be a doubling in the number of consumer cases and a fivefold increase in the number of commercial cases.

Hamish Goodall: Roughly, yes.

Lewis Macdonald: What impact will that have on the way in which firms deploy their resources in the area of arbitration? Should those who have recently made use of arbitration to protect their interests as consumers be concerned about the change in the balance of cases?

Hamish Goodall: Consumer cases involve private individuals rather than firms—

Lewis Macdonald: But consumers have access to arbitrators who are quite expensive, as Gavin Brown said.

10:30

Hamish Goodall: In consumer arbitration schemes, costs are subsidised for the benefit of the consumer. For example, the ABTA scheme allows a person to claim up to £5,000 at a cost of less than £100; the rest of the cost is subsidised by the industry. For claims up to £10,000 I think that the cost is about £172, which bears favourable comparison with the cost of taking a case to court.

Lewis Macdonald: It depends on whether an industry body has signed up to an arbitration procedure.

Hamish Goodall: Yes.

Lewis Macdonald: If an industry body provides for arbitration, to what extent is that spelled out in contracts into which consumers enter for the supply of goods or services? Will the bill change the current situation?

Hamish Goodall: It is entirely a matter of commercial choice for the people who draw up the contracts. It is impossible to say how many contracts currently include arbitration clauses. We hope that in the future more bodies will consider including such clauses. For example, the Scottish Government's procurement directorate includes an arbitration clause in all its contracts, as a minimum.

Lewis Macdonald: Does the law require the possibility of arbitration as a method of resolving a dispute to be drawn explicitly to the consumer's attention?

Graham Fisher: The consumer protection provisions in the 1996 act have the effect of protecting consumers against contracts in which they might be bound by arbitration clauses that they might not want to be caught by.

Lewis Macdonald: Will the bill affect that?

Graham Fisher: No, for the reasons that I gave earlier.

Lewis Macdonald: What is the current provision on employment contracts? Is it envisaged that more employment disputes will be dealt with through arbitration as a result of the bill?

Graham Fisher: Provisions on what is known as arbitration in relation to employment, such as Advisory, Conciliation and Arbitration Service provisions, are specialised procedures in their own right and are not intended to be caught by the bill. Section 14 contains detailed provision on how statutory arbitration will be affected by the bill. In effect, statutory arbitration procedures—if indeed they count as arbitration procedures—will take precedence over the provisions in the bill.

Lewis Macdonald: That is helpful.

I think that it is fair to say that employees' personal injury claims against employers in relation to industrial injuries currently tend to go to court. Is there an expectation that that will change as a result of the bill?

Graham Fisher: Not particularly, on that point—

Lewis Macdonald: So that is not an area about which, for example, the Government is talking to employers about contractual provision.

Graham Fisher: No.

Lewis Macdonald: We talked about the intention to move away from the model law. I presume that in the current arrangements the costs of maintaining and updating legal provision are borne not by Scotland, but by the body that administers the model law.

Hamish Goodall: Yes, that is right. I understand that revisions to the model law are in prospect but are still at draft stage. I think that the work is done by a committee of the United Nations.

Lewis Macdonald: So the UN bears the cost of that work. If Scotland repeals the model law, will the maintenance costs fall to the Scottish Government?

Hamish Goodall: No, because we will react only to changes in the model law. Ministers will, by order, amend the arbitration legislation to take into account the changes that have been made.

Lewis Macdonald: Changes will not be made automatically.

Hamish Goodall: No.

Lewis Macdonald: In other words, you will have to maintain a watching brief on changes that are made to the model law. Is that an extra cost for the Scottish Government?

Hamish Goodall: I think that such a cost would be insignificant.

Lewis Macdonald: Why?

Hamish Goodall: Because practitioners will tell us when the model law is about to be changed.

Graham Fisher: Given the international obligations that are involved, I do not think that the model law is updated very often. There was an update in 2006, but before that it took some time for changes to come through the pipeline.

Christopher Harvie (Mid Scotland and Fife) (SNP): I have a general question—my points tend to be more general—about areas that are strengthening in commercial adaptation in modern economics and technology. Areas of arbitration that were not significant in the past could become areas of major importance. I am thinking of the Common Market legislation that last year opened up the European railway system to allow trains to run internationally. The legislation enables German trains to run in France and through the Channel tunnel to Britain, over a wide variety of systems of track ownership. In Britain, one of the uncovenanted and much-criticised results of the Railways Act 1993 is that up to 300 legal personalities are running the railways at any one point. Could Scottish arbitration procedure establish itself in such new, developing contexts in order to become of international significance?

Hamish Goodall: There are a number of areas in which Scottish arbitration might be able to create a niche market for itself—the new renewables industry being one. I reiterate that it is up to those who wish to provide arbitral services to make the case to the industry concerned. They have attempted to do so in relation to the oil industry, but at present, unfortunately, most arbitration work for the North Sea goes to London. However, I understand that significant efforts are being made to change the minds of some oil companies to persuade them to arbitrate in Scotland instead. Arbitration should try to get into any new industry on the ground floor, by getting arbitration clauses included in the original contracts.

Christopher Harvie: I will cite an example from another part of transport. I declare an interest, as

the president of the Scottish Association for Public Transport, which represents operators, unions, local authorities and the like and encourages co-ordination between means of transport. One of the problems that we come up against is that the Transport Act 1985 specifically prohibits consultation between transport operators. That leads to the spectacle in so many Scottish bus stations of a bus from company A coming into the bus station just one minute after a bus from company B, which provides a potentially useful connection, has disappeared. There can be no consultation between the companies without infringing the terms of the 1985 act, which specifically bans collusion between companies. Could arbitration in that area be used to replace a particular legal inhibition with common sense? If so, could the outcome be incorporated into common law, as case law, and used to build up an incremental form of agreement in the industry?

Many of the problems that will arise between international train operators and the people who control the tracks and the signalling will be of that nature.

Hamish Goodall: Arbitration will assist only if an agreement to go to arbitration is included in the original contract.

Graham Fisher: That might be a matter for transport legislation in the first instance. As I mentioned, we are taking the powers to amend existing arbitration procedures in transport legislation. We could modify a particular statutory arbitration procedure to make it sit with the principles and provisions of the bill, but to bring in arbitration in the first place would be a step beyond that. I suppose that that is an issue for transport legislation in the first instance.

Christopher Harvie: I have a final point. The origins of international arbitration lie in the realm of transport and the Alabama case of 1871. The fact that the armed cruiser Alabama, a Confederate ship, virtually wiped out the commerce of the federal merchant marine during the American civil war was put down to the fact that the Alabama had been allowed to escape from its construction site in Birkenhead, which was owned by a Scotsman, into the Atlantic. The arbitration of the Alabama case established precedents that were incorporated into international law. Could there be parallels with conflicts about national jurisdiction in transport, which might necessitate the creation of systems of international co-operation? If arbitration clauses were to be bound into the operation of Eurostar or the extension of Eurostar services to Scotland, for example, that would be an area in which a Scottish arbitration procedure could not just simplify matters, but be incorporated into international procedures of land transport and also, incidentally, bring a lot of useful business to Scotland.

Graham Fisher: I suspect that it would, particularly in international matters, be down to parties' willingness to use arbitration procedures, such as those for which the bill provides.

Hamish Goodall: You might be interested to know that the two acts of Parliament that make provision for the Edinburgh tram system contain provisions that require disputes to be referred to arbitration. However, I understand that a recent dispute was settled before things went that far.

Ms Wendy Alexander (Paisley North) (Lab): I want to pursue the consumer issue that Lewis Macdonald dealt with. There are two main issues—speed and cost. On cost, although I take your point that using arbitration is cheaper than going to court, the mechanism for enforcing arbitration awards is an issue that has been raised in submissions to the committee. What keeps some cases out of court and out of arbitration is not simply concern about the cost of the procedure but anxieties about what the award will be and whether it will be enforced.

Comments have been made to us about rules 46 to 56, which relate to the mechanism for enforcing arbitration awards. On section 10, which deals with enforcement, people want to know how easy it will be in practice to enforce domestic arbitral awards, particularly in small-scale consumer arbitrations. Does the bill represent a step change? In the light of the representations that you have received, is that an area in which amendments might be anticipated?

Hamish Goodall: Graham Fisher is the expert on that, but an arbitration award can currently be enforced in a court. That will continue to be the case in the future.

Ms Alexander: Will the bill help us to overcome the impediment of people being reluctant to go to arbitration because of anxieties about subsequent enforcement?

10:45

Graham Fisher: Section 10 puts the current position on a statutory basis, but I am not sure whether it will make a step change to address concerns about enforcement. Are you thinking of particular concerns?

Ms Alexander: Evidence has brought the issue up. If we want the bill to be at the cutting edge, this matter will be of interest as the bill progresses. That relates to my second question, which is about time limits. I understood from your answers to Gavin Brown that because some large commercial or international arbitrations are complex, an arbitrary time limit might not have merit. However,

we are trying to encourage consumer arbitration, which is distinct. Adjudications under the Housing Grants, Construction and Regeneration Act 1996 are subject to time limits. You said that ministers considered generic time limits. Did you consider the case for time limits for consumer adjudications? Are they still on the agenda?

Hamish Goodall: When a profession, trade or industry establishes an arbitration scheme, it will decide whether to impose time limits—the Government should not impose such limits. An arbitration scheme for an industry should reflect that industry's circumstances. If an industry wants time limits, it can set them. We cannot do that.

Ms Alexander: I will press you. I understand that time limits are set for adjudication under the 1996 act.

Hamish Goodall: That is right.

Ms Alexander: Those time limits are statutory, so a decision was made that time limits were appropriate for one class of arbitration. I am asking not about generic time limits but about time limits for consumer arbitrations, which are—arguably—a subset and for which a case might be made if we want the bill to be at the cutting edge. A legal precedent for arbitration time limits exists.

Graham Fisher: The precedent is not in the consumer context, but we could certainly think about imposing a time limit for a set of arbitration procedures for which that would be valuable. However, the Scotland Act 1998 limits what we can do to protect the consumer.

Hamish Goodall: It is worth making the point that adjudications in the construction industry are on single issues, which is why they can be done within 28 days. Such adjudications occur only in the construction industry. Adjudication has been characterised as a quick and dirty fix to get construction projects finished, because contractors and subcontractors keep falling out with each other. If a dispute can be adjudicated so that a project can be completed, that is beneficial. However, even if an adjudication has taken place during a construction dispute, that might not be the end of the matter. It is in most cases, but arbitration or litigation sometimes takes place once a project is done and dusted.

Ms Alexander: The wisdom of the decision rests on the character of the consumer adjudications that are undertaken in Scotland. My inference—it is no more than that, which is why I ask you to write to us if you have evidence about the character of consumer adjudications in Scotland—is that such adjudications relate largely to construction or trading standards disputes. If that is so, time limits might have merit. If you know of any analysis of the couple of hundred consumer adjudications, seeing it might help us to reflect further on whether time limits would be appropriate in order to expedite the procedure. If it transpires that a high percentage of consumer adjudications are incredibly complex, and that time limits would therefore be inappropriate, so be it. However, the matter might be worth a second look, as part of the scrutiny of the bill.

Hamish Goodall: We can certainly write to the committee about that.

Nigel Don (North East Scotland) (SNP): I want to go back to the founding principles of the bill. They seem to be very sensible, but there is no hierarchy. Should there be?

Hamish Goodall: We consulted on that point, and the message was that there should not be a hierarchy. The principles, as you probably realise, are taken from—and are virtually the same as—those in the Arbitration Act 1996, which applies in the rest of the UK. I am fairly certain that there is no hierarchy among them under the 1996 act.

Graham Fisher: That is right.

Nigel Don: Are you happy about that?

Hamish Goodall: Yes.

Nigel Don: I had been wondering from the beginning why we were not consolidating all the rules, but the discussions about consumer law have immediately explained to me why some rules will not be included. I presume that the rules that you think are from English law could be mentioned in some explanatory note, so that a person coming new to the matter could find that. Is that the only exception? Are any other aspects of the law not being consolidated in the bill?

Hamish Goodall: I think that everything in the 1996 act is also in our bill, is it not?

Graham Fisher: Broadly, that is true. I was not sure whether the question was about existing Scots law and what the bill sweeps up. Aside from the consumer-protection measures that we have discussed, everything else in statute is in the bill, as far as we can see. Any bill will rest against the common-law background that precedes it. Otherwise, the bill will govern any arbitration in Scotland.

Nigel Don: What I am trying to establish is that the bill is comprehensive, except in so far as there are matters that you cannot include in it, because they are reserved. Those matters could be referred to in notes to ensure that people know about them. In principle, the bill is complete.

Graham Fisher: Yes, and we are happy to put such things in the explanatory notes, if that helps.

Nigel Don: I am thinking of the student who will want to have one document, for example.

I return to the point that Gavin Brown made earlier about the desirability of a step change. I am not talking about legal aspects, but about economic aspects. I understood the point about the process being made faster and cheaper, and I took notes about that. The answers that I heard were largely aspirational, but not entirely unfounded. Have other things been suggested that could have been incorporated into the bill, which really would have provided for a step change, but which we have had to pull back from doing, because of the potential unwanted consequences? Does the bill go as far as we could have gone?

Hamish Goodall: I do not think that anything else of that nature has been suggested. At consultation, nobody suggested time limits. I do not think there was anything else.

Nigel Don: As has been said, arbitration does not happen until parties get into dispute.

Hamish Goodall: Yes.

Nigel Don: Arbitration also happens, however, only after agreement that parties would go to arbitration. There is a huge time delay in all that.

Hamish Goodall: Arbitration agreements are often written into contracts. However, if parties fall into dispute, they might make ad hoc decisions to go to arbitration. It does not have to involve a previous arbitration agreement; the parties that find themselves in a dispute could simply agree to go to arbitration.

Nigel Don: That takes me to my next point. Let us assume that we enact the bill in reasonable order—let us not worry about the details, which will end up being whatever they are. What will the Government do, in principle, to ensure that arbitration is taken up as fast as possible by all those who could derive benefit from it?

Hamish Goodall: The Government will issue guidance on the bill in the normal way. It would be inappropriate for the Government actually to market arbitration—which will be up to those who wish to provide arbitral services—as opposed to any other form of dispute resolution, such as mediation or, indeed, litigation. We can certainly try to publicise the existence of arbitration for the benefit of members of the public, but marketing it would be slightly different.

Nigel Don: The Government might like to think about that, because if we want to make a step change for Scotland in this area—I recognise that the bill is part of that—we need to find an appropriate way of ensuring that the rest of the world has noticed what is going on.

I want to pick up on the part of rule 45 about damages. First, I make a plea, particularly on behalf of the construction industry, that damages be mandatory. As we go down the sub-contractor tree to the people at its roots, we find that it is actually two men and a dog who do the work on the ground. They will have no commercial clout and will undoubtedly find themselves on the end of the minimum standard. We should try to draft provisions as they are drafted in consumer law—I know that we have no competence for that—in order to give the individuals at the bottom of the tree the rights that we think they should have. If we make damages anything other than mandatory, they will be excluded in the small print by a competent lawyer. I just ask you to consider whether that is really what we want in this context.

If the damages provision remains in the bill, will it include provision for damages for delay in the arbitration process? If so, it would be in no party's interest to delay arbitration. That would be one of the best ways of keeping arbitration moving.

Hamish Goodall: There are provisions in the bill—I am sure that Graham Fisher will tell me where in a minute—to allow the arbitrator to take into account in the expenses that are awarded any delay that is caused by a party to the arbitration.

Nigel Don: Thank you. In that case, I merely reiterate my point that, if the bill includes provision for mandatory damages, the ultimate sub-contractor will have the best protection that can be provided. Given that such people do the actual work, that seems to me to be a sensible way forward.

Marilyn Livingstone (Kirkcaldy) (Lab): Given the bill's potential value to the Scottish economy, which is why it was referred to this committee, I agree with Nigel Don's point about marketing. I have a question about the seat of arbitration. If someone chose to arbitrate in Scotland, that would not necessarily mean that the arbitration would have to be dealt with in accordance with Scots law, which would bring us full circle. If we do not market the bill as something different and if someone would not need to use the bill's provisions, what would bring someone to Scotland?

Hamish Goodall: I think that any arbitration would be subject to Scots procedural law, although it might use the substantive law of another country. Graham Fisher will say whether that is right.

Graham Fisher: Yes. The substantive law that is used in a dispute would be separate from the application of the bill's procedural rules. It would be a complicated legal question as to which international arbitrations that come to Scotland would fall under the bill's provisions. If arbitrations end up being seated in Scotland for the purposes of the bill and are under our jurisdictional rules, the regime of the bill will apply and will be mandatory.

I do not know whether that goes some way towards answering Marilyn Livingstone's question. Certainly, parties can choose to use Scots arbitration law as the law that governs the procedural aspects of the arbitration. They can then separately have the dispute resolved as a question of English law. There are many complexities, but essentially what the parties put in their arbitration agreement will decide whether they will use Scotland as a venue.

11:00

The Convener: I have a question about how the bill deals with the Scottish arbitration rules. What is the thinking behind having them in a schedule rather than the main body of the bill? The commercial judges of the Court of Session have expressed concern that it is unclear whether the rules will form part of general law.

Hamish Goodall: There is no question but that the rules will form part of the general law.

The Convener: There is a question—the commercial judges are questioning whether the bill makes it clear.

Hamish Goodall: The fact that the rules are in a schedule is, to some extent, irrelevant because they will form part of the law of Scotland as if they had been in the body of the bill.

Graham Fisher: It is a matter of statute law. We are happy that the bill will have the intended effect, but we note the commercial judges' comments and their suggestions for improving the drafting. We will reconsider the wording but, as a matter of general statutory interpretation, the schedule is as much a part of the bill as any other element is. We have no concerns on that front, but we are happy to re-examine the constructive and helpful comments that the commercial judges have given us. We have another list of points that we are happy to take into account and consider.

Hamish Goodall: It might be worth pointing out that statutes regularly use schedules to hive off provisions. An example is the Scottish Parliamentary Pensions Act 2009. There is no doubt that MSP pension entitlements have a statutory underpinning.

The Convener: I am not sure that we should ever use Scottish parliamentary systems as a good basis for such arguments.

We seek follow-up on a number of points. Do you have any information on the nature of consumer arbitration, which Wendy Alexander raised? At one point, you listed the ways in which the bill is an improvement on the current United Kingdom legislation; perhaps you could give us the complete list in writing. It might also be of benefit to the committee if you could provide the number of respondents that were involved in the analytical services division research that is referred to in paragraph 35 of the policy memorandum.

Hamish Goodall: I can tell you that now: I think there were only 20, which is an indication of the low level of arbitration in Scotland. I will check that.

The Convener: That will be helpful.

I thank Hamish Goodall, Alison Dewar and Graham Fisher for their evidence.

11:03

Meeting suspended.

11:06

On resuming—

Climate Change (Scotland) Bill

The Convener: Item 3 is consideration of the committee's approach to stage 2 of the Climate Change (Scotland) Bill. The committee published its own report on sections 48 to 51 of the bill, which deal with energy matters, and made a number of recommendations, which were agreed unanimously, on how the bill should be amended at stage 2.

The Government lodged most of its stage 2 amendments to the bill last week. We will discuss what the committee wishes to do in the light of those amendments. We have an approach paper, page 3 of which mentions points on which the Government has not yet lodged amendments that we may wish to consider lodging. I propose that the committee lodge such amendments in my name.

I open the matter for discussion. Committee members should also have received yesterday a further response from the minister on the recommendations from this committee that were not covered in the lead committee's report.

Lewis Macdonald: I will start with promoting and improving energy efficiency. I have had some discussions on that with the Government, which is minded to accept amendments on the matter. It has been slow to lodge an amendment partly because of that and is happy to accept an amendment from elsewhere.

I have in front of me a draft of an amendment in my name, which would address the issue in section 48(2). I am happy for it to be lodged as a committee amendment in your name, convener, if you are so minded. The amendment would replace the existing wording, and concerns

"promoting energy efficiency; and … improving the energy efficiency of living accommodation, in Scotland."

That form of words would take us forward. Arguably, it is not the only thing that we need to do, but it would certainly address the issue in section 48(1).

The Convener: Does the committee agree to lodge that as a committee amendment?

Members *indicated agreement*.

The Convener: In that case, I ask Lewis Macdonald to forward the proposed amendment to the clerks.

Lewis Macdonald: I am happy to do that. In addition, there may be some merit in retitling section 48, although I have not discussed that with the Government. At the moment, the title is "Duty of Scottish Ministers to promote energy efficiency". We might want to lodge an amendment to extend it.

There is also an argument about repeal of section 179 of the Housing (Scotland) Act 2006, in schedule 2 to the bill. It might be interesting to lodge an amendment on that, if only to see how ministers respond.

Rob Gibson (Highlands and Islands) (SNP): A number of amendments are being suggested. Will the parts of the bill to which they refer be dealt with at this committee?

The Convener: No, they will be dealt with at the Transport, Infrastructure and Climate Change Committee, but I would go to that committee to move any amendments on behalf of the Economy, Energy and Tourism Committee. It is open to any member to attend any committee meeting where stage 2 of a bill is being dealt with.

We are not sure when the amendments will be considered. The Transport, Infrastructure and Climate Change Committee has three meetings set aside for stage 2 of the bill; I suspect that the proposed amendments would be dealt with at the last of those. The Transport, Infrastructure and Climate Change Committee might have to go back to the Government to ask for an extension to stage 2 in order to deal with all the amendments. We will have to wait and see.

Is the committee content that we also lodge a probing amendment on repeal of provisions in the 2006 act?

Members *indicated agreement*.

The Convener: Secondly, there is a proposed amendment to incorporate annual energy efficiency and renewable heat targets and reporting requirements in the relevant sections of the bill. Are members content to lodge such amendments?

Rob Gibson: Yes. I have taken some initiative in that direction, although I have not yet seen the final wording of what is proposed. I am perfectly happy to share that with members once I have discussed it with the Government, as Lewis Macdonald did. We could sharpen up the targets for renewable heat. At the moment, 1 per cent of heat comes from renewable sources and the target to get that to 11 per cent by 2020 has been set, but I am trying to address the road map to get us to the 11 per cent target.

The Convener: Are members content for us to lodge an amendment to that effect?

Members *indicated agreement*.

The Convener: The clerks can discuss the wording with Rob Gibson. I hope that we can reach agreement on that.

The next suggestion is that we lodge an amendment to ensure that regulations made under section 50(1), which will make provision for the matter that is mentioned in section 50(4), are subject to the affirmative procedure. The recommendation in our report was that all secondary legislation that will be associated with the bill should be subject to the affirmative procedure. The regulations under section 50(1) appear to be the only secondary legislation that would not be subject to the affirmative procedure. Are members content to lodge an amendment to that effect?

Lewis Macdonald: Has there been any explanation from the Government as to why the regulations will not, in the bill, be subject to the affirmative procedure? I have not seen one.

The Convener: No. Perhaps we should lodge a probing amendment to get that explanation.

The minister made a commitment to provide draft regulations on the energy performance of non-domestic buildings before stage 2, but we have not seen them yet. He said that such regulations would require secondary legislation. The committee considered that those regulations should be extended to the domestic sector. The proposal is that we lodge an amendment on that basis.

Christopher Harvie: It would be useful to have examples of different types of non-domestic buildings and their likely footprints—if a building can be said to have a footprint. There is a wide variety of buildings from industrial equipment and housing right through to supermarkets, which interest me most.

The Convener: That is a fair point. Unfortunately, we are in a bit of a difficult position, because we do not yet know what the draft regulations will look like. The question is whether we wish to lodge an amendment on the basis of our recommendation that we include domestic buildings in the regulations.

Lewis Macdonald: I have had discussions with interested people, who have suggested an amendment to insert a new section that would apply to domestic buildings. In most essentials, that section would be the same as section 50 as it applies to non-domestic buildings, but with perhaps one or two additional points regarding enforcement and how it would apply in practice. Again, it may be that such an amendment would encourage ministers to make commitments that would meet the concerns that have been raised. It would be worth lodging such an amendment. If the committee decides to do so, I will be happy to share the wording of the suggested amendment.

11:15

The Convener: Are members content to lodge such an amendment, as a committee amendment?

Members *indicated agreement.*

The Convener: There are two final suggestions to consider. The first is an amendment to give the Scottish ministers enabling powers to provide for some form of local taxation rebate for investments in renewables. The proposal is not that they would have to introduce such a rebate, but that they would have the powers that would enable them to do so. The Government had argued that providing such a rebate would require primary legislation, so we need to give it that primary legislative power if they are to do so.

Ms Alexander: I know that the coalition of energy organisations and green organisations that was put together to support Sarah Boyack's proposed energy efficiency and micro-generation bill produced a good briefing for the stage 1 debate on the Climate Change (Scotland) Bill that itemised a number of areas in which they would like legislative action to be taken. Could the clerks take a look at that? I do not think committee amendments could be beyond what we have promised to do, but that itemised list of areas is interesting. Some suggestions are not appropriate for inclusion in the Climate Change (Scotland) Bill, such as the one about further action on permitted development rights, but it would be helpful to check that list of suggestions to see whether we have covered what we can. If we have not, individual committee members could lodge the necessary amendments.

The Convener: I do not think that the clerks received a copy of that submission, which was sent only to members. Could you forward a copy to the clerks?

Ms Alexander: I am struggling to find mine, but I am sure that it can be found—perhaps the Scottish Parliament information centre has a copy. It was the official briefing by the round-table grouping.

The Convener: I am sure that Sarah Boyack has a copy. If you could ask her to forward a copy to the clerks, that would be helpful.

Ms Alexander: Yes.

The Convener: Obviously, the committee would be able to lodge amendments only in relation to the local taxation rebate.

Ms Alexander: That is the most prominent issue.

The Convener: Do members agree with the suggested amendment?

Members *indicated agreement.*

The Convener: The final suggestion concerns an amendment to place an obligation on ministers to produce a renewable heat plan rather than simply giving them the power to do so. They have indicated that they intend to do so, so such an amendment should not present them with any major problem.

Do members agree?

Members *indicated agreement.*

The Convener: The clerks will draft amendments and consult members on their wording. The amendments will be lodged in my name, and members of the committee can sign them—I think up to four members of the committee can sign each one.

Lewis Macdonald: We have talked about the energy efficiency performance of existing domestic and non-domestic buildings and of building standards for new buildings. The remaining question, however, concerns extensions to existing buildings. Is there scope for an amendment that would introduce a section to deal with that?

The Convener: I think that we could consider that as part of the energy inquiry. We did not cover that issue in our report, so it is outwith the scope of what we can lodge in an amendment. Of course, that does not stop anyone else from lodging an amendment to that effect.

We now move into private session.

11:18

Meeting continued in private until 12:28.

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