ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 27 May 2009

Session 3

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

CONTENTS

Wednesday 27 May 2009

ECONOMY, ENERGY AND TOURISM COMMITTEE
17th 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:

Richard N M Anderson
Garry Borland (Faculty of Advocates)
John Campbell QC (Chartered Institute of Arbitrators)
Professor Fraser Davidson (University of Stirling)
Hew R Dundas (Chartered Institute of Arbitrators)
Robert Howie QC (Faculty of Advocates)
Jamie Hume (Scottish Government Business, Enterprise and Energy Directorate)
Colin Imrie (Scottish Government Business, Enterprise and Energy Directorate)
Sue Kearns (Scottish Government Business, Enterprise and Energy Directorate)
Neil Kelly (Law Society of Scotland)
Jim Mather (Minister for Enterprise, Energy and Tourism)
Brian Reeves (Royal Institution of Chartered Surveyors Scotland)
David Rennie (Scottish Government Business, Enterprise and Energy Directorate)

CLERK TO THE COMMITTEE

Stephen Imrie

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Gail Grant

LOCATION

Committee Room 6

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 27 May 2009

[THE CONVENER *opened the meeting at 09:33*]

Arbitration (Scotland) Bill: Stage 1

The Convener (Iain Smith): Good morning, colleagues. I welcome everyone to the 17th meeting in 2009 of the Economy, Energy and Tourism Committee.

The first item of business is stage 1 consideration of the Arbitration (Scotland) Bill. We are joined by a panel of distinguished witnesses, and I ask them to introduce themselves briefly and tell us who they represent.

Hew R Dundas (Chartered Institute of Arbitrators): I am from the Chartered Institute of Arbitrators. I was president of the institute in 2007 and am a full-time international arbitrator in approximately 10 jurisdictions around the world.

John Campbell QC (Chartered Institute of Arbitrators): I am a Queen's counsel at the Scottish bar and, for the moment, president of the Chartered Institute of Arbitrators, which is centred in London, has 12,000 members in about 90 countries and operates through 35 branches. I am a practitioner of the law in Scotland, mainly in town and country planning but in all forms of alternative dispute resolution. I am very glad to be here.

Professor Fraser Davidson (University of Stirling): I am from the University of Stirling and, as far as I know, I am not representing anyone this morning.

Richard N M Anderson: I am an advocate, barrister and attorney, mediator, adjudicator and arbitrator and fellow of the Chartered Institute of Arbitrators. However, I am here in a personal capacity this morning.

Garry Borland (Faculty of Advocates): I am an advocate, and along with Mr Robert Howie, I am representing the Faculty of Advocates. I practise in the commercial and construction field and have relatively long experience as a practitioner of arbitration.

Robert Howie QC (Faculty of Advocates): I am a QC at the Scottish bar. Like Mr Borland, I practise in commercial law, tending to take on construction and shipping cases, and I have significant experience in domestic and international arbitration. Mr Borland is fortunate, in that my experience is, sadly, a lot longer than his.

Brian Reeves (Royal Institution of Chartered Surveyors Scotland): I am a chartered valuation surveyor, arbiter and commissioner for the Scottish Council for International Arbitration. In 2002, I worked on the Dervaird committee and I am also the vice-chairman of the Royal Institution of Chartered Surveyors Scotland international dispute resolution faculty board, which is based in London, and the immediate past chairman of the Scotland RICS dispute resolution faculty board. As an arbiter and expert for the past 30 years or so, I have handled more than several hundred cases in the Scottish market.

Neil Kelly (Law Society of Scotland): I am from the Law Society of Scotland. I have about 25 years' continuous experience in domestic and international arbitration. I am a commissioner of the Scottish Council for International Arbitration, a past committee member of the Scottish branch of the Chartered Institute of Arbitrators, an honorary surveyor and convener of the Adjudication Society in Scotland.

The Convener: Thank you. Because the panel is quite large, members and witnesses should keep their questions and answers as tight as possible. Members can direct questions to individual witnesses or ask a general question. If a general question is asked, witnesses should not feel that they have to answer unless they have a specific comment to make. Otherwise, we could be here all day.

I will start with a fairly general question. The Government has indicated that one of the reasons for introducing the bill is the economic benefit that it will have for Scotland. Can any of the witnesses quantify the bill's potential economic benefits?

Hew Dundas: In our submission, we have endeavoured to quantify some of the bill's economic effects. However, as you can see, certain effects cannot be quantified in any form. One difficulty is that, as arbitration is by definition more or less a private process, there are few published statistics other than those produced by bodies such as the Chartered Institute of Arbitrators that make appointments each year. We do not know, other than through anecdotal information, the number of arbitrations that take place privately between private parties and without the involvement of our institute, the RICS or others.

John Campbell: In its submission, the Chartered Institute of Arbitrators tried as far as it could to differentiate between domestic and international arbitrations; to quantify the value of that work to London; and then to apply a pro rata reduction to reflect the fact that professional fees

in Scotland are lower. The figures that we came up with are set out on pages 4 and 5 of our submission.

Since we made the submission, we have tested the figures—privately, of course—with our colleagues and have sought their rigorous criticism. As no one has demurred materially from the figures, I am reasonably satisfied that they are fairly robust and can be relied on.

Brian Reeves: There is a lot of evidence that does not come from experience. A quite well-known PricewaterhouseCoopers report that was published in 2006 demonstrated that the economic benefits are probably less than what most people might expect, despite the fact that the number of international arbitration cases has increased.

The same theme emerged in a paper by Christopher Drahozal of the University of Kansas, who in 2004 did a study of increased legislation in a selection of countries between 1994 and 1999. Again, the number of arbitration cases increased, but the economic benefits were not quite as large as had been hoped—although that depended on how much effort was put into promoting the various new bits of legislation.

The Convener: I will follow that up from a slightly different angle. Benefits might accrue to businesses in Scotland that decide to go down the route of arbitration rather than other routes, but is there any evidence that the current law deters people from using arbitration? If so, what are the main barriers in the present law that will be addressed by the bill?

John Campbell: I do not want to hog the floor, but a range of deterrents is apparent to anyone who studies the current scene. I should perhaps add to my previous answer that the economic benefit that might result from the bill's passage will not be accrued instantaneously but will accompany the culture change that ought to occur. The figure that we have hazarded is between £15 million and £25 million a year.

You asked about deterrents. As I see it, parties are deterred from participating in arbitrations, if it is not too trite to say so, because of the current state of the law, which is difficult to find and somewhat remote and inaccessible. In addition to that, it is possible in Scotland to derail proceedings if one is so minded by requiring an arbiter to state a case for the opinion of the court. That takes the case away from the arbitrator and puts it into court, when one becomes subject to the vagaries of court delays, which in my experience, for what it may be worth, can be highly significant. In effect, the process is rendered not useless, but clumsy, inaccessible, remote, expensive and all the other things for which people often criticise courts. The bill would mean that that deterrent would disappear.

Richard Anderson: Ordinary litigation presented a number of difficulties that were overcome by the introduction of the commercial court. I have experience in a number of areas of solicitors advising their clients to opt in their contract for use of the commercial court as opposed to arbitration.

Garry Borland: My experience is consistent with what Mr Anderson has just said. I know of a solicitor in a major Scottish firm that practises internationally in the field of construction who follows the practice of simply deleting any arbitration clause that appears in a contract that is presented to him because, historically, he has found arbitration to be an unsatisfactory process.

A more specific answer to your question is that, for a number of reasons, arbitration has not, in my experience, presented itself or been available as a speedy and relatively inexpensive system. I think that that is the main deterrent—it has not been a quick or a cheap process.

Hew Dundas: You asked for evidence. I have been in the oil industry since 1978, both in the United Kingdom continental shelf and around the world. Until not so long ago, I was head of legal at Cairn Energy, which I believe is Scotland's fifth-largest company. Throughout those 30 years, the idea of arbitrating in Scotland has been a total no-go area, for the reasons that the submissions identify, which my colleagues have repeated this morning. The use of arbitration has been unthinkable. The oil industry might have considered arbitration in England after 1996, but it has consistently preferred litigation, given the shortcomings in arbitration here. That is my evidence from 30 years' experience in the oil business. To my knowledge, there has never been a Scottish arbitration arising out of the UKCS.

09:45

Neil Kelly: It is entirely correct that, as Mr Campbell said, the lack of a modern arbitration law for domestic arbitration in Scotland has hampered the use of arbitration. It is to be applauded that the Parliament is considering such legislation now.

The problem with stated case was not that people did not want to use it, but that it took a year and half for the appeal court to hear the cases. That is a slightly different perspective from Mr Campbell's. In my experience, if someone whose business life depends on a tribunal's decision on a dispute is asked whether they want a situation in which they can do nothing if the tribunal goes wrong on the law, their answer is invariably that they would want to do something about such a mistake. That was reflected in the consultation responses.

Robert Howie: My experience reflects that to which Mr Kelly has just spoken. I have found that clients were interested in arbitration as a potentially private and speedy way of dealing with disputes until I told them that it was sudden death and that, if the arbiter got it terribly, horribly wrong on the law and made a schoolboy error, they would be stuck with it. Their enthusiasm then disappeared out of the window and they were desperate to keep the stated case, however long it took, because it was the one protection that they had left. Therefore, they would be concerned at the suggestion that the stated case was simply to disappear and that we would be back to Scottish arbiters being domestic despots, as they were called in the 19th century.

However, with respect to Mr Dundas, it is not quite correct to say that the oil industry has always abjured Scotland. I have been in two international oil industry arbitrations and suspect that, if I have done two, other people have done more elsewhere. Although we may know something about it and cases that indicate that something has happened sometimes pop up in the courts, nobody can really know the figures for the obvious reason that arbitration is a private process.

One problem is the dual-track arbitration system that exists between United Nations Commission on International Trade Law cases and domestic cases. The Government is to be congratulated on seeking to get rid of that. In an international shipbuilding case, I had the unhappy experience of seeing a proof to decide whether it was competent to state a case go on for a whole week with people being brought from all round Europe to give evidence. Under the old, simple domestic system, that would not have happened. There was an enormous delay of more than a year, not because of the stated case but because of the debate about whether a case could be stated, as a furious argument had broken out about whether we were under the UNCITRAL rule or domestic rule. In so far as the bill proposes to get rid of that dual-track system, it is an undoubted advance.

Neil Kelly: I will add something else by way of evidence about how thinking has changed. Construction contracts traditionally used arbitration as their modus operandi for resolving disputes. The standard form of building contract in Scotland always included arbitration clauses but, in more recent times, because our law of arbitration has not been considered to be modern and up to date, the default dispute resolution provision in contracts that the Scottish Building Contract Committee issues has been for cases to go to the commercial court. That reflects the fact that, as Mr Borland said, people in construction who are looking for a speedier and more cost-effective method of dispute resolution have tended to go the commercial court.

Rob Gibson (Highlands and Islands) (SNP): It was pointed out that the competitive nature of lower fees in Scotland might be attractive if a simplified process was available. Does that matter much? Will it be possible for us to measure the potential value to economy?

Hew Dundas: An International Chamber of Commerce study from a few years ago shows that the costs of an international arbitration are roughly 80 per cent the parties' legal and other costs, roughly 12 per cent the costs of the tribunal and 8 per cent the costs of the ICC itself. We can assume that, for international arbitrations, arbitrators will charge much the same everywhere, although that is not exactly true.

The ICC charges scaled rates, so 80 per cent of the costs of the arbitration are the legal fees. If that cost can be cut sharply, by choosing an alternative jurisdiction to the expensive jurisdictions of London and New York, the parties can make a significant saving. To give one example—which will probably frighten my colleagues from the Faculty of Advocates—the equivalent of a QC in Singapore is on about £230 to £240 per hour. Some years ago there was a famous quotation from a fashion model, who said that she would not get out of bed for less than $10,000 a day—I invite the English bar to appear in an arbitration at a rate of £250 an hour. Significant savings are available in Scotland in comparison with some other jurisdictions.

Richard Anderson: The total cost of an arbitration in London can be quite large, if one considers the cost of the premises and hotel accommodation for a large number of witnesses and representatives. The attractions of Edinburgh, and Scotland, will be an added element if arbitration can be seen to work and is reasonably priced here.

John Campbell: In many international cases that present themselves for an arbitral solution, a choice needs to be made at some point about where the arbitration should be conducted. The nature of global or transnational contracts means that when arbitrators are selected, such a choice may need to be made.

Part of the reason for choosing a particular location is, of course, the cost. It is not true to say that parties simply go where their lawyers are, or, conversely, that lawyers go where the parties are. If someone would rather spend four weeks in Riga, or the Belgian Congo, or St Andrews, there may be a pretty obvious answer. Without being invidious about any other part of the world, experience tells us that that is a factor in determining the outcome of that question.

In addition—my friends have already mentioned the cost of legal help—Scotland is well equipped

with decent lawyers who practise in the arbitration trade. London is too, but lawyers in each of the two countries operate at different fee rates, so the marketplaces are quite different.

The Convener: I would always recommend St Andrews.

Rob Gibson: Why not come to Inverness?

We are attempting to measure the potential value of arbitration to the economy. Aside from the issues of fees and your explanation that the legal costs are a large part of the decision-making process, is there any other aspect of the potential value that we could measure to get a handle on the issue?

John Campbell: It is hard to measure. The convener asked about attractiveness to disputing parties, and we have all talked about the fees of professionals, representatives and arbitrators, and so on. Looking at the issue from the other side, from the point of view of the user of the process, it seems that there might be a culture change, in that this nice tidy bill—with the law in one bit and the rules in the other—might present to disputing parties a convenient home-grown way of achieving a rapid solution.

There will always be an argument—as has been ably presented by Robert Howie and Garry Borland—that it is better to go to court than to an arbitrator. That is to do with the quality of the decision maker, and it depends on the case whether one needs absolute legal certainty or whether something a bit more rough and ready will do. To sell that domestically would be an intangible economic benefit, because serious commercial competing parties would be able to say, "Well, we have a home-grown instrument that we can use." One of the beauties of the bill, of course, is that it can be used at both the consumer level and the highest commercial level.

Brian Reeves: We discussed that aspect with the Minister for Enterprise, Energy and Tourism, Jim Mather, about three weeks ago. The bill has potential social benefits in making justice available to the man in the street, who goes through life with many complaints and problems and is dissuaded from going to court to rectify them because going to court is intimidating and not an easy thing to do. If education in this country were adjusted so that children in primary school learned a bit about business, a bit about the courts and a bit about arbitration as a route, and if all that were woven into the social fabric, the social benefits would be manifest.

I have recently been reading one or two international papers that have concentrated on the financial aspects. Although financial benefits are important for the economy, they may seem a bit vulgar when compared with the benefits for the people. As Hew Dundas and John Campbell have said, the economic benefits in any country have been impossible to quantify over the past 20 years. Those benefits are a function of the commitment of Government as well as the commitment of institutions.

Last year, this committee produced a commendable report. Your sixth report of 2008 talked about "Team Scotland", about co-ordinating efforts, about the possible use of local authorities, and about arbitration. Whether the bill can take off will depend on the extent to which you promote it on the international stage. If you promote the bill, you promote Scotland. At the moment, Scotland has a fair bit of making up to do; the banking crises of the Royal Bank of Scotland and HBOS have been well publicised, and representatives from Scottish Enterprise were recently down in London to try to compensate for the problems.

The bill offers an opportunity for the Government here in Scotland. Quite apart from the opportunities for business, there is a spectrum of potential benefits. A cost benefit analysis would show that, overall, many millions of pounds would be produced. We should not consider simply the financial aspects of any one case.

Robert Howie: If I may suggest it, gentlemen, perhaps you need to be a little cautious about making assumptions of the commercial and financial benefits that would accrue from changing the legislation. If you imagine an international dispute between, say, Indians or Chinese on one side, and people from this country on the other, the decision on where to go and arbitrate does not depend fundamentally on questions of cost or legal fees. Frequently, there is a relationship between the cost and the scale of the dispute. If your dispute is about £50 million, a legal cost of £0.5 million does not matter, but if your dispute is about £1 million, a legal cost of £0.5 million assuredly does matter.

You must accept that there will always be very large cases for which the attractions of London, or New York or Geneva, will always be greater than ours. People will say, "Yes, I know that Sir Extremely Eminent KC of the London bar will cost a great deal, but that's because he is extremely eminent. We want people who are very good, because we think we are right in our dispute. The other side is throwing up smokescreens, but Extremely Eminent will see through them and we will win." That is what litigants, or people who are going to arbitration, want to do: they want to win. In general, they will pay the price that they think they have to pay.

You must therefore be careful. Just because fees in Scotland are, as a general rule, lower than they are in England or elsewhere, you cannot assume that people will beat a path to your door if

you but change the legislation. There is a limited amount that you can do in changing legislation. People will always want to assess each case and ask, "Where is it and when is it?" and then, more important, "Who will appear as the lawyers? Who will be the arbitrators? What confidence do we have in their experience and their ability at this exercise?"

The brute fact is that, if you are competing with London, you are competing with one of the major international centres that will always tend to sweep up the big and highly profitable work that would bring in money and invisible earnings of the variety that you are talking about. It is true that costs are lower here, but there has to be a degree of caution about saying, "Costs are lower here, so that will encourage work to come in, if we but change the law." I suspect that it may prove to be not quite so simple.

One will probably never be able to tell the amount of additional work that one will cause to come to Scotland by altering the law, but it will probably not be as great as one might hope.

John Campbell: I share those reservations and I share Mr Howie's sense of caution. However, the alternative is to do nothing. I do not think that anybody regards this bill as a mechanism for attracting the cream of arbitral business from London; London is well resourced and well established, and I do not think that anybody would disagree that it is the world centre of this trade. However, if you do not have the ability to offer an alternative, nothing will ever happen. That is what the bill is about. When I talk about culture change, that is what I mean.

10:00

Hew Dundas: I have two brief comments. First, to follow on from Mr Howie's remarks, the general counsel of Shell Exploration gave a presentation in Aberdeen last month in which he said that Shell has three fundamental requirements for considering arbitration in any country. The first requirement is that the relevant country is a signatory to the New York Convention on the Recognition and Enforcement of Arbitral Awards: Scotland is a signatory, through the United Kingdom. Secondly, Shell requires that the courts be non-interventionist: the bill will provide that. Thirdly, Shell requires that arbitration law is robust and allows for maximum arbitral efficiency: the bill will provide that.

On the original question on the quantification of economic benefit, a couple of weeks ago I circulated colleagues in more than 50 countries and asked whether anybody in their country had considered quantifying the economic benefits of arbitration. I had the sum total of zero responses on that question—nobody has ever considered that before. However, at the last count I think that I had nearly 20 responses saying, "If you know anything better than we do, please tell us." There is a real difficulty in pursuing the issue of quantification.

Lewis Macdonald (Aberdeen Central) (Lab): I am interested in exploring further a number of questions that have arisen from the evidence, in relation to how the bill is constructed.

What we have heard during the meeting reinforces what is shown in the written evidence: there is broad support for the thrust and the principles of the bill. Mr Anderson, among others, raised a couple of points on which I would like him to expand and others to respond. First, should the rules be incorporated in the body of the bill or contained in a schedule? The second point, which we discussed with the bill team at last week's meeting, concerns the essential nature of limiting cost and avoiding unnecessary delay. Should there be a statutory limit on delay? Or do we simply express in the bill the warm wish that there should be no unnecessary delay, without explaining how that is to be achieved?

The third point, which I think that the Scottish Council for International Arbitration raised—from their introductions this morning, I know that Mr Reeves and Mr Kelly have a connection with the council—concerns the model law and whether its repeal is the appropriate way of ensuring that we do not deter international customers from coming here. Perhaps Mr Anderson will expand on the first two points, then we could hear from others.

Richard Anderson: To link up with the previous point, if the bill could be made so good that, say, an additional 50 arbitrations came to Scotland that would not previously have come, and assuming that those who came to Scotland to arbitrate tacked a holiday on the end and brought their families with them, presumably there would be appreciable indirect earnings for hotels and tourism in general.

However, the key matter, as has been said, is making the bill better than any other form of arbitration that is currently available. I believe that that could be done. Personally, I am not too happy about going down the schedule route. My preference would be to have two or three stated arbitration procedures that the parties could select, depending on complexity and on their wishes, and which would be enshrined in principal legislation and address the problems that face arbitration everywhere, which are procedures, costs and time. I believe that Scotland can leapfrog the problems that exist elsewhere to make Scottish arbitration better than that which is offered anywhere else. In that case, international parties and others will beat a path to Scotland's door.

Lewis Macdonald: In your written evidence, you raise the level of compulsion or time limiting that the bill might additionally offer.

Richard Anderson: I am firmly of the view that there should be a compulsory time limit. The present trend in England is that adjudication, which is a successful interim dispute resolution procedure, happens within 28 days, with a slight extension in most cases. That is regarded as being inappropriate for larger cases involving amounts of the order of £4 million or £5 million. At present, a voluntary 100-day limit for arbitration is in place. I believe that, if that was enshrined as a primary legislative requirement for an option that parties could choose, in a large number of cases, it would be an attractive option. The parties would know that they could come to Scotland, get a good arbitrator—as they are to be called—and good legal representation and achieve a result within 100 days. That would trump anything in England and would make the system here very attractive.

Professor Davidson: My response to that is that, under the act that we hope the bill will become, parties will have scope to impose time limits on the tribunal if they want to do so, by adopting sets of institutional rules that impose time limits. In different sorts of arbitration, the parties might adopt different time limits, depending on the type of arbitration that is involved. I might be corrected, but I am not aware of any national legislation that imposes a universal time limit for all arbitrations of whatever type. If that was done, we would have to answer the question of what happens if the time limit is not adhered to. If the whole proceedings are not to be a nullity, a mechanism would have to be created to dig the parties and the tribunal out of sticky situations.

The obvious way of doing that would be to say that if things go wrong, the parties can always apply to the court to extend the time limit. However, that would add a source of possible delay, cost and uncertainty to the proceedings. If that was to happen in Scotland, international parties in particular might not be too sure about arbitrating in Scotland. They might stop for a minute and think that the 100-day time limit seemed extraordinary, especially for the sort of cases that they would bring to Scotland. They would know that, if they could not adhere to the time limit, they would have to go to the Scottish courts, but they would not know anything about the Scottish courts. They would know roughly how the courts in England deal with time limits, but the Scottish courts would be an unknown quantity, so they would decide that it would be better to leave it alone. That is my fear about the implications of imposing a time limit.

Hew Dundas: I will give examples from my practice that illustrate the issue. Lewis Macdonald asked about delay. At present, I am chairing an arbitration in London in which the claimant is German and the respondent is a Canadian company that is in liquidation. The liquidator has indicated that it will not submit a defence. The time runs out on Friday of this week—29 May. On Monday, the tribunal will move the arbitration forward. In England, we have a statutory obligation to proceed "without unnecessary delay". We think that that allows us not to work over the weekend, but we will start on Monday.

With great respect, Mr Anderson's fixed-time-limit proposition is utterly unworkable. The case that I have just mentioned can be dealt with within 28 days, as it is not difficult. However, I had another case recently in which all the parties involved were middle eastern. The only UK-related thing about the case was that there was a British national on the panel. That case took the equivalent of well over a year because of the way in which business is conducted and other issues in the middle east. Mr Anderson's concept is admirable but completely unworkable in practice.

I respectfully suggest that the obligations in the bill—which are highly similar to those in the Arbitration Act 1996—mean that if proceedings closed this Friday, the Scottish arbitrator would have to have good reason not to proceed with the next phase of the arbitration on the immediately following working day. The question is whether the process can be that rigid.

I have another point to pick up on, which is that in the adjudication process that Mr Anderson mentioned, if the decision is not made within the 28-day period, as extended, the adjudication collapses and starts all over again. The imposition of rigid time limits has a serious downside if the time limits are not met.

Neil Kelly: I tend to agree with Mr Dundas that enshrining a one-size-fits-all approach in legislation will not work, given that it is trying to cover so many different types of arbitration, from relatively small to very large arbitrations as well as international arbitrations. On the whole, that would not be workable.

However, as Mr Dundas indicated, there are provisions in the bill that lend themselves to moving things forward relatively quickly. We need a change of mindset among the parties and a new spirit to move forward to more speedy dispute resolution than we have had in the past, using the process of arbitration. I do not think that the example of statutory adjudication in the 1996 act really assists. That system provides an interim decision; thereafter, the parties are able to go to the court or to arbitration for a final decision. One needs to consider carefully any lessons that might be drawn from statutory adjudication. In my experience, it is relatively rare for a statutory

adjudication not to have an extension to the 28-day period.

John Campbell: There is an informal aspect that may be important. It is quite a privilege to sit as an arbitrator, but it is quite difficult to become one, and it is quite difficult to acquire widespread competence because an arbitrator has to acquire a practice before they can acquire competence. Appointments by appointing institutions—such as, but not confined to, the Chartered Institute of Arbitrators—carry with them the obligation to respect the name of the institution and not to do it damage. A party who is disgruntled by delay may feel that it is open to them to complain to the institution because the arbiter has gone to sleep on the case. Take it from me—that sort of informal pressure is very powerful.

Brian Reeves: Every year, the RICS has about 600 applications for rent review arbitrations in Scotland. The equivalent figure for England is about 9,000. It is a big business—every five years, commercial properties such as shops, offices, industrial sites and supermarkets have a rent review due. The RICS is the appointing body, and a potential arbiter has to undertake to proceed with reasonable expedition. Most of those cases do not require a hearing, and they are completed within three months. At the end of the day, a fixed period is not required—I agree with Mr Dundas about that. The RICS has to have feedback at the end of the arbitration. If a member of the chairman's panel of arbiters does not have a decent reputation because of regular feedback from those cases, they will be removed from the panel. Quite apart from the bill making adequate provision, there is every incentive for the arbiter to move with haste and for the parties to remove him if he does not do so.

Garry Borland: I have reservations about imposing in the legislation what might be viewed as an artificial time constraint. If one of the bill's objectives is to attract large-scale, complex international work or to encourage the use of arbitration in large-scale, complex domestic disputes, it does not seem to me that an artificial time constraint will assist.

10:15

One must be realistic about the agreement of rules or procedures that will encourage a speedy resolution. It may not be in the interest of the party that is defending an arbitration to agree to a speedy resolution.

Practically speaking, I see the most important considerations in relation to time to be the attitude and approach of the arbiter, and in particular their adopting a fairly intense case management approach with a view to moving any arbitration on as expeditiously as appropriate.

The Convener: Mr Anderson has the right to reply.

Richard Anderson: Mr Borland is right. It is no good saying that the parties can adopt time limits if they want to do so, because the agreement of all the parties is needed to achieve that, and that is rarely available, as Mr Borland said.

Time limits are not unknown in legislation. Adjudication, for example, although it is an interim process, has a 28-day time limit. If people run up against the time limit, as they often do, the process can be extended for a limited period with the agreement of the adjudicator and the referring party. Indeed, if all the parties agree, the process can be extended for an unlimited period. That does not involve the courts at all; it is within the rules.

Arbitration is generally accepted to be a rough-and-ready procedure. Nobody is looking for a perfect answer. People want to get a solution and get on with their business; time is important to them. If people know that there will be 100 days, possibly with an extension by agreement, they will simply gee up and get on with things. From my limited experience of voluntary 100-day arbitrations in England, I think that they are working, to the extent that everyone gets to a decision within 100 days by hook or by crook. Therefore, I see no reason in principle why there cannot be a built-in time limit. If there was, the speed question would be answered and the concept of Scottish arbitration would be made considerably more attractive than what is available elsewhere.

Hew Dundas: In addition to the provisions of the bill that police or regulate—or however one wants to describe it—the arbitrator, particularly those that lead up to his or her removal for delay, a professional misconduct charge would be opened up through the Chartered Institute of Arbitrators' code of ethics, which applies to all members of the institute. That could conceivably mean the arbitrator being removed from the institute. I appreciate that that might not help the aggrieved party, but it is fairly frightening for us guys who sit in the arbitrator's chair. None of us wishes to be caught up in that.

Lewis Macdonald: I think that Mr Campbell mentioned the bill's attractiveness for consumer cases as well as for commercial cases. I am interested in exploring a particular aspect of that.

Given the importance of privacy or confidentiality in making the arbitration of cases in Scotland attractive to commercial concerns, how can the consumer interest be protected when, for example, an arbitration case finds a fault or a flaw in how something has been marketed that will have consequences or implications for other

people? An example that comes to mind is the charges that are imposed by high street banks on card transactions. The discovery in one case that those charges were ill-founded has implications for millions of consumers, but such discoveries will benefit those consumers only if the case is held in public or its lessons are made publicly available. There are consumer watchdog bodies for consumer cases. Those bodies made great efforts to publicise the outcome of the case in question so that consumers would be aware of it.

In relation to consumer cases, how do you square the importance of privacy with the importance of building up a body of case law that can be applied in other cases to the benefit of the wider public?

Hew Dundas: There are several solutions to that. To my knowledge, disputes about bank charges are never referred to arbitration. I suggest that they are in the group of things that it might not be appropriate to refer to arbitration. Certain countries prevent certain matters from going to arbitration. For example, in India, any contract involving any element of technology transfer cannot be arbitrated under Indian law, because the Indian Government says that technology transfer is a matter of national and public interest. The consumer bodies can approach bank charges in whatever way they wish and they can put the appropriate pressure on the statute, the statutory bodies and the legislators.

It would be easy to design a scheme whereby the essential nature of a decision in a consumer case was reported in an anonymised fashion. In the maritime industry, there is a long tradition of reporting maritime awards in an anonymised fashion, with names changed and so on, so that knowledge of the decision is put out. Once it is put out into the public eye, other parties that think that they might have the same issue can deal with it. It would be possible to take such an approach to consumer schemes.

Lewis Macdonald: That is interesting. Am I right in thinking that the bill does not debar certain classes of case in the way that Indian law does? If a mechanism for publishing relevant precedent in an anonymised way was appropriate, ought it to be provided for in the bill?

Hew Dundas: You are entirely correct that there are no prohibitions in the bill, but prohibitions would normally arise through decisions of the court or through other legislative instruments that would prevent certain classes of transaction from going to arbitration. That is the case in countries such as India, China and the US, where such exclusions are rather more common than they are here.

Will you repeat your second question so that I can answer it correctly?

Lewis Macdonald: If there was merit in having a mechanism to make public in an anonymised way precedent established in arbitration, ought that to be provided for in the bill?

Hew Dundas: I suggest that such a mechanism should be adopted sector by sector. The consumer schemes with which the Chartered Institute of Arbitrators deals are set up in consultation with, for example, the travel industry and the funeral services industry. In one way or another, those schemes are monitored fairly energetically by the Department for Business, Enterprise and Regulatory Reform or other appropriate Government departments, which sometimes impose such schemes on sectors of industry. In such an instance, it would be for the department and consumer representative bodies to ensure that the scheme provided results that were in everybody's best interests. By results, I mean not only the decision in an individual case but the precedent-type decisions that you are talking about. That would be quite possible and highly likely.

John Campbell: To give life to the monitoring point, I can tell you that fashion changes. In the travel industry, we have seen private arbitration schemes, which have a fixed, low cost and in which arbitration is quick. The pendulum sometimes swings towards the use of an ombudsman. If that is found not to be satisfactory in some sectors, the pendulum swings back again towards having a consensual process. Over time, the pendulum will swing back and forth on such legal ideas for dispute resolution.

The Chartered Institute of Arbitrators runs about 120 consumer schemes of that nature across the UK on matters ranging from false teeth and funerals to Ford motor cars, the travel industry and mobile phones.

Professor Davidson: At the risk of stating the obvious, although it is useful to have arbitral awards in certain areas published, they cannot create precedents, even for other tribunals.

Robert Howie: Professor Davidson has taken the first of my observations out of my mouth. I wanted to ensure that Lewis Macdonald, who used the word "precedent" several times, was not labouring under the misapprehension that any decision by arbiter 1 has any effect on the decision by arbiter 2. Such decisions can be monitored and published as much as people like, but they have absolutely no effect whatever as precedent.

On the underlying point, I am bound to say that the Faculty of Advocates—like the judges, I notice—has considerable reservations about the proposals on confidentiality. We venture to

question how the proposals would work in practice, how an obligation of confidentiality would be placed on a court, how that obligation would be enforced if it was found to have been breached and, further, how such an obligation would relate to what is normally regarded as the right of newspaper journalists and others to watch court proceedings.

If confidentiality is to apply to a report of the proceedings, what will happen if someone who has watched the arbitration proceedings picks up that they relate to what he conceives to be a matter of public interest? If he approaches one of you gentlemen—or any other MSP—and you agree that the matter is of serious interest and importance, what will happen if you raise the issue on the floor of the Parliament? The issue of interest might well be who is involved in the matter. The public interest might lie in the fact that a particular individual is involved in the dispute and is arguing whatever it is that is disputed.

It occurs to us that careful thought might need to be given to the extent to which one can impose any confidentiality obligation on reports of court cases or on what the court says. Normally, the court's opinions come straight out on the internet. How will that information be prevented from shifting around? One might well ask whether that should be prevented. In forming such a strict view about confidentiality, we might find that television and newspaper interests will trot along to argue whether it is open to the Parliament to make such a provision, given the restrictions on the Parliament's legislative competence and given what they might see—whether rightly or wrongly—as their right to report exactly what happens in the Queen's courts.

Hew Dundas: May I answer that? With respect, the position in England is crystal clear. Under the civil procedure rules, certain arbitration applications are normally heard in private and no public judgment is issued. In certain cases, the default is the opposite, but both positions can be changed by the decision of the judge after hearing the parties on the matter. That mechanism was tested in the Court of Appeal, which confirmed that the civil procedure rules were entirely legal in that regard and complied with the Human Rights Act 1998. Therefore, it is not possible for the details of the judgment or arbitration to get into the newspapers because no representative of the newspaper will be present in the courtroom when the application is being heard. There is no difficulty in that regard.

On the issue of what happens if the confidentiality obligation is breached—which Mr Howie also, correctly, raised—the aggrieved party has two main remedies. They can either seek an injunction to prevent the breaching party from breaching or they can sue for damages for breach of contract. Often, the difficulty is in quantifying the damages.

However, the gist of the matter is that the procedural issues to which Mr Howie referred have been fully developed and tested in the English courts and are, in so far as is possible, fully reflected in the bill. I suspect that a certain adaptation of the rules of court will be required to reach the equivalent position that pertains in England.

John Campbell: For your notes, convener, the relevant rule is rule 25.

Gavin Brown (Lothians) (Con): I will get into the nuts and bolts of some of the rules and provisions in the bill, but I first have a narrow question for the CIArb. On domestic arbitrations, the CIArb's written submission estimates that there are currently about—plus or minus a few—50 commercial arbitrations and 250 consumer arbitrations. Of course, it is difficult to get entirely accurate figures. The written submission goes on:

> "We can reasonably envisage … a starting point, within a reasonably short time after the Bill has come into force, of 200 commercial cases, 250 small business cases and 500 consumer cases."

That suggests a quadrupling of commercial cases and a doubling of consumer cases. Where are you getting those figures from and what is the justification for those estimates?

10:30

Hew Dundas: The population of Scotland is fairly close to 10 per cent of the population of England. Those numbers are, broadly, the equivalent English numbers divided by 10. We have no other easy basis on which to estimate anything.

Gavin Brown: Following the implementation of the 1996 act south of the border, did the number of arbitrations increase dramatically?

Hew Dundas: No, and for a very good reason. We in Scotland hope to consign to the statutory dustbin an antiquated law that dates back, in part, to at least the 13th century and to start with a clean sheet of paper. With the Arbitration Act 1996, England followed arbitration legislation that had been passed in 1979, 1950, 1934, 1889 and 1856—there had been a long process of gradual improvement and development over 150 years, which meant that there was no quantum increase in England. The other factor that has to be taken note of is the fact that, around the time that the Arbitration Act 1996 came into force, the Housing Grants, Construction and Regeneration Act 1996 also came into force. That act—known colloquially as the construction act—took away a large

proportion of English construction arbitration and dumped it into another process.

Taking those two factors into account, one could argue the position that interest in arbitration in England increased in 1996, but it is hard to separate out all the factors.

I apologise for repeating myself, but the point is that we in Scotland are doing something radically different from what was done in England in 1996. We are not fine tuning existing law; we are creating something new—something that we have never had before. In terms of estimating quantum, we cannot easily rely on the English statistical model.

John Campbell: In terms of evaluating the quality of the vehicle that is used to carry forward the process, it is important to recognise that the 1996 act started life as a private initiative among judges who were concerned with arbitration, such as Lords Mustill and Saville. It is said that one of them went around knocking on the doors of senior law firms and asking for money to promote the initiative and that they got it, because those firms recognised that the template and the tools that they were using to work in that growing trade in London were not as satisfactory as they could be. To go back to Lewis Macdonald's question, they did not just lift a model off the shelf and say, "This'll do us"; they devised an instrument of their own.

Gavin Brown: The main reason that many businesses to which I have spoken gave for not opting for arbitration is that they felt that arbitration was too slow and, related to that, too expensive—that ties in with what Mr Borland said.

Other than time limits, which have been discussed already, is there anything that should be in the bill in the interests of making arbitration faster and/or cheaper?

Hew Dundas: I will respectfully answer that question by saying, no, there is nothing that can constructively and usefully be added to the bill to make any difference to the moves, procedures and controls that are in the bill.

As Mr Campbell said earlier, what is needed is a change of culture. In his submission, Mr Anderson gave a nightmare example of an arbitration that went on for ever and cost an enormous amount. Conversely, in an international case that I am currently chairing, a deadline runs out this Friday and we will commence the next stage on Monday. That is how the modern international arbitrator moves. It is a prerequisite—and the Chartered Institute of Arbitrators' code of ethics requires—that Scots arbitrators will do just that when the new bill comes into force.

Richard Anderson: I think that the bill could be changed to address those two points, which constitute the main hurdle to arbitration in this country and to making Scottish arbitration better than any other arbitration.

The trend in adjudication, given the changes in the law that are coming through, is that each party is to be responsible for its own expenses and costs. That tends to be the approach in the United States of America. The parties are thus able to quantify the costs involved and to assess whether the cake is worth the candle—whether it is worth going for arbitration.

As things stand, arbitration can be a slow, cumbersome procedure—even worse than litigation. With expenses following success, the process can be extremely expensive, to the extent that the entire business is imperilled, or at least the personal wealth of the person involved. Although it would be a radical step, it would be possible to write into the bill provisions relating to time and cost. In my opinion, that should be done to make the Scottish arbitration system unique, and very attractive.

Brian Reeves: As a practising arbiter, I would say that a fixed time limit would not be practical, given the flexibility that is required for different cases.

I will give one example to show the cost of arbitration compared with litigation. In the public domain is City Wall Properties (Scotland) v Pearl Assurance. That case, on the interpretation of a rent review clause for a number of car parking spaces at East Green Vaults, Aberdeen, went to Lord Clarke, reverted to Lord Clarke in the outer house of the Court of Session, and then went to the inner house. That took two to three years and cost the company, which is a one-man company, £250,000 in fees for Richard Keen QC and various other lawyers. The individual is now trying to quantify the issue and get the actual rent review moved forward—with one in 2003 and one in 2006, I think. If the arbitration clause had not excluded section 3 of the Administration of Justice (Scotland) Act 1972, on the finality of a decision by an arbiter, that three-year job would have been done in six months at a fraction of the cost.

As an arbiter with several hundred cases under my belt over 30 years, I cannot think of one case where arbitration has taken longer than litigation. I have never come across such an example.

John Campbell: My friend Mr Anderson reverts to his previous points about time limits. On the wider stage, with a new act and a core of skilled arbiters, there will be a culture change, and a recognition of what Mr Dundas has spoken about—the importance of the code of ethics and of giving the process the intellectual and commercial

respectability that it is capable of achieving. However, that will not happen overnight.

Hew Dundas: I will give one more example. I took over an arbitration in Singapore two or three years ago. The parties were from mainland China and the European Union. The arbitration had been bouncing around for about a year. The chairman either resigned or was removed. I was asked to deal with it as a matter of urgency by the Singapore International Arbitration Centre. The award was delivered 94 days after I was appointed, and the total cost of the arbitration was about $30,000. These things can be done if the arbitrator or tribunal gets on with it, in which case it is done at minimal cost. If the parties are allowed to develop submissions spread over a year, using three eminent QCs, it will cost a lot; if it is done in 90 or 180 days—or whatever the appropriate time is—less money is spent, automatically.

Gavin Brown: I trust that Mr Dundas is prepared to sign a contract to bring all his arbitrations from Singapore to Scotland in future.

Rule 45 talks of the power of an arbitrator to award damages—something that I think does not exist in Scots law at present. It is a default rule. In some submissions, the suggestion was made that the rule should be mandatory. Should the rule be default or mandatory?

Neil Kelly: The Law Society has issued written observations on the matter. Our common-law rule is a joke as far as the domestic business community and the international community are concerned. Under Scots common law, the arbiter has no power to assess and award damages.

It may appear on the face of it that it is perfectly okay to leave the power in a default rule, so that, unless the parties agree otherwise, the power will apply. The difficulty on which we need to focus is what parties will do when they think that it is in their commercial interest to do a particular thing. If one party can do something that will inflict difficulty on an opponent, the likelihood is that it will do it. One thing that could be done is the deletion of the power to award damages. We could end up with the situation where someone has bought into arbitration but—perhaps unwittingly on their part because there is an imbalance of arms, with the other party being represented by a solicitor—the contract has deleted the power to award damages. They could be forced to arbitrate on certain claims but be unable to arbitrate on a claim for damages. That could result in parallel proceedings—one set of proceedings in the court for damages and the other for claims that fall within the arbitration clause.

It could be argued that the matter is one for agreement between the parties. The difficulty with that is that, in the regime under the bill, at least a quarter of the rules are mandatory and cannot be changed. A line has to be drawn somewhere. Part of the problem with the process of arbitration is that people with clever lawyers will take whatever steps they consider are appropriate to delay or cause difficulty to opponents. Traditionally, because this has been a rule of our common law, people have used it to prevent others from having their claims for damages placed before arbiters. People have been forced into parallel proceedings with increased cost.

Clearly, two arguments are involved. The particular problem in this regard—and I speak as someone who has had to wrestle with problems of this nature for 25 years—is that, when people are in dispute, they do not think rationally or logically; they think only of what is in their best interest at that moment. If someone thinks that it is better for them to remove the power to award damages, they will do it. However, that does not mean that the arbitration and disputes are resolved smoothly.

In our submission, we tried to reflect our experience of what users do when push comes to shove, which is different from what they might say in filling out a questionnaire on law reform or what people think is the politically correct thing to say. If we want a smoother arbitration process, in which people cannot make difficulties, on balance, it would be better to include the power to award damages in the bill. Impliedly, if we were to leave it in default, we would be saying, “It is fine for you to do that.”

Hew Dundas: Let us suppose that G Brown Ltd is about to enter into contract with N Don Ltd—

Gavin Brown: It is not going to happen.

Hew Dundas: I am sure that it is prohibited by the parliamentary rules, but let us just make that supposition. In negotiating your contract, Mr Brown, if you are well advised, you will agree that, in the event of a dispute, it will be governed by the Scottish arbitration code 2007. At the time of making the contract, your two companies do not know who will claim and who will defend in any dispute.

Mr Kelly spoke about a situation where, after the dispute has arisen, people decide what set of rules to use. As a general commercial rule, that is not very good practice. I draw the committee’s attention to the Scottish arbitration code, which has a clear power for the arbitrator to award damages. The agreement is made between the two parties.

In the hypothetical case that I just described, if the parties have agreed that the Scottish arbitration code will govern future arbitration on a dispute that has not arisen yet, about a subject that is not yet known, they have agreed the power to award damages. If they have not agreed to use

the Scottish arbitration code, the bill says that the default rule—rule 45—will apply, and the arbitrator will still have the power to award damages.

10:45

The circumstances that Mr Kelly identified are real but relatively rare, because parties negotiate the arbitration code into the contract at the outset or end up in the loving hands of the default rule in the bill because they have not agreed anything else.

As to agreeing or not agreeing, when parties are in dispute, they rarely agree anything, so the default rule will apply, because the parties will not have agreed to anything different.

Gavin Brown: What about commercial advantage? If a main contractor put out to tender a construction contract for which five subcontractors bid, the main contractor could say as part of the arrangement that, if the other party wanted to obtain the contract, they would have to agree to remove the damages clause. What about such a scenario, which involves an imbalance in negotiating power?

Hew Dundas: In some circumstances, the employer in the construction contract is the claimant. If he wrote it into his contract that no damages could be claimed, he might shoot himself in both feet simultaneously.

Garry Borland: Mr Brown's point is nonetheless well made. It is consistent with my experience in construction-related work, in which main contractors have considerable bargaining power over subcontractors. The point is realistic.

Beyond the damages point, the faculty has significant concerns about rule 45. Paragraph (c) of the rule gives the arbiter the power to order a party to do something—in court terms, that would be described as an order of specific implement—or to refrain from doing something, which would be an order of interdict. Paragraph (d) allows the arbiter the power to rectify a contract or to reduce a deed or other document. Such powers are a little incongruous, because they are not open to the junior tier of professionally qualified judges—judges in the sheriff court.

A sheriff has no power to reduce a deed or a document or to order, at least ad interim, the specific implement of a contract. As I said, it is incongruous that professionally qualified judges sitting in the sheriff court do not have the power to reduce a document or a deed or to order specific implement ad interim when those powers are being given to arbiters.

I have a further point about the power to order a party to refrain from doing something, which is in effect a power to interdict parties from doing things. In the civil court context, a breach of interdict has the potential to visit criminal consequences on a party. The committee and the Parliament should hesitate to afford arbiters such powers.

Paragraph (d) of rule 45 refers to the power to order rectification, which is currently open only to the court. Rectification and reduction are matters to which third-party interests can be relevant. In saying that, I am conscious that rule 54(2) refers to third-party rights and interests. However, in short, the committee and the Parliament should hesitate to afford arbiters such powers.

Neil Kelly: Can I just comment on what Mr Dundas said? As I understood it, part of the bill's scheme is to cover instances when people arrive at a point where they are in dispute and have never heard of arbitration before. It does not encourage people to go off to arbitration if one of the parties is able to refuse to refer to arbitration an element of the claim that may relate to damages—that just does not work.

The type of contract to which Mr Dundas alluded—in which there is an arbitration clause in the underlying contract and the dispute arises later—is perhaps more common in the construction industry, in which I work. It is nonsense to suggest that whether damages powers should be given to arbiters is not the subject of discussion at that stage and that powers are in some sense allowed by default or not. Lawyers advising clients must address these issues every day of the week and it is up to the clients to decide what route they take. Normally, they will take the route that they think is in their best interests. If they think that they are the party who is less likely to be the subject of a claim for damages, they may well take such a power out of the contract. That is perhaps particularly the case in construction contracts, which will have, for example, damages-type claims such as liquidated and ascertained damages that will be claims under the contract but not strictly damages. That therefore takes out that concern for an employer, who can make a claim under the contract, but it will not be a claim for damages of the type that we are discussing. All I am doing is giving the committee the experience of the practitioners in the area. That is all that the Law Society seeks to reflect in its evidence to the committee.

The Convener: Before I come back to Gavin Brown, I have a general point on the arbitration rules in schedule 1, given that there may be a number of occasions when the arbitration is not between parties of equal strength, if you like. A classic example of that is a case in which a supermarket chain is against a supplier, because the supermarket chain is seen to have much more power than the supplier. Do you think that how the

bill defines arbitration rules as default or mandatory will provide sufficient protection to the weaker party in such a case, or do you think that some of the rules that are currently default should be made mandatory to ensure that there is equal protection for both parties?

Hew Dundas: I will suggest a hypothetical example. A supplier provides potatoes to a supermarket chain, but the potatoes are found to be contaminated and 250 people die. Is it reasonable that there should be some action in damages by the supermarket against the supplier? I believe that it would be reasonable. In the reverse case, the supplier perhaps fails to deliver any potatoes, leaving a major supermarket chain with no potatoes across a busy weekend. I suggest that the fault in that instance could be on either side. I do not think that it is reasonable to decide that the balance is one way or the other at the outset of the execution of the contract.

May I just respond briefly—

The Convener: That is not the point that I was trying to make. In terms of negotiating the arbitration rules for an individual case, if one party is much stronger than the other, they may be able to exert pressure to require that certain of the default rules are not applied, which may put the weaker party at a disadvantage. I just wonder whether there are too many default rules, which would therefore allow that sort of practice to happen, or whether the balance is right in the bill. It is not about individual cases, but about the pressure that may be put on one of the parties in arbitration by the other party to reach a set of rules that may be to the former party's disadvantage.

John Campbell: It will always be a matter of balance, will it not? It is very difficult indeed to legislate for potentially unequal bargaining parties. What we try to do is take away the inequality by legislating in a certain way.

The Convener: Precisely—that is the point that I was trying to make. Do the bill's rules do that?

John Campbell: I believe that they do, but there will always be room for discussion.

Professor Davidson: One of the key factors that are constantly stressed in relation to international arbitration in particular is the idea of party autonomy. The bill tries to adopt party autonomy, which means that the number of default rules should be kept to an absolute minimum to allow the parties to decide something different if they want.

On the fixation with one party being stronger than the other, I suspect that that is perhaps in danger of deforming the bill into taking account of the exceptional rather than the norm.

Gavin Brown: Under the current law as I understand it, an arbiter can award interest only from the date of decree arbitral. Under rule 46, the arbiter can award interest from the date when he or she considers that the sum was reasonably due. The rule as it stands is a default rule; some submissions to the committee have suggested that it should remain so, while others have suggested that it should be mandatory. Can any of you elaborate on the position that you have taken in your written submissions?

Robert Howie: I wonder whether it will remain a real issue for long. I recall that the Scottish Law Commission has proposed legislation on the substantive law of interest to Parliament. If such legislation is passed, the issue will simply go away because it will be covered by the substantive law of Scotland. The problems around arbiters' ability to award interest before the decree or afterwards, and at differing rates, will be dealt with by the proposed larger-scale changes to the law of interest through that legislation.

The committee might wish to consider how such legislation, if it is going ahead—you will know that better than I do—will sit in conjunction with the bill. The whole problem may simply not arise, because it will be cured elsewhere.

The Convener: That bill has been delayed. It has gone out for further consultation.

Professor Davidson: Mr Howie's point assumes that it is Scots law that governs the issue of interest. One of the aspects of default rules is that rather than simply tinkering with the rule, parties might invoke a law other than Scots law as their default position to deal with the matter. The position of Scots law might therefore be irrelevant in certain cases.

Neil Kelly: With regard to my observations about the default provision in relation to damages, the same arguments apply—and are even more pointed—in relation to interest. It seems strange that people are encouraged to go to arbitration, yet if a party deletes the default provision, it is encouraged to go to the courts, which will gladly grant interest. That point of principle needs to be addressed so that people do not cause difficulties in the arbitration process because of the nature of the default rules. Otherwise, some people will do that, and then other people will do it as well. The whole reputation of the process will be affected if we do not address the issue.

We have been talking for decades about deficiencies in the law in relation to an arbiter's power to award interest. In the 21st century, a standard rule that an arbiter cannot award interest before the date of decree arbitral appears to most people to be a nonsense. It might take four weeks, 100 days, six months or a year before a decision

is made, and yet no interest is awarded for that time.

It may be a decision for the parties, but we have a situation in which there are 80 rules, of which only 25 per cent are mandatory, and in which—to pick up Professor Davidson's point—all the default rules are capable of being changed. We do not suggest that the Parliament should be involved in a wholesale rethink of the default rules, but we know—and have done for decades—that particular rules cause problems in practice, and people will use any deficiencies that they can to their advantage.

One might say that people should have the right to do that, but is that the best that we can do in Scotland on basic questions such as the award of interest for the period before the date of the decree arbitral?

Hew Dundas: The positions of rule 45 on damages and rule 46 on interest are highly similar to the position that was adopted in the 1996 act. I am not aware of any reported case in England in which either provision has given any difficulty whatsoever.

11:00

Neil Kelly: I am sorry—the point is not whether a reported case has resulted from a difficulty that arises from a provision. A decision will not be reported when the parties have made a contract in which the right to interest is deleted. That is a straightforward question.

Merely because a rule is in the 1996 act—most of which was not enacted for Scotland—that does not mean that, a considerable period thereafter, we should enact it in Scotland. Scotland has the opportunity to produce something new that reflects the experience of the arbitration process here. The Law Society has pinpointed two areas in which difficulties have been caused, which the Parliament has the opportunity to do something about.

Professor Davidson: If the rule on interest were made mandatory, it would apply in the way that it is set down to all arbitrations, so Parliament might want to consider the position on compound interest. The bill says that the parties can decide whether compound interest is to be available. If that were a mandatory rule, it would look like compound interest was automatically made available as a remedy to all tribunals. Parliament might want to revisit that if it goes down that road.

Neil Kelly: I agree with Professor Davidson. The Law Society foreshadows that issue in its observations, because it expects the wording of the current default rule to be tweaked, as it is very wide on the award of some types of interest and on compounding interest.

Gavin Brown: The judges of the Court of Session and the Chartered Institute of Arbitrators say that rule 29, on when a tribunal cannot agree on a decision, should be revisited. Can anyone elaborate on how it should be revisited?

Hew Dundas: The chartered institute would consider most closely and respectfully any suggestion by the judiciary in that regard. Similar provisions are common internationally and have given rise to no problems in my experience not only of the 10 jurisdictions in which I operate but of a wide range of other jurisdictions courtesy of various internet e-mail discussion fora and the like.

I would like to revisit the rule because of the judiciary's reference to the arbitrator who was last appointed. That might give rise to difficulties if a third arbitrator has never been appointed. The chartered institute would like more time to consider all sorts of complications before reaching a definitive view on the issue.

For example, the tribunal is dealing with a matter of considerable urgency this morning. I am not attached to my BlackBerry at the moment and the tribunal can proceed in my absence, as action will have to be taken this morning. The situation is capable of being, and generally is, dealt with by rules of arbitration. I have not checked the Scottish arbitration code on that, but that would be the first point of reference for what happens in practice.

Gavin Brown: Some submissions suggest that rule 50, on provisional awards, should be a default rule rather than a mandatory rule. Some written evidence has suggested that rule 51, on part awards, should be a mandatory rule rather than a default rule. Does any panel member have views on those rules?

Hew Dundas: In our view, the designation of the two rules is back to front. I suggest that the M, for mandatory, and the D, for default, were put in the wrong places when the bill was printed.

Gavin Brown: You think that that is just a typo.

Hew Dundas: Yes. With respect to the draftsmen, I think that there was an inadvertent error. I do not recall seeing the rules designated in that way in earlier drafts of the bill or the consultation.

Neil Kelly: I understand the point that has been made. The Law Society has observed that there is a strong argument for a mandatory power to make part awards.

Christopher Harvie (Mid Scotland and Fife) (SNP): I have a question about the importance of locality in attracting arbitration cases. The point has been made that cases tend to go to London

because expertise is available there that is not available elsewhere. It struck me during our discussion last week that it would be worth while considering what influence industry has on the procedures that are worked out, particularly in local specialisms such as North Sea oil. Do cases tend to be drawn to particular locations because expertise is available there?

John Campbell: There is a small number of preferred arbitral centres around the world. I will not list them all, but people go to Stockholm, for example, for a range of reasons—not least the attractiveness of the city, but also because it has established a tradition of east-west dealing between pre-cold war communist bloc countries and non-communist bloc countries. I am sure that you are familiar with that. People also go to the far east, perhaps to Singapore for reasons of expedition and cost or to Hong Kong because of its proximity to the People's Republic of China. The list goes on. I am not sure if that answers your question.

Christopher Harvie: That is a starting point. I am thinking of two areas that will expand enormously, one of which is wind farms and energy supply. The committee has had a certain amount to deal with in relation to that. I imagine that the arrangements for renewable energy generation and transmission are likely to be a large area for arbitration. I am thinking of things that are difficult to locate in any one state's purview because they concern international arrangements.

John Campbell: On a domestic scale, it is difficult to see why arbitration should be required in respect of renewables contracts. As you know, disputes usually arise at the planning stage, and the planning process is not immediately or obviously susceptible to arbitration. Arguably, it is susceptible to mediation, but we are not here to discuss that. It is certainly susceptible to crisp decision making by the appropriate authority.

Christopher Harvie: I was thinking more about transmission than about the creation of generating capacity.

John Campbell: As you say, transnational contracts that deal with transmission are bound to become more important, but such contracts typically have embedded within them dispute resolution processes of the cascade variety, whereby parties are enjoined first to use their best endeavours to reach a solution. Cascading down from there we often find compulsory mediation. It is always difficult to know when mediation has failed, but it is usually when the mediator walks away. Thereafter, we find a range of formal processes.

If the question is where people will go for arbitration in, for example, cases across the North Sea or between France and the United Kingdom, one would expect the contracts in such cases to specify where any disputes will be resolved. For example, a contract might state that the ICC rules will be adopted, which would put the case into Paris, or that the Scottish rules will be used, which would put the case into Scotland.

Christopher Harvie: I am thinking that the business of making rules is part of the arbitration process itself, although that process will be quite independent and self-generated. Two areas strike me: the first is the transmission of renewable energy, and the second is the complex structure of the trans-European networks, particularly the rail network, where we are dealing with some state companies and some private companies. Those two areas seem to require a new type of expertise, which, if it is established in one place, is likely thereafter to attract cases. In the latter case, the fact that Scotland has two large multinational rail transport contractors in Stagecoach and FirstGroup might cause rail cases to come to this country, where that expertise can be tapped, written into agreements and used subsequently to settle disputes.

John Campbell: The bald proposition is that the repository of expertise in a country attracts dispute resolution mechanisms on the periphery of that particular industry. I do not demur from that. Frankly, it cannot be legislated for. Nevertheless, on being a magnet and attracting such dispute resolution mechanisms—well, we would have to see, would we not?

Robert Howie: Again, I have the unhappy task of urging caution about overoptimism. Even with the big transport or rail companies, I suspect that their dispute resolution provisions are written into large contracts, which, if they reflect the ones that have crossed my desk in the past on not too dissimilar matters, will be in the hands of large commercial firms, particularly in London. There are a number of reasons for that, some of which are historical, but we are in the year of grace 2009 and we have to live with history.

History has led to a lot of underwriting or financing, for example, in London. The work of setting up contracts will go to the big London firms and it will be second nature to those gentlemen to write in the London clauses that they have written in since they were articled clerks. On the face of it, they will also have sound reasons for so doing, because they know that a number of gentlemen—it is invidious to name names—who operate in the area of transport, for example, have been silks or are retired judges and have practised for years in areas such as CMR notes for transport by road, the carriage of goods by sea and Warsaw

convention cases. They have done the lot; this stuff is not new to them. The London firms know that those men are very able and are good at dealing with disputes and handling evidence. They have watched them do it man and boy for years, so they will just go to them. They are not going to take a chance on other people, even though they might be just as good, because the firms do not know them and are not going to take risks with their clients' interests by trying them out.

There would inevitably be a drift of quality. If you said, "I can tell you that the experts who know about how to deal with transmission all live on the line between Dundee and Glasgow," the answer would be that the experts could move and be put up in a London hotel. The big companies and law firms are interested not necessarily in that class of expertise but in the expertise that can analyse issues and evidence and legal problems. The contracts would probably have to be written under English law, so the English bar would be an obvious and cheaper place to go, because if cases came up here, someone would have to lead additional evidence on the law of England, therefore costs and time would go up. Your idea is cheerful, but, while I am sure that those whom Mr Borland and I represent would be delighted for you to be right for entirely altruistic reasons, I fear that you might be disappointed.

11:15

Richard Anderson: In the modern world, things are no longer written in stone; they are susceptible to change. Let us take as an example the London Maritime Arbitrators Association. For historical reasons, London was the only place to go for maritime arbitration for many years. However, at the annual dinner this year, the chairman said that he now regarded the Singapore equivalent as a serious threat and that London had to pull its socks up and watch its game if it was not to be eclipsed to an extent. I believe that if you establish centres of excellence for renewables and demonstrate an arbitration procedure that really works, you could attract a lot of business.

Christopher Harvie: On the point about London magnetically attracting legal expertise, we are in a totally unprecedented situation as far as power generation and transmission are concerned. In addition, the state-owned railways of one country can now operate in a variety of ways in other countries. As far as I know, there is no precedent for that outwith periods of war and conquest. If I want to send goods to the continent by rail or, for that matter, to London, I will deal substantially with the German state railway. That is a new technical situation.

Brian Reeves: Time moves on and other international arbitration centres are opening all the time: a centre opened recently in Dubai; there is now the Chinese European Arbitration Centre, which I think Hew Dundas wrote about in the recent edition of the Chartered Institute of Arbitrators newsletter; a centre has opened in Hamburg; and Spain has adopted the United Nations Commission on International Trade Law rules as a gateway to South America. Other people are setting up arbitration centres.

Many countries might not feel comfortable dealing with England. Sweden has attracted many international cases over the years because of its perceived neutrality. Scotland is very much in the same boat. Scotland could well attract international arbitration cases from many countries, whereas England will not because it is England. We have to look positively at the situation. If there is a co-ordinated team effort that is publicised properly and everyone works together on it, I have no doubt at all that cases will gradually build up. It will not be an overnight thing, but we have to look to the future.

The Convener: Thank you. Unfortunately, as you said at the start of your contribution, time is moving on, and it has now defeated the committee, because we have another item to deal with this morning. I thank the panel for giving us their views, which we will consider carefully when writing our stage 1 report.

11:18

Meeting suspended.

11:25

On resuming—

Energy Inquiry

The Convener: Item 2 is the final evidence-taking session of our energy inquiry. I welcome back the Minister for Enterprise, Energy and Tourism and thank him for giving us the opportunity to ask further questions on some of the key issues that we might want to address in our report. I do not think that there is any need to reintroduce the minister's team of officials, who all attended the previous meeting—welcome back. Lewis Macdonald will open up the questioning.

Lewis Macdonald: I have a couple of questions about the responses that you gave us the last time you appeared before us and the submission that you provided us with following that appearance. Given that you say that you are a full member of the Scottish energy advisory board, although you were unable to attend its first meeting, you will understand that I was extremely surprised to find that your name is still absent from the appendix to your submission that lists the members of the board. I take it that that is another administrative error rather than a change since the board's first meeting.

The Minister for Enterprise, Energy and Tourism (Jim Mather): I think that that list is a cut-and-paste of the names of the people who attended the first meeting. I can assure you that I am embroiled and thoroughly involved in the board's work.

Lewis Macdonald: Is your name the only minister's name that is mysteriously missing from the list? Are there other ministers whose names ought to be there and are not?

Jim Mather: The names that we have provided are those of the external players. You can assume that, in addition to my involvement, the First Minister will maintain a healthy involvement as we move forward.

Lewis Macdonald: Understood—thank you very much.

In response to some questions on renewable energy in general, you indicated to Marilyn Livingstone that you thought that your Government's consent rate over the past two years was

"about twice the going rate of consents under the previous Administration."—[*Official Report*, *Economy, Energy and Tourism Committee*, 13 May 2009; c 2106.]

That claim surprised me, which is why I asked a supplementary about the rejection rate.

The figures that you have provided us with make clear what both those rates are. Let me quote back to you from that information. Since May 2007, you have approved 22 projects with a combined renewable energy capacity of 1,686.1MW and have rejected five projects with a combined renewable energy capacity of 1,157.1MW. My reading of that is that you have rejected approximately 40 per cent of the renewable energy capacity of projects that you might have approved. According to the figures that you have provided us with, in its final four years the previous Administration approved 17 projects with a capacity of 1,413.1MW and rejected two projects with a capacity of 70MW. My reading of that is that the previous Administration approved 95 per cent of the capacity of projects that it could have approved, whereas your approval rate has been 59 per cent. That is quite a difference. In fact, the rate of return is about two thirds of what it was under the previous Administration. Do you accept that?

Jim Mather: I accept that there might have been an element of procrastination under the previous Administration, which left us with a backlog of decisions in the pipeline on projects that we had good reasons to reject. On most of those projects, we honourably provided quick decisions. On the Lewis proposal, we initiated the Halcrow study and further studies on grid upgrades, and, in the case of Kyle and other proposals that would have been impacted by air traffic control issues, we engaged thoroughly with airports and the national air traffic control authorities.

Lewis Macdonald: But you must accept that it is the responsibility of ministers not to put applications in front of yourselves but to make decisions on them, and that your decisions are overwhelmingly more negative than those of the previous Administration. Your rejection rate of potential additional capacity is eight times higher than that of the previous Administration.

11:30

Jim Mather: To be fair, if we consider the timeframes, the legacy element and what was in the pipeline with a strong predisposition to rejection, the previous Administration can claim wholesale paternity and maternity rights to the backlog.

Lewis Macdonald: I am sure that you do not mean to imply that you know what previous ministers would have done with applications that they did not determine. The responsibility for those determinations clearly lies with you.

You mentioned a legacy element, and have pointed out that the applications for the five major projects that you have rejected predated your

appointment. How many of the applications for the 22 projects for which you have given consent predated your appointment?

Jim Mather: A good number of them.

Lewis Macdonald: Can you tell us how many?

Jim Mather: I cannot tell you exactly how many.

Lewis Macdonald: Did all or almost all of those applications predate your appointment?

Jim Mather: In the early period, all of the applications would have done so. Obviously, that would be less so as time passed.

Lewis Macdonald: So you expect that nearly all of the 22 applications for which you have given consent predated your appointment. Are there any exceptions? Were any of the 22 applications made since the Government took office and you were appointed as minister?

Jim Mather: I am not certain about that.

Jamie Hume (Scottish Government Business, Enterprise and Energy Directorate): We can find information about that and send it to the committee.

Lewis Macdonald: The question is important if the argument is that applications were rejected because they were poor and that the poor applications were made under a previous Administration. It is clear that the same logic should be applied to the applications to which you have consented. Is that fair?

Jim Mather: There is a new phase. Those who submit applications have a much clearer understanding that they must do a lot of work to ensure that environmental considerations are squared away, that they have an accord with communities, and that there is local buy-in. In that climate, with work being done beforehand, I think that there will be a higher percentage of consents. I do not think that such work was done to the extent that we now like it to be done. That is part of the evolutionary process.

Lewis Macdonald: My concern is that if developers think that there is a far higher chance of an application being rejected under the current Administration than under previous Administrations, that might impact on the number of applications that are submitted. Can you identify trends in the numbers of applications that have been submitted, particularly in the onshore wind sector? Is it possible to say whether the numbers of applications that have been made per annum or per month have gone up or down in the past two years?

Jim Mather: I invite Jamie Hume to say something about application rates.

Jamie Hume: We would need to break down the sub-50MW applications and the 50MW-plus applications. Some have been extension applications. Since I started in the job, we have tried to analyse whether there is a clearly discernible pattern, but nothing has readily emerged. Applications appear to be relatively sporadic. However, there has been a lot of focus on making clearer to the developer community the pre-application work that needs to be done. The objective is to reduce demand in all the different bits of the system by reducing the number of applications that may end up at the inquiry stage, for example. We can certainly analyse the trends and find out whether any patterns emerge, despite our view that there is no particularly significant pattern.

Lewis Macdonald: I understand that you may not have all the information readily to hand, but you must have a feel for what is happening. Officials who see applications on their desks before they go to the minister must have a feel for whether more or fewer applications for developments with a capacity of more than 50MW are being submitted.

Jamie Hume: Colin Imrie, who ran the consents team for a couple of years, may have a view on that.

Colin Imrie (Scottish Government Business, Enterprise and Energy Directorate): I refer to what we introduced in early 2008. In late 2007, the minister announced that we would work towards a nine-month target for the approval of applications. There was also a clear signal to the industry that it is important to try to resolve environmental, aviation and other issues in advance rather than try to solve them in the system. It is much more difficult for people to solve issues when they have to deal with the fact that they are in a process in which addendums must be advertised and so on. It is far better to try to solve issues in advance and get community buy-in.

I do not have the exact figures that are being sought, because I have not done the job for a few months, but I know that at least seven—perhaps more—well-prepared applications came in after that period. Some of those applications have now been approved, of course. The Siadar application met the nine-month target, and approval of the Whitelee wind farm extension application, which came in after that, was announced last week. Judging from where we were sitting in the consents unit, I am not aware of any particular slowdown—between seven and 10 applications came in after that period.

Lewis Macdonald: I would be very interested to have that information. I hear what you say about streamlining some of the process, but it would be interesting to know how developers view the

situation. I am particularly interested in the onshore wind category above 50MW, which has been the subject of refusals. Has that acted as a disincentive to applications? To what extent can you identify that? Does Mr Imrie have some information on that?

Colin Imrie: I am sure that follow-up information can be provided. We have been advising applicants to be very careful in judging whether their applications will have a chance of succeeding. It is important to sort out the impacts in advance. The feedback that we have received at official level indicates that applicants welcome the chance to know what is and is not possible. Applicants can end up wasting a lot of money on applications that will not succeed, for whatever reason. Developers have therefore generally welcomed the opportunity to get a clearer signal in advance on what is practical.

Lewis Macdonald: That is interesting. I will mention a specific project—without, of course, expecting the minister to comment on it. The minister and his officials will be aware of the proposals for an offshore wind farm in Aberdeen bay, and I believe that there have been discussions on it. I would be interested to know whether that is the sort of project where the Scottish Government can talk to developers in advance of an application to facilitate its proceeding in an acceptable form.

Jim Mather: We have been very much engaged in that. The issue is perhaps best addressed by Jamie Hume, who has been directly involved in it.

Jamie Hume: The project is fantastic, and would clearly be of tremendous benefit to Scotland, for a wide number of reasons, not least the potential to bring in turbine manufacturers to locate in Scotland and to establish the whole notion of a centre of excellence, with Scotland becoming the go-to place for offshore renewables development. It is fair to say that the project was taken by Aberdeen Renewable Energy Group to a point of relative clarity around the objectives and what would be needed to develop it, but the group's successful lobbying to get €40 million from Europe has added a harder edge as far as the timeframe is concerned.

As was announced at the all-energy conference last week, Duncan Botting, who takes over as the executive chair of the Scottish European green energy centre, is becoming directly involved and will help to pull together a kind of coalition of interests, which brings together for the first time the full range of experience and perspective that is needed for the project to succeed.

I have personally been talking through the issues with some local stakeholder groups, including Aberdeen Harbour Board. A range of quite difficult issues has arisen. On the one hand, the project is ambitious; on the other hand, it is not universally popular. We are 100 per cent supportive of the concept and we are 100 per cent behind any process that will lead to a successful application and a successful accessing of the money from Europe. However, there is still work to be done to frame the clear objectives. Should there be 28 turbines or 11 turbines? Who will be involved? Who will the end users be?

We have a slightly delicate line to follow between helping to get the project to the right stage and the fact that the consents unit sits in my team. For that reason, Government involvement in the project has been handed to SEGEC. The whole process is now taking place within that sphere—that is where we are at. The first fresh meeting on the matter took place at the all-energy conference last week. We are hopeful that the team that is now in place will be able to drive the project through to a successful conclusion.

Lewis Macdonald: That is helpful.

I have one final question for the minister. I acknowledge the points that have been made about seeking to address the aviation issues that have held up wind farm decisions, or negated them, as the minister described it. There is another potential set of similar issues to do with navigation. We have talked about those issues applying to offshore wind farms, but if wave and tidal energy projects were to develop in a commercial form, navigation issues would arise with them, too. Are you in discussion with Westminster colleagues and the relevant agencies on aviation and navigation issues? How far ahead must those discussions take place to avoid obstacles arising?

Jim Mather: We have been heavily engaged on aviation throughout our period in office. Colin Imrie has led on much of that.

On navigation issues, we are open to full engagement. We recently had conversations with Ian Grant of the Crown Estate to consider what we can do to pull together the interests that can help us optimise the benefit from UK waters. We are looking to do that.

On developer attitude, a quote from a British Wind Energy Association annual report might be useful. It states:

"In 2007 the incoming Scottish Government promised to improve the system in order to maintain investor confidence in what is effectively the renewable powerhouse of the UK. These promises were kept, with a flurry of decisions coming after Government took office and a further voluntary pledge to make decisions on Section 36 projects within nine months of submission."

It continues:

"The role of Scotland cannot be overstated in"

becoming

"the powerhouse for wind energy in the UK".

It states:

"Even when taking into account the offshore contribution, which is all located south of the border, Scotland still currently contributes around half of the UK's overall operating capacity."

So a positive attitude is coming through.

To return to your point, I am particularly keen to engage with the Crown Estate at a national level, because we are talking about a potential 6.4GW capacity, which is material. Even in my constituency, there is potential for 2.4GW off Kintyre, Islay and Tiree, so there is an absolute imperative.

Lewis Macdonald: I welcome the engagement with the Crown Estate. The other agency that I hoped to hear you mention is the Maritime and Coastguard Agency, given its role. Is there engagement with that agency?

Jim Mather: In essence, the logic of the conversation that I had with the Crown Estate in Tarbert just seven weeks ago was that we should sit down and identify all the stakeholders and ensure that we get them all in a room to have a plenary session. Clearly, that would include maritime and fishing interests.

Ms Wendy Alexander (Paisley North) (Lab): I want to pursue the point about investor confidence. My questions are really about how policy is driven forward and the minister's role in that in Government. It is desirable for Scotland to realise its wind energy potential, but that requires investor confidence. We can make clear to developers their obligations, but there is a global market with global developers and they can simply choose to go elsewhere, whether that be Spain, Germany or Denmark. One piece of evidence that the committee has uncovered and which merits further study is that the rejection rate in local public inquiries in Scotland in the past five years has been higher than 50 per cent. I am not aware of any policy initiative from the Government to address that. Obviously, that relates to small-scale local projects, but it is a concern.

Frankly, warm words in a dated annual report are not the same as a potential investor considering the decisions that have been made and finding that the rejection rate in megawatts has gone from 5 to 40 per cent in the past two years. That is bound to have a negative effect on developers' locational decisions. I ask the minister to reflect on that. The evidence is that the manufacturing industry seems to be voting with its feet. Consider the energy that the Government has had to expend in trying to rescue the Vestas project. If we are really on the threshold of or even approaching realising our potential as the Saudi Arabia of wind power, how do you explain the fact that we have almost no embryonic manufacturing industry and that that which is here is relocating elsewhere? The reason for that is that it is much easier to get consent in other nations, such as Denmark or Spain, even if the efficiency of wind farms in those countries is comparable with or even less than that of wind farms in Scotland.

11:45

The relocation of manufacturers out of Scotland and the UK, or their ambivalence about locating here, is a matter of concern. As the energy minister, what policy developments are you driving? I know that we will hear about one rescue project that has been brokered by the Government. That is not the same as a vote of manufacturing industry confidence in this nation as a powerhouse. How do you respond to developers when they say that half of local public inquiries are hostile and that the number of applications rejected by ministers has risen from 5 to 40 per cent? In policy terms, what are you doing not simply to make it quicker for you to say no, but easier to get a yes?

Jim Mather: I feel as if a negative tsunami has just washed over me. An annual report dated 2008-09 cannot be called dated—it is bang up to date. It is made even more up to date by the fact that we rubbed shoulders with the British Wind Energy Association immediately after I spoke at the all energy conference, where we felt the energy in the room. The atmosphere at the conference and at British Wind Energy Association events resembles that during the personal computer revolution of the 1970s, with lots of ideas and people coming forward. Many of the people who are developing new technologies and getting them market ready are indigenous to and rooted in Scotland. The manufacturing sector is beginning to warm up and to understand the potential that is here. Burntisland Fabrication Ltd is developing and opening up new engineering jobs in Stornoway.

The opening speeches at the conference by representatives of Welcon Towers Ltd, which is taking over from Vestas, were incredibly positive about Scotland and endorsed everything that the British Wind Energy Association said in its annual report. People are seeing not only the policy signals from the Government but its vision, goals and constancy of purpose in achieving those. When we came into Government, we set the goal of generating up to 31 per cent of electricity from renewables by 2011. From what has been built on the ground or is consented and will be ready for implementation before that date, we are in a position to say that that number is pretty much

made. There is even scope for consenting and building more capacity within that timeframe. People are responding to the signals. When we take our proposition to Europe, showcase what is happening in Scotland and have a dialogue with people, we find that they listen with intent and are looking to learn from us. Even the rest of the UK is looking to learn from Scotland.

Ms Alexander: Any developer listening to this exchange would be more encouraged if you acknowledged that there was a problem, rather than saying that there is none. It is a matter of concern that local communities remain so hostile in many instances. It would be helpful if you indicated that you are concerned about how embryonic our manufacturing base is and mindful of the fact that the figures tend to suggest a rise in rejected megawatt capacity, which may give developers concern, and if you provided a menu of policy options that the Government is considering. Simply saying that there is no problem and that we are realising our potential is a signal that is not delivering for us in the international marketplace.

Rob Gibson: Minister, you inherited the crisis involving Vestas. Has the new company had to make provision for the building of larger wind towers?

Jim Mather: Yes. I think that that is very much its ambition. It is looking to increase materially the footprint of the plant that it has at Machrihanish. I get the distinct impression that it is looking to evolve its product range over time, whereas its predecessor more or less left the plant with a mission around a static product that did not evolve. That is a key difference.

Rob Gibson: Are there lessons to be learned from the way in which support for the creation of the original Vestas factory in Campbeltown was given? Was it predicated on particular projects coming to fruition? Do you have any information about that, and can you share it with us?

Jim Mather: I am not entirely privy to whether the support was connected to individual projects. However, we have spent considerable time getting in the room the people who are best able to interact with each other and move things forward. One of the key factors in getting the baton passed from Vestas to Skykon and Welcon Towers was the fact that early in the process, after it was announced that Vestas was minded to go to consultation and to withdraw, we got it in the room with developers, utilities, landowners and engineering interests and so on. In essence, we brainstormed to see what the potential was, which reinforced the other things that were happening. The Scottish Government's energy team was in the room talking about our direction of travel; our desire to see aviation, environmental and community interests sorted and squared before applications came forward; and our desire to create a more collegiate environment, whereby people work more in harmony together and we get further economic development and further development of the manufacturing base and we increase added value in Scotland.

Rob Gibson: So, there is a dynamic to the development of that company, which means that it will be able to adapt to Scottish conditions to a greater extent than Vestas was prepared to.

Jim Mather: That is a fair comment.

Rob Gibson: My second question is on the rejection by public inquiry of certain schemes. We will leave aside the dodgy arithmetic around the number of rejections. One of the largest schemes was in Lewis. We will leave to the historians the question why that scheme was put forward in the form that it was. Is there a pattern whereby applications in certain parts of the country are regularly rejected?

Jim Mather: I think not. However, I will let Jamie Hume answer that question.

Jamie Hume: A previous question was about policies to improve the degree of take-up in local areas. Engagement with local authorities on all these issues is high on our agenda. Last year a series of information-sharing and training seminars were held, which involved the Crown Estate and BWEA. There was discussion with planning officials and elected officials about the range of issues involved and about scope and opportunities. It is worth acknowledging that there is a fair way to travel here. We just did a bit of analysis of all the local authority single outcome agreements, of which only 15 mentioned renewable energy—the rest did not have that in their plans. That shows how much we have to engage with COSLA and local authorities to take forward a common base of understanding. We are planning an engagement session on that later in the summer.

The issue came up at the most recent meeting of the Renewables Advisory Board—it advises the UK minister—which I attended in London. There was a general acceptance in the room that it was not all down to local planning officials, given the pressure that anti-development campaigns are successful at mobilising. Those campaigns have become incredibly sophisticated—for example, by investigating the potential for judicial review of how processes were carried out. A sophisticated and well-organised local campaign can end up derailing a project that might well have been good for the local community. You are right to suggest that rejections are more prevalent in some areas than in others. Issues need to be addressed in areas where there is a high level of resource but a

track record of no decisions being taken. However, we are doing what we can to make progress.

Rob Gibson: On the earlier panel of witnesses, with whom we discussed the Arbitration (Scotland) Bill, there happened to be one of the leading pleaders who take on wind farm applications. You mentioned discussions that you have had, but there seems to be a lack of a Scottish renewables strategy that gets planning rules and intentions through to every level of society including developers, environmentalists, communities and national bodies. When there are so many holes in the fabric of arguments in favour of developing renewables, it is more likely that people will be able to pick off individual applications. Is my analysis correct, and should there be a strategy?

Jim Mather: The RSPB's March 2009 report on planning for wind farms says that it is essential to have a clear and well-understood message within central Government and its agencies, and that many stakeholders have held up the approach in Scotland as a good example. I can see that we could benefit from codifying the procedures and tightening them up, but I think that we are coming from quite a good place.

Rob Gibson: I have to question the urgency with which the issue is being dealt with. Some years ago, Highland Council wrote a huge document that made it nearly impossible for any developments to take place, even dozens of miles away from sensitive pieces of land. Drawing a Scottish strategy together could be one of the best legacies that this Government could leave.

Jim Mather: The chief planner has brought his planning guidelines down from 330 pages to 36 pages. The trend is in that direction.

Rob Gibson: A former energy minister in Britain, Brian Wilson, when questioned on the community benefits of the likes of offshore renewables, said that places such as Shetland and Orkney would not receive the kind of funds that came from the oil industry. He said that communities would not receive that level of funds from the development of renewables.

The record is that community benefit has been pitiful from individual commercial wind farm applications. Communities have to get a full return from their resources, if at all possible. It would be a big help if you gave us a hint of how that kind of approach could be taken with the new marine renewables.

Jim Mather: I wonder whether Sue Kearns could give us some insight on that. There have been material benefits of late from the Clyde installation.

Sue Kearns (Scottish Government Business, Enterprise and Energy Directorate): We have a lot of experience in trying to maximise community benefits onshore, but you are right to suggest that we have to turn to the offshore side of things, where a lot of work will have to be done. Organisations have been set up, and we have a group looking into marine energy and offshore wind. One of the factors that the group will be looking into will be community benefits. It will be important to consider that right at the start, rather than leaving it to the end.

Rob Gibson: In Norway, local municipalities can sell hydropower to the national grid, so it is imperative that we give guidance on such issues to communities in Scotland that have opportunities to benefit from wind, wave and tidal power. I hope that you will share our sense of urgency.

12:00

Jim Mather: We certainly share the sense of urgency. I note that Islay Energy Trust has been pretty successful in brokering arrangements with potential investors in its neck of the woods. Also, in relation to Lewis Macdonald's earlier point, we would envisage having communities in the room when we have that conversation with the Crown Estate and others on offshore wind.

Colin Imrie: That is an important point. The development of community renewables is really making a difference, particularly at the small-scale community level in rural areas. However, I suspect that there will also be opportunities in urban areas in future.

The issue of commercial wind farms has always been tricky. Under the planning rules, applicants have been specifically encouraged not to refer to community benefit in their application in case it is seen as a "bribe". One of the reasons why large-scale wind farms do not gather community support is that they are effectively seen as a lose-lose option. You are getting a large number of pylons or large towers on your hill and you are not getting any money out of it. If there are jobs, they tend to be for contractors who are bussed in from the cities. Once the contractors are there, there are few jobs left. It is important that those issues are addressed more seriously, whether they relate to planning, policy or the way in which applications for a development come forward.

The latest ideas, particularly those that are coming out of the islands—such as Shetland, with its application for the Viking plant, and the Western Isles—show that to build community support for renewables, you need to build in a much clearer and more publicly acknowledged element of community benefit. An example of that could be community ownership of the land on which the wind farm is based, which would provide a much higher level of support to the community,

and more direct involvement of the community than a simple, small pay-off per megawatt, which is what used to be the going rate. That is an important issue, which the committee will want to consider.

Rob Gibson: As a small coda, we could do with a list of the schemes that were rejected. It would be interesting to consider whether any public or community-owned land is involved in any of those schemes.

Lewis Macdonald: The Government's response contains a list of the rejected applications, which were at Lewis, Kyle, Greenock, Clashindarroch and Calliachar.

Rob Gibson: But no detail of whether there is community land involved, which is the point I was making for the community interest. I do not need to be corrected on that.

Ms Alexander: Minister, you have heard from all sides. This is a huge issue. I wonder whether you could ask one of your officials to take a look at our evidence session with those involved in the planning process, who were deeply frustrated that the terms of reference for local public inquiries in many ways militate against a positive decision. You have just heard from Colin Imrie, who was the head of the consents unit, on his view that we should be using community benefit as an incentive. Why has that not happened yet and when will it happen? Will you undertake to facilitate an early discussion on that at the forum for renewable energy development in Scotland? It is becoming one of the themes of the Scottish energy advisory board to consider changing the crazy situation in which developers are discouraged from highlighting community benefit as a central part of their application. If we can move on that as soon as possible it would make a significant difference at the local level.

Jim Mather: I am genuinely open to that.

The Convener: One other planning issue that is of considerable importance to this committee is the Beauly to Denny line. I am not expecting you or your officials to make any comment about whether it will be approved, but the committee is concerned about the timescale. At present, it seems that a decision on that will not be made until towards the end of the year. Could you assure us that the Government will do everything that it can to ensure that the decision is taken—whether for or against—as quickly as possible, and, if possible, earlier than is currently being indicated?

Jim Mather: You can take that as read. I underline the key point that we have to be absolutely sure that due process is followed to the letter. That is what is consuming time at the moment.

The Convener: I appreciate that due process must be followed. However, one wonders why due process must take several months rather than less time, considering that the inquiry has been completed.

Gavin Brown: I would say that the Council of Economic Advisers is quite an impressive group. It recommended strongly that the Government get an independent energy report. Why did it recommend that?

Jim Mather: I would love to be a spokesman for the Council of Economic Advisers, but I am not. It has made its recommendation and, in the spirit of openness, we have taken that firmly on board.

Gavin Brown: So you are saying that, as the minister for energy, you do not know why the Council of Economic Advisers thinks that that is important.

Jim Mather: I have accepted that it thinks that that is important.

Gavin Brown: What is the current state of play with regard to that independent report?

Jim Mather: Work in progress.

Gavin Brown: Are there any indications of when that report is likely to be published?

Jim Mather: I am not entirely sure. Colin, what do we think?

Colin Imrie: It is a work in progress.

Gavin Brown: Before Christmas?

Jim Mather: The fact that it is independent means that the timescale is a little bit more out of our control than would otherwise be the case.

Gavin Brown: So no indication has been given with regard to when it might be finished.

Jim Mather: I have been given no such indication.

The Convener: I think that "work in progress" means that we will not see anything for a while.

Gavin Brown: I will leave that line of questioning there, then.

On energy efficiency, the last time that we spoke, I urged you to submit a better outline, and I have to say that I think that you have done. I am not an expert on energy efficiency but, in the 10 or 12 pages that I got yesterday, I think that there was something that I would call an outline. I am happy to give you credit for that.

In your submission, you state that the Government is due to publish its own carbon management plan. When will that be published?

Jim Mather: A specific date for that has not been finalised yet.

Gavin Brown: I do not want to appear petty, but I would like to know when that might happen. Will it be before the recess, in the autumn or some other time? Has the work been done?

Jim Mather: The work is being done as we speak, but I cannot give you a firm date for publication.

Jamie Hume: It is not within our patch, so I am not sure what timeline those folks are working to.

Gavin Brown: It is not within the energy portfolio. Is that right?

Jim Mather: It is on the climate change side of the house.

Jamie Hume: But it will feed in to work that we are doing on energy efficiency.

The Convener: It might help, minister, if I asked your colleagues in the climate change unit whether they could give us an indication of the rough timetable for the publication of the plan.

Jim Mather: We are taking that marker away with us.

Gavin Brown: You specifically referred to the 2011 target. In the report that you gave us two or three weeks ago, just before the previous time that you appeared before this committee, you said that Scotland has 5.5GW of renewables installed, consented or under construction. Can you give me a rough idea of how that figure breaks down into those three categories?

Jim Mather: I think that the figure is nearer 6GW now, following the announcement last week.

Colin Imrie: With the Whitelee wind farm coming on stream, well over 3GW is operational and at least 2.5GW is in construction or just about to be in construction.

Gavin Brown: So 3GW is operational—

Colin Imrie: Well over 3GW. I do not have the figure to hand. Do you know the figure, Jamie?

Jamie Hume: Not any more precisely than that.

Colin Imrie: It is going up. I think that, following Whitelee coming on stream, the figure is 3.4GW. I can get the exact figures and come back to you.

Gavin Brown: That would be helpful.

Minister, you talked about the target of having 31 per cent of our electricity coming from renewable sources by 2011. Given the figure for operational renewables that you just mentioned, what percentage of the electricity that is consumed in this country comes from renewables today?

Jim Mather: Marginally ahead of 20 per cent.

David Rennie (Scottish Government Business, Enterprise and Energy Directorate): The last year for which we have figures available is 2007, when the figure was something over 19 per cent. We will clarify that for you.

Gavin Brown: Was that the figure for consumption?

David Rennie: Yes.

Gavin Brown: So it is roughly 20 per cent.

Colin Imrie: We cannot be sure until we get hold of the statistics that will come through later, but, given that we now have well over 3GW of operational renewables, we would expect the percentage of electricity that comes from renewable sources now to be around 25 per cent.

David Rennie: The next set of figures will come out around the end of the year.

Colin Imrie: And they will be for 2008, will they not?

David Rennie: Yes.

Colin Imrie: Our estimate, as I said, is that we will be coming near to the 25 per cent mark.

Gavin Brown: The last published figure was around 20 per cent, but you think that, if the data were published today, the figure would be around 25 per cent. Is that correct?

David Rennie: Yes, particularly because the Whitelee wind farm adds 312MW to our capacity, which is a significant amount.

Gavin Brown: What discussions have taken place on the North Sea supergrid in the past 12 months or so?

Jim Mather: Work is being done on that through the strategic environmental assessment. We have also had first-class connections with Europe on the matter. The First Minister made some good overtures in his dialogue with Andris Piebalgs, the European energy commissioner, which we followed up on. He put us in touch with Georg Adamowitsch, the European grid co-ordinator.

Adamowitsch is a significant player. We know for a fact that he will be the continuity figure after the European elections. We briefed him extensively about Scotland's potential in a way that opened his mind: we had him make presentations to conferences here, and we spent two very full days with him, which included an extensive meeting with the First Minister. The net result of that has been that Scottish Government energy officials now sit on his grid working party for Europe. We have plugged in to the main stream and are doing everything that we can in that area, as well as maintaining a dialogue with National Grid, the Office of Gas and Electricity Markets, the Crown Estates and others.

Colin Imrie: We were represented on and made a presentation to Adamowitsch's grid group in February and attended a conference in Marseilles in March.

I should also stress the fact that we are working closely with the United Kingdom Government officials in that regard. In many senses, the blueprint for a grid with interconnections across the North Sea can be built on the back of the proposals that are already set out in UK terms through national planning framework 2 and, in particular, the report of the electricity network strategy group, which came out in March and puts in place agreements on interconnections between the Scottish islands and the mainland and proposes connections between Scotland and England to allow for increased exports of electricity from Scotland. The interconnections in that blueprint will, of course, include connections with the offshore wind farms in the North Sea, which, by 2015, should include developments off the Scottish coast to the east and west—that is why the on-going work with Ireland is important.

12:15

The European Union has now recognised the North Sea grid development as one of its six strategic energy priorities alongside more effective connection of gas corridors in south-east Europe and the improvement of diversity of supply for security purposes through the involvement of the northern seas, which include the North Sea and the Irish Sea. Our work at ministerial and official level and in co-operation with the UK is designed to take forward those European strategic priorities; indeed, we are trying to find collaborative projects to develop as part of the European economic recovery programme and to take forward the North Sea concept. Given all that and the plans for island interconnections from the Shetland Islands and the Western Isles that have already been identified as priorities in the UK's ENSG report, Scotland has the opportunity to be at the leading edge of developing the technology to integrate direct current cables into alternating current systems.

Marilyn Livingstone (Kirkcaldy) (Lab): Your supplementary evidence refers to

"Potential gaps / risks to reaching our 2020 target and options for reducing these".

I have a couple of questions on enterprise, energy productivity and skills and jobs. First, with regard to the energy and construction sector, you highlight the need to retain existing jobs, to keep us competitive and to create new jobs. What additional funding is Scottish Enterprise making available to the companies that most need support at this difficult time?

Jim Mather: There is much more of a focus on ensuring that the sector comes together and that there is more cohesion. A central plank of the recovery programme is to ensure that the energy sector realises its potential and attracts the full involvement of commercial interests. That is business as usual, and those signals are being recognised by Vestas and other companies.

Marilyn Livingstone: The construction industry's role will obviously be crucial. You say that it is business as usual, minister, but the fact is that for many companies that is simply not the case. They are under real threat, and many people, including apprentices, are losing their jobs—Michael Levack, for instance, told us that the industries were experiencing a flight of skills. There is huge concern that business as usual simply will not do, and I seriously believe that Scottish Enterprise has to refocus its efforts. I know that it is carrying out a lot of work with account-managed businesses and business gateway but, from evidence that I have seen in my constituency and in other areas, the group of businesses caught in the middle is giving rise to concern.

Instead of the business-as-usual approach, which is just not good enough, we must have specific policies to ensure that we remain competitive and that the flight of skills does not happen. After all, the question is whether we will be in fine enough fettle when we finally come out of the recession.

Jim Mather: The member should look, for example, at the money that we are putting into encouraging energy efficiency and our work on that front with the Scottish Builders Federation and the Scottish Construction Forum. Many house builders are successfully migrating to installing replacement windows and other energy efficiency measures, and they are managing to maintain the integrity of their businesses with support from and as a result of work with the Carbon Trust and the Energy Savings Trust and funding from the Scottish Government. There are huge opportunities, and I am happy to say that many contracting businesses are taking advantage of them.

Marilyn Livingstone: As you have said, we need to retain skills in the sector and, indeed, upskill workers. However, week after week, more and more apprentices are being made redundant. What influence do you have over the skills agenda? I have been very disconcerted by a number of developments, including the fact that funding for level 2 modern apprenticeships is lower than the level that the industry thinks it needs to deliver the places and much lower than the funding being made available south of the border. As a result—and as the sector skills

council for the construction industry has told us loud and clear—companies, which are already under extreme pressure, cannot take on redundant or new apprentices.

Evidence from the sector suggests that we are not training enough apprentices and that the package for those who have been made redundant is not good enough. When I recall how we lost a whole generation of people as a result of the miners' strike, I have grave concerns about the folk who have lost their jobs and what we are doing for them.

As for retraining engineers to carry out retrofitting, install heat pumps and so on, we are talking about specialist trades that the industry has said require work placements. Those placements are no longer available because companies that are losing apprentices and other employees are reluctant to take on such work. Given that that is a huge issue for the Government, how are you working with the Cabinet Secretary for Education and Lifelong Learning to address it, and what funding is being made available?

Jim Mather: We held the apprenticeships summit last month, and we are working very closely on the issue with the Cabinet Secretary for Education and Lifelong Learning and with Skills Development Scotland. Indeed, SDS's chairman, Willy Roe, is also chairman of Highlands and Islands Enterprise and as such is very much aligned with the work. We are also bringing forward £95 million of European money to ensure that 75,000 places will be delivered over the piece.

Moreover, we are continuing our very open discussion with the industry, which has made it clear that maintaining continuity of employment and retaining skills will be important for what happens when the recession ends. The oil and gas sector, in particular, retains the folk memory of what happened back in the 1980s, when it downsized its operations and lost a lot of people and talent, especially the young talent in the pipeline. When the good times came round again, the sector found that, when it pressed down on the accelerator, it did not have the skills that it needed to drive forward. In essence, we are trying to create a climate in which everyone realises that we are all in this together and are looking to work with the industry, sector by sector, to achieve that end. In fact, that has been a recurring theme in our work with 50-plus industrial sectors over the past two years, and efforts to address the issue have woven in the involvement of the Cabinet Secretary for Education and Lifelong Learning, Skills Development Scotland and others.

Marilyn Livingstone: Concerns have also been expressed about capacity in our universities and colleges and, in particular, the situation with school leavers. As you know, applications to those institutions have increased by 30 to 40 per cent and, with the caps that have been put in place, courses in many key subjects are now full.

There has also been an increase in applications for bursary funding. Because of the number of people staying on, my own college, Adam Smith College in Kirkcaldy, needs £500,000 of additional money to meet the demand for bursaries. I think that the figure for Scotland overall is £4.5 million. Minister, I do not have to quote all the statistics; you already know them. How do you plan to support people who have lost their jobs or their apprenticeship places to enter university and college, and what discussions have you and your Cabinet colleagues had on alleviating the situation?

Jim Mather: What I can say is that the early indications that more people want to educate or upskill themselves are a heartening sign. I know that the cabinet secretary, the Cabinet and Skills Development Scotland are working closely with the colleges to see how they can channel that enthusiasm through the available resource to ensure that we make best use of it for education. However, that is not my distinct remit, and I am loth to be a spokesman for my colleagues.

Marilyn Livingstone: What I am saying is that it is important that you have that dialogue in the areas where you will require those skills. If people cannot get into the sectors that are required, that is a big issue for your portfolio. I am asking what influence you are going to have on that agenda.

Jim Mather: It is key that we work closely with the sector skills councils. We must also show a willingness to work with each of the sectors, which we have done since we came into government. We have a shared opportunity to channel that enthusiasm and get it to work through.

Christopher Harvie: I have the odd cheap political point to make first. People looking at the technical innovation in this country and the supply of skilled labour will note that they are about a fifth of those of several of our major industrial competitors on the continent—I refer to my experience of teaching in Germany. They will also notice that the biggest technology projects that we have running are not wind farms or anything like that—they are building another Trident and two aircraft carriers, which are all a bit of a folie de grandeur for a rather small and not particularly successful European economy.

What advantages can we gain from our involvement in North Sea oil in terms of routes, expertise and the recycling of equipment that is destined for oil rigs—for instance, generators, combined cycle equipment and the like—to provide a means both of training up manpower, in reconditioning and adapting those things for

onshore use, and of producing a much more decentralised form of conventional carbon burning power than we have at the moment? Our interviewees in Denmark were astonished to find that we had a colossal power station—Longannet—that had no connection to any form of district heating. District heating reaches 64 per cent of Danish households. That is a form of intermediate technology that we can develop along with new forms of renewable generation.

Jim Mather: That is an interesting question on innovation. I often ask myself why we have lower levels and what is different in this country. One key issue in Scotland is the lack of economic powers, which means a consolidation of ownership elsewhere that creates that predisposition, but there is perhaps also a wider British industrial malaise vis-à-vis research and development, the value of which is not properly understood.

In fact, there is perhaps a failure to pick up—I will indulge Gavin Brown here—on the Deming approach of continuous improvement, continuous focus on what the customer wants and being hard wired to an innovative mindset. If we stick with what we have got, that is stasis, and stasis will see other people going past us. If we do not develop, others will. I recognise that and applaud the work of Professor Umit Bititci at the University of Strathclyde, who is bringing that into play through an organisation called the Strathclyde institute for operations management.

12:30

The advantages that we can gain from our involvement in the North Sea oil industry have been a repeated theme in every speech that I have made to an oil and gas audience over the past two years, and it is beginning to get real traction. When I was at the offshore technology conference in Houston, Texas, I found that the delegates from Scotland were very receptive to it. It was particularly heartwarming to go to the all energy conference last week and find that people are migrating and diversifying from an oil and gas expertise base. The appetite to do that is material, and it can and will only grow. Those people have considerable expertise, and they realise that cause and effect has given them an industry that will survive beyond the life of hydrocarbons in the North Sea, which is exactly what we want from renewables.

I think that the penny is dropping on district heating, and it will feature in what we are doing on renewable heat. Lessons are being learned, and I noticed an example in my constituency recently. A district heating system in Lochgilphead had been less than wonderful because the insulation on the pipes from the boiler house to the homes was less than wonderfully efficient. That lesson has been learned in other installations in Argyll and Bute, which now have things right. We are in an evolutionary process, but some of the low-hanging fruit associated with our major generating stations must be addressed.

Colin Imrie: Christopher Harvie mentioned renewable heat. One plan under the energy efficiency action plan is to address non-renewable heat, because it is clear that we do not take advantage of waste heat as we should do. We need to do more about that, but we must recognise that it will be a long and difficult task to change the process. Our country had cheap coal and everybody had coal fires, and then we suddenly moved to having cheap gas, at least for properties that are on the gas grid. As in countries such as the Netherlands, people installed boilers in their houses. That has been the general approach, and it will be difficult to change that. We are not in the same position as Denmark, which went down a different road.

Nevertheless, there are some good examples of joint working, such as the combined heat and power systems in tower blocks in Aberdeen and the opportunities through the new sustainable Glasgow project. Trying to change the process overall is an important way of demonstrating that we are moving towards a more energy efficient future.

The Convener: In the section of your supplementary evidence on new coal-fired power stations, you state:

> "As a general principle, the Scottish Government considers that new generating plant should be sited adjacent to existing thermal power stations, where it can make use of existing supporting infrastructure."

Should you not also make it a principle that new generating plant should be situated where the waste heat can be used effectively and efficiently?

Jim Mather: I think that that almost applies.

The Convener: It does not apply at the moment. None of the existing thermal power stations has a district heating scheme attached to it, and some of the stations are quite distant from major urban centres. They are not unsuitable for it, but they are not in the best locations for making best use of district heating.

Jim Mather: You can expect that to be covered in the guidance.

Christopher Harvie: We know from our Danish experience that the Danish heat grid can be up to 60 or 70km away from where the heat is generated—the heat pipes are very efficient. It is not beyond the bounds of possibility that, with adaptation, Longannet could supply places as distant as Glasgow.

On a more general point, I often read supposedly optimistic articles in the papers that fill me with dread, in which a supermarket company announces that its new supermarket is 70 per cent more heat efficient than its existing supermarkets. It is when one glances round all the existing supermarkets and watches them simultaneously freezing and warming themselves, with a minimal degree of insulation, that one realises that that, in combination with the total road orientation of delivery and purchase, means that a revolution has been going on in Scotland over the past 20 years that is totally negative as far as conservation is concerned. We therefore need audits and improvements in retail to give us a much more conservationist type of operation.

Another chilling point came up at last week's committee meeting when the housing associations were asked whether they would be interested in new-build property in Britain that could not be let. They said, "Not on your life. The stuff just does not reach the standards that we would want." That was one of the most chilling reflections on the housing boom in Britain. Again, we need an audit of what can be done to improve such buildings so that they are not only modern but bearable.

Jim Mather: I believe that you can expect what you seek from the on-going work of the Carbon Trust, which will be supported by the provisions of the Climate Change (Scotland) Bill. That would have been more evident to you if you had joined me yesterday at the new energy technology centre in East Kilbride, which is funded by Interreg money. The plan is to take over what is largely a 1950s campus, with many 1950s buildings that are worse even than those that you described a moment ago, in order to test the spectrum of technology for energy efficiency. The centre will assess new forms of bricks with energy-efficiency elements and the use of air-source heat pumps, solar energy and so on, in order to improve the fabric of the buildings.

There was a great turnout of people yesterday at the meeting at the East Kilbride centre: there must have been 60 or 70 in the room who were committed to contributing to the process. Meanwhile, at the other end of the equation, Marks and Spencer is trying to hone its corporate social responsibility by seeking to move its premises to an energy neutral position.

The Convener: Members want to come in, but I will ask a couple of questions first. I want to explore a bit more the purpose of the energy advisory board and the advisory themed groups. They were announced during our previous meeting with the minister, so we did not have a chance to consider them in depth. However, at that meeting Lewis Macdonald raised the absence from the board of a couple of key sectors: the nuclear industry and, more significant, energy efficiency people. The board seems to be made up primarily of people with an interest in production rather than in reducing consumption. What role does the advisory board have in driving forward measures for energy efficiency and reducing consumption?

Jim Mather: It has a comprehensive role. In the speeches on the issue that we have made over the past year, we have increasingly highlighted energy efficiency as the low-hanging fruit that allows us to get to where we want to be on the overall climate change issue and Scotland's competitiveness. When I gave evidence to the committee on 13 May, I may have eclipsed the role of Ian Marchant of Scottish and Southern Energy as probably the one person on the board whom I believe will do the most effective job on energy efficiency, because he has a strong vested interest in doing so. He regards energy efficiency as a key, added string to his company's bow. I suspect that Scottish Power's board will take the same generic approach. We are now beginning to see an approach that considers the totality of energy and regards generation, distribution and energy efficiency as parts of the whole. I expect Nick Horler of Scottish Power and Ian Marchant to play as big a role in that approach as anyone.

The Convener: Will you explain the themed groups' link with the advisory board? To what extent are they subordinate to the board, in the sense that they will take instructions from and report to the board, or is each group self-standing, as FREDS is, with a link that does not necessarily involve a subordinate role?

Jim Mather: To view their role as subordinate or to have an excessive focus on processes is not entirely helpful. The groups are, essentially, entities that will, from the bottom up, feed into the advisory board and give it the additional focus on specific areas that would be harder to achieve in that macro forum. We are involved in trying to bring things together, in a very collegiate spirit, to ensure that, at the advisory board level, Scotland gets the best possible overview of energy in relation to our overall competitiveness and economic development.

The Convener: I raise the issue because, although FREDS has obviously been a very successful innovation, I am concerned to ensure that we do not end up with a bureaucratic system in which the work that it does is slowed down because it has to go through reporting processes and so on. Will the themed groups be able to carry on their work while reporting into and informing the advisory board? Will they be able to take forward their own initiatives without having to wait for permission from the advisory board?

Jim Mather: We are all working to the same worthy goals: ensuring security of supply and optimisation of energy in Scotland; ensuring Scotland's competitiveness; and having the quality of life and level of economic development that allow more people to be in work, using energy and paying their bills—the whole totality of it. We are looking to have energy as a key platform in Scotland's overall competitiveness and wellbeing.

Colin Imrie: As an illustration, it is perhaps worth adding that the thermal generation and carbon capture and storage group and the oil and gas advisory group will work very closely with Scottish Enterprise, which will provide the secretariat and will work very closely with them in its industry-related roles. Last week, David Rennie discussed with Brian Nixon from Scottish Enterprise how the system will work.

David Rennie: Brian Nixon and I discussed, first, the formation of the thermal generation group and, in particular, the oil and gas group. Membership is still being clarified, but there will be an obvious linkage between the three sub-groups and the main advisory board. In some cases, members of the sub-groups will also be represented on the advisory board. That will enable communication, discussion and the feeding through of papers, requests for information and so on. We hope that the first meeting of the oil and gas group will take place within the next few months. Brian Nixon is taking the lead on that, but we are working closely with him.

Ms Alexander: The creation of the Scottish energy advisory board is a welcome development. The minister talked about how it will look at the totality of issues. I am therefore puzzled as to why we are setting up a completely separate programme board on energy efficiency, which is not a themed group and does not report into the Scottish energy advisory board. Why is that the case?

Jim Mather: That board has been set up because of the volume of work that has to be done and the level of detail that has to be covered, and because it provides the opportunity to bring in people who are particularly knowledgeable about those areas and can take them forward to the right level in a proper way.

Ms Alexander: I can think of nobody more high powered than the First Minister, Jim McDonald, who is our foremost academic in the area, Nick Horler and Ian Marchant, who are the chief executives of their respective corporations, and Brian Nixon at Scottish Enterprise. They all sit on the Scottish energy advisory board, but we are to have a separate programme board on energy efficiency that will be denied the expertise of those individuals. I know that the minister is a keen student of the international marketplace in ideas. He would have seen the new energy secretary in the United States—a Nobel prize-winner—saying last night that energy efficiency should be the number 1 priority. The minister has set up a body that he says looks at the totality of the issues but he has shoved energy efficiency off into a wee group on its own. It is unlikely that any of those individuals—Jim McDonald, the First Minister, Nick Horler, Ian Marchant or Brian Nixon—will be asked to sit on both bodies. Even if they were, why is energy efficiency not an integral part of the Scottish energy advisory board's work? Will the minister reconsider the wisdom of putting energy efficiency into a group on its own, given the risk that it will become a Cinderella subject? I do not expect an answer now, but the issue merits reflection.

12:45

Jim Mather: We have given it considerable reflection. I get the feeling that if we had gone for one big consolidated entity that met much more frequently than could possibly be sustained, we would be nailed for that, too.

In essence, we have a terrific group of people on the advisory board and in the themed groups who are committed to making things better in Scotland. We should applaud them all for their time and effort in taking part.

Ms Alexander: I agree whole-heartedly, but that does not answer my question. Why is there not a themed group for energy efficiency? Why is energy efficiency not part of the energy advisory board's work?

Jim Mather: Energy efficiency is in the bone marrow of every single element of the process. Colin Imrie might want to add to that.

Ms Alexander: It is not mentioned in the remit or the terms of reference in your supplementary evidence, and you have now set up a parallel body. Why?

Colin Imrie: The programme board will work within the Scottish Government and will involve the public sector. Its job will be to drive forward the preparation of the action plan. The consultation document will be published in the summer and brought to the main advisory board when it meets again in the autumn, which will be a major opportunity to bring in the external stakeholders.

Ms Alexander: It is helpful that you have clarified that the programme board will work within the Government. However, that still leaves the fact that the US energy secretary and many others say that energy efficiency is our greatest challenge in the energy sector, and yet there will not be a themed group to examine the issue as part of the all-Scotland stakeholders organisation. I wonder

whether the issue merits further reflection, given the universal impression that the Government has given experts in the field that energy efficiency is a Cinderella subject.

Christopher Harvie: Energy efficiency is covered in annex D to the supplementary evidence.

Ms Alexander: Will the minister consider making it a themed group?

The Convener: The committee might wish to reflect on that in its report—and the minister might wish to reflect on it, too, following the points that have been made.

Jim Mather: We will certainly reflect on the vehemence with which the subject has been mentioned, but I reiterate that we agree with the view from the US that energy efficiency is up there as the number 1 issue. It is low-hanging fruit on which we can make big progress; that view is reflected in pretty much every public statement that we have made on the issue during the past two years.

The Convener: I will pick up a couple of points. Can anyone explain what is meant by the paragraph in the supplementary evidence that states:

"Each themed group will be chaired jointly by the Minister and an Industry member. For instances when the Minister is not able to make a meeting, the appointed industry member will stand in. The Chair and Deputy Chair will rotate bi-annually. The chairs and co-chairs of these groups will also be members of the strategic steering group".

It mentions co-chairs, chairs, deputy chairs and rotating chairs. That does not seem to make any sense. Who exactly will chair—or co-chair—the groups?

Jim Mather: I have a pretty good track record of turning up for FREDS, but we discovered early on that there was a positive benefit in bringing in as a co-chair someone who was steeped in the issues full time. The experience of working with Jason Ormiston as my co-chair on FREDS has been really good. I come from a tradition that says that experts are usually the people who do the work, and given Jason's background the co-chairing aspect has worked well.

I think that that approach will work in this case, too, but I commit to making myself available because it is an important learning exercise. We have developed the way in which we run the sessions to help elevate the process and ensure that we get a genuine flow of ideas.

The Convener: I have no problem with the groups having co-chairs; I am simply concerned that the paragraph that relates to chairs, co-chairs and deputy chairs is a bit confusing and perhaps needs to be clarified.

On a slightly more serious point, will the thermal generation and carbon capture and storage group examine, as part of its task or theme, the issues of waste heat and district heating schemes? Will it also look at issues such as energy from waste and CHP plants?

Jim Mather: Absolutely, on both counts.

The Convener: Is energy from waste allied to district heating an integral part of the Government's plans for Scotland's energy future?

Jim Mather: When I was at the all energy conference last week, I was impressed by the progress that the Austrians are making on the use of waste. We have material plans on the renewable heat side.

Sue Kearns: Energy from waste will form part of the renewable heat action plan; we are looking for a really strong contribution from our waste policy colleagues on the issue. There is a cap on the contribution of energy from municipal solid waste—members probably know that 25 per cent of MSW can go towards energy. There is much more that can be done in the commercial and industrial sector. We need to look closely at that area, as we can get a lot out of it in the future. Energy from waste is a key part of renewables targets.

The Convener: What is the logic of the cap?

Sue Kearns: You must put that question to waste colleagues. I think that it relates to the waste hierarchy. It is more efficient, in waste efficiency terms, to begin with recycling and so on and to go last to energy from waste.

The Convener: I have no problem with that, but I am not entirely sure that I see the logic of having a cap on the amount of energy that can be generated from waste.

Sue Kearns: It is to ensure that the other mechanisms are used first.

The Convener: I do not think that there is a logic to that. If we have done everything that we can to reduce, reuse and recycle—the hierarchy should ensure that that happens—why should we be able to use only a certain amount of what is left for energy? About 50 per cent of waste, on average, cannot be reused or recycled. It makes no sense to set a cap of 25 per cent. Should we not have a restriction on what can be sent to landfill? In Denmark, nothing that can be reused, recycled or combusted can be sent to landfill.

Sue Kearns: A ban on sending biomass to landfill is being considered.

Jamie Hume: The issue of planning gain and whether community benefit can be considered alongside applications was raised earlier. Energy from waste and planning gain are examples of

issues where there has been a fairly narrow focus by distinct policy areas across the public sector and in government. In the current climate, we are trying to push at the boundaries and to identify obstacles. As Sue Kearns said, we want to open up conversations and to look at changing policy in areas that are closely linked but peripheral to our key policy. Much of our work is focused on that.

The Convener: I seek total clarity on the Government's position on carbon capture and storage from coal or gas-fired power plants. The supplementary evidence refers to

"the aim of decarbonising the electricity generation sector by 2030."

Is it a reasonable assumption that the Government's position is that it will allow new coal-fired power stations that do not have carbon capture operating at the time of build, provided that it is in place by 2030?

Jim Mather: You should wait until we produce the guidance, once we have assimilated the views that are expressed in response to the consultation and taken on board the UK Government's policy statements on the matter. It is too early to reach the conclusion that you have set out.

The Convener: What is the timescale for publication of the guidance?

Jim Mather: We plan to produce it during the summer.

The Convener: Do you expect any carbon capture and storage plants to be operational in Scotland by 2015?

Jim Mather: We are hopeful that we will do well in the demonstrator competition. The proposals that have been submitted for Scotland make a compelling case. There is huge competence at the Scottish carbon capture and storage centre, especially in the person of Stuart Hazeldine, who is a stellar figure. When we took him to Norway to discuss the issue, we got an enormous amount of interest, as we did when we took him to Brussels.

There is an awareness that carbon capture and storage is particularly suited to Scotland, as we have the appropriate geology and infrastructure in the North Sea. There is potential to involve the method in enhanced oil recovery and to have a grid in Scotland that could serve carbon capture facilities throughout Europe. Those points have been well raised and have attracted interest from Europe.

Colin Imrie: The UK Government announced at the end of April that it plans to consult during the summer on a proposed levy or feed-in tariff to support up to four demonstrators throughout the UK. We have been working closely with the UK Government on that. The Scottish Government has responsibilities for the issue in relation to regulation and the way in which such money would be spent. Scotland has real opportunities to play a key role in the UK demonstrator competition and more widely. The UK Government plans to consult on the issue over the summer, in partnership with the Scottish Government.

Jim Mather: It is worth mentioning "Opportunities for CO_2 Storage around Scotland—an integrated strategic research study", which the First Minister launched on 1 May. We have the interest of the EU, whose overall economic recovery plan seeks to support carbon capture and storage projects. We are considering what we can do on that.

David Rennie: At the time of the CCS report launch, the First Minister gave a commitment to publish a road-map on CCS. That will involve a range of partners. One good thing that came out of the research project and report to which the minister referred was that 19 organisations were involved, which shows the breadth of expertise and interest in Scotland. We are seeking to build on that so that we do not just have a report, full stop. Discussions are taking place between various individuals and partners in those 19 organisations about what happens next, how they want to be involved in the road-map and how they want to progress.

Colin Imrie: There is a particular opportunity through the EU economic recovery programme to make progress with practical projects that could lead the way in Europe, whether on storage or demonstration. Those are being worked on. We hope that ideas will be produced in the next week or two.

The Convener: In evidence that we heard on fuel poverty during our inquiry, it was suggested that investment of £1 billion to £1.2 billion is required to meet our fuel poverty targets. That amounts to about £100 million a year in area-based energy efficiency schemes. Is there any prospect of the Scottish Government including sums of that order in future budgets to meet the fuel poverty targets and to contribute to meeting climate change targets?

Jim Mather: We continue to fund the Carbon Trust and the Energy Saving Trust. We are also working on the energy assistance package, which is supported by £60 million of Scottish Government funding and by carbon emissions reduction target—CERT—funding from the energy companies. A lot is happening and, as we come through the economic challenge that we face, I hope that we will be able to do more. We will consider that at the time. We will also seek to have a more effective economy that gets more people into work and takes more people out of the fuel

poverty net through the vehicle of their having fulfilling and productive lives in the workplace.

Lewis Macdonald: At the all energy conference last week, I met representatives of several enterprising companies that are involved in heat, including ones that are considering the use of biomass to produce heat. The minister will be aware that the project involving Aberdeen City Council and the Aberdeen Heat and Power Company is a good model, but that other local authorities have not yet been able to replicate it. As Colin Imrie suggested, in part, that might be because of the existing infrastructure in other places.

13:00

However, one of the things that Aberdeen Heat and Power brought to our attention when we met it was that, in Scotland, the parts of our district heating systems or combined heat and power systems that are subject to business rates are more extensive than they are south of the border. For example, pipes that lead into people's homes, to which the minister referred in relation to Lochgilphead, are subject to business rates in the high-rise blocks in Aberdeen, and I presume that that will also apply if such projects are developed in Glasgow. However, that is not the case south of the border. Does the minister think that Government can address that?

Jim Mather: In my experience, when you get individuals together to discuss trying to optimise a locality and get better results for people, they tend to change their position. I am always keen to try to get as many people in the room at one time as possible to have that debate. I offer an Aberdonian example: when the Food Standards Agency came to engage on aquaculture, it came into the room determined to protect public health, full stop. That was its limited vision at the time, but it left the room three hours later wanting to help the industry produce more safe, healthy, nutritious food in order to protect public health.

When there are potential constraints and difficulties, let us try to broker a meeting at which we get the two sides of the equation in the room. When we have successes, such as the one in Aberdeen, let us find ways to broadcast them in a climate in which other people are broadcasting their successes, from which Aberdeen might learn.

Lewis Macdonald: Can I take it from what you say that ministers would be prepared to consider the issue?

Jim Mather: We are prepared to broker the debate because when you get reasonable people in a room with a unifying goal—for example, making Aberdeen as compelling a place to live and work in as possible—all things are possible.

The Convener: I appreciate that you have to leave shortly, but I have a final, brief question. In response to a written question, your colleague Stewart Stevenson told me that a study on whether air-source heat pumps should have permitted development rights is out to tender. The study will cost around £25,000 to £30,000, and the decision is to be made towards the end of the year. Do you not think that it would be better value for public money to spend £25 on sending ministers and a couple of officials to Mitsubishi to look at its heat pump?

Jim Mather: Who is to say that both things are not happening?

The Convener: Okay. On that note, I thank you and your team very much for your evidence. I am sure that you will look forward to our report.

As this is the end of the information and evidence gathering for the energy inquiry, I place on record the committee's appreciation of everyone who has given oral or written evidence and those who have facilitated any of our fact-finding visits during our extensive inquiry. We have gathered a huge body of information, and over the next couple of weeks we will craft a report that I am sure will be challenging and valuable. We look forward to publishing the report some time in June and to the Government's ultimate response to it.

That brings us to the end—

Rob Gibson: Before we close, may I ask whether we will receive a paper from the clerks on a banking inquiry?

The Convener: If you will allow me to complete my business, I will tell you what is happening.

We will see the minister next week in connection with the Arbitration (Scotland) Bill—I am sure that he is mugging up on it, as we are. We look forward to that. Next week, we will also discuss our future work programme, when the subject of banking will come up. That concludes today's business.

Meeting closed at 13:04.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 9 June 2009

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by RR Donnelley