ECONOMY, ENERGY AND TOURISM COMMITTEE

Wednesday 3 June 2009

Session 3

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ECONOMY, ENERGY AND TOURISM COMMITTEE
18th 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 ALSO ATTENDED:

Nigel Don (North East Scotland) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Graham Fisher (Scottish Government Legal Directorate)
Hamish Goodall (Scottish Government Constitution, Law and Courts Directorate)
Jim Mather (Minister for Enterprise, Energy and Tourism)

CLERK TO THE COMMITTEE

Stephen Imrie

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Gail Grant

LOCATION

Committee Room 1

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 3 June 2009

[THE CONVENER *opened the meeting at 10:01*]

Work Programme

The Convener (Iain Smith): I welcome colleagues to the 18th meeting in 2009 of the Economy, Energy and Tourism Committee. The Minister for Enterprise, Energy and Tourism, Jim Mather, is not available to discuss the Arbitration (Scotland) Bill with us until 11 am. If necessary, we will suspend the meeting after consideration of agenda items 1 and 2 and resume at 11 am. Members might welcome at that point the opportunity for a private discussion about lines of questioning for the minister.

I have received no apologies this morning and Nigel Don is here again as a guest member. Item 1 is to consider our work programme. I asked the clerks to produce a paper on possible options for our future work programme that also outlines what the committee has done to date. I am not asking for agreement today on exactly what we will do; rather I ask for indications of which areas the committee might want to consider for our programme after the summer recess so that the clerks can work up some more detailed ideas. We do not have to hold a full committee inquiry on everything; there is an option to have reporter-led inquiries whereby one or two members look into a particular area and report back to the committee.

Given that we have concentrated to date on tourism and energy, and in light of the current economic situation, we need to focus on the economy and enterprise areas of our remit over the next few months. There are some suggestions in the paper about areas that we might wish to cover. I invite members to offer their comments and thoughts.

Rob Gibson (Highlands and Islands) (SNP): We have an extensive paper on the future of the banking and building society sector. Unfortunately, looking to the future requires us to understand a bit about the immediate past. Although it is important to look at the potential for job creation in the financial sector as we eventually come out of recession, some of the reasons why we have reached the condition that we are in, whereby banking jobs have been lost, are germane to the committee. For example, we heard evidence from the Dunfermline Building Society chief executive last September. Although we have limited powers, we have considerable interest in exploring how banks and building societies affect the whole of the Scottish economy and I hope that we consider using our remit to have a full inquiry into the subject. We would have to agree on the remit for the inquiry, but I hope that it would be as widely drawn as possible. I am interested to hear what members have to say.

The Convener: I say at the outset that my primary concern is to ensure that the committee works on an issue that is within our remit and on which we can make recommendations that the Scottish Parliament can actually implement. I would be concerned about undertaking an inquiry that had a limited chance of getting to the bottom of an issue—because of the limitations on the Parliament's and the committee's powers—and in which we would not be able to reach conclusions that could be implemented, because the Scottish Parliament does not have the power to do so. On that introductory note, I open up the issue for further discussion.

Lewis Macdonald (Aberdeen Central) (Lab): I have a lot of sympathy with that view, convener. I am aware that discussions were held at the Parliamentary Bureau on the possibility of the Parliament establishing a committee with a remit that would cross the boundaries of various committee remits. I am interested in members' views on that. Rob Gibson is right that the issue is important for the wider Scottish economy, but the convener is absolutely right that there is a limit to the recommendations that our committee can usefully make, given the limits of our remit and the Scottish Parliament's powers. However, given the exceptional circumstances, there may be a case for an exceptional approach by the Parliament, rather than the committee, to establish an ad hoc body that would include members of various committees and whose remit would cross committee remit boundaries. That committee could consider the issue as a whole but, even in that context, we would have to acknowledge that there is a limit to what the Parliament can recommend to ministers, because many of the issues are reserved.

Christopher Harvie (Mid Scotland and Fife) (SNP): The implications of finance and banking for general economic development are a crucial issue. The finance and banking sectors are important not simply as industries in themselves, but as the necessary suppliers of capital and of international arrangements for matters such as the enormous costs that are involved with infrastructure and renewables projects. That has an absolutely crucial bearing on the committee's general purposes. For instance, from what we saw in Denmark and Germany, the implications of finance as well as technology more or less

assume a banking system that is fit for purpose. In general, our banking system seems not to be so.

Ms Wendy Alexander (Paisley North) (Lab): Whether we are talking about an inquiry by us or by another body, greater clarity is needed. Almost no part of the issue that Chris Harvie raises about whether the banking system is fit for purpose falls within our remit. Rob Gibson talked about having a look back. If we look at the period from when the credit crunch began to be visible in the United States in the autumn of 2007 until the crisis hit fully in September 2008, we see that the issues in that time were, for example, the capital adequacy ratios for banks, the degree of regulation of products that were in the shadow banking market and whether the prospectuses for rights issues that were issued in March 2008 were wholly honest about the circumstances of the institutions. We would then be into the territory of the terms of a takeover and the role of the Office of Fair Trading, which was the issue that dominated much of our discussion in the autumn. We would also be considering the undertakings that the Financial Services Authority gave about the state of some of our banks at that time.

Not one of those issues—including prospectuses, the role of the shadow banking market, capital adequacy ratios, international regulation and the OFT's degree of leverage in takeovers—is ours, but if you take a look back, those are the issues that matter. The United States courts are now pursuing them. I am not against further investigation of all those things. I do not see how you can construct a global banking system without reflecting on those matters, but it seems to me that none of them falls within our remit. The critical issue is clarity about what is within and what is outwith the scope of the inquiry, which I do not think that we have achieved.

Chris Harvie raised one issue that it is appropriate for this committee to consider, which is the quality of banking, or the lending environment, for small and large businesses in Scotland. However, that is only one part of the forward prospectus. Other parts are the role of the financial sector, given that it is the dominant sector in the Scottish economy, the role of the skills base and a future skills map.

It seems to me that there are three issues: banking as a service provider to the wider global economy; the shifting nature of the contribution of the Scottish financial sector; and the implications for the skills base. The issue of the lending environment for businesses in Scotland would need further work, but the remit for that would be very different from the remit that we are talking about. Skills, which is not in our territory, and the role of the financial services sector in the Scottish economy, are areas that we might want to look at in the context of the six priority areas on which the enterprise networks have chosen to focus.

I have highlighted some of the difficulties with looking back. Many witnesses would say, "I am sorry, but that's not your business," and I am not sure that that would enhance the reputation of the Parliament. Even if witnesses did seek to answer, it would be difficult for us to pursue the matter.

Bearing in mind the concentration of financial services in Edinburgh and, to a lesser extent, Glasgow, and the role of skills, if it were just the Economy, Energy and Tourism Committee that held an inquiry we would not allow for key Lothian members, including Margo MacDonald, who first raised the issue and put it on the agenda, to participate and we also would not capture the skills agenda, which seems the most pressing one for us, given that Scottish public policy could have a material influence on the future of the sector.

I do not think that there is clarity around what is within or outwith the scope of the inquiry and what part of a look-back would be within our remit. I cannot see how any of the critical decisions are primarily in our territory, which takes me back to the point about joint work with committees in other places. If we are taking a look forward—I say this as a west of Scotland member—it is vital to recognise the role of Edinburgh and the Lothians. Probably the key lever at our disposal, as identified by the Financial Services Advisory Board, is around skills. We would want to pursue these issues through a vehicle that allowed the parts of the Parliament that have a remit around skills and the prospects of our new skills organisation to rise to the challenge, to be part of any inquiry. We would get into difficulties if we tried to look at whether Skills Development Scotland was the right body.

I am nervous about trying to shoehorn an inquiry into this committee alone.

10:15

Stuart McMillan (West of Scotland) (SNP): I congratulate the clerks on the briefing paper, which I thought was very helpful, given that I am the newest member of the committee.

We should take ourselves out of the Parliament and consider ourselves as members of the public as well as members of the Parliament. Not to consider some type of inquiry into the future of banking and the financial sector in Scotland would do the Parliament a disservice and would have a negative impact on public perception, as the Parliament could legitimately be accused of running away from a vital economic issue. I lay that down as a marker for all the members to consider. We have a duty to consider that important element of the Scottish economy.

I take on board the points that members have made. Wendy Alexander had a couple of points on the lending environment, which is important to what can, may or might not happen, so we ought to consider what the future is on that. To consider the future, we must also determine what the problem is and what has taken us to that point. I do not know what the scope of any inquiry would be—that is for us to discuss and agree or disagree on—but it must include understanding why we are where we are so that we can move forward. It is also paramount that, in any inquiry that we undertake, we bring in other representative view points from the general public and people who work within the banking and financial sectors.

Gavin Brown (Lothians) (Con): I apologise for arriving late this morning.

The powers of this or any other committee—ad hoc or otherwise—are outlined in section 23 of the Scotland Act 1998. As I understand it, we do not have great powers to compel the key players in the banking crisis and the credit crunch. We have tried to invite key players in the past, and those invitations have been declined, so it would be difficult for us to compel or invite witnesses from the Bank of England, the Financial Services Authority or the Treasury. That is the tripartite relationship that holds responsibility. If we cannot get any of them, we will have a tough start. I am not sure whether any United Kingdom Government ministers would be willing to attend, so we will not get much from them. I am also unsure—this is a bit more opaque—about the degree to which we could get directors or former directors and others who held responsibility for what went on in the various banks in the lead-up to the crisis.

There is a host of people whom we could invite but I would be dubious about whether they would turn up or wish to give evidence and it is not clear to me that we have powers to compel them. Therefore, my first big query is who would come and who would be able to take us forward.

If there is to be an inquiry, two principles are critical. First, there should be no replication. There have been two committee inquiries at Westminster and simply rehashing to any degree what has been done there would not be a good use of any committee's time. Secondly, anything that we do on the matter must be forward looking as opposed to backward looking. Simply examining what happened is not helpful and has been done, but it might be helpful to consider where we go from here and what the committee and Parliament can do. Our powers are limited, but I am sure that there are things that we can do.

On the debate about whether this committee, another committee or an ad hoc committee should undertake any inquiry, we are the committee with responsibility for the economy and the issue is closer to our remit than to any other committee's. I am not persuaded by the arguments that I have heard so far for some sort of ad hoc committee. One or two members have made the point that there is a crossover on skills with the Education, Lifelong Learning and Culture Committee, but we would not consider the issue of skills alone, although it would be part of any inquiry. We considered skills as part of the tourism inquiry, and we did not feel that we needed to set up an ad hoc committee in relation to that. Skills has also been a key subject in our current energy inquiry, and, again, there has been no crossover with the education committee in that regard.

I am not persuaded that we need an ad hoc committee because there might be some crossover in one area, or because of the regional argument that many of the financial services jobs are in the central belt and members in that area might therefore be affected more than other members. If we were to consider issues such as renewable energy and marine energy, we might argue, for example, that those issues affect the Pentland Firth more than other areas and that there should be an ad hoc energy committee of members who represent the surrounding areas. We are an economy committee, and we broadly represent the regions of Scotland. I am comfortable with the idea that we do not need a regionally based ad hoc committee—we are perfectly capable of delving into the issues.

There are things that we can do, but it would not be helpful to have a banking inquiry that is looking back. Anything that we do needs a clear focus. We have had a tourism inquiry and we are about to conclude an energy inquiry, so it is right that we focus on something to do with the economy, partly because we have not covered it in the form of a larger inquiry, and partly because the current circumstances are exceptional.

Marilyn Livingstone (Kirkcaldy) (Lab): I certainly agree that we should look forward and think about what the committee can do. I agree with Gavin Brown that a rehash of what has already been done would not be welcomed by anybody—as Stuart McMillan said, we should put ourselves in the place of the public or businesses.

Nigel Don and I recently met representatives of the construction industry. Around 38 members of different trade bodies were present that evening, and if they were sitting here now they would say that they are concerned about liquidity and the lending environment, and skills. Those two big issues came over loud and clear, and that sector is in the maelstrom of the current situation.

We need a clear focus, which should be on the economy. I would like us to examine the enterprise networks—there will be big changes for the

networks, and it would be right for us to include them and their future strategies in any inquiry. I have concerns about the current lack of focus on the networks.

Christopher Harvie: On the question of whether we look back or look forward, the performance of the FSA and the various regulatory organisations has been so dismal that any inquiry should be undertaken about them rather than through them.

There has been a total failure of regulation in and around London. I do not know whether members heard the "File on 4" programme last Tuesday about the commercial wing of HBOS. It was terrifying: the losses that were attributable to straightforward criminal activity totalled £250 million. We might be able to interrogate the journalist Gillian Tett, and perhaps the *Financial Times*, which seems to know much more about the financial maelstrom than anyone in the FSA or the Treasury does.

The House of Lords inquiry into the FSA has just reported in the most dismal terms, and I think that the sources that I have mentioned would be open to us—we would need them to clear the ground to discover what has been happening. A division of Scotland's second-largest bank was somehow able to run up losses into the quarter-billion range without any of it being called in by the senior management or the directorate of the bank. That issue, which seems to have entered the public arena, must have had some reflection on general Government policy towards the bank and is something that we need to look at. We certainly need continuity and there is certainly a need to look forward, but I do not think that we will get either from Westminster, as it is already in the grip of the hysteria that accompanies an election. We might be the only body that can do this kind of work.

Nigel Don (North East Scotland) (SNP): I take Gavin Brown's point about our ability to look back in any serious way, and the point that he and others have raised about duplication. However, I think that the people of Scotland expect us to research what will give us and them the best possible future. We should lay down a blueprint of what should be done and identify who should do it, and if that activity is outwith our powers or the powers of the Scottish Government, we need for better or worse to say so. However, I believe that that would be the remit that the electorate would lay down for us if we were to ask them. I do not think that people want a witch-hunt—well, they probably would like a witch-hunt if it would give them the right answers, but we cannot rewrite history simply by burning a few witches. We need to look forward, interrogate the people who will make the future happen and examine what all the arms of Government should be doing to help them in that regard.

Lewis Macdonald: As Christopher Harvie's comments demonstrate, we risk trying to mount a Westminster inquiry into Westminster-accountable agencies without the powers to compel them either to appear or to do anything about our recommendations. I think that that speaks for itself: as soon as we open the remit to cover matters for which we are not accountable, we will inevitably get drawn into discussing things over which we have no influence.

There is good evidence to suggest that it might be useful for the Parliament to commission an ad hoc committee to examine areas over which it has some influence. Gavin Brown highlighted a couple of arguments that he did not support, but we should note that members of the Finance Committee want to look into these matters and that, according to my notes, Rob Gibson has also written a letter to that effect. There is some merit in looking at a mechanism that crosses the boundaries of different committee remits, but I do not think that there is any merit in or any useful product to be gained from an Economy, Energy and Tourism Committee inquiry into matters on which Scottish ministers have no locus. An ad hoc approach might allow us to take a slightly different angle on the subject, but within the Parliament's devolved competence.

Rob Gibson: We must remember that the committee has a scrutiny and an advocacy role, which will allow the Parliament to consider not only how we have been affected by the recession and the bank crash but how we will get out of this situation. As far as our scrutiny role is concerned, the clerks' paper sets out the various issues that we should consider, including employment levels in the financial services sector, our reputation as a financial centre, the availability of credit and the plans for the restructuring of banks and building societies in Scotland. We must be able to dig into what has happened to know how we will move forward.

It might be useful to examine how other countries have handled the same issues; after all, our situation is not unique. Given the range of material that we might have to consider, our advocacy role is just as important as our scrutiny role. As the proposed remit is fairly clear and might well find a measure of consensus, we should seriously consider the subject for the committee's major inquiry for the near future. As an ad hoc committee would have no more powers than this committee, such a move would be unnecessary. In addition, members of other committees could attend and take part in our meetings, as Nigel Don has done—Margo MacDonald and others could do the same. That is

not a problem; the committee could deal with the issue quite well.

There is the spur that, last autumn, we received evidence on the banking situation, which we want to revisit with regard to the Dunfermline Building Society. We may be limited in whom we can induce to speak to us, although I take on board Chris Harvie's point about journalists who are well briefed on certain issues that may pertain directly to whether we can create more jobs or get more credit into our economy quickly. I suggest that the committee finds some means of holding the inquiry, in the widest possible terms, but along the lines that were suggested by the clerks.

10:30

The Convener: Thank you for those helpful comments. I would love the Parliament to be able to conduct the type of inquiry that some parts of the media have talked about and to take evidence from the Bank of England, the FSA and Government ministers—not just Treasury ministers, as the competition issues relating to the HBOS-Lloyds TSB merger need to be investigated properly by someone—but I do not believe that we have the powers to do that. If we do not, the worst outcome of all would be for us to end up being unable to achieve what we seek.

As Stuart McMillan said, if we are looking to the future, we must have some idea of where we have come from, so any inquiry that we hold will have a retrospective element. For example, consideration of the restructuring of banks and building societies will inevitably result in some discussion of what happened to the Dunfermline Building Society and of where Nationwide intends to take it. A useful way forward would be for us to draw up our remit along the lines of the first four bullet points in paragraph 12 of the paper and to ask the clerks to provide us with more detail. Do members agree with that proposal?

Lewis Macdonald: I have listened carefully to what other members have said. I know from the clerks' paper that Rob Gibson's original suggestion was that an ad hoc committee of members of two existing committees be established. Given that he has expounded a different view today, I would be interested to know why his position has changed.

The Convener: I understand that Rob Gibson's original letter requested the establishment of a joint committee, to be made up of members of the Finance Committee and the Economy, Energy and Tourism Committee. I asked the clerks to examine that suggestion. We concluded that none of the proposed inquiry—except, possibly, issues relating to the loans book for housing associations—fell within the remit of the Finance Committee. The advice that I received from the clerks was that the Economy, Energy and Tourism Committee is in a position to conduct a forward-looking inquiry into the banking sector and that an ad hoc committee is not required. However, the Parliamentary Bureau or the Parliament may decide otherwise. I am sorry—I did not mean to answer on Rob Gibson's behalf.

Rob Gibson: When the convener of the Finance Committee said that the matter did not fall within the committee's remit, it became obvious that a joint committee consisting of members of the Finance Committee and the Economy, Energy and Tourism Committee would not work. I am convinced that the issues that are raised in the paper are our province and that we should hold the proposed inquiry.

The Convener: Are members content for us to ask the clerks to draw up a slightly more detailed proposal for an inquiry along the lines of the first four bullet points in paragraph 12? That appears to be agreed.

Lewis Macdonald: There are six bullet points.

The Convener: I think that the next two bullet points are, perhaps, a separate matter that the committee might want to make the subject of a shorter inquiry. We might want to find out the Government's thinking on the Scottish investment bank and the joint European resources for micro to medium enterprises—JEREMIE—programme. That inquiry could be done either in parallel with the banking inquiry or, as it will be quite short and well focused, before it.

Lewis Macdonald: The paper contains a number of useful suggestions on short inquiries. One area that is not included but which we ought to think about addressing in the next parliamentary year is the reorganisation and refocusing of the enterprise networks, which would bear further consideration.

The Convener: I was coming to that. To ensure that the enterprise networks and business gateways have had time to settle, we should think about considering the matter around Easter next year, which will be two years after the restructuring and one year after the full implementation of the business gateway in the Highlands and Islands. It might be premature to address those matters any earlier than that, as we will not have allowed sufficient time for evidence to build up.

Lewis Macdonald: We could perhaps return to the subject after our next short inquiry and see whether the timing is right at that point.

Stuart McMillan: Would it be possible to run short inquiries on the subjects of the last two bullet points in tandem with a larger banking inquiry? I imagine that there may well be some crossover

points, and we could avoid duplication if we dealt with those three inquiries at the same time.

The Convener: If members agree to the overall programme, the clerks can go away and build up a more detailed programme with suggested timescales for the various parts. Within that, they will have to build in our legislative commitments, particularly stage 2 of the Arbitration (Scotland) Bill; on the basis of recent evidence, that might take slightly longer than we had originally expected.

Ms Alexander: The other matter that is on our agenda is the budget. Obviously, a new comprehensive spending review is coming up and, although we do not yet know what it will be, it is fair to say that, given that the enterprise budget has taken significant hits over the past two years, which were times of relative largesse, the pressure on it might intensify in a more constrained environment.

Historically, the difficulty has been that committees do not get the Government's proposals early enough to enable them to examine them in depth. However, I think that we, along with the budget adviser, should do as much as we can to understand the choices and shifts that will have been made. That will be valuable in informing some of the work that we will do. Inevitably, there will be trade-offs between money going into innovation, money going into the enterprise network—and, within that, into various parts of the enterprise network—money going into tourism and so on.

Because of the factors that I have outlined, we should do a little more work on the budget this year than we have done in the past. The export and manufacturing inquiry and the productivity and innovation inquiry are not time limited, while the work on the budget is. I would therefore welcome the chance to have a couple of sessions in the period between September and Christmas with the budget adviser, whom we will appoint next week. During those sessions, we could reflect on shifts in overall enterprise spending in, say, the past decade and whether they make sense in terms of the emerging issues.

In suggesting that, I am mindful of the fact that it would be a good idea to have a one-off session in the first half of next year during which we could look back on the year of homecoming. That would give us insights into issues around, for example, tourism spend and the cost of events.

The Convener: The budget will form part of the programme. We will have a chance to discuss in more detail the remit of the budget adviser, if we agree to appoint one, when we come back to that in due course.

Lewis Macdonald: I have a slightly different suggestion with regard to the timing. I understand why Stuart McMillan suggested that the short inquiries might usefully be taken in tandem with the larger banking inquiry, but I wonder whether it might be better if we arranged our programme so that the conclusions of our banking inquiry could inform our further work on the Scottish investment bank and so on. I think that the impact on exports and manufacturing should be considered at an early stage, of course.

The Convener: We can consider timing issues when we come back with a more detailed report. There is an argument that, as the Government is shaping its ideas on the Scottish investment bank, the committee might have an opportunity to influence that process by getting in with its thoughts on that matter. If we leave it too late, we might find that we are dealing with more of a fait accompli.

Lewis Macdonald: That is an important point. Can we discuss it again when the remit comes back before us?

The Convener: Yes.

Rob Gibson: At some point following an inquiry, we conduct a review. The National Trust for Scotland's current problems affect people's access to, and the care of, quite a big slice of our heritage. There are disquieting issues with regard to the way in which the NTS is operating and has been run. I urge that we take into account at an early stage some way of inquiring into that situation. There are 300,000 members of the NTS, but there are 5 million people—as well as our visitors—who rely on our heritage being accessible and fit for purpose in the 21st century.

The Convener: There are issues around the fact that, although the NTS is an important body, it is technically a private organisation. However, there might be an opportunity for a reporter-led inquiry, which would enable one or two members to talk in some depth with the NTS. That might be better than our having a full inquiry.

Stuart McMillan: Last year, when I was a member of the Justice Committee, the committee conducted an inquiry into community policing, which tied in quite well with the budget process, because of the evidence that had been taken. It might be an idea to consider the approach that the Justice Committee took to the budget process last year, particularly with regard to Wendy Alexander's suggestion about the enterprise budget and so on.

The Convener: The committee will have an opportunity to discuss its approach to the budget process with the budget adviser, if we agree to appoint one. Your suggestion is welcome, however.

Christopher Harvie: When Tavish Scott was the convener, I raised the notion of an inquiry into the nature of the Scottish black economy. The idea was sent off to Scotland's Futures Forum and, from conversations with its members, I know that they were interested in it.

Now that one of the biggest elements in the present financial catastrophe has turned out to be the penetration of what was called legitimate finance by sub-prime finance, with which the black economy was closely linked, the issue seems to have moved closer to centre stage and might form an interesting part of our inquiry into banking. The black economy was very much in evidence in the "File on 4" programme on HBOS.

The Convener: My understanding is that the Scottish Government was undertaking some research into that area, and that the Futures Forum was waiting for the outcome of that research.

Christopher Harvie: That is nice to know.

The Convener: If anyone knows otherwise, they should let us know. Once that research is published, the committee can consider the issue again.

Do members agree that the clerks and I should develop a programme based on what is in the paper?

Members *indicated agreement.*

Budget Process 2010-11 (Adviser)

10:45

The Convener: Remarkably, we come to item 2 on the agenda at exactly the time when my crib sheet says we should.

Under this item, I must ask whether the committee wishes to appoint an adviser to assist us with our budget scrutiny this autumn. If we wish to do so, we need to make the appropriate bids to the various parliamentary authorities. Are we happy to agree to do so?

Members *indicated agreement.*

10:45

Meeting suspended.

11:00

On resuming—

Arbitration (Scotland) Bill: Stage 1

The Convener: I welcome to the committee, once again, the Minister for Enterprise, Energy and Tourism. I invite him to make some opening remarks before we move on to questions.

The Minister for Enterprise, Energy and Tourism (Jim Mather): Thank you, convener. Good morning. I am delighted to be here. I am grateful for the work that the committee has put into its scrutiny of the Arbitration (Scotland) Bill to date and the expertise on the matter that has been demonstrated.

I am keen to put my contribution in context. We are clear that commerce needs speedy, affordable and effective dispute resolution, and arbitration is one method of achieving that. The bill provides an opportunity to stimulate arbitral activity in Scotland. It modernises and codifies the law in a structure that makes it accessible to non-lawyers. Arbitration is particularly suitable for commercial disputes because it is usually confidential and it therefore protects commercially sensitive information.

The committee might know that I recently met about 30 stakeholders in arbitration in Scotland, and I was impressed by their enthusiasm for the bill. That session generated about 20 flipchart sheets of comment and data, including many useful insights, some of which I will try to mention today. If the committee has an appetite to see the output of that session, I will be happy to submit it to the clerk. It was clear from the session that, when Scotland develops effective and efficient domestic arbitration services, it will also attract the interest of parties to international arbitrations. On the other hand, if nothing is done, the use of arbitration in Scotland will decrease yet further due to the difficulties with the current law and the lack of a codified, statutory basis.

It is pretty much impossible accurately to quantify the bill's economic benefits to Scotland, partly because arbitration is usually a confidential process, as it will continue to be. However, there is no doubt that a huge range of commercial disputes could be arbitrated, from consumer matters to big international contracts. It is believed that smaller firms often do not pursue bad debts because of the time and expense that are inherent in using the courts. A great deal of management time is spent on disputes, particularly in smaller businesses, and that non-productive activity is of no incremental value. Instead, it simply consumes resources.

As disputes are inevitable in business, efficient, cost-effective methods of dispute resolution are required. Arbitration is one of those, as it can be tailored to the circumstances of the dispute. In that vital function, it delivers another benefit—that of preserving the business relationship between the parties. To add to the economic benefit, there is potential for tourism. If international arbitration is attracted to Scotland, hotels, restaurants, transport, retail and so on will benefit.

How will the bill make arbitration faster and cheaper? The existence of a framework for conducting arbitrations will mean that parties need not always agree the procedure for arbitration before it starts, and the limitation of court involvement clearly expedites matters. For example, if the parties cannot decide on an arbitrator, an arbitral appointments referee will be the default option before they go to court. An arbitrator will always be able to make an initial decision about his or her jurisdiction, and strict limits are placed on court reviews of arbitration, where appropriate.

The ability to choose an arbitrator who is an expert in the field of the dispute means that time need not be spent on leading technical evidence, which will obviously save time and money. Equally, the arbitrator is not tied to rigid court structures and can adapt the procedures of the arbitration to the circumstances of the specific dispute. Parties can, of course, decide on time limits for the arbitration, but the bill gives the arbitrator the power to set and enforce time limits, under rules 27, 30 and 38. In addition, arbitrators, for the first time, are placed under a specific, mandatory duty to conduct arbitrations without unnecessary delay or cost.

If arbitration is quicker, it is likely to be cheaper. I understand that evidence was given last week that arbitration could be considerably quicker than going to the Court of Session. However, it will always be up to arbitration practitioners to sell their services in the dispute resolution market by emphasising to prospective parties that arbitration can be both cost effective and quick.

In reviewing the current position, I move on to comment on why it is proposed to repeal the United Nations Commission on International Trade Law—or UNCITRAL—model law. The model law has not been successful in attracting international arbitration to Scotland. The fact that there are estimated to have been only about 20 cases in 19 years is evidence of that. Part of the reason is that the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 failed to address several faults in Scottish arbitration law.

The model law is incomplete and there are some important gaps in it. For example, it does not give the arbitrator the power to award damages, interest or expenses. Jurisdictions that do not have the model law are thriving, including London, Paris, Geneva, Zurich, Stockholm and New York. England's law reflects model law principles, as does the bill. However, it will still be possible for parties to adopt the model law in preference to the rules in the bill, subject to the important mandatory rules that it contains. Section 24 contains a power for ministers to amend the bill's provisions in due course in the light of future amendments to the model law.

The overwhelming body of opinion in the consultation was that the model law should be repealed. Those who favoured that include the Chartered Institute of Arbitrators, which represents those who conduct international arbitrations all over the world, the Royal Institution of Chartered Surveyors, and the judges in the commercial court of the Court of Session. It is important that Scotland has an effective, efficient arbitration regime that works domestically, and we hope that the international business will follow.

The Scottish arbitration rules in schedule 1 to the bill are intended to lead arbitrators and parties through the process of arbitration. The placing of the rules in the schedule makes them more accessible, particularly to non-lawyers, and does not affect their application as binding law. Section 1 establishes the principle of party autonomy so that parties are free to agree how to resolve disputes, subject only to the safeguards that are necessary in the public interest. For that reason, most of the rules are default rules that will apply as a matter of law but only if the parties have not agreed on something else that is inconsistent or contrary. In order to ensure that arbitrations are fair and impartial, some rules must be mandatory and the parties must be unable to contract out of them. In order to preserve the principle of party autonomy, however, the number of mandatory rules has been kept to a minimum. There is a balance to be struck between the fairness and impartiality of the process and the principle of party autonomy.

I finish by saying that the group that we had in to brainstorm the economic potential was positive about the bill. Since then, I received an e-mail from a leading arbiter, who made a comment that I will share with you:

"Since I last met you I have been in five countries, and in each place I have told them what we are doing here. They are just amazed at the elegance and economy of this Bill."

I look forward to taking questions and to getting some further input that can bolster that elegance and economy.

The Convener: Thank you for those opening remarks. I begin by asking you about the economic benefits that the Scottish Government suggests will come from the bill. Are you in a position to quantify those? To date, the committee has been unable to establish that.

Jim Mather: As I said in my opening remarks, it is difficult to estimate or put firm numbers on the economic benefits. The Chartered Institute of Arbitrators has a figure in mind. It believes that there is potential for some £15 million of new international arbitration business to come to Scotland, using a population ratio for what is occurring in London and applying a 40 per cent discount for Edinburgh and Glasgow rates.

When we held the session with arbitrators in the Parliament, there was a positive mindset about what could be achieved. They have an appetite not only to achieve that potential but to build arbitration into the fabric of the total Scottish legal services proposition and attract many more people to carry out legal work in Scotland, above and beyond arbitration.

The Convener: I have another general opening question. Supplementary evidence from the Law Society of Scotland and the Faculty of Advocates and some of the other evidence that we have received seems to suggest that there are varying opinions about the bill—the Chartered Institute of Arbitrators is clearly supportive, but others have more doubts. Although there is a general belief that the law of arbitration needs to be clarified and updated, why should the committee support the approach that the Government has taken in the bill?

Jim Mather: The compelling reason is that it looks as though the bill will make arbitration faster and cheaper, which is very much in the interests of the wider Scottish economy. I exposed that argument to a large group of stakeholders at a meeting that was open to anyone to attend. Once they were in the room together, the atmosphere became very positive. I do not know how many people in that room were from the Faculty of Advocates or the Law Society—perhaps my officials can tell me—but there was genuinely positive feeling in that session about what could be achieved. Lots of ideas were proposed and there was genuine enthusiasm for the legislation. The e-mail that I received from a senior player on the arbitration scene shows that there is a real appetite to make the most of the bill.

The Convener: My colleagues will ask more detailed questions in a moment; I have another general point. Numerous comments have been made about the quality of the drafting of the bill. Have you any comments about that? Do you envisage amendments being made at stage 2 to address some of those drafting issues?

Jim Mather: I am aware of a number of technical issues from various sources and I look forward to their being managed through interaction between officials and those sources and the operation of stage 2. We will do everything that we can to make the bill even better. I gave you a quotation about the "elegance and economy" of the bill, and I am keen for that perception to continue and to be bolstered by any other steps that we can take to make it more and more true.

Hamish Goodall (Scottish Government Constitution, Law and Courts Directorate): I add that the Faculty of Advocates and the Law Society are both generally in favour of the general principles of the bill. They might have concerns about its detailed drafting, but we think that those concerns can be addressed at stage 2. We are grateful to them for raising those matters at this early stage.

The Convener: Thank you.

The Law Society commented in its evidence that it does not consider that the case for repeal of the model law has been made. That seems to be a fundamental point of disagreement with the approach in the bill. Will you comment in more detail on why you chose to repeal the model law?

Jim Mather: I note what the Law Society says, but the pretty widespread view seems to be that the model law has been a relative failure in Scotland since 1990, with an estimate of only 10 to 15-plus cases in that period. The view is widely held that the model law is incomplete and that there are many crucial gaps in it. There is also a view that it is wrong in principle to expect the parties involved, by their own efforts, to cover deficiencies in the law. We have to look to what is happening commercially in non-model law jurisdictions such as London, Paris, Stockholm, Geneva and New York, which are thriving and doing much more international arbitration business.

Lewis Macdonald: If it is indeed your view that the model law has been a failure, why then endorse its principles and incorporate them at the heart of the bill?

Jim Mather: It comes down to two small words—"or" and "and". We can take the either/or approach or the "and" approach and create an option in the bill to give people flexibility so that they can choose to use the model law. Whichever option is chosen will make Scotland a more attractive place in which to carry out arbitration.

Lewis Macdonald: The point that has been made by those who criticise the proposed repeal of the model law is that the reasons underpinning Scotland's failure to thrive as a centre for international arbitration are nothing to do with the model law, but are to do with the fact that there has been no significant effort to market Scotland for the purpose of arbitration. For example, there is no centre for international arbitration. The arbitration provisions in Scotland have grown up over the centuries, and the domestic arbitration system therefore requires to be updated before international business can be attracted. Do you accept that the places that you cited a moment ago as successes were successes irrespective of whether the model law was in place elsewhere in the world?

11:15

Jim Mather: I accept that we are dealing with complexity—there are lots of factors at work in an issue as complex as this. The message that we got from our dealings with stakeholders and allies in arbitration was that the bill would put Scotland back on the map, widen the options, increase awareness of Scotland as a centre for arbitration and increase Scotland's suitability as an area for arbitration. Essentially, it would make us more competitive, rather than less. Having both approaches seems to be a better blend.

Lewis Macdonald: One of the arguments that we heard last week in favour of repeal was that retaining the model law alongside a modernised Scottish arbitration provision would be liable to challenge on grounds of discrimination under European Union law. Does the Scottish Government have a view on that? Is there an element of truth there?

Jim Mather: The feeling that I get from talking to my colleagues is that retaining the two approaches would give us more robustness vis-à-vis European law. I ask Graham Fisher to say something about that.

Graham Fisher (Scottish Government Legal Directorate): When we gave evidence on the submission from the judges in the commercial court, we pointed out that, in particular areas, the Arbitration Act 1996, which applies in the rest of the United Kingdom, does not conflict with the principles of the model law. There are gaps in relation to damages, interest and so on, which apply over and above the principles of the model law—gaps that, for the rest of the UK, are fixed by the 1996 act. The question therefore remains whether that provides a modern and robust arbitration regime that is effective across the board.

There are various points of detail in any arbitration regime in relation to which European Community issues of discrimination can be considered. In particular, case law from the English courts has confirmed that EC discrimination issues could arise in relation to particular aspects of arbitration, particularly the

sisting provision, which has been raised by some of the expert consultees on the bill. Fundamentally, whether such issues arise depends on the detailed justification for making for foreign parties any element of the arbitration regime different from what it is for domestic parties. The bill makes a distinction between the different regimes that apply to domestic and foreign parties.

To my knowledge, there has never been a challenge to the regime in Scotland, in which the provisions that apply to domestic arbitration are different from those that apply to international arbitration. To that extent, there is no overriding concern about EC law. However, there have been cases in which difficulties with EC law have arisen in relation to particular aspects of arbitration procedure. The UK Government has acted in the past not to bring into force discriminatory provisions in the 1996 act, when it felt that they have been a problem. That is one concern, among many others, that gave rise to the decision to have one consistent regime that applies to domestic and international arbitration.

Lewis Macdonald: In effect, that bars access to the model law for international parties.

Graham Fisher: It may do. When we appeared before the committee two weeks ago, the Law Society changed its position on the day, and it has changed its position again. We are considering the society's further clarification, which we received only yesterday, that it is particularly concerned about the mandatory rules in the bill. That clarification is new. We are happy to reconsider those aspects and to see whether provision on the individual detailed rules of the regime could be made in relation to the model law.

Lewis Macdonald: The point is important. I understand that the Law Society originally opposed the repeal of the model law but that, as you say, it indicated two weeks ago that it would not be so opposed if access to the model law remained. The society now makes the case that some of the mandatory provisions in the bill will prevent access to the model law. Are you saying that you are not yet clear about whether that is the case?

Graham Fisher: As the policy memorandum says, the mandatory rules in the bill will take precedence over the equivalent rules in the model law. We have always been clear about that. This is the first time that the Law Society has said that its particular concern is the mandatory rules. We are happy to consider those rules against the mandatory provisions of the model law.

Gavin Brown: The purposes behind the bill are sound and reasonable and its principles have broad support. If nothing else, it is positive to codify the law in one place and sharpen it, perhaps while learning some lessons from the 1996 act south of the border.

However, if arbitration is to have a successful future in Scotland, it must be faster and cheaper—those two features are of course related. The primary reason why arbitration has practically fallen off the edge of a cliff—the number of commercial arbitrations a year is down to 50—is because in many cases it is just as slow as or slower than going to the Court of Session.

What provisions in the bill will genuinely make arbitration faster? In the sessions that you have had, has something else been proposed that might be considered? Has the Government analysed the reasons for delays in arbitrations and the points in the procedure at which delays occur? Have we taken steps at all those points to speed up the procedure?

Jim Mather: A huge amount of attention has been paid to the subject. A founding principle of the bill is that arbitration should

"resolve disputes … without unnecessary delay or expense".

Rule 23 places a mandatory duty on arbiters to

"conduct the arbitration … without unnecessary delay, and … without incurring unnecessary expense."

The creation of arbitral appointments referees will mean that parties can avoid the need to go to the courts, although limited recourse to the courts will be available. Rules will impose a mandatory duty to get on with it. The bill repeals the stated case procedure—the former Lord President, Lord Hope, supports that repeal.

The bill contains a good array of provisions to achieve the intended end. That was accepted by the group that we brought together. When we asked the group how clients would define the arbitration service that they needed, cost and convenience arguments were to the fore. We were told that clients wanted a convenient place for hearings, cost and time effectiveness, a one-stop shop, no risk of appeals, privacy of proceedings, confidentiality, robust safeguards and good processes.

Gavin Brown: I will not press the point, but I make a plea to the Government to continue to visit the issue all the way to stage 3. If the rules make arbitration faster, they will be fantastic; if they do not make arbitration significantly faster, I question how big an impact they will have in practice.

I move on to consumer arbitrations. I think that there are about 50 commercial arbitrations a year in Scotland and an estimated 200 or so consumer arbitrations a year. I asked the officials two weeks ago what analysis had been done to consider the effect of the bill on consumer arbitrations. I asked

because the bill seems very much geared towards commercial arbitrations. The Scottish Government has helpfully outlined about 20 or 30 schemes of which it is aware—there is a whole host of them—and I am concerned about the bill's effect on those schemes, which currently function reasonably successfully, I presume. Imposing 25 mandatory rules might present a danger to those small-scale consumer schemes. Are you overcomplicating matters for those schemes?

Jim Mather: We certainly hope not to overcomplicate things. We seek to create much more use of arbitration. We recognise that consumer protection is reserved to Westminster, but we think that there is some scope for us to do more here. I made some notes about this point, having anticipated your question, and I ask Graham Fisher to fill the gap while I find them.

Graham Fisher: I can address the matter in part. Gavin Brown raised the issue two weeks ago. As he says, there is a question about the mandatory rules to be applied in future to consumer arbitrations, as well as to other kinds of arbitration.

There is a separate question about the commencement of the provisions of the bill and whether they will apply to existing contracts. That has a clear implication for the question that Gavin Brown has asked. Will consumer arbitrations, like other arbitrations, become complicated by the mandatory rules? The rules are intended to cover the essential elements of an arbitration regime. In many cases, they will replace the present common-law provisions—they will be mandatory as a result of the application of the law. Something like stated-case procedure will apply, and it will give parties certain rights to take cases to court, whether they like it or not. A lot of the mandatory rules in the bill, which provide for appeals and so on, are there to ensure the fairness of the procedure. Generally, we have tried to keep the mandatory rules to a minimum, in line with the principle of party autonomy.

That represents the starting point when it comes to the mandatory rules in the bill—they largely replace what is in the common law. They are not intended to alter radically or complicate arbitrations—particularly consumer arbitrations. As the minister said, we hope that they will not have that effect.

Gavin Brown: I will come back to that later. Again, I will not dwell on the matter today. I am not trying to throw up issues just to look clever, but I genuinely think that the Government has a blind spot on the issue. I cannot see from the list of consultees that you have consulted the relevant consumer groups. I say that because we have received written evidence from the Advisory, Conciliation and Arbitration Service, from the motor trade and from one other group in which they basically say that they do not have much to say about the bill because it will not apply to them. As I understand matters, that is simply wrong—the bill will apply to every arbitration. My concern is that the consumer groups that run arbitration schemes have not been involved in the process, and those that have been think that the bill does not apply to them. There might therefore be some unintended consequences.

Graham Fisher: The point about ACAS relates to a question that Lewis Macdonald raised with us on 20 May. ACAS arbitration will not be affected by the bill. That might not be clear in the bill, but it will certainly be clarified in the detailed consequential provisions that will accompany it. ACAS arbitration, as a particular example of statutory arbitration, will not necessarily be covered in the same way. On the other examples that were mentioned, perhaps Hamish Goodall can say something about the consultation on the bill.

11:30

Hamish Goodall: The bill will apply to the motor manufacturers society—sorry, what was the name of the organisation?

Gavin Brown: The organisation from which we received evidence was the Society of Motor Manufacturers and Traders Ltd.

Hamish Goodall: I do not have that organisation's response to hand, but I am not clear why it thinks that the bill will not apply to the motor trade.

Gavin Brown: Bear with me a second while I find the written submission so that I can read it out.

I am sorry, but I cannot find the submission just now. Perhaps I can come back to it.

My request, I suppose, is that the Government contact the organisations that it believes currently run consumer arbitration schemes—some 30, I think, are mentioned in the policy memorandum. The Government has suggested that it will advise those organisations about the legislation before it comes into force, but, given the possibility of unintended consequences—the bill might overcomplicate matters for schemes that run perfectly well at the moment—will the Government write directly to all those organisations to ask them whether they foresee any potential problems with the proposals?

Jim Mather: You make a good point. Most of the schemes are run for those organisations by the Chartered Institute of Arbitrators. Nevertheless, perhaps the question flags up the opportunity that we could take to meet those

organisations, just as we met the more mainstream, higher-profile arbiters about six weeks ago. Essentially, we could go through a repeat of that process by arranging a session that allows us not only to brief them but to listen to their views.

Gavin Brown: That is what I was pressing for.

Another possible blind spot for the Government became evident during our evidence session last week with the Faculty of Advocates and the Law Society. Naturally, given that the Minister for Enterprise, Energy and Tourism is the member in charge of the bill, the big focus seems to have been on the potential economic impacts that the broad principles in the bill might help to produce. However, towards the end of last week's evidence session when we started to focus on the provisions in the bill, the Faculty of Advocates and the Law Society flagged up quite a number of unintended consequences that might flow from the application of those provisions.

Let me pick out just one. Garry Borland, an advocate who is expert in construction arbitrations, pointed out that rule 45 will in effect give arbitrators a power similar to that of interim interdict to prevent an action from taking place. Breaching an interim interdict that has been granted by a court is a criminal offence, for which severe criminal penalties can apply, but the bill makes no provision on what will happen if someone breaks what is in effect an arbitrator's interim interdict. We ran out of time last week, so the Faculty of Advocates has submitted further evidence on the issue. Just as the minister has met economic interests—and just as he has promised today to meet consumer groups—will he commit to get together with legal experts to ensure that all the provisions are watertight? We need to ensure that the bill does not contain provisions that will come back to haunt both the Government and the Parliament.

Jim Mather: That is a very sound proposition, which we would be naive not to take up—in other words, we will take it up. Getting everyone in the same room to discuss, debate and correct all the ideas, issues and potential unintended consequences would seem to me to be a sound way to proceed. I have no problem with that at all.

Gavin Brown: Thanks to my friend Nigel Don, I have managed to find the bit that I was looking for—although it might not be quite as relevant, in the light of your promise.

In its submission to the committee, which you might not have had a chance to see, Consumer Focus Scotland said, at paragraph 8:

"We understand that the Bill does not expressly encompass consumer arbitration schemes".

If a group such as Consumer Focus Scotland is saying that, there is perhaps some confusion out there.

Jim Mather: The reserved nature of consumer protection militates against that. We will invite Consumer Focus Scotland and bodies from the motor trade and elsewhere to have that debate with us. There is always the possibility of making an order under section 104 of the Scotland Act 1998, through which measures could be added to the bill once it is enacted. That is an option that we could employ.

Gavin Brown: I accept that you will discuss specific provisions with the legal experts, which is helpful, but I have a question about the rule that gives the arbiter the power to award damages. That represents a step change, which is welcome from a commercial point of view. As I understand it, that is currently a default rule. Some organisations felt that it ought to be a mandatory rule because of the different bargaining powers that various parties will have. Construction contracts are a big focus of arbitrations. An employer might put out to tender work that five contractors all want—I would imagine that that is likely now more than ever. The employer is in a position to say, "By the way, we will not apply that default rule. There is no way that we will allow an arbiter to award damages." Has the Government had a chance to consider arguments that have been made in that regard?

Jim Mather: We have, but I think that the view is that the parties might not wish the option of making an award of damages to be open to an arbiter; they might, for example, only want a legal position to be stated. The Arbitration Act 1996 contains an equivalent, default position. If the dispute parties are unlikely to agree on the detail of an arbitral process, sensible powers should be provided for arbitration by default.

We are willing to debate the issue and to try to get people to consider it objectively because our aim is to achieve buy-in. That is why we ran the session that we ran six weeks ago, and it is why we will run follow-up sessions.

Gavin Brown: So the Government is still open to persuasion on that argument.

Jim Mather: No, we believe that what we have proposed is the right way to go, but we want the issue to be debated and we want people to understand the logic behind our position.

Gavin Brown: Rule 46 will give the arbiter the power to award interest from the date on which the sum was due rather than the date on which the decision is made. That is another step change. Various groups have argued that application of that rule ought to be mandatory rather than the default position, again because of the existence of

differing bargaining powers. Has the Government rethought that issue?

Jim Mather: No. Parties may decide for their own reasons that the arbiter should not have the power to award interest at all, that he should be able only to award a certain fixed rate of interest or that he should be able only to award simple as opposed to compound interest. The provision in the bill is equivalent to a provision in the Arbitration Act 1996 that seems to have bedded down well, so it looks as though it is suitable for Scotland. Not many voices have been raised on the issue; in fact, no voices were raised on rule 45 or rule 46 at the session that we ran six weeks ago.

Gavin Brown: I was not there, so I would not know, but several submissions to us were explicit about rules 45 and 46.

Jim Mather: From what category of organisation did those submissions come, in the main?

Gavin Brown: From memory, they were from the Law Society and the Court of Session judges. Last week, we received oral evidence on the subject from the Faculty of Advocates, which has now provided a written submission.

The issue has been raised whether the bill could or should have retroactive effect on pre-existing contracts when the parties have not gone to arbitration but have a pre-existing contract and have agreed to go to arbitration under whatever rules they have agreed. As it stands, it appears that the bill would have retroactive effect. Has the Government considered submissions made by parties warning against that?

Jim Mather: The concern is that, if we did not go down that path, the parties would not benefit from the new law. There would be two laws in place, and that would be confusing. That is why we are going down the path that we have advocated.

Gavin Brown: The Housing Grants, Construction and Regeneration Act 1996 introduced adjudication as a means of resolving disputes. That act made it quite explicit that the scheme applied only to contracts that were entered into after 1 May 1998. The view was taken at that time that it was important to make that explicit. You will be aware that it is a principle of Scots law and many other laws that retroactive effect should generally be avoided. Of course, there are exceptions, but it is broadly accepted as a legal principle that retroactive effect should be avoided unless there are good reasons not to do so.

Jim Mather: The general principle is that the bill is looking forward more than trying to be retrospective or to do anything retroactive. I invite my legal adviser to comment on that.

Graham Fisher: Retrospective provisions are to be avoided. I do not know whether the provision in the bill, if it applied in that way, would be strictly retrospective but it would certainly bite on existing contracts if that approach were adopted. As I mentioned before, provision can be made in commencement orders or in the bill itself, as was the case in the consultation print, for the commencement of the bill. There are two methods of commencement—the adjudication-type method, which Gavin Brown mentioned, and the method that was chosen to commence the Arbitration Act 1996. The latter applies across all cases and is used, for instance, in relation to court rules. It is often used when procedural changes are made, although I appreciate the fact that the bill is a different animal.

We appreciate and take seriously the concerns that the Law Society has raised about the effect on parties with existing contracts. However, for the reasons that the minister has outlined, at present we are inclined to apply the provisions on an on-going basis across the board.

Gavin Brown: I have one final question. Rules 50 and 51 relate respectively to provisional awards and part awards. As printed in the bill, rule 50 is mandatory and rule 51 is default. Strong representations were made last week, including by the Chartered Institute of Arbitrators, that the designation of those rules was the wrong way round. It was claimed that that is a typo in the bill.

Hamish Goodall: No, it is definitely not a typo: the designation is intended to be that way round. It is something that we could discuss further.

Rule 50 is intended to be a mandatory rule because, in a situation in which a small company pursued a debt against a larger company, rule 50 would allow the arbitrator to make a provisional award to the smaller company that might prevent it from going into insolvency. If rule 50 were not mandatory, the larger company might seek to get the smaller company to agree that that rule would not apply.

As we said earlier, there is a balance to be struck in some cases as to whether rules should be mandatory or default. The designation of rule 51 is perhaps something to which we could return.

Gavin Brown: I was just keen to establish whether that was a mistake.

Hamish Goodall: No, it is not a mistake; it is meant to be that way.

11:45

Gavin Brown: As you outlined, there is genuine concern about the dealings between larger and smaller companies. My final comment to Mr Goodall is that the same concerns that you have raised may also apply to rules 45 and 46—unfair bargaining positions are involved. I ask the Government to reflect on that.

Jim Mather: We will reflect on what you have said; such suggestions are the stuff of this exchange. If we can get the Faculty of Advocates, the Law Society, the Chartered Institute of Arbitrators and others together in the room—perhaps with committee members—it would make a useful, interactive session.

Gavin Brown: I would be happy to be there, if such a meeting were to go ahead.

The Convener: I am very pleased that Gavin Brown volunteered for that task.

Rob Gibson: I have a small point of clarification. In evidence, the Faculty of Advocates questioned the intention of section 22(2)(b). Is it the case that only members of the Chartered Institute of Arbitrators can be an arbitrator? If so, would that not set up a closed shop?

Jim Mather: That is certainly not the intention. I will ask my colleagues to give you the fine print on that.

Hamish Goodall: I do not think that there is anything in the bill that requires an arbitral appointments referee to appoint from within his or her profession. The point made by the Faculty of Advocates is that, at present, the dean can appoint a solicitor rather than an advocate as an arbitrator. Nothing in the bill would stop that.

Lewis Macdonald: Minister, I return to what you said in response to a question from Gavin Brown on consumer organisations. As Mr Fisher said, I have raised the matter on previous occasions, and I remain concerned on the subject. On the one hand, I am pleased that you agreed to Gavin Brown's suggestion about meeting the organisations. On the other hand, I am slightly surprised that you have not done that thus far—or it appears that you have not done so.

I am also very concerned about your reference to section 104 of the Scotland Act 1998, which allows an act to be amended once it is enacted. It seems unusual for that sort of reference to be made at stage 1. Clearly, if adjustments have to be made to the bill, we expect that to happen at stage 2 or stage 3.

Jim Mather: Two points are involved. First, the organisations were invited to the event that we held. We will now reiterate the event and make it more specific in the hope that they will turn up. We will also utilise the fact that two members raised the matter at committee as a further compelling reason for them to attend.

Secondly, the consumer element is important in going forward. Essentially, the domestic situation creates the robustness that gives us the basis on which to move on to international fields. That is where the real commercial value for the professions lies. We are therefore keen to ensure that everything is done to make the bill as complete and useful as possible.

Lewis Macdonald: The domestic side is clearly important to consumer interests. We need to be clear about that. Why did you refer to section 104 of the Scotland Act 1998? Why talk of adding to the bill when we are still at a very early stage in the process?

Jim Mather: Basically, we are talking about a reserved matter. I may have more of a focus on reserved matters than others have.

Hamish Goodall: The provisions that relate to consumer matters are in the Arbitration Act 1996. If we were to suggest to our colleagues at Westminster that it would help if all the law for Scotland in this respect was put in one place, they would have to agree to a section 104 order to effect that.

Lewis Macdonald: So the provisions will have a retrospective effect on the Arbitration Act 1996.

I turn to the submission from the Society of Motor Manufacturers and Traders in which it appears to imply that current arbitrations in Scotland are conducted in line with the legislation that applies elsewhere in the United Kingdom. Is that correct?

Hamish Goodall: Yes, it is.

Lewis Macdonald: I assume therefore that we are talking about a change—a significant change—in the framework within which those arbitrations will go forward. Have I understood correctly the implications of what you are proposing?

Jim Mather: Yes, indeed. That is why we invited the organisations in the first instance and why we are happy to accede to a subsequent meeting.

Lewis Macdonald: That was so that they could clearly understand the basis on which they would go forward.

Jim Mather: Yes, and so that they could get excited about the commercial implications for their organisations and members. Having a better accord with customers over the long term and a better appreciation of the process that is in place is genuinely good for business.

Lewis Macdonald: That would clearly be a good thing. Of course, they might regard it as potentially complicating if a single organisation operates according to two different arbitration regimes. Is there a risk involved in that from the point of view of the consumer?

Jim Mather: We intend to address that risk head-on.

Nigel Don: Thank you for accommodating my schedule, convener. Good morning, minister—I have just a couple of thoughts. Some of my comments were taken up by other members, for which I am grateful. I will just reiterate my thoughts on bargaining strength, particularly in the context of the construction industry. You and I have met recently in other contexts on that issue. One of the things that comes across to us when we talk to people in the industry—rather than the lawyers—is the extreme inequity of the bargaining power going down the chain of contractors. We really do have to talk to the people at the bottom of that chain about what should be in arbitration, if they are ever to be able to use it. I know that they are not the only creatures on that particular planet, but I think that they are a significant part of it.

I would also like to return to sections 85 to 87 of the 1996 act, which are not being re-enacted in the bill. I just want to plead that they should be. The student in me reflects on the days when you just could not find the law because it was scattered around. Simply not to replay those three sections in the bill—if that can legally be done—seems to me to be an omission.

Jim Mather: I will take the inequity issue first. One of the benefits that I anticipate accruing from the meeting that we have committed to with the industry groups is that we will debate inequity openly. Our experience is that, when we start to debate them openly, positions of inequity tend to evaporate in as much as altruism—or maybe the need for altruism—is more prevalent when people are having an open debate. I will really welcome that opportunity and we will see how that goes forward. I ask my colleagues to address the issue of the missing sections 85 to 87.

Graham Fisher: I am happy to do that again. As we mentioned before, I think we agree that it makes perfect sense to include those sections in the bill. I would certainly rather read in one place all the Scots law on arbitration than just read the bits in the Scotland Act 1998. There is a limited power in schedule 4 of the 1998 act to restate reserved law, but the provisions also have to be for a devolved purpose. The concern here is that they would not be. If it were within our powers, we would be happy to do what Mr Don seeks. Unfortunately, the only way to do it might be, as we said, to use a section 104 order under the 1998 act, if Westminster was agreeable to putting the provisions into the bill thereafter, so that they would show up in the one place if the bill were enacted.

The Convener: Has an approach been made to Westminster or the UK Government to see whether they would be willing to accommodate those sections being incorporated in the Scottish bill?

Graham Fisher: Yes. We have certainly been in touch with them, but I do not think that we have had a definite answer yet.

The Convener: It would be useful if we could find out before stage 2 whether such an answer has been forthcoming. Are there any other questions?

Christopher Harvie: I have just a brief point, which repeats something that I asked in a previous meeting. It seems that certain recent developments in energy and transport, notably in pipelines and railway lines, will give room for considerable successions of arbitration cases between the providers of those services and their users, particularly under new European regulations that make possible the use of railway lines by multiple contractors.

Scotland is well placed, because of our experience of energy production from North Sea oil, which is leading towards renewables developments, and because of the siting here of two big multinational transportation concerns—Stagecoach and FirstGroup—to use the legislation to establish a particular expertise in those areas.

Jim Mather: That is a good point. We should take advantage of any opportunity to use the fabric and infrastructure of Scotland. We should also take any opportunity to bring people together to see what else evolves out of the mix. That is what I have been trying to do in the past two years. I sense the opportunity and the advantages, so I shall take that further.

The Convener: In the supplementary evidence from the Law Society, and in recent evidence from the Faculty of Advocates, considerable concerns were expressed about rule 67, which relates to appeals to the court. Has the Government had time to reflect on those comments and, if so, do you have anything to say on that?

Jim Mather: There is a determination to reflect on all the comments and factor them in to our future thinking. I ask Graham Fisher to give us the detail.

Graham Fisher: We have had some time to reflect on that evidence, although not much, given that we received the Law Society's supplementary submission only yesterday. It makes a detailed argument about when a point of law can be raised in relation to an appeal on a point of law. As a

response to the consultation on the draft bill, we changed the provision on the detail on whether an appeal can be made on a pure point of law. Internationally, many arbitral jurisdictions do not have any appeals on point of law at all. England is particularly anomalous in that context. I am afraid that I do not recall whether that point was made to the committee last week.

Rule 67 is a default rule, which the parties can opt out of, and so can choose to deny themselves recourse to the courts in that context. We are happy to consider further the technical point on the scope of rule 67. However, on reading the Law Society's submission, we were not, at first blush, entirely sure of the reasoning. The Law Society seems to say that there is doubt over whether an arbitrator will, as a result of the restriction in the appeal process, be able to take a view on a point of law in the first instance. To an extent, the reasoning seems to be the tail wagging the dog. The intention is certainly that the arbitrator will, in arbitration, be able to take a view on a pure point of law. We are happy to consider that matter further. One indication that the bill will allow a decision on a point of law is in rule 44.

The Law Society takes objection to the terminology in the submission from the Chartered Institute of Arbitrators, which states that the rule

"severely limits the likelihood of any such appeal succeeding."

I am not sure that we would necessarily adopt the chartered institute's terminology, but it is important for the expedition of the arbitral process under the bill that there are limits on appeals. We have talked about the importance of speeding up the process wherever possible.

The Convener: The concern of the Faculty of Advocates is that the procedure that is set out in rule 67 does not accord with normal practice in Scottish law, and that some of the provisions in the bill more generally seem to have been lifted from English legislation and put into the Scottish bill in a way that does not necessarily reflect terminology and practice in Scots law. Will you consider that between now and stage 2, particularly in relation to rule 67?

Graham Fisher: The Faculty of Advocates did not respond to our consultation, so we welcome its views on the technical aspects of the bill now. We are happy to consider that issue.

There was a deliberate decision to import restricted appeal on point of law from England. The faculty seems to be hoping for a wider appeal on point of law, which it says would be in line with what is currently in place in the law of Scotland. However, the bill is trying to expedite the arbitral process for users.

12:00

The Convener: We received written and oral submissions on rule 25, on confidentiality, in which concern was expressed that if a case appears in the courts, rule 25 will restrict current practice, which is that court proceedings should be open and public. Again, there seems to be a contradiction between what is proposed and normal practice. Indeed, there is concern that the approach might be contrary to the European convention on human rights, in that it might restrict the freedom of the press and the public's right to information about what is happening in the courts.

Graham Fisher: We read the comments of the Faculty of Advocates on rule 25. The intention behind the restrictions is that the identities of parties should not be revealed when a matter goes to court and is reported. The approach would not prevent more general publicity on the process. In that sense, the provision is—we hope—narrow. We will consider the faculty's points in more detail.

The judges of the commercial court made a valuable point about the provision, which we intend to fix. There is a wide range of exemptions, which will allow, for example, the release of information about court proceedings, if that is in the public interest.

Hamish Goodall: The point about the rule on anonymity in legal proceedings is that if the parties have agreed to go to arbitration and have agreed that the process will be confidential, it would be unfortunate if the process were to be disclosed and publicised simply because one party wanted to appeal on some ground or other. The approach is simply intended to preserve confidentiality in the process.

The Convener: We will reflect on your comments.

We discussed time limits at last week's meeting, and there was no unanimity among our witnesses on the matter. Does the Government think that there is merit in considering compulsory time limits in arbitration procedures?

Jim Mather: The timeframe will vary from arbitration to arbitration. Some matters will take longer to resolve than others. The key point is that few consultees argued in favour of time limits. At the stakeholder session a few weeks ago, only one member of the panel argued for time limits.

Time limits might present as many problems as they would solve. We want matters to be resolved speedily and cheaply, but it is equally important that complex disputes be resolved justly and fairly. We are looking to the profession to build a reputation, in different spheres of arbitration, for being speedy and affordable and for resolving disputes within a decent timeframe. We need to

give the profession the freedom to do that, in a context in which it is competing with other jurisdictions for arbitration business.

The Convener: My final question relates to points that have been made in evidence to the committee. The bill appears to give powers to arbitrators—such as decrees of reduction, and orders for specific implement ad interim—that sheriffs cannot grant and which are currently exclusively within the province of judges in the Court of Session. What is the reason for giving those powers to arbitrators?

Jim Mather: It is to do with effectiveness. I will invite Hamish Goodall to comment.

Hamish Goodall: When parties agree to go to arbitration, in effect they agree to go to a private judge rather than to the public courts. Usually, they will want their private judge to have the same powers as judges in the public courts. In other jurisdictions, it is quite common for arbitrators to be given such powers. In fact, I understand that there may be some authority to suggest that in Scotland that is possible under the common law. We therefore do not think that arbitrators are being given an exceptional power—provided that the parties are happy to go along with it. It is, of course, a default rule.

Graham Fisher: I would add that there are protections for interested third parties, for whom concerns would arise if they were affected by what is, in essence, a private dispute-resolution mechanism between two or more parties.

Gavin Brown mentioned interim interdict. Nothing in the bill would create a criminal sanction on the back of an interim interdict. An equivalent power exists in England and Wales in relation to injunction. The interpretation there is that the arbitrator cannot create a criminal sanction on the parties.

If there are concerns, we would be happy to reconsider the drafting of the bill to see whether that point can be made clearer.

Stuart McMillan: I want to go back to rule 25 on confidentiality and to suggestions that have been made in relation to European Union law. I assume that anyone involved in arbitration would also argue commercial confidentiality, since aspects of their contracts may well be discussed.

Jim Mather: That is a very good point. Research that was done in 2006 by Queen Mary, University of London suggests that, although enforceability is clearly the most important factor that leads parties to arbitrate rather than litigate, the second most important factor is confidentiality, which is way up there. It featured heavily in the session that we held with stakeholders six weeks ago: it came up early in our conversations and, as we went on, people drilled down and identified it as a key element. If it can be made synonymous with arbitration in Scotland, that will be a key selling point for the professions.

The Convener: I have just had a chance to check the wording of the bill in relation to the point that Rob Gibson made on section 22. The Faculty of Advocates expressed concern in relation to section 22(2)(b), which says that arbitral appointments referees have to show that they

"are able to provide training, and to operate disciplinary procedures, designed to ensure that arbitrators conduct themselves appropriately."

The concern was that an arbitrator from the Chartered Institute of Arbitrators would not be in a position to provide the training or to operate disciplinary proceedings against a solicitor who is not a member of the institute. That is where the issue of a closed shop might arise. You might want to reflect on that and come back to the committee in writing.

Hamish Goodall: The arbitral appointments referee will be a body rather than an individual. The Chartered Institute of Arbitrators, the Royal Institution of Chartered Surveyors, the Faculty of Advocates, the Law Society and the Institution of Civil Engineers will all provide training for people who will act as arbitrators. It is not as if an individual will have to provide the training.

The Convener: I am not sure that that entirely answers the point. Section 22 seems to refer to an individual who is the referee, or individuals who are the referees, rather than to a body. Those people would be appointed by ministers.

The disciplinary issue is the key one. To fulfil the requirements of section 22(2)(b), referees have to be able to discipline an arbitrator who fails.

Jim Mather: Let us respond to you in writing on that issue, to try to provide some clarity.

The Convener: If there are any other points on which you would like to write to us, it would be helpful to receive your letter before our next meeting on 10 June. We have to prepare a draft report to meet the Parliament's timetable for stage 1.

Jim Mather: Would it be useful for us to send in a Word file of bullet points from the session that we held six weeks ago? That would enable you to understand the tone, and to read about the topics that dominated our discussions.

The Convener: Thank you—that would be helpful. It would also be useful if you could tell us who attended the session.

Jim Mather: Okay.

The Convener: That concludes our evidence session. I thank the minister, Hamish Goodall and Graham Fisher for their evidence.

I am afraid that Mr Mather has a season ticket and will be back again for our next meeting, to consider under affirmative procedure a statutory instrument on renewable energy. We look forward to that. We will also consider drafts of our energy report and our stage 1 report on the Arbitration (Scotland) Bill.

Meeting closed at 12:11.

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