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Personal Injury Arbitration

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and

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Overview

- Background
- Development in Scotland
- PI Arbitration in England

- Advantages and Disadvantages
- Interest in PI Arbitration in Scotland



What is Arbitration?

- A mechanism of settling disputes and obtaining a final and binding decision, without recourse to a court
- Private determination of a dispute by an independent third party
- Form of alternative dispute resolution in which the parties to a dispute agree to be bound by the decision of the arbitrator they have appointed



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Alternatives

- Litigation
- Negotiation

- Mediation
- Med-arb
- Arb-med

- Expert determination
- Adjudication



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Key Features

- Arbitration clause or
- Submission agreement

- Ad hoc or
- Institutional

- Consensual
- Non-governmental
- Final and binding



Legislation

- Arbitration (Scotland) Act 2010
- Old law seen as outdated and unsatisfactory
- Stated case procedure disruptive
- Scotland adopted the UNCITRAL Model Law regulating international commercial arbitrations in 1990

Legislative Development

- English Arbitration Act 1996
- Draft Arbitration (Scotland) Bill initiated in 1997
- Scottish Arbitration Code in 1999
- 2010 Act now provides a comprehensive, modern framework



- Main body of the Act regulates foundations of arbitration
 - seat of the arbitration
 - enforcement of an arbitral award
 - interaction between arbitration and the courts



- Schedule 1 includes a set of rules governing the conduct and procedure of the arbitration
 - appointment of arbitrator
 - powers of arbitrator
- Mandatory rules cannot be modified or disapplied by the parties
- Default rules apply unless the parties agree to modify or disapply those rules



Procedure

- Rule 28 default rule
- In absence of agreement, arbitrator can determine the procedure to be followed in arbitration as well as any evidential matters
- Not imitation of court proceedings



- Written statement of case and a response helps focus issues
- No need for an actual hearing
- Oral evidence permitted
- May be combined with witness statements

Comparison With England

- Both share fundamental principles
 - Fairness
 - Party autonomy
 - Limited court intervention
- Similar procedures for challenging the jurisdiction of the tribunal or awards
- 2010 Act has improved upon 1996 Act
 - Express and detailed confidentiality provision as a default rule
 - Covers oral agreements to arbitrate



English PI Arbitration

- Arbitration is popular in shipping, building and commercial disputes already
- PICArbs set up in England
 - Pre-action protocol
 - Proposal to arbitrate
 - Arbitration agreement
 - Summary of claim
 - Arbitrator appointed
 - Response
 - Arbitration runs to settlement or trial



English Reasons

- Ministry of Justice cuts and closure of courts
- Increased court fees
- Inefficient county courts
- Trials being bumped
- Introduction of costs budgeting
- Strike outs for procedural default
- Delays in assessments of costs



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English Reasons

- Civil Procedure Rules
- *Mitchell v News Group Newspapers* [2014] 1 W.L.R. 795
- *Denton & Others v T H White Limited* [2014] 1 W.L.R. 3926



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Scottish Reasons?

- ASPIC
- *Moran v Freyssinet* [2015] CSIH 76
- Taylor Report on Funding of Civil Litigation



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Advantages

- Choice of arbitrator
- Expertise
 - FDRS
 - University of Aberdeen
 - ACIArb, MCIArb and FCIArb
 - PI Bolt on option
- Efficiency



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Advantages

- Confidentiality
- Convenience
- Hot-tubbing



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Advantages

- Arb-Med
- Continuity
- Timescales



Disadvantages

- Lack of appeal
- No powers to compel any action from non parties
- Fewer recoveries of documents
- Multiparty disputes can be problematic



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Costs

- Parties pay for tribunal
- Hire the arbitrator
- Agree in advance
- Tenders



Discussion

- Pilot case – PI Arb v ASPIC
 - Who will finish first?
 - Who will save money?
- Trial period
- Royal College of Physicians and Surgeons in Glasgow



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