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Which seat to choose?

FEBRUARY 2020 – FRANCO-BRITISH LAWYERS SOCIETY EVENT AT THE DUBLIN DISPUTE RESOLUTION CENTRE

On 6 February 2020 I was delighted to represent the Scottish Arbitration Centre at this event about arbitral seats organised by the Franco-British Lawyers Society and the Dublin Dispute Resolution Centre.

Justice David Barniville (L above) chaired the debate among (L to R) Robert J.D. Stevenson (representing England and Wales), Peggy O'Rourke SC (Ireland), GCL (Scotland), David Sharpe QC (Northern Ireland), David Guerra Bonifacio (Switzerland) and Alexandre Reynaud (France). Also pictured second from R is Sara Phelan SC. Thank you to Katie Dempsey, Manager of the Dublin Dispute Resolution Centre, for the photo.

My objective was to persuade the audience that Scotland – or to be more accurate, a city in Scotland (as a Glaswegian I reluctantly had to concede that this is very probably Edinburgh) is an excellent seat for international arbitration.

This was a particularly good time to promote Scotland as an attractive seat and venue for international arbitration and raise awareness of the Scottish legal and justice system, since Scotland as an arbitral seat is under the spotlight given that Edinburgh is hosting the next ICCA Congress. The Congress had been scheduled for 10 – 13 May 2020, but due to the COVID-19 pandemic, has been postponed until 1 – 4 February 2021. Entitled *Arbitration's Age of Enlightenment?*, the congress will take stock of achievements and explore ideas to adapt to a fast-changing environment and shape the future of international arbitration.

What then makes a good arbitral seat? Various guides and surveys have identified so-called "safe seats".

For example, the Chartered Institute of Arbitrators' London Centenary Principles drawn up in 2015 are a set of criteria considered to be necessary for an "effective, efficient and 'safe' Seat for the conduct of International Arbitration." They include the jurisdiction in question having a clear and effective modern arbitration law and a competent and independent judiciary with the requisite experience.

The 2018 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary University of London and White & Case LLP on "The Evolution of International Arbitration" found that preferences for a given seat continue to be primarily determined by the seat's "general reputation and recognition." This was followed by users' perception of the jurisdiction's formal legal infrastructure, the neutrality and impartiality of its legal system, the national arbitration law, and its track record in enforcing agreements to arbitrate and arbitral awards.

The December 2019 updated Guide to Arbitration Places (or "GAP") produced by the Delos arbitration institution sets out six criteria which it considers define "safe seats". Again, the law and the judiciary are two of those criteria.

What makes Scotland a "safe seat"? The answers are fully set out on the Scottish Arbitration Centre's website and below are my personal top four areas.

- Firstly, the law. Scotland benefits from a relatively recent, state-of-the-art law in the shape of the Arbitration (Scotland) Act 2010. The Act was the product of a major overhaul and update of Scotland's previous ancient patchwork of laws and jurisprudence.

  The Scottish Act is similar to the 1996 Arbitration Act which regulates arbitration proceedings in England and Wales and Northern Ireland (with some differences, such as confidentiality, mentioned below). The Scottish statute contains what international arbitration practitioners would expect to see: it uses best practice from around the world. The UNCITRAL Model Law served as inspiration for the Act but was not integrated into it.

  Finding your way around the law quickly and, in particular, identifying any mandatory rules is important when selecting an arbitral seat and it is therefore worth emphasising that the Scottish Act is user-friendly because all mandatory rules are flagged as such. In other words, if you are considering seating an arbitration in Scotland, you can immediately and easily identify the rules that will automatically apply. An example of a mandatory rule is the Arbitral Tribunal's power to rule on its own jurisdiction (Rule 19).

  Another important point addressed in the Act is confidentiality. Whether or not different aspects of an international arbitration are confidential (including submissions and documents, hearings, awards …) depends on any agreement the parties may have reached concerning confidentiality (including their agreement to any arbitration rules) as well as the law at the seat of the arbitration. For example, the English Arbitration Act does not address confidentiality, although case law has made it clear that there is an implied duty of confidentiality. In France, whilst there is a specific confidentiality rule for domestic arbitrations, there are no such rules for international arbitrations

(except for the arbitrators' deliberations), although case law refers to a general duty of confidentiality.

Arbitration in Scotland is confidential unless the parties agree otherwise, and unlike the position in many jurisdictions, the duty to treat proceedings as confidential is set out in the Act and has been strongly supported by the Scottish courts. If an application is made to a Scottish court regarding an arbitration, the court will keep the parties' names and details of the case anonymous. It is also possible to obtain a court order prohibiting reporting of a case. Bearing in mind the tension that may exist between confidentiality and transparency (especially in investor-state cases), it is important to note that the Scots confidentiality provisions may be modified or deleted, thus allowing for transparency where appropriate.

- Secondly, the Scottish legal system. The Scottish legal system is mature and Scotland's independent judiciary supports the arbitral process without unnecessary interference.

  The Scottish judiciary is highly supportive of arbitration under the 2010 Act. If a court action is raised despite the presence of an arbitration agreement, the Scottish courts will enforce the arbitration agreement and stay the court proceedings. Concerning the enforcement of awards, the courts operate on the basis that arbitral awards will be recognised and enforced.

  Although the spirit of the 2010 Act is for limited intervention of the courts, the Act nevertheless ensures that the courts can step in to support the arbitral process if asked. For instance, if there are difficulties at the critical stage of constituting a tribunal, the Scottish Act prefers to use an arbitral appointments referee (i.e., an appointing authority) instead of the court, although the court has power to appoint an arbitral tribunal if this fails. The appointing authority makes more sense than going straight to the court as happens in some jurisdictions, since most appointing authorities will have greater experience of making nominations (and probaby more extensive databases of potential arbitrators) than the courts.

  There is also ongoing education when it comes to arbitration matters heard before the Scottish courts: in 2017 an Arbitration Court User Group of judges,

legal professionals and others was established as a forum for consultation, discussion and feedback on practice and procedure in these cases.

- Thirdly, the neutrality and impartiality of the Scots legal system. Scotland has a mixed legal system of common and civil law elements, which may make it attractive as a neutral venue. Being perceived as neutral and impartial is vitally important and this has been critical to the success of arbitration seats such as Stockholm.

- Lastly, Scotland offers a cost-effective arbitration process. Scots arbitration law is flexible, appeal processes are restricted and Scots legal professionals have the necessary expertise to provide the same services as those offered in the major arbitral jurisdictions.

Although the above are only selected advantages of Scotland as a seat, Scotland in fact captures all of the aspects of a safe seat mentioned in the reports at the start of this post. One further point of interest is that Scotland also has a specialist "niche", which is its role in the energy sector.

A final question for consideration: should our choice of an arbitral seat also be determined by the (lack of) actions of the relevant city, jurisdiction and local arbitration institution(s) in relation to climate change?

See you at ICCA!