



ISSN : 1875-4120
Issue : (Provisional)
Published : September 2025

This article will be published in a future issue of TDM (2026). Check website for final publication date for correct reference.

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Arbitration in Scotland by T. Cole

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Arbitration in Scotland

Tony Cole¹

1. The Interviews

This empirical study examines the contemporary landscape of arbitration practice in Scotland through qualitative research conducted as part of a comprehensive project funded by the United Kingdom's Economic and Social Research Council. The research employed a multi-jurisdictional approach, encompassing interviews across 47 countries, 127 cities, and involving 1,086 interviewees, with the broader project examining commercial arbitration practices throughout Europe.²

The Scottish component of this research comprised nine semi-structured interviews conducted across three major legal centres: Glasgow, Aberdeen, and Edinburgh. The fieldwork was undertaken between September and October 2022, with two interviews conducted in Glasgow on 22 September 2022, two in Aberdeen on 3 October 2022, and five in Edinburgh on 5-6 October 2022. All interviews were conducted by the author and professionally transcribed following digital recording. The selection of interviewees employed a systematic approach, drawing upon established legal directories (WhosWhoLegal, Chambers, Legal500), professional recommendations, and comprehensive internet research to identify leading practitioners and knowledgeable participants across the Scottish arbitration landscape.³

The methodological framework adopted semi-structured interviews lasting approximately 90 minutes each, involving 18 participants in total. This approach drew from established qualitative research practices in socio-legal studies, enabling exploration of emerging themes while maintaining systematic data collection.⁴ The

¹ Reader in Arbitration and Investment Law, University of Leicester; Arbitrator, Independent (non-U.S. cases) and JAMS (U.S. cases). This article incorporates an experiment in the use of a Large Language Model (Claude by Anthropic) to assist in drafting – which comes through at times in some awkward and unimaginative phrasing. Each interview was coded by the author, and then notes drafted. Claude was then used, through an extended process of experimentation, to produce an initial draft of the article based on the author's notes. This process included an extended period of prompt refinement, along with the production of multiple drafts. Claude was never given access to the interview transcriptions, but only to the author's notes, to ensure that the draft produced would reflect the author's judgements of which points from the interviews should be discussed, and that the draft would reflect the author's judgements and evaluations. Nonetheless, the draft article produced was then reviewed and redrafted, both to eliminate hallucinations and to ensure that the text of the article accurately reflected the author's views.

² Further information on the project is available at <https://commercialarbitrationineurope.wordpress.com>.

³ A list of interviewees who have chosen to be publicly identified is available on the project website.

⁴ See Surabi Gupta & William S., "The Highs and Lows of Interviewing Legal Elites", 21 Int'l J. Qualitative Methods 1, 2 (2022) (discussing advantages of semi-structured interviews for elite research).

interview protocol incorporated multiple dimensions: open-ended discussions guided by predetermined topics, identification of perceived “leaders” in both Scottish and international arbitration contexts, and responses to hypothetical scenarios designed to reveal decision-making frameworks and professional values.

This multi-faceted approach proved particularly valuable in understanding Scotland's position within the European arbitration landscape, revealing nuanced perspectives that purely quantitative methodologies might have overlooked. The semi-structured format facilitated organic discussion development while ensuring comprehensive coverage of key themes, yielding rich qualitative data regarding market structures, professional practices, cultural dynamics, and the challenges facing Scottish arbitration development.⁵

2. The Arbitration Market

Historical Context and Contemporary Challenges

Arbitration possesses deep historical roots in Scotland, extending back to medieval times, and drawing from both the isolated nature of many areas of Scotland until recent times,⁶ and a traditional Scottish desire for separation from English law and courts.⁷ This historical foundation provided a cultural familiarity with alternative dispute resolution that continues to influence contemporary practice. However, despite this longstanding tradition and consistent expressions of high regard for the quality of the Scottish legal profession both domestically and internationally, Scotland's arbitration market remains significantly constrained in scope and volume.

The limited scale of Scottish arbitration activity becomes evident when examining available data. A 2010 article reported an estimation by John Murray, Lord Dervaird, a leading figure in Scottish arbitration,⁸ that fewer than 10-15 international arbitrations had been seated in Scotland since 1990.⁹ The 2015 Scottish Arbitration Survey provided additional insight, estimating that only 22 arbitrations (international or

⁵ This Article has been drafted on the basis of the interviews performed, and reports the statements made by interviewees. Where a topic is addressed that involves publicly-accessible information, additional research has been performed and a citation to supporting research is included. However, unless expressly stated otherwise, all other statements in this Article reflect the author's valuations and judgements based on statements made by interviewees to the author, rather than presenting information independently verified by the author.

⁶ Which limited the accessibility of any formal court system.

⁷ See, e.g. Jackson W. Armstrong, “Arbitration in Late Medieval Scotland: “bon accord” in Urban and Rural Contexts”, 9 *Journal of Irish and Scottish Studies* 50 (2018); A.M. Godfrey, *Civil Justice in Renaissance Scotland* (2009), ch. 8; Mark Godfrey, “Arbitration in the *Ius Commune* and Scots Law”, 2 *Roman Legal Tradition* 122 (2004).

⁸ See generally, “Tributes to the Hon Lord Dervaird FCI Arb”, 82 *Arbitration* 215 (2016).

⁹ Steven P. Walker, “The Renaissance of Scottish International Arbitration”, 3 *Scots Law Times* 9, 10 (2010).

domestic) had been seated in Scotland from mid-2013 to mid-2014, with roughly half arising from construction and property disputes, and most involving amounts under £500,000.¹⁰

Contemporary Market Structure

The contemporary Scottish arbitration landscape exhibits distinct sectoral characteristics, with property disputes maintaining particular prominence. Rent review arbitrations were described as representing a significant component of Scottish arbitration activity, alongside lease termination disputes, dilapidations claims, and disputes arising from commercial premises occupation. One interviewee estimated that approximately 50% of Scottish commercial leases contain arbitration clauses, although they acknowledged the absence of comprehensive statistical data to verify this assessment.

Construction arbitration, while historically significant in Scotland, experienced a dramatic decline following the introduction of statutory construction adjudication in 1998.¹¹ The 1970s was described as witnessing substantial arbitration activity in construction disputes, with arbitration dominating over litigation in this sector. However, the introduction of construction adjudication fundamentally altered this landscape, leading to what interviewees consistently described as the collapse of construction arbitration in Scotland, mirroring developments in England.

The construction adjudication system, initially conceived as providing rapid resolution of straightforward disputes, was said to have expanded beyond its original mission, to encompass increasingly complex matters traditionally handled through arbitration. This “mission creep” has effectively displaced arbitration even in sophisticated construction disputes, with multiple interviewees reporting unease with adjudication's expansion into areas requiring detailed legal analysis by experienced legal decision-makers, despite adjudication's compressed timelines and the majority of construction adjudicators in Scotland being quantity surveyors rather than lawyers.

Geographic Distribution and the Aberdeen Market

Scotland's arbitration market demonstrates significant geographic concentration, with the Edinburgh-Glasgow “central belt” dominating activity, while

¹⁰ Derek Preston Auchie, Richard Farndale & Chris McKay, “Scottish Arbitration Survey No.1” (2015), available at <https://www.lawscot.org.uk/media/2d0piujx/scottish-arbitration-survey-june-2015.pdf> (last visited 9 September 2025).

¹¹ Through the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (Scotland) Regulations 1998.

Aberdeen presents a distinctive market closely connected with the oil and gas industry. This geographic distribution reflects both economic realities and relationship-driven business development, the latter particularly prominent in Aberdeen.

Aberdeen's position as a hub for North Sea energy activities creates unique arbitration opportunities, though these frequently involve English law and international parties, leading to arbitrations seated outside Scotland despite Scottish legal representation. In turn, construction adjudication practitioners in Aberdeen reported significant overlap between practitioners engaged in traditional land-based construction disputes and offshore disputes arising from the oil and gas and renewables industries. This overlap was said to reflect common engineering and construction issues across these sectors, although oil and gas and renewable disputes will standardly fall outside the scope of statutory construction adjudication.

The importance of relationships in Aberdeen's market cannot be overstated. Interviewees emphasised how personal connections provide strategic advantages in a market where both London and Edinburgh remain accessible alternatives. The small size of Aberdeen's construction adjudication market, constrained by the city's population and the likelihood of repeat interactions between parties,¹² as well as the presence in Aberdeen of in-house lawyers for energy companies, further emphasises relationship management's crucial role in that market.

The Shadow of London and English Law

Perhaps the most significant structural challenge facing Scottish arbitration development is what can be termed “the shadow of London”. This operates on multiple levels: London's established position as a major international arbitration centre creates a strong gravitational pull for complex disputes, while the increasing importance of English law in Scottish commercial transactions naturally leads to London-seated arbitrations.

Interviewees described the prominence of English law in Scottish commercial practice as having increased substantially over recent decades, attributed largely to the growth of nationwide and international firms operating in Scotland, many resulting from acquisitions of prominent Scottish firms. This creates a dynamic in which firm-wide standard form contracts and policies adopt English law, given the dominant importance for the larger firm of the English market, leading to English law being adopted even for Scotland-related contracts.

More broadly, this trend toward English law adoption was described as reflecting several factors: the presence of Scottish branch offices of English companies, the

¹² Encouraging settlement of disputes, rather than escalation to adjudication.

prevalence of English law in standard form contracts intended for multi-jurisdictional use, and the general acceptance of English law even by Scottish parties due to its familiarity and widespread recognition. Some interviewees noted that governmental bodies and some larger Scottish companies retain a preference for incorporating Scottish law into their contracts, but that this is also something easily given away during negotiations, as ultimately they are usually also quite happy with English law.

Several interviewees also noted the economic incentives favouring English legal work for Scottish lawyers, including higher billing rates being possible when the competing firms are London-based, and a greater tolerance for substantial legal fees in larger London-based disputes than in traditionally more moderately-sized Scottish disputes. Indeed, one interviewee described their firm as having adopted a strategic focus on developing English litigation work, as representing a market more promising for growth than Scottish work: given the vast difference in market size, capturing even a small portion of the English market provides substantial work volume and fees.

Specialist Sectors and Niche Markets

Despite overall limited arbitration activity, certain sectors demonstrate consistent arbitration usage in Scotland. Public sector entities were described as having a preference for arbitration over litigation in some circumstances, due to the enhanced privacy made possible by arbitration, which avoids the public scrutiny of disputes that proceed through courts. This was formalised by the 2014 decision of the Scottish government to adopt arbitration at the Scottish Arbitration Centre as the default position for new government contracts.¹³

On the other hand, as already described, the energy sector, while significant for Scottish legal practitioners, more strongly contributes to arbitration activity outside Scotland than within Scotland. Energy disputes, despite originating in Scotland, frequently proceed through London-based international arbitration due to industry structure, international party involvement, and greater familiarity of parties and counsel with English law and international arbitration procedures than with their Scottish equivalents.

¹³ “Scottish government contractual disputes to be resolved through Scottish Arbitration Centre, ministers announce”, *available at* <https://www.pinsentmasons.com/out-law/news/scottish-government-contractual-disputes-to-be-resolved-through-scottish-arbitration-centre-ministers-announce> (last visited 15 September 2025).

Market Development Obstacles

Interviewees identified several interconnected obstacles to Scottish arbitration market development. Firstly, the limited number of experienced Scottish arbitrators creates a bootstrapping problem: lack of arbitration activity prevents experience development, while limited experience discourages selection as an arbitrator.

The comfort level of Scottish lawyers with litigation was said to present another barrier to arbitration development. With adequate litigation work available, many practitioners simply lack the incentive to invest time and resources in developing arbitration expertise, particularly given the uncertain return on such an investment in Scotland's limited arbitration market.

Finally, the consistent focus on arbitration development in Scotland since the 1990s has been on attracting international arbitrations, rather than on building a domestic arbitration culture. This approach, while understandable given international arbitration's prestige and potential economic benefits, has arguably led to a neglect of the opportunity to build on both arbitration's consistent usage in domestic property disputes and on the prominence of construction adjudication, to create a broad arbitration awareness and acceptance among Scottish businesses and legal practitioners.

3. Arbitration Institutions

The Scottish Arbitration Centre: Vision and Reality

The Scottish Arbitration Centre stands as the dominant arbitral institution in Scotland, though its development trajectory reveals significant tensions between international aspirations and domestic market development. Established in 2011 as part of efforts to promote arbitration following the adoption of the Arbitration (Scotland) Act 2010, the Centre operated for over a decade without actually administering arbitrations, finally introducing its first Rules on 18 May 2023.¹⁴

This delayed move to case administration is perhaps best understood as reflecting the Centre's original conception as a promotional body, rather than an administering institution. Given Scotland's limited arbitration market and the existence of the Scottish Arbitration Rules incorporated into the Arbitration (Scotland) Act 2010,¹⁵ immediate institutional administration arguably appeared unnecessary. However, this

¹⁴ 2023 Rules of the Scottish Arbitration Centre, *available at* <https://scottisharbitrationcentre.org/rules-of-the-scottish-arbitration-centre/> (last visited 15 September 2025).

¹⁵ Arbitration (Scotland) Act 2010, Schedule 1.

approach generated tension between the Centre's international promotional activities and domestic community and market development needs.

Interviewees presented mixed assessments of the Centre's impact. While acknowledging the dedication of the individuals involved in its operation, and praising their successful efforts to enhance Scotland's name recognition in international arbitration, there was also a widespread sentiment that there were fundamental misconceptions in the Centre's strategic approach. Specifically, that the focus on promoting Scotland as a seat for international arbitrations, rather than on developing domestic arbitration, was setting aside existing opportunities in order to aim at more prestigious one, but without a clear conception of Scotland's distinctive "offer" in the international sphere. Ultimately, not only is international arbitration just a difficult market for any jurisdiction to develop given the existence of other established jurisdictions, but it is even more difficult to promote a jurisdiction in which lawyers have limited practical arbitration experience, there are almost no full-time arbitrators, and there is little track-record of how courts will handle arbitration matters. Essentially, the grassroots work was not done to provide a foundation for the more prestigious international cases. Scotland and the Centre were trying to run before they had properly learned to walk.

The 2022 ICCA Edinburgh conference exemplified these tensions. While the Centre was praised for bringing the conference to Scotland, providing Scotland with unprecedented international arbitration recognition, the event's disconnect from Scottish practitioners was notable to interviewees. Ultimately, most arbitration practitioners in Scotland have limited arbitration practices and were unlikely to benefit from the high-level international connections facilitated by such an event, highlighting the gap between successful international promotion and successful domestic development.

The Scottish Arbitration Centre's approach reveals broader strategic challenges in arbitration market development. Efforts to establish Scotland as a regional arbitration hub face competition from well-established centres like London, while domestic market development requires sustained engagement with Scottish businesses and legal practitioners who may have limited arbitration awareness or interest.

In addition, the Centre's lack of distinctive offerings beyond cost advantages raises questions about its competitive positioning. One interviewee suggested that a more direct engagement with contract drafters might prove more effective than the broad promotional activities on which the Centre has focused. Success stories from that interviewee of targeted efforts to incorporate Scottish arbitration clauses into specific transactions were said to demonstrate the potential benefits of focused, relationship-based development approaches rather than general marketing campaigns.

Ultimately, without clear points distinguishing arbitration at the Centre from established alternatives, attracting international cases will likely remain challenging, as experienced institutions provide similar services with proven track records.

Alternative Institutional Frameworks

The Chartered Institute of Arbitrators (CIArb) was consistently identified by interviewees as the leading alternative institution in Scotland, although almost exclusively in the context of construction disputes. While the CIArb's direct engagement with commercial arbitration practice was said to be limited, the focus of the Scottish Arbitration Centre on international promotion, rather than on domestic development, was arguably reflected in the fact that it was the CIArb, rather than the Centre, that was most commonly identified by interviewees as the most promising connection for individuals interested in developing a commercial arbitration practice, due to the accreditation and training that the CIArb offers.

4. The Arbitration Community

Community Fragmentation and Geographic Divisions

Scotland's arbitration landscape reveals significant challenges in community formation, characterised as it is by sectoral fragmentation rather than a unified professional identity. Instead of a single cohesive arbitration community, Scottish interviewees described instead multiple distinct groupings: construction-focused practitioners, property dispute specialists, those affiliated with the Scottish Arbitration Centre, and geographically separated practitioners in Aberdeen versus the Edinburgh-Glasgow central belt.

This fragmentation reflects the nature of arbitration work in Scotland, where practitioners typically engage in arbitration as one component of a broader dispute resolution practice rather than as a primary specialisation. This professional reality introduces barriers to community development, as individuals will naturally connect most frequently with others sharing their primary practice areas, rather than those who share their occasional arbitration involvement.

Aberdeen's separation from the central belt creates additional complexity. While Glasgow and Edinburgh were described as functioning overwhelmingly as a single, connected legal market, Aberdeen's geographic distance and the importance of energy-related work distinguish it from this dominant central belt market. However, this separation should not be understood as exclusion; Aberdeen practitioners did not see themselves as "outsiders" when participating in Edinburgh events, and Scottish dispute

resolution practice more broadly was described as operating nationally rather than regionally.

The Impact of Scale and Repeat Interactions

The small scale of Scottish arbitration practice generates both advantages and challenges for community development. Interviewees consistently emphasised how Scotland's limited dispute resolution practitioner pool affects professional behaviour, discouraging confrontational approaches common in larger jurisdictions, with London being the repeated comparison. Ultimately, the likelihood of encountering the same individuals in future cases was said to encourage cooperative and reasonable conduct, as unreasonable behaviour in current disputes risks relationship damage that will have negative future consequences. The expectation of ongoing professional relationships shapes procedural approaches and settlement discussions in ways that larger, more anonymous markets cannot replicate.

However, small scale also creates challenges in applying international arbitration standards. Strict application of the IBA Guidelines on Conflicts of Interest in International Arbitration, for instance, were described by some interviews as impracticable in Scotland's limited practitioner pool, where some degree of connection between arbitrators and parties/counsel becomes nearly unavoidable. This necessitates a more flexible approach, but one that, as described in Section 5 of this report, is counterbalanced by a particularly strong commitment by Scottish practitioners to the independence and impartiality of arbitrators.

Construction Community Dynamics

To the extent a coherent arbitration-connected community exists in Scotland, interviewees identified construction as the most developed sector. The construction community was described as sufficiently small that participants know each other personally, creating friendly interactions even in adversarial settings. For example, conference calls in adjudication proceedings were described as often beginning with social conversations reflecting personal familiarity among regularly interacting practitioners.

The Chartered Institute of Arbitrators in particular provides some community focus for construction practitioners, although its emphasis on adjudication rather than arbitration limits its relevance to arbitration community development. While CIArb membership provides networking opportunities and professional development, the dominance of adjudication in construction disputes means that this community contributes minimally to arbitration practice development.

Even within construction, however, interviewees questioned whether a genuine “community” exists, beyond a simple familiarity among a limited number of practitioners. As a practical example, when asked to identify three “leaders” of construction adjudication/arbitration in Scotland, some construction-focused interviewees struggled to identify individuals to name, commenting that the field was comprised of individuals working independently, rather than as part of a coordinated and actively-led professional community.

Community Development Efforts by the Centre

The Scottish Arbitration Centre's community development efforts received mixed assessment from interviewees. While acknowledging attempts to encourage arbitration community development, particularly in Edinburgh, these efforts were ultimately deemed unsuccessful. Despite familiarity with arbitration among some Edinburgh practitioners, no active, engaged community has emerged.

Concerns were also expressed by some interviewees regarding what they described as insufficient training provision by the Centre, as well as what were felt to be inadequate efforts to unite Scotland's disparate arbitration practitioners. This criticism connects to the Centre's “international” focus, and the efforts made to enhance Scotland’s name recognition within international arbitration, which has arguably led to the neglect of the smaller domestic arbitrations that might have provided a foundation for community development.

Professional Development and Networking

As described by interviewees, career development in arbitration for Scottish practitioners often involves time spent working in London, reflecting both the market size differential between Scotland and London and the learning opportunities available in more active arbitration centres. This pattern reflects a tension between developing Scottish arbitration capabilities and recognising that expertise development may require engagement, extending over multiple years, outside Scotland.

5. Arbitration Procedure

Procedural Rigidity and Flexibility

As described by interviewees, Scottish arbitral procedure demonstrates conscious adaptation of familiar litigation procedures within more flexible frameworks. Specifically, while Scottish arbitration was described as fundamentally adopting

Scottish litigation practices, given that these are the practices with which litigation-focused practitioners are familiar, the resemblance was said to be to Scotland's higher courts, where more flexible procedure and active case management are common, than to the more procedurally rigid lower courts. In this way, arbitration was able to reflect practitioner backgrounds in Scottish litigation while still accommodating arbitration's procedural flexibility.

Arbitrator Approaches and Appointment

One point highlighted by some interviewees was what they described as an increased willingness of Scottish arbitrators to adopt an inquisitorial approach, asking questions and attempting to identify what actually happened in a dispute, rather than just relying on the parties' submissions. This arguably reflects a combination of the significant importance of construction adjudication in Scotland, as an inquisitorial approach is common in that context, and the inclusion in the Scottish Arbitration Rules of an explicit permission for arbitrators to decide for themselves "to what extent the tribunal should take the initiative in ascertaining the facts and the law".¹⁶ However, interviewees emphasised that approaches vary significantly between individual arbitrators, rather than there being a uniform "Scottish" methodology in this respect.

Moreover, within the context of construction adjudication, an inquisitorial approach was described as particularly common when the adjudicator is a quantity surveyor, rather than a lawyer, as is the dominant practice in Scotland. Interviewees consistently described parties as being comfortable with such an approach, as while their lawyers might bristle at seriously questionable interpretation/application of the law, the parties would focus instead on the understanding displayed by the adjudicator of the substance of their dispute, and the practical insight visible in the outcome.

With respect to arbitrator appointment, three-arbitrator tribunals were said to be rare in Scottish arbitration practice, reflecting a domestic rather than international dispute focus and the smaller amounts typically at stake. More broadly, the limited pool of experienced Scottish arbitrators was described as creating an unavoidable tendency toward repeat appointments at levels exceeding international arbitration norms, although reflecting the practical necessities of smaller arbitration markets. Larger disputes, or disputes requiring specialised decision-maker expertise, will often result in the appointment of a London-based arbitrator/adjudicator.

Within construction adjudication, some concern was expressed about risks to impartiality arising from the combination of Scotland's limited market size and the

¹⁶ Rule 28(2)(e). Note that this is a default provision, not a mandatory provision, and so can be overruled by party agreement.

dominance of quantity surveyors in arbitrator appointments. Specifically, that the practice of quantity surveyors acting as experts as well as adjudicators creates risks equivalent to “double hatting” in international commercial arbitration: an adjudicator can have an incentive not to alienate counsel who might give them a future appointment as expert.

Party-Appointed Arbitrator Independence

Scottish interviewees demonstrated notably strict approaches to questions regarding the independence and impartiality of arbitrators, including party-appointed arbitrators, with strong resistance across interviewees to any suggestion that a party-appointed arbitrator has any obligation to their appointing party. Interviewees consistently emphasised complete independence expectations for party-appointed arbitrators, including resistance to consulting with appointing parties regarding Chair selection, potentially reflecting small jurisdiction reputation concerns, where reputational damage can be easily incurred and where individual integrity reflects more directly on the broader professional community.

This passionate commitment to arbitrator independence, including a stated willingness to resign from tribunals perceived as corrupted rather than participate in a flawed process, appeared more commonly and was expressed more strongly amongst interviewees in Scotland than was common across other jurisdictions included in this research project. As a result, while admirable as an ethical stance, it arguably conflicts with the repeated attempts to make Scotland a “hub” for international arbitrations, since the strong Scottish commitment to independence and impartiality represents a more rigorous independence standard than commonly adopted internationally.

The Quality and Development of Construction Adjudication

One interviewee described adjudication as being a very rough process when first introduced, involving adjudicators who lacked adequate expertise and with legal representation often absent. However, this weak early process was described as substantially improving over time, driven primarily by adjudicator-nominating bodies implementing more rigorous selection criteria, including enhanced interviewing for individuals interested in joining a panel of adjudicators and mandatory continuing professional development requirements for adjudicators.

However, interviewees also highlighted that recent years have seen a substantial procedural drift away from the adjudication process as originally envisioned, both in terms of the default 28-day timeline and the subject matter of disputes. Interviewees consistently referenced a systematic extension of adjudication deadlines, at the

agreement of both parties, with adjudications now routinely lasting 2-3 months, for complex disputes 9-10 months, and in some cases over a year. This temporal expansion appears driven by several interconnected factors. Complex disputes generate substantial amounts of evidence that cannot realistically be addressed by counsel and considered by an adjudicator within the default 28-day timeline. Additionally, one interviewee noted that jurisdictional challenges have now become “standard” in almost every adjudication, consuming significant portions of the initial 28-day period. Notably, such challenges were described as often reflecting a strategic decision rather than a genuine objection, made primarily to purchase additional time for case preparation.

The implications of this drift are significant, as while extended timelines may enhance substantive thoroughness, they fundamentally alter the character of adjudication as originally conceived. Nonetheless, interviewees noted that even extended adjudications operate against the backdrop expectation of rapid resolution, and so still result in a faster procedure than would have been likely through arbitration.

This increased flexibility of deadlines then connects with what interviewees described as the development of significant “due process paranoia” among adjudicators, attributed to interventionist approaches by Scottish courts and to adjudicators’ concerns about public criticism of their decisions. This has resulted in adjudicators being reluctant to deny parties’ requests for additional procedures or submissions, and being more willing to request additional time themselves rather than attempt to meet an in-place deadline.

This “drift” in deadlines is then matched by a drift in “mission”, with interviewees describing adjudication as now being used for a wide range of disputes, far beyond the standard payment disputes for which it was primarily designed. Overall, there was a fairly consistent feeling amongst construction-focused interviewees that adjudication had expanded beyond its mission, and that it was being used for cases for which it was not well-suited. As one example, one interviewee noted that they had seen some large professional negligence claims that arose out of construction contracts going to adjudication, even though a proper resolution of that claim would require a very careful legal analysis by an experienced lawyer, and that this was less likely to happen in adjudication than in litigation or arbitration.

Nonetheless, despite these concerns, interviewees also consistently confirmed that they saw no desire for adjudication to be replaced or substantially altered, also stating that it is rare for a dispute to continue to litigation or arbitration once an adjudication decision is delivered, despite this being an option available under the law. One interviewee estimated that in their experience perhaps 2-3% of cases did so, another estimating under 10%. However, rather than reflecting genuine satisfaction with the adjudication decision received, this was seen by interviewees as attributable

more to exhaustion following an intensive adjudication process, and a lack of party appetite to incur further costs. Notably, interviewees highlighted that these feelings of aversion were then enhanced by the “drift” of adjudication procedure into a lengthier and more complex process – because there was usually little reason to believe that a different decision would be received through arbitration/litigation, given that the adjudication process they had just gone through was itself ultimately like an arbitration.

Construction Adjudication’s Impact on Arbitration

Notably, interviewees described Scotland's construction adjudication experience as having significantly influenced construction arbitration practice, by setting procedural expectations and timing standards. Effectively, the demonstrated ability of parties to meet tighter deadlines during adjudication was described as leading to an increased opposition to longer deadlines in arbitration. As argued by one interviewee, it is easier to resist an opposing counsel’s request for X weeks to perform an action, when you can point out that they have previously performed exactly the same action in significantly less time in an adjudication.

6. Arbitration Law

The Arbitration (Scotland) Act 2010: Development and Reception

The Arbitration (Scotland) Act 2010 represents the most consistently praised aspect of Scottish arbitration development, generating substantial professional pride despite its limited practical impact on arbitration volumes. Yet this disconnect between legislative quality and market impact illustrates the fundamental limitations of law reform as a market development strategy, demonstrating that even optimal legislation cannot create markets without complementary economic drivers, institutional support, and cultural change.

While the UNCITRAL Model Law had been incorporated for international arbitrations¹⁷ through the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, interviewees described Scottish domestic arbitration law prior to 2010 as antiquated and problematic, combining multiple statutes with ancient case law, resulting in uncertainty, delay, and expense. This was said to have created a situation in which disruptive parties could extend arbitrations for years through procedural manipulation, thereby undermining arbitration’s use and development.

Efforts to address these deficiencies included the 1999 Scottish Arbitration Code, developed by the Scottish Council for International Arbitration, CIArb’s Scottish

¹⁷ And through the agreement of the parties for domestic arbitrations.

Branch, and the Scottish Building Contract Committee,¹⁸ with an updated version of the Code being issued in 2007, called the Scottish Arbitration Rules 2007.¹⁹ However, the Code in both its manifestations was not mandatory, and needed to be adopted by the Parties. Notably, given construction's central place in Scottish dispute resolution practice, the Code was originally designed to apply to construction and engineering disputes, even if it was available to be adopted more broadly.

Legislative Development Process

Although the Act was only adopted in 2010, the legislative process leading to its development is properly seen as commencing significantly earlier. Most prominently, in 2002 a working group led by John Murray, Lord Dervaird, drafted the 2002 Arbitration (Scotland) bill, although it was not adopted by Parliament despite considerable optimism at the time.²⁰ Moreover, in a repetition of the “shadow of London” influence referenced previously, this draft was itself undoubtedly influenced by Lord Dervaird's previous participation in the Departmental Advisory Committee on Arbitration Law (DAC), which had a central role in the production of the Arbitration Act 1996.²¹

As described by one interviewee, it was to a large extent ultimately Scottish devolution and a desire to escape from the “shadow of London” that led to the adoption of the Arbitration (Scotland) Act 2010. According to that interviewee, while preparing its 2007 manifesto, the Scottish National Party had been looking for policies to include that were consistent with its vision of an independent Scotland, and embraced the idea that “Scotland, with its international reputation in finance and law is ideally placed to offer world-class arbitration services...[A]n international arbitration service in Edinburgh would be well placed to attract a significant share of this growing market.”²² While the commitment included in the Manifesto was to create a “Scottish International Arbitration Centre”, this endorsement set the scene for a further endorsement of the improvement of Scottish Arbitration Law.

Then, following the Scottish National Party's 2007 victory in the Scottish Parliament election, efforts resumed to produce a new arbitration Act. Again, however, the “shadow of London” is reported to have had an impact on this process, with the Scottish National Party unwilling to simply adopt legislation mirroring the “English” 1996 Arbitration Act, whatever its virtues, since doing so would be inconsistent with an

¹⁸ Fraser Davidson, “Some Thoughts on the Scottish Arbitration Code 2007”, 74 *Arbitration* 348, 348 (2008).

¹⁹ *Id.*

²⁰ See, e.g. Lord Dervaird, John D. Campbell, Steven Walker & Hew R. Dundas, “Arbitration in Scotland – A New Era Dawns”, 2 *Arbitration* 115 (2004).

²¹ Effective in England, Wales, and Northern Ireland.

²² Scottish National Party, *Manifesto 2007* (2007), p. 65.

ideological commitment to Scottish independence. As a result, the Arbitration (Scotland) Act 2010 was born, influenced by the Arbitration Act 1996, but nonetheless able to be described as an improvement upon it.

Professional Assessment and Impact Limitations

While interviewees consistently expressed pride in the Arbitration (Scotland) Act 2010's quality and design, they were also realistic about its limited practical impact on arbitration development in Scotland. As noted by one interviewee, while they personally were very excited about the Act when it was introduced, they were alone within their law firm's dispute resolution department in having any interest in the Act at all – other litigation-focused lawyers saw arbitration as something really only relevant to construction practitioners, so largely irrelevant to their own work.

This conceptual connection between arbitration and construction amongst Scottish dispute resolution practitioners at the time of the Act brings out a further impediment to the Act having any significant impact on arbitration volumes in Scotland: the Act's adoption occurred a decade after adjudication had overwhelmingly replaced arbitration as the dominant form of construction dispute resolution. Since construction represented Scotland's primary non-court dispute resolution sector, adjudication's displacement of arbitration removed the most obvious field in which the new Act's benefits could be demonstrated, while the mental association amongst litigators between arbitration and construction meant that few non-construction litigators had an interest in testing arbitration's potential in their own practices. Arguably, had the Act preceded adjudication's replacement of arbitration in construction disputes, the improved process of construction arbitration resulting from the Act might have encouraged broader adoption of arbitration within commercial dispute resolution in Scotland.

This timing issue illustrates broader challenges in legal reform impact: even well-designed legislation requires appropriate market conditions and demonstration opportunities to achieve intended effects. The Act's technical quality ultimately could not overcome structural market changes that had already shifted alternative dispute resolution usage away from arbitration in the market segment in which the Act was most likely to have an immediate impact.

7. Courts and Arbitration

Limited Judicial Experience and Precedent Development

Scotland's constrained arbitration activity directly impacts judicial experience with arbitration matters, and was described by interviewees as creating a degree of uncertainty about how courts will deal with arbitration matters.

This has been addressed to some extent by the Rules of the Court of Session, Scotland's highest civil court,²³ which establish dedicated arbitration judges for arbitration-related matters, with the goal of providing specialised expertise in arbitration-related cases.²⁴ Interviewees were positive about this approach, describing those judges as knowledgeable and supportive of arbitration.

However, one interviewee described anecdotal reports from colleagues of Scots law disputes being arbitrated in London to avoid the perceived risk of the Scottish courts. Not, to be clear, that the courts were seen as problematic, but rather that because of the limited arbitration-related caselaw that exists, given the limited amounts of commercial arbitration in Scotland, counsel and parties felt more comfortable being subject to the more predictable London courts.

Interviewees stated that some retired Scottish judges work as arbitrators, but confirmed that it is not a prominent aspect of Scottish arbitration practice. A distinction was drawn with respect to sports arbitration, where the use of judges as arbitrators was said to be far more common.

8. Gender and Arbitration

Representation Patterns and Professional Barriers

Gender representation in Scottish arbitration reflects broader patterns within the Scottish legal profession, where underrepresentation of women increases at senior levels despite overall gender balance among practising lawyers. As of 2023, while 57% of Scottish solicitors were female,²⁵ only one-third of advocates (barristers) were women,²⁶ and women comprised only 32% of full-equity law firm partners.⁶ These

²³ Below only the Supreme Court of the United Kingdom.

²⁴ Rule 100.2: "All proceedings in the Outer House in a cause to which this Chapter applies shall be brought before a judge of the court nominated by the Lord President as an arbitration judge or, where no such judge is available, any other judge of the court (including the vacation judge)."

²⁵ Law Society of Scotland, "Diversity data 2022/23" (2023), *available at* <https://www.lawscot.org.uk/research-and-policy/equality-and-diversity/research/diversity-data-202223/> (last visited 16 September 2025).

²⁶ Roddy Dunlop KC, "Gender diversity in the legal profession: Has the glass ceiling been smashed?" (2023), *available at* <https://www.advocates.org.uk/news-and-responses/news/2023/mar/gender-diversity-in-the-legal-profession-has-the-glass-ceiling-been-smashed> (last visited 16 September 2025).

disparities also manifest within arbitration practice, particularly in arbitrator appointments versus counsel roles.

Female interviewees across Scotland noted gender equality as being an area in which issues remain, although these statements were more prominent in Glasgow and Aberdeen than in Edinburgh, a number of female interviewees in Edinburgh expressing no concerns in this respect. Significantly, even within Edinburgh, generational differences existed, with younger women more likely to mention negative experiences than senior practitioners, reporting concerns expressed regarding their capability for leadership roles, compared to both men of equivalent age and older women.

Moreover, while individual instances of direct discrimination were reported, interviewees emphasised that remaining concerns fundamentally relate to structural issues, rather than conscious discrimination. That is, that despite the significant number of female lawyers in law firms in contemporary Scotland, the law firm career path nonetheless remains in a form originally designed for a man with a wife at home who will be the primary caregiver of any children. Firms were said to struggle at times with supporting women who have children, as that is not the model on which the firm has been built. Interviewees acknowledged that this was a recognised issue, with ongoing efforts being made to address it, but stated that it nonetheless still remains an issue.

A similar informal obstacle was described within construction in particular, a field in which female counsel equal or exceed male counsel, but in which men nonetheless dominate adjudicator appointments. This context was seen as reflecting the fact that construction in Scotland was traditionally a male-dominated field built on interpersonal male relationships. Because of this background, which still influences contemporary practices, women can be unconsciously excluded from career opportunities simply because discussions about arbitrator appointments or counsel instructions may take place in a group of men on a golf course or otherwise informally socialising. Interviewees emphasised that they did not see this as involving conscious exclusion, or judgement regarding the competence of female lawyers, but that it nonetheless reflects how informal male networks can perpetuate exclusionary practices. This dynamic was seen as likely to persist until women achieve sufficient integration into professional practice that male-only informal networks lose their centrality to professional advancement.

9. Arbitration Education and Entry into Arbitration Practice

Educational Limitations and London Experience

Arbitration education in Scottish legal training was said by interviewees to remain limited, with undergraduate legal education rarely addressing arbitration as an independent subject, although some law schools have begun incorporating arbitration coursework. More broadly, interviewees confirmed that there is no clear career pathway into arbitration in Scotland, reflecting Scotland's limited arbitration market in which even successful practitioners cannot focus exclusively on arbitration work.

Yet again, however, the “shadow of London” was revealed to be important, with multiple interviewees reporting spending time in London early in their career, gaining experience in arbitration and in complex commercial disputes, before moving back to Scotland. In turn, dual qualification in English and Scottish law was said to have become increasingly common among Scottish practitioners, reflecting English law's prominence in Scottish commercial transactions.

Ultimately, two pathways appear to be available to young Scottish practitioners interested in practicing arbitration in Scotland: (1) focus in construction or property, and gain experience through domestic arbitration, or (2) go to London and qualify in English law.

10. Conclusion

Scottish arbitration ultimately reflects a jurisdiction characterised by sophisticated legal infrastructure, high-quality professional expertise, and persistent structural challenges that limit market development and community formation. The Arbitration (Scotland) Act 2010 provides an excellent legislative foundation, and Scottish legal professionals demonstrate clear expertise in dispute resolution, yet arbitration remains marginal to Scottish commercial practice.

The fundamental challenge facing Scottish arbitration lies not in technical deficiencies but in market dynamics that favour established alternatives. London's gravitational pull as a major arbitration centre, combined with English law's increasing dominance in Scottish commercial transactions, creates structural impediments to Scottish arbitration development that repeated efforts have not been able to overcome. The “shadow of London” operates both directly, through market competition, and indirectly, through legal integration that makes London arbitration the natural choice for English law disputes.

Scotland's experience illustrates broader tensions in arbitration market development between international aspiration and domestic foundation building. The

Scottish Arbitration Centre's focus on international promotion, while understandable given the prestige of “international” arbitration, appears to have led to the neglect of less glamorous groundwork that is essential to domestic market development and professional community building. The result has been international recognition without corresponding domestic arbitration culture development.

Professional community fragmentation then creates further structural challenges. Geographic dispersion across Edinburgh, Glasgow, and Aberdeen, sectoral divisions between property, construction, and international practitioners, and generational gaps between established practitioners and emerging talent create multiple fragmentations resistant to integration. Without strong, unifying institutions or a clear shared identity, Scottish arbitration practitioners remain isolated within their primary practice areas, rather than coordinating as a group. This fragmentation impedes knowledge transfer, prevents coordinated advocacy, and perpetuates arbitration's marginalisation within Scottish legal culture.

Scottish arbitration's future depends critically on resolving the tension between international ambition and domestic development needs. Realising Scotland's arbitration potential likely requires abandoning unrealistic international hub aspirations in favour of sustainable domestic development. Building from existing strengths in property and construction disputes, developing sectoral expertise in energy transitions or climate disputes, and creating genuine community structures, offer more promising paths than pursuing international recognition without solid domestic foundations.

Scotland's experience offers valuable lessons for other jurisdictions pursuing arbitration development. Legislative reform, while necessary, is insufficient without complementary economic, institutional, and cultural changes. International aspirations without domestic foundations almost inevitably fail. Small markets face particular challenges from established centres' gravitational effects. Most fundamentally, arbitration development requires a long-term commitment to community building and institutional development, with success requiring abandoning grand ambitions in favour of sustainable, incremental development built on genuine foundations rather than aspirational rhetoric.