Sovereign debt arbitration in Scotland: creating a Debt Arbitration Panel

Ever since the early years of the Jubilee 2000 campaign in the 1990s, many debt-campaigning organisations have called for a Fair and Transparent Arbitration process - or FTA - which would allow for the cancellation of unpayable debts.[1] EURODAD's own *Charter on Responsible Financing* argues the case that *'all loan documents should provide a provision for an independent and transparent arbitration procedure in case of repayment difficulties or dispute (at the request of borrower or lender)'*[2]. While there is debate as to whether a standing international insolvency court would be the final end of such a global progress, there is general consensus that the beginning point could be different arbitration panels around the world[3].

Scotland as a seat of international arbitration

- Within the United Kingdom and through the Scottish Parliament Scotland has devolved power over law and order which includes the ability to create its own legal institutions and structures.
- In 2010 the Scottish Parliament passed the Arbitration (Scotland) Act, drawing on the best features of international arbitral rules to introduce a modern statutory framework for national and international arbitrations to be held under Scots Law. The following year the Scottish Arbitration Centre was set up by the Scottish Government to be a focal point for promoting and conducting arbitrations in Scotland[4].
- The principal component of the Arbitration (Scotland) Act is the Scottish Arbitration Rules which present the specific details of how arbitrations will be conducted; 48 of the 84 rules are labeled *default* and as such are open to amendment.
- Since its inception, the Scottish Arbitration Rules have been amended for use in specific disputes, notably the Family Law Arbitration Group (Scotland)'s (FLAG(S)) arbitration rules for family dispute arbitrations[5].

Sovereign Debt Arbitration Rules

Following the example of FLAG(S), Jubilee Scotland has developed new rules for arbitration, launched in March 2012 with the support of Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs. Working within the framework of the 2010 Arbitration (Scotland) Act, these bespoke rules have been presented as a guide for the conducting of arbitrations between creditor and debtor countries choosing to seat an arbitration in Scotland[6]. With no sovereign debts of its own – export credit remains a reserved issue administered by UK Export Finance for the whole of the UK – a particular advantage of seating an arbitration of this type in Scotland is its neutral position. It is neither a creditor nor debtor country in its own right. Key innovations of the Sovereign Debt Arbitration Rules include a mandate to decide disputes on the basis of **justice,**

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1 Kaiser, 2009: *An International Insolvency Framework*, Erlassjahr

2 EURODAD, 2008: *EURODAD Charter on Responsible Financing*

3 EURODAD, 2009: *A Fair and Transparent Debt Work-Out Procedure – 10 Core Civil Society Principles*; Jubilee Scotland, 2011: *Defuse the Debt Crisis*

4 http://www.scottisharbitrationcentre.org/

5 http://www.flagscotland.com/pdf/RULES_of_Arbitration_(Scotland).pdf

6 Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules*, http://www.jubileescotland.org.uk/sites/default/files/SDAR.pdf

fairness or equity and provision for **transparency and openness**[7]. In addition, the Rules call for the creation of a **Debt Arbitration Panel**, a group of arbitrators from which creditor and debtor parties will be able to select those who will sit on the arbitral tribunal. This briefing focuses on this third innovation, the Debt Arbitration Panel, and considers issues of how it might look and work in practice.

Rule 5 on the number of arbitrators states that 'the tribunal shall be composed of three arbitrators who are members of the Debt Arbitration Panel'. This rule remains 'default', that is it remains open to modification and amendment by agreement of the two parties and so will not necessarily be adopted in all arbitrations. The Arbitration (Scotland) Act dictates that it is a default rule and so Jubilee Scotland's bespoke amendment can only exist as a guide as to how an ideal arbitration will be conducted. It is nevertheless anticipated that in most cases, in agreeing to arbitrate under the Sovereign Debt Arbitration Rules parties are agreeing to all Jubilee Scotland's modifications[8] and so to referring to a Debt Arbitration Panel in the selection of arbitrators.

Importantly, how the Debt Arbitration Panel will be constituted is yet to be decided and so presents one of the main obstacles to holding an arbitration in Scotland under Jubilee Scotland's bespoke rules. This briefing therefore explores the role and creation of the Debt Arbitration Panel, outlining some of the options for pursuing this as well as potential challenges. It is aimed at a wide range of audiences including those working within international debt campaigning, academics, and legal experts, and presents two distinct panel models for consideration. The intention of this briefing is to gather feedback on the models, understand their strengths and weaknesses, and examine how they would work in practice as Jubilee Scotland seeks to move ever closer to making sovereign debt arbitration a reality.

Why a Debt Arbitration Panel?

- Neither creditor nor debtor dominated tribunals
- Greater certainty concerning procedures
- Support finding skilled and experienced arbitrators in the field
- Improved openness, transparency, and accountability of arbitrators

Given the contested nature of sovereign debt disputes, the need to reassure both parties they will be treated equally and receive a fair hearing is crucial. The rules also therefore state a tribunal must be made up of a **multi-member panel** with each side appointing their own arbitrator and so having representation. A third arbitrator is chosen by the body governing and administering the Debt Arbitration Panel to provide a neutral voice. This is in contrast to the original Scottish Arbitration Rules in which, unless specified otherwise, tribunals consist of a sole arbitrator. The Debt Arbitration Panel will therefore exist as a publicly available list of arbitrators certified to conduct sovereign debt arbitrations and from which the parties are each able to choose their own arbitrator.

Questions have been raised over the legitimacy of an approach in which parties are given a say in arbitral appointments. Some commentators, for example, express concerns party-appointed

[7] For more information see: Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules - Modifications,* http://www.jubileescotland.org.uk/sites/default/files/SDARM.pdf; Jubilee Scotland, 2012: *Scotland: a seat of sovereign debt arbitration.* http://jubileescotland.org.uk/node/204#attachments

[8] Jubilee Scotland, 2012: *Sovereign Debt Arbitration Rules: Modifications, http://www.jubileescotland.org.uk/sites/default/files/SDARM.pdf*

arbitrators on multi-member tribunals may come to act like 'non-neutral partisan arbitrators'[9]. With the inclusion of *ex aequo et bono* into the rules (where decisions are made on the basis of general considerations of justice, fairness, equity, and law), mitigating potential partisanship becomes increasingly important. Given the history of debt cancellation, where creditors have previously dominated, a multi-member tribunal however remains a necessity to prevent this by ensuring both sides have an equal voice, can have some confidence that their views will be taken seriously, and that the result is not the decision of one person. The inclusion of a third neutrally appointed arbitrator should also minimise the effects of possible bias.

Significantly, these concerns surrounding multi-member party-appointed tribunals moreover provide one of the key rationales for creating a dedicated Debt Arbitration Panel. The creation of such a panel is designed to minimise the risk of partisanship. By referring to an existing list of arbitrators - one which is made publicly available and to both sides - parties know who the potential arbitrators might be prior to any hearing. Subsequently concerns over the credibility of arbitrators can be minimised and uncertainty as to what the arbitration will actually look like reduced. Debtor countries can also feel reassured that, unlike existing processes, the arbitration will not be creditor-dominated and creditor countries equally need not fear a pro-debtor bias in which cancellation is inevitable. In theory, this should mitigate the possibilities of either party presenting opposition to entering into arbitrations.

The Panel also ensures both debtor and creditor feel confident when entering into an arbitration agreement that members of the tribunal possess the necessary skills, knowledge, experience, and legitimacy to preside over such an arbitration. In essence, they can be reassured that the arbitrators will not be selected at random or on the basis of politics. By sitting on the Debt Arbitration Panel, arbitrators are acknowledged as skilled and reliable practitioners. In this way the Panel also supports parties in finding an appropriate arbitrator with the relevant skills and expertise to represent their case within the arbitration. This is particularly important in avoiding imbalance within the arbitration process where developing countries are potentially lacking in jurisprudential resources[10]. By being on the Panel arbitrators are thus effectively on 'standby' with the potential for being approached at any time by parties to take on a sovereign debt arbitration.

The Scottish Arbitration Rules, on which Jubilee Scotland's Rules are based, make allowances for parties to challenge arbitral appointments, for example if the arbitrator is believed not to be impartial or independent, to have treated the parties unfairly, or not be in possession of a qualification required by the agreement of both parties[11]. By presenting parties with a pre-existing Panel from which they and the opposing party choose their arbitrators therefore a more practical benefit is offered too. It can potentially reduce the likelihood of objections being raised once an arbitration has commenced - parties know in advance who the potential arbitrators will be whilst all Panel members will be suitably qualified - and subsequent, potentially lengthy, challenge procedures being enacted and causing delays.

Finally, the greater openness and transparency of the Panel ensures arbitrators are held accountable for their conduct in past and future sovereign debt arbitrations. Any possible secrecy is removed. Arbitrators will not only be challenged by parties in cases of suspected partisanship but their actions will also be open to public scrutiny. Provision for independent reviews of cases

[9] Kapeliuk, 2012: *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, The Review of Litigation

[10] Fritz and Hersel (2002): *Fair and transparent arbitration processes: a new road to resolve debt crises.* Berlin Working Group on Environment and Development.

[11] Arbitration Scotland Act, Schedule 1, Part 1, Rule 10.

and arbitral behaviours could further support this. As is found within arbitral panels of the International Centre for Settlement of Investment Disputes (ICSID)[12], arbitrators would serve time-limited terms which whilst renewable, would see renewal dependent on their conduct and demonstration of their continuing suitability for the Panel.

The benefits of a creating a Debt Arbitration Panel for arbitral appointments are therefore clear. A major challenge to moving forward with holding an arbitration under the Sovereign Debt Arbitration Rules however is the process by which a Debt Arbitration Panel would be created and maintained. Jubilee Scotland has devised two potential models for this. One follows the example of FLAGS and focuses on creating a small expert-led panel of arbitrators who themselves choose to get involved and become members. The second is more akin to structures already in place in a number of supranational organisations including the United Nations and ICSID in which countries are signatories of a treaty and subsequently nominate their own arbitral representatives. The following table sets out the key differences in the two proposed options and some of the pros and cons of each approach.

	Supranational Treaty-based Member-led Panel	**Small-scale Expert-led Panel**
Panel membership	Membership-based organisation. All parties wishing to be involved in sovereign debt arbitration must sign up and nominate a set number of arbitrators.	Expert-based organisation. Small group of expert arbitrators specialising in international trade law. Arbitrators selected by expressing interest and demonstrating competency to governing body (not nominated).
Number of arbitrators	Large number of possible arbitrators: - all parties have nominated own arbitrators (Panel neither creditor nor debtor dominated) - greater choice - less delay if objections - more options where preferred arbitrators unavailable BUT… - more work to administer - harder to hold arbitrators accountable (so many arbitrators that is hard to keep checks on all of them)	Small number of possible arbitrators: - greater potential for developing expertise - arbitrators more easily held accountable - supports greater consistency in agreements and settlements BUT… - less choice - possibly dominated by creditor countries where there are more developed legal communities - efforts needed to attract

[12] ICSID: CHAPTER I International Centre for Settlement of Investment Disputes, Section 4 The Panels – 'Article 15, 1: Panel members shall serve for renewable periods of six years'.

		arbitrators to the Panel
Organising and administering authority	Requires international treaty organisation such as UN or UNCITRAL to ratify treaty and administer the Panel. This body would then act as appointing authority for third arbitrator. Need to get UN and its members 'on side'. - No sovereign debt arrangements of its own so can be presented as neutral BUT… - Needs international support and campaigning to persuade countries to become involved	Requires Scottish Government to set up a body to organise and administer the Panel. This body, through Scotland's Arbitral Appointment Referee legislation, would then act as appointing authority for third arbitrator. - No sovereign debt arrangements of its own so can be presented as neutral BUT… - On-going development of - Scotland and potential inheritance of debts in instance of independence
Funding the Panel	Costs borne by all members. No conflict of interest in funding.	Costs borne by organising body (Scottish Government) and possibly external funders. Raises questions regarding possible conflict of interest.
Training and expertise	No specialist training provided - no potential for development of expertise - appointment criteria will vary across member states - more difficult to assess arbitrators' performances with lack of standardised expectations	Specialist training provided: - skills renewal throughout time serving on Panel (regardless of actual involvement in arbitration cases) - development of expertise - supports evaluation and assessment of arbitrators - standardised entry requirements for joining the Panel BUT… - Questions over who will deliver and fund training in this area.
Applicability	Applicability: - Only applies to states who are signed	Applicability: - Can be used by all countries with no long-term

	up members of the organisation and who have nominated arbitrators - Bilateral country-to-country arbitrations only	commitment - Can be used to cover both bilateral arbitrations and those involving supranational organisations

The two models explained

1) The Supranational Treaty-based Member-led Panel

One solution, forwarded by AFRODAD (African Forum and Network on Debt and Development), proposes a panel constituted within a treaty or supranational organisation, ideally with the involvement of the United Nations or more specifically one of its subsidiaries, for example the United Nations Commission on International Trade Law (UNCITRAL). AFRODAD suggests that 'each member state might be free to name one person. These nominees would then represent the roster from which creditors and debtors could choose their panel members'[13].

The major benefit of this model is that each member state, creditors and debtors alike, signed up to the organisation would be represented on the Debt Arbitration Panel. It is also a format which is established practice in international law. For example, the UN Convention on the Law of the Sea; 'every State Party shall be entitled to nominate four arbitrators […] The names of the persons so nominated shall constitute the list.'[14]. International Centre for Settlement of Investment Disputes (ICSID) rules similarly make provision for four nominated arbitrators per member state from which arbitrating parties can then choose[15]. As in the case of ICSID, while each member would nominate a given number of Panel members, they would need not be nationals of that country but simply affiliated with it in some way and/or happy to be a 'national' nomination of that state[16].

The preferred number of arbitrators nominated by each country is variable - AFRODAD suggest one per country whilst existing examples take the number up to four. The advantage of having more than one arbitrator per country is that it helps overcome cases of delay where an arbitrator is unable to take a case. Parties have a greater number of options from which to choose. Similarly, if and where a challenge is raised, there is simply a wider pool of arbitrators from which to make an alternative appointment.

Possible concerns regarding partisanship in arbitrator selection on the part of states entering into an arbitration can be overcome if, in accordance with existing UNCITRAL rules, nationals and representatives on the Debt Arbitration Panel of each party involved in a specific arbitration are excluded from being selected. Parties will clearly have to choose arbitrators external to their own Panel nominations should they enter into arbitration[17].

Under the ICSID Convention disputes must be between ICSID Contracting States (or companies or nationals from these states) and it would thus be unprecedented to create a Panel open for use by non-members as well as members. A weakness of this model is therefore that any international treaty-based or member-led Debt Arbitration Panel would only be applicable for arbitrations

[13] AFRODAD, 2006: *Implementing Fair Debt Arbitration: What needs to be done?* p15
[14] United Nations: Lists of conciliators and arbitrators nominated under article 2 of annexes V and VII to the Convention
[15] ICSID: CHAPTER I International Centre for Settlement of Investment Disputes, Section 4 The Panels
[16] ICSID: CHAPTER I International Centre for Settlement of Investment Disputes, Section 4 The Panels
[17] García-Bolívar, 2005: 'Comparing Arbitrator Standards Of Conduct In International Commercial And Investment Disputes', *Dispute Resolution Journal*, Vol 60:4.

between the member states represented in it. Non-member countries would be subsequently excluded from using the Sovereign Debt Arbitration Rules. There are several reasons why countries may prefer not to sign up. With administrative costs necessarily borne by member states in this type of Panel, and on an ongoing basis, states could be reluctant to join the organisation whilst others may feel in their current circumstances it is unnecessary. For instance, if a country has no outstanding debt issues which they would be willing to arbitrate, they may be unwilling to join. Similarly, expectations of a financial contribution could present a barrier to creditor countries joining who may feel their existing debt arrangements with other countries are legitimate and can be dealt with through current, creditor-dominated structures. There is thus no guarantee all countries would be covered by this design of Panel.

A further potential obstacle in pursuing this route is the requirement for the UN, or a similar supranational or multilateral body, to organise and ratify any membership treaty and then assume an ongoing role in establishing and administering the Panel. Whilst this would be largely an administrative function, principally acting to ensure each country has representation and that lists are kept up to date, there would be other occasional demands. For example, it would need to be an organisation trusted to act as appointing authority for the third tribunal member, to oversee any reviews of arbitral conduct, and be on hand to deal with any challenges throughout the arbitration process. As AFRODAD argue, 'the UN could act as the appointing authority if one side should fail to nominate its arbitrator(s) in time or if the nominees should fail to agree on the one further member to reach an odd number'[18]. With the Sovereign Debt Arbitration Rules being based first and foremost in Scots law, using them in their current form for an international treaty may prove difficult. Nevertheless, they could be used as a framework for this longer-term ambition with reference to the UNCITRAL Model Rules[19] and the New York Convention[20], for example.

2) The Small-scale Expert-led Panel

The Family Law Arbitration Group (Scotland) (FLAG(S)) whose bespoke family law arbitration amendments to the Scottish Arbitration Rules informed the development of the Sovereign Debt Arbitration Rules present an alternative approach to the constitution of a panel.

FLAG(S) has been developed by experts in arbitration and family law in Scotland to provide parties with a comprehensive list of arbitrators highly skilled in both areas. Parties then agree to 'appoint as Arbitrator, and by mutual agreement, a member of FLAGS' within the arbitration agreement[21]. Therefore Panel members are not nominated by members (i.e. the potential parties) but admitted by way of demonstrating their competencies in the field. This is already to some extent suggested within a model for a sovereign debt tribunal proposed by authors Christoph Paulus and Steven Kargman in which the UN Secretary General would select ten to twenty expert arbitrators from which a tribunal would be subsequently appointed[22].

In the FLAG(S) model training is provided to certify members are qualified to arbitrate such disputes whilst this also ensures ongoing support for skills development and renewal. This will aid in reviewing arbitrators' suitability for the Panel and making sure they are still sufficiently expert

[18] AFRODAD, 2006: *Implementing Fair Debt Arbitration: What needs to be done?* p16

[19] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

[20] http://www.newyorkconvention.org/

[21] Family Law Arbitration Group (Scotland), 2012: http://www.flagscotland.com/arbitration-clause

[22] Paulus and Kargman, 2008: Reforming the process of sovereign debt restructuring: A proposal for a sovereign debt tribunal. *Workshop on Debt, Finance and Emerging Issues in Financial Integration Financing for Development Office (FFD), DESA 8 and 9 April 2008, pp7-8*

in these types of cases. For the purposes of sovereign debt arbitrations, arbitrators would require skills in international trade and investment law and clearly experience of international arbitration. We might expect arbitrators to have some knowledge of or experience working in international development cases but this would not be essential.

Following this model would likely make for a smaller panel which is easier to administer but on the other hand does not necessarily make all parties feel fairly represented, nor will it offer as wide a choice of arbitrators. Mechanisms and safeguards would need to be put in place to ensure both creditor and debtor countries accept the neutrality of the Panel and so are not deterred from entering into arbitration by fears of a creditor/debtor country bias despite party-appointed arbitrators at the stage of forming the tribunal. Creditor countries are likely to be over-represented on the Panel given their better developed legal sectors. Nevertheless, a smaller Panel has greater potential for developing expertise through shared experiences because there is less anonymity between Panel members and cases, allowing arbitrators to learn from each arbitration conducted by the Panel. Furthermore, there is likely to be greater consistency in the rulings within each arbitration amongst a smaller and closer group of arbitrators[23].

A sovereign debt arbitration group, similar to FLAG(S) would need to be established to administer this and Scotland would be an ideal place for developing this model, not least because the Sovereign Debt Arbitration Rules are designed to fit into the Arbitration (Scotland) Act 2010 but also because Scotland holds no sovereign debt arrangements of its own. Discussions with the legal community in Scotland, the Chartered Institute for Arbitrators Scotland, and Scottish Arbitration Centre, as well as the Scottish Government could represent the start of this process. Additionally, under the Arbitration (Scotland) Act, eight neutral Arbitral Appointment Referees exist which could be chosen in this Panel model to act as the appointment authority for the third arbitrator[24].

Undoubtedly however, should Scotland gain independence, it will likely inherit some of the debts owed to the UK which may present a challenge to the international neutrality of any organisation which is created. Nevertheless, in guaranteeing the arbitrators on the Panel are international representatives rather than simply arbitrators from Scotland, potential objections to it being 'nationally organised' or a partisan body could be mitigated. This will also be important given the need to ensure a range of experience and skill across panel members since it is likely necessary to look beyond Scotland for this.

Possible obstacles to this model include questions of funding. An international membership-based organisation sees member countries contribute financially[25] but if the organisation is developed as a Scottish innovation, this responsibility will shift to the Scottish Government. The Scottish Government could seek funding from external bodies to support this yet this then raises questions as to *who* is funding the administration of the Panel and whether there is any conflict of interest. The legal practices of the Panel arbitrators might also be a possible source of funding as in the case of FLAG(S). In the long-term, an internationally run organisation, such as UNCITRAL, could take on this administrative role and assume financial responsibility for the Panel but this will necessarily form part of a larger campaign and the support of UN member states for this being incorporated into UNCITRAL's existing remit.

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[23] Ibid, p5

[24] The Arbitral Appointments Referee (Scotland) Order 2010, http://www.legislation.gov.uk/ssi/2010/196/pdfs/ssien_20100196_en.pdf; Scottish Arbitration Centre, http://www.scottisharbitrationcentre.org/index.php/arbitration/arbitration-appointment-referees

[25] http://www.un.org/en/hq/dm/budget.shtml