Scottish Arbitration Rules – The modifications

A new Arbitration (Scotland) Act came into force in Scotland in 2010, drawing on best practice across the world to create a modern statutory framework for arbitrations, both national and international. Within the Act the Scottish Arbitration Rules which present the specific details of how arbitrations are to be conducted. Of the 84 rules, 48 are labeled *default* and as such are open to amendment. Seeing opportunity in Scotland's strong arbitration structures and following the example of the Family Law Arbitration Group (Scotland) (FLAG(S)) which amended the rules for use in family law disputes, Jubilee Scotland has developed new rules for sovereign debt arbitration, launched in March 2012 with the support of Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs. In consultation with legal professionals, academics, and international debt experts, the bespoke Sovereign Debt Arbitration Rules form a guide for the conducting of arbitrations between creditor and debtor countries choosing to seat an arbitration in Scotland. The rules draw heavily on Scotland's existing Arbitration Act but feature new elements specifically targeted at sovereign debt arbitrations and overcoming the inadequacies of existing international provision in debt workout or cancellation processes.

Key innovations of the Sovereign Debt Arbitration Rules include:

- the mandate to decide disputes on the basis of **justice, fairness or equity** including taking into account matters of sustainable development, the human rights of third-parties affected, and debtor states' ability to provide basic needs and services to its citizens;
- provision for **transparency and openness**, to ensure that the benefits of decisions reached in Scotland have positive ramifications in the wider international campaign; and
- practical considerations, including the creation of an appropriate **Debt Arbitration Panel** and a clear **range of possible awards**.

This briefing accompanies the 'Sovereign Debt Arbitration Rules – Modifications'[1] and acts as a commentary for the key amendments to the original Scottish Arbitration Rules. The briefing is designed to be read alongside the Modifications.

The modifications

New Rule: Application of these rules D[2]

Both parties will agree to arbitrate under the Sovereign Debt Arbitration Rules as set out by Jubilee Scotland[3]. In this way they agree to an arbitration being conducted according to all the modifications featuring in the new rules. Whilst the amended rules necessarily remain *default* within the wider framework of the Scottish Arbitration Rules, and therefore open to further amendment by the parties, there is an expectation that in entering into an arbitration agreement under these rules parties sign up to all the modifications and will be unlikely to make additional changes.

Rule 1 *Commencement of arbitration* D

A key feature of the arbitration agreement proposed here is that there will be a stay on all debt repayments during the course of the arbitration[4].

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

2 'D' – Used to denote default rules. ('M' – Used to denote mandatory rules.)

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

4 Kaiser, J, 2009: *An International Insolvency Framework - Why it is needed and what it could look like*; EURODAD, 2008: *EURODAD Charter on Responsible Financing*

***Rule 5 Number of arbitrators* D**
***Rule 6 Method of appointment* D**

Rules 5 and 6 refer to the creation of a Debt Arbitration Panel and use of multi-member tribunals. Given the nature of the types of disputes being arbitrated, the need to reassure both parties they will be treated equally and receive a fair hearing is crucial. The rules 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 to be chosen by the body governing and administering the Debt Arbitration Panel to provide a neutral voice on the tribunal. Creating a specific group from which arbitrators will be chosen – the Debt Arbitration Panel – reflects the example set by FLAG(S) as well as established practice in supranational bodies, for example that of the International Centre for Settlement of Investment Disputes (ICSID). By adopting such an approach to arbitral appointment it is hoped that arbitrations here will: have neither creditor nor debtor dominated tribunals; provide prospective parties with greater certainty concerning likely procedures including information on who the possible arbitrators may be; support countries in finding skilled and experienced arbitrators in the field; and improve openness, transparency, and the accountability of arbitrators[5].

***Rule 26 Transparency* D**

'Sovereign debt negotiations must be public and the results and agreements made must also be public.'[6]

The major feature of Rule 26 is that all arbitrations will be held in public with the appropriate logistical arrangements being made in consultation with both the disputing parties. This is in stark contrast to traditional arbitrations in which the tribunal is typically held behind closed doors. The new rule instead ensures details of any resultant restructuring or refinancing will be released externally and in turn help set precedents for future debt workout procedures. The amended rule also makes sure however that the benefits of the decisions being made in Scotland or under Scotland's Arbitration Act can have positive ramifications in the wider international campaign, drawing attention to how debts have been accumulated and at what expense. It is hoped this will also promote future arbitrations by encouraging debtor countries to pursue a just resolution of their debt arrangements but equally lead to changes in behaviour amongst rich nations in their dealings with poorer countries. Finally, the arbitration must be transparent and open if fairness is to be guaranteed and the arbitral process, including the arbitrators, be held accountable.

Parties retain the option to keep some information confidential but this is *only* where there is agreement from both parties to do so. The tribunal will also take any necessary steps to prevent the unauthorised disclosure of information relating to any third parties participating in the proceedings.

***Rule 34 Experts and Participation of non-disputing parties* D**

This rule has been extended according to principles of *amicus curiae*[7] to allow for non-disputing parties, for example NGOs, to request permission to make a written submission to the tribunal regarding the debt being disputed.

***Rule 47 Rules applicable to the substance of the dispute* D**

Disputes are to be arbitrated with reference to *ex aequo et bono*, therefore on the basis of general considerations of justice, fairness, equity, and law. Arbitrators are therefore legislated to take into account matters of sustainable development, economic assessments, human rights, and the protection

[5] For more information see – Jubilee Scotland, 2013: *Sovereign debt arbitration in Scotland: creating a Debt Arbitration Panel*

[6] EURODAD, 2009: *A Fair and Transparent Debt Work-Out Procedure: 10 core civil society principles*

[7] Amicus curiae: someone who is not a party to a case who offers information that bears on the case but that has not been solicited by any of the parties to assist a court.

of basic state obligations, as well as the rule of law[8]. These are things typically overlooked in current debt cancellation procedures which more often than not adopt a purely economic view based solely on calculations of debt sustainability and without reference to the development context[9]. This was considered to be one of the major failings of the Highly Indebted Countries Initiative (HIPC) in 2005. Bangladesh is a case in point – it did not qualify for this debt relief despite the fact that nearly half of its population live below the poverty line[10]. The new rules seek to ensure the nature of the debts in question, including their origins, what they were for, and the impact on the debtor country populations, are not ignored. This is important because many of these debts are the result of irresponsible lending, being made to dictatorial regimes, relating to weaponry or environmentally unsound projects, going to countries which could evidently not repay them, and lacking in transparency. Equally, they are leaving many of the world's poorest nations locked in poverty with little prospect of development. Arbitration under these rules thus provides a forum for these issues to be raised and discussed. In this way it effectively allows for an independent audit of the debt to be conducted.

This is therefore one of the most important innovations of the bespoke rules in that it ensures all matters relating to a debt are taken into account when deciding on a new debt arrangement.

Rule 49 Other remedies available to tribunal **D**

The Rules outline a variety of possible remedies which the tribunal may 'award'. These may be of a declaratory nature, involve ordering a party to do or refrain from doing something (for example, maintaining an existing debt arrangement), or focus on specific parts of a debt arrangement (for example, order a freezing or reduction of interest rates, a restructuring of a debt arrangement, a change in conditions attached to an existing loan, or a total cancellation of a debt). There is also an option for the parties to agree upon an alternative remedy. The aim of this rule is to indicate the possible options and so provide prospective parties with an idea of what an outcome might entail. In Jubilee Scotland's consultation on these Rules this was consistently felt to be an important issue particularly for encouraging the participation of creditor states.

Rule 57 Arbitration to end on last award or early settlement **D**

The amendment to Rule 57 is simply a technical change and allows the parties to end the arbitration early prior to an award being made should they be in agreement to do so.

Summary

These modifications presented here have been designed to provide a framework for conducting sovereign debt arbitrations in Scotland within the Arbitration (Scotland) Act 2010. Importantly, they aim to overcome many of the criticisms leveled at existing mechanisms of debt workout. They make provision for a transparent and accountable process in which both debtor and creditor country have an equal voice and the decision as to the future of an existing debt arrangement is based not solely on law but on considerations of justice, fairness, and equity. With these modifications in place, foundations are now in place for bringing sovereign debt arbitration to Scotland.

[8] EURODAD, 2011: *Responsible Finance Charter*; EURODAD, 2009: *A Fair and Transparent Debt Work-out Procedure: 10 core civil society principles*

[9] AFRODAD, 2013: http://www.afrodad.org/?afrourl=Pages/Debt/External%20Debt/Fair%20and%20Transparent%20Arbitration

[10] Jubilee Scotland, 2010: Debt in 2010: A tale of two countries, http://www.jubileescotland.org.uk/assessing-hipc-mdri