

EXECUTIVE NOTE
THE ARBITRAL APPOINTMENTS REFEREE (SCOTLAND) ORDER 2010
(S.S.I. 2010/196)

The power to make the Arbitral Appointments Referee (Scotland) Order 2010 (“the Order”) is conferred by section 24 of the Arbitration (Scotland) Act 2010 (‘the 2010 Act’). Under section 33(2) of the 2010 Act, it is subject to negative procedure.

Policy objectives

The primary objectives of the Arbitration (Scotland) Act 2010 are to:

- Clarify and consolidate Scottish arbitration law, filling in gaps where these exist in the previous law;
- Provide a statutory framework for arbitrations which will operate in the absence of agreement to the contrary;
- Ensure fairness and impartiality in the process; and
- Minimise expense and ensure that the process is efficient.

The Scots law approach to arbitration taken in the 2010 Act aims to be consistent with that in the rest of the UK under the Arbitration Act 1996 where appropriate. The 2010 Act is largely based on the 1996 Act though it is drafted in a different style and has some augmentations.

Under section 24 of the 2010 Act, the Scottish Ministers are given the power to authorise by order persons to act as arbitral appointments referees for the purposes of the Scottish Arbitration Rules as set out in schedule 1 to the 2010 Act.

Under rule 7 of schedule 1 to the 2010 Act an arbitral appointments referee can, on the application of one of the parties, appoint an arbitrator where it is not possible to appoint a tribunal or arbitrator in accordance with any provisions made by the parties in either their arbitration agreement, as otherwise agreed, or in cases of failure or refusal to make an appointment under rule 6 of the Scottish Arbitration Rules (method of appointment). There is recourse to the Court in the event of disputes (rule 7(6)).

This procedure largely replicates current practice where parties are unable to agree on the identity of an arbitrator and wish to seek the assistance of an appointing or nominating body. It is intended to avoid the parties having to apply to the court for the appointment of an arbitrator. Officials of bodies such as the Law Society of Scotland, the Faculty of Advocates and the Chartered Institute of Arbitrators have made such appointments for many years.

The Scottish Ministers, when deciding who may be authorised to act as an arbitral appointments referee, must have regard to the criteria for appointment laid out in section 24(2) of the 2010 Act. Subsection (3) provides, for the avoidance of doubt, that an arbitrator appointed by an arbitral appointments referee need not be subject to the training and disciplinary procedures of the referee. This is to allow appointment from another profession.

The Scottish Ministers invited applications from known appointing and nominating bodies in February this year. At the same time an invitation to apply for authorisation as an arbitral appointments referee was published on the Scottish Government website.

The applicants for authorisation all submitted details of their existing procedures for appointing arbitrators and the Scottish Ministers have satisfied themselves as to their relevant experience, their provisions for training members as arbitrators and the disciplinary regime which applied to their members.

Considering the different complexities and organisation of each applicant body, the Order authorises the bodies themselves to act as arbitral appointments referees, rather than a particular office holder [except in the case of the Dean of the Faculty of Advocates]. It will then be for the internal procedures of each individual body to set out who would be authorised to actually appoint an arbitrator.

Consultation

A public consultation was carried out on the Arbitration (Scotland) Bill from June to September 2008. The written responses to the consultation have been published on the Scottish Government website.

Responses to the consultation document and of stakeholders at various meetings were overwhelmingly positive towards the Bill and comments mainly related to the detail of how the proposed arbitration rules should work. Respondents to the consultation overwhelmingly accepted the proposal for arbitral appointments referees. In these circumstances it was not thought necessary to consult separately on this Order.

Regulatory Impact Assessment

A Regulatory Impact Assessment was carried out on the draft Bill, but none has been carried out on this Order. The arbitral appointments referee procedure reflects previous practice, in that if parties to a dispute could not agree on an arbitrator then they might refer the matter to an appointing body to make the appointment. It is not therefore expected that there will be any extra burden placed on parties to a dispute which is to be arbitrated since, in the event of the failure of any agreed procedure to appoint an arbitrator, any one of the parties may apply to an arbitral appointments referee to make the appointment.

Financial effects

There will be no financial effects arising from this Order. There is no charge to parties applying to be authorised as arbitral appointments referees. There may be savings to parties who are unable to agree on an arbitrator to resolve their dispute by permitting them to apply to an authorised arbitral appointments referee to make an appointment. An arbitral appointments referee may charge a fee for so acting, but the alternative would be to apply to the court to appoint an arbitrator which is likely to be more time consuming and more costly.

Scottish Government
Justice Directorate
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