

# ARBITRATION (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### BACKGROUND

3. Arbitration is a legal procedure where parties submit a dispute between them to a third party, who often has specialist expertise or knowledge, who will act as a private tribunal to produce a final and binding decision on the dispute. Some statutory regimes refer matters to arbitration, but for other cases by agreeing to go to arbitration the parties voluntarily deny themselves recourse to the courts or other methods of dispute resolution. The agreement to go to arbitration may be contained in a contract concluded between the parties possibly years before they come into dispute, or agreed in a submission when the dispute arises.
4. The arbitrator's decision or "award" is final and binding without further court hearing of the issues. An award may be enforced like a court decree. Within countries which have ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") or the 1961 Geneva Convention (European Convention on International Commercial Arbitration), agreements to arbitrate and awards made in other countries will be recognised with no need – in the case of most awards – for further review of the issues.
5. Domestic Scots arbitration law derives primarily from case law and has not been codified into statute. The law is often not clear or readily accessible, nor does it reflect modern practice on arbitration. Section 66 of, and Schedule 7 to, the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1990 \(c.40\)](#) adopted the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on arbitration into Scots law for international commercial arbitration, but not for non-commercial arbitration or domestic arbitration where the parties are domiciled in Scotland.

### THE ACT

6. The Act has drawn from the UNCITRAL Model Law (adopted on 21 June 1985), the [UK Arbitration Act 1996 \(c.23\)](#), from the work done in a draft Bill for Scotland developed by a working group chaired by Lord Dervaird in 2002 and from consultation comments by parties interested in the promotion of arbitration in Scotland. The Scottish Law Commission 1984 Report on Breach of Confidence (Scot. Law. Comm. No. 90) was also drawn from in drafting the confidentiality provisions in Scottish Arbitration Rule 26 in schedule 1 to the Act.

7. The approach in the Act is broadly consistent with the UNCITRAL Model Law and the regime for the rest of the UK in the Arbitration Act 1996 where appropriate. It establishes a statutory regime for arbitration in Scotland. Schedule 1 to the Act lays out a standard set or code of clauses (“the Scottish Arbitration Rules”) that form a regime for parties who voluntarily agree to go to arbitration, where that arbitration is ultimately governed by the law of Scotland.
8. Which law ultimately governs any arbitration is governed by the “seat” of the arbitration, also known as the “juridical seat” or “place” of the arbitration. This concept is important because arbitrations are often between parties in different countries and so cross jurisdictional borders. The concept of the “seat” describes the country where the arbitration is based and which legal system, including the rules of Scots law enshrined in the Act, therefore governs any arbitration. The governing legal system can be different from the law which applies to the substance of the dispute, or (in some jurisdictions) from the rules regulating particular aspects of arbitration procedure. Where an arbitration is seated may depend on the choice of the parties as to which law applies, and the conflict of law rules in the different legal systems which may become involved.
9. The regime in the Act will also apply to a greater or lesser degree to arbitration under specific statutes, so far as not inconsistent with those statutes, and as applied under the Act.
10. The Act and the Scottish Arbitration Rules contain a number of “mandatory” rules which cannot be departed from even by agreement of the parties, if they have agreed to go to arbitration at all under Scots law. However, the majority of the Scottish Arbitration Rules are “default” rules – parties are free to make their own arrangements, by agreement, on the matters covered by the default rules. Where the parties agree on different rules, or agree to disapply the default rules, either before or after the dispute arises between the parties, the default rule or rules will not apply (section 9 of the Act). For instance, default rules will not apply if they are inconsistent with the parties’ agreement to arbitrate or anything done with the parties’ agreement, or if the parties choose another law to apply instead. The code in the Scottish Arbitration Rules can also be adopted wholesale by parties and used by their arbitrator.
11. Although the Scottish Arbitration Rules set out in schedule 1 – both mandatory and default rules – may affect the operation of parties’ arbitration agreements, they remain statutory rules. In particular, default rules do not lose their statutory nature because they appear in a schedule to the Act or apply only in certain circumstances, for example in the absence of contrary agreement by the parties.
12. The Act applies the same rules to domestic, cross-border (with other parts of the UK) and international arbitrations, where the Scottish courts have jurisdiction over an arbitration whose seat is in Scotland. Accordingly, the separate treatment in Scotland of international commercial arbitrations under the UNCITRAL Model Law will be replaced by a single code informed by the UNCITRAL Model Law principles. The Act also provides for the enforcement of arbitral awards, foreign and domestic (section 12), and consolidates a separate procedure for the enforcement of foreign arbitral awards to which the New York Convention applies (sections 18 to 22).

### ***Terminology – “arbitrator”***

13. In Scots common law there is a technical difference between the term “arbiter”, more commonly used, and the term “arbitrator”, where an arbiter decides in accordance with the law while an arbitrator can decide in terms of general equitable considerations (known as “*ex aequo et bono*”). The Act dispenses with this distinction and the term “arbitrator” is employed throughout the regime established by the Act following modern international arbitral practice.

### ***Statutory arbitrations***

14. A wide range of statutes, for example, employment legislation, use arbitration to resolve disputes which arise under those statutes. The Act includes provision to apply, to the extent that they are not inconsistent with the statutory provision, the general rules of arbitration in the Act to such arbitrations and a power for the Scottish Ministers, with the approval of the Scottish Parliament, to vary by order how those rules apply (sections 16 and 17).

### ***Consumer arbitrations***

15. Certain other statutory provisions apply to arbitration in Scotland. Sections 89 to 91 of the UK Arbitration Act 1996 apply to Scotland. Together with the [Unfair Arbitration Agreements \(Specified Amount\) Order 1996 \(S.I. 1996/3211\)](#) and the [Unfair Terms in Consumer Contracts Regulations 1999 \(S.I. 1999/2083\)](#), those provisions provide protections for those who might inadvertently agree to unfair low-value consumer arbitration clauses.

### ***Commencement and implementation***

16. The Act was brought into force on 7th June 2010 for non-statutory arbitrations. The commencement of the provisions of the Act and its implementation is described below as it stood at the date of publication of these Notes. The commencement and transitional arrangements are set out in sections 33, 35 and 36 of the Act and in the [Arbitration \(Scotland\) Act 2010 \(Commencement No. 1 and Transitional Provisions\) Order 2010 \(S.S.I. 2010/195\)](#), with the transitional arrangements described below in relation to section 36.
17. The Rules of the Court of Session as they apply to arbitration have been updated with the addition of a new Chapter 100 (arbitration) of those Rules and the substitution of Part IX of Chapter 62 (recognition and enforcement foreign arbitral awards—formerly under the UNCITRAL Model Law and now for awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and other foreign awards). The rules changes were made by paragraph 10 of Act of [Sederunt \(Rules of the Court of Session Amendment No. 4\) \(Miscellaneous\) 2010 \(S.S.I. 2010/205\)](#).

## **COMMENTARY ON SECTIONS**

### ***Introductory***

#### ***Section 1 – Founding principles***

18. [Section 1](#) sets out the founding principles of the Act. The purpose of the founding principles is to inform and steer the interpretation and application of the provisions of the Act. The principles reflect the principles found in the Arbitration Act 1996. The founding principles are not ranked; therefore there is no hierarchy of principles.
19. The first founding principle establishes fairness and impartiality as the standards by which disputes are to be resolved by arbitration. It is also part of this principle that resolution of the dispute is to be effected without unnecessary delay and without incurring unnecessary expense.
20. Although much of the code set out in the Scottish Arbitration Rules and in the Act is made up of rules which will only apply in the absence of agreement between the parties, the second founding principle reinforces the idea that parties are to be free to decide themselves on procedures for the resolution of their disputes, subject only to public interest safeguards.
21. The third principle is that the court should not intervene in the arbitration process except as provided by the Act. This principle will assist the courts to limit unnecessary

intervention. The court should only intervene if it is necessary to support the arbitration process, for example to get the process back on track or by enforcing orders by the arbitrator.

## **Section 2 – Key terms**

22. **Section 2** explains certain important terms used in the Act. These include:

“*Arbitration*” – The Act and Scottish Arbitration Rules will apply to domestic arbitration, cross-border arbitration between parties in the different jurisdictions of the UK and international arbitrations whose seat is in Scotland. Section 10 (suspending legal proceedings) and section 12 (enforcement) also extend more widely.

“*Dispute*” – The definition is inclusive rather than exclusive and may include disputes other than the kinds mentioned. A “dispute” for the purposes of the Act generally and section 10 on the suspension (or “sisting”) of legal proceedings in particular, includes a refusal to accept a claim, for instance even if it can be claimed that the matters in question are indisputable or beyond dispute. It also includes any other difference, contractual or otherwise.

## **Section 3 – Seat of arbitration**

23. As noted at paragraph 8 above, the seat of an arbitration is the country in which an arbitration is based from which the legal system which ultimately governs the arbitration is drawn. It may affect the procedures to be adopted in the arbitration, for instance for an arbitration seated in Scotland under the Act the mandatory Scottish Arbitration Rules will apply. The Act provides that the seat may be designated by the parties, an institution or individual where authorised explicitly by the parties or by the arbitral tribunal. The seat of the arbitration may also be determined, for instance, by the courts according to the rules of private international law.
24. Choosing to arbitrate in Scotland in accordance with the Act does not affect the substantive law used to decide the dispute itself, for instance it does not mean that it must be determined in accordance with Scots law.

## **Arbitration agreements**

### **Section 4 – Arbitration agreement**

25. The agreement to go to arbitration can be in a past agreement between the parties or in a submission to the arbitrator when the dispute arises. It can include arbitration clauses in separate agreements incorporated in the arbitration agreement.
26. Arbitration agreements are recognised by the Act whether they are concluded orally or in writing. Accordingly, all arbitrations in Scotland may in principle be subject to the Act. However, other specific laws may require arbitration agreements to be in writing, for instance the [Requirements of Writing \(Scotland\) Act 1995 \(c.7\)](#) in relation to heritable property. A written arbitration agreement may also be necessary for the resulting arbitral award to be enforceable, either in Scotland by summary diligence following registration for execution in the Books of Council and Session, or in foreign countries under the New York Convention.
27. As noted above, there are also other specific legal protections for consumers who might be inadvertently caught by low-value arbitration clauses.

### **Section 5 – Separability**

28. **Section 5(1)** provides that an arbitration agreement which is part of another agreement is to be treated as separate from the principal contract. Accordingly, section 5(2) means that where it is alleged that the principal contract is void or non-existent, voidable or otherwise unenforceable, the arbitrator will not lack jurisdiction over the dispute in

question only as a result of that fact. Section 5(3) means that a tribunal can rule on whether an agreement that includes an arbitration agreement is valid in accordance with that arbitration agreement.

### **Section 6 – Law governing arbitration agreement**

29. **Section 6** establishes a presumption that where Scotland is designated by the parties as the “seat” of the arbitration (see paragraphs 8 and 23 above), and the Scots arbitration law in the Act therefore governs the arbitration, Scots law will also govern the arbitration agreement, unless the parties explicitly state that another law should govern that agreement. The arbitration agreement itself is considered separately from any wider contract of which it may form part (under section 5 of the Act). The significance of the law that governs the arbitration agreement is that it governs its formal validity, scope, and related matters.

### **Scottish Arbitration Rules**

#### **Section 7 – Scottish Arbitration Rules**

30. **Schedule 1** to the Act sets out the Scottish Arbitration Rules in the form of a single code. The Rules govern every arbitration seated in Scotland and form part of the general law of Scotland in the same way as the body of the Act, and not as a matter of contract between the parties. Whether a provision is included in the body of the Act or the schedule is irrelevant to its status as statutory law. Section 7 is however subject to section 9 whereby parties can agree that a default rule does not apply. The arbitration agreement between the parties will always have to be considered together with the Act.

#### **Section 8 – Mandatory rules**

31. The mandatory rules take precedence over any agreement between the parties which conflicts with those rules. If an arbitration is not conducted in accordance with the rules which apply to it (including the mandatory rules), the tribunal or arbitrator may, depending on the breach, be open to removal or dismissal (with potential consequences for their expenses), and an award may be liable to challenge.
32. The mandatory rules are listed in section 8. They are also identified in the Scottish Arbitration Rules in schedule 1 for the ease of the reader by an “**M**” at the end of the rule heading.

#### **Section 9 – Default rules**

33. Parties are free to make their own arrangements, by agreement, on matters covered by the default rules. Only where there is no such agreement will the default rules apply. Default rules do not lose their statutory nature because they apply only in certain circumstances, for instance in the absence of contrary agreement by the parties.
34. Subsections (2) to (4) make detailed provision making clear that the parties can agree to vary any or all of the default rules, insofar as they agree to modify or disapply them. This can be done in the arbitration agreement or elsewhere, and at any time before or after the arbitration begins. Subsection (4) makes clear that inconsistent provision in the arbitration agreement or other document takes precedence, and that the parties can choose to adopt, for example, the UNCITRAL Model Law, UNCITRAL Arbitration Rules, the Chartered Institute of Arbitrators’ Scottish Arbitration Code, industry standard rules or the procedural rules of other legal systems (subject to the mandatory Scottish Arbitration Rules which cannot be contracted out of).
35. The default rules are identified in the Scottish Arbitration Rules in schedule 1 for the ease of the reader by a “**D**” at the end of the rule heading.

## ***Suspension of legal proceedings***

### ***Section 10 – Suspension of legal proceedings***

- 36. [Section 10\(1\)](#) provides that a court must suspend legal proceedings on the application of a party to those proceedings in relation to any matter under dispute, subject to certain conditions.
- 37. Paragraph (a) provides that the matter under dispute must be the subject of a valid agreement to arbitrate.
- 38. Paragraph (b) provides that an applicant must be a party to the arbitration agreement. The applicant may be a person claiming through or under the party to the arbitration agreement, for example with a contractual right assigned to someone else, or as part of a group of companies.
- 39. Paragraph (c) requires that the party seeking to suspend the legal proceedings has notified the parties to those proceedings.
- 40. Paragraph (d) provides that the applicant must not have taken any step under court procedures to answer the substantive claim or acted in a manner indicating a desire to have the dispute resolved by the court rather than arbitration.
- 41. Paragraph (e) provides that where the court is satisfied that the arbitration agreement is void, inoperative or incapable of being performed, it need not suspend the proceedings.
- 42. Subsection (2) provides that arbitration agreements are not effective to prevent parties bringing legal proceedings which the court refuses to suspend, but this does not apply to statutory arbitrations (see section 16(2)).
- 43. Subsection (3) applies the provisions to arbitrations seated outwith Scotland, in order that the Scottish courts have a duty to sist proceedings in relation to arbitrations seated in England and Wales or Northern Ireland or elsewhere.

## ***Enforcing and challenging arbitral awards etc.***

### ***Section 11 – Arbitral award to be final and binding on parties***

- 44. [Section 11](#) provides that an arbitral award is to be final and binding on the parties and persons claiming through or under them (for example an assignee or successor to rights under an arbitration agreement). It protects the interest of third parties, in particular where the award seeks to rectify or reduce a deed or other document (see rule 49(c) of the Scottish Arbitration Rules). Parties can also still challenge the award by any available arbitral process of appeal or review or under Part 8 of those rules. Subsection (4) means that section 11 does not apply to provisional awards under rule 53. Provisional awards are not final and binding only to the extent specified in the award or until superseded by a subsequent award.

### ***Section 12 – Enforcement of arbitral awards***

- 45. [Section 12](#) deals with the options available to a successful party in the event that the unsuccessful party fails to comply with the terms of the arbitral award.
- 46. [Section 12\(1\)](#) provides that an application may be made to the sheriff or the Court of Session for an order enforcing an arbitral award with the same effect as a court order bearing a warrant for execution. The effect is that where a court grants an order under this rule, the tribunal's award may be enforced by executing diligence in the same way as a court decree may be enforced (without a further warrant).
- 47. [Section 12\(2\)](#) provides that the court cannot enforce an award, while it is being appealed, reviewed (e.g. as provided for in the arbitration agreement) or corrected.



48. The court will not make such an order, or may restrict its extent to part of the award, if satisfied that the tribunal lacked jurisdiction (section 12(3)). Under section 12(4), the party against whom an arbitral award is made can object on the basis that the arbitrator had no jurisdiction only where the person has not lost the right to object under the Scottish Arbitration Rules (in particular rule 76).
49. Arbitral awards will continue to be registrable for execution in the Books of Council and Session or sheriff court books where the parties have so agreed in the arbitration agreement. (This is separate to the procedure in subsections (1) to (4)). In those circumstances, awards continue to be enforceable by summary diligence in accordance with the law of diligence (see the [Debtors \(Scotland\) Act 1987 \(c.18\)](#) and the [Debt Arrangement and Attachment \(Scotland\) Act 2002 \(asp 17\)](#), and the [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#)). The arbitration agreement will continue to require consent to registration for execution, and to be registered. Section 10(5) makes limited provision to that end, providing that, where the other requirements for enforcement are met, arbitral awards are so registrable despite not being self-proving in accordance with the Requirements of Writing (Scotland) Act 1995, unless the parties agree otherwise.
50. [Section 12\(6\)](#) means enforcement is available in the Scottish courts for those with arbitrations seated elsewhere. This will include arbitrations seated under the other jurisdictions of the United Kingdom (section 18 of and Schedule 7 to the [Civil Jurisdiction and Judgments Act 1982 \(c.27\)](#) also allows mutual enforcement of arbitral awards from other parts of the UK).
51. [Sections 12](#) and [13](#) do not affect any other right to enforce an award under sections 19 to 22 (New York Convention awards) or under any other enactment or rule of law.

### ***Section 13 – Court intervention in arbitrations***

52. [Section 13](#) prohibits legal proceedings in respect of the tribunal’s award or any other act or omission of the tribunal other than in accordance with the Act. Other recourse to the courts under their existing powers in relation to arbitration are not however undermined by section 13.
53. It particularly excludes judicial review or other types of review or appeal of arbitral awards—any recourse to the court under the Act which is “final” is not subject to further appeal. So, for instance, the Outer House’s decision under rule 42(4) is stated to be final. There is accordingly no further appeal or review in light of sections 1(c) and 13 of the Act.
54. To ensure that the courts have jurisdiction where necessary under the Act, and that the Scottish Arbitration Rules are not only a matter of private right between individuals, it is also made clear that while court interference with a tribunal’s award or any other act or omission by a tribunal in conducting the arbitration is prohibited, the courts do have jurisdiction on those matters where the Scottish Arbitration Rules or the Act so permit.
55. [Section 13\(3\)](#) limits, to certain specific procedures under the Act, the occasions when jurisdictional questions may be raised with the courts.
56. [Section 13\(4\)](#) provides that recourse to the Court of Session and the sheriff court is available to appoint an arbitrator where parties have agreed that, subject to the mandatory rules in the Act, the UNCITRAL Model Law is to apply (there is no power at common law to appoint), in accordance with Articles 6 and 11(2) to (5) of the Model Law.

### ***Section 14 – Persons who take no part in arbitral proceedings***

57. [Section 14](#) protects the rights of those who are alleged to be a party to the arbitral proceedings, but who do not participate in the arbitration. Subsection (1) allows such

a party to challenge the jurisdiction of the tribunal on the same grounds as a party, by court proceedings.

58. Subsection (2) gives an alleged party the same rights as an actual party to the proceedings to challenge an award under rules 67 or 68 but relieves the alleged party of any duty to exhaust available arbitral procedures for appeal or review of the award.

### ***Section 15 – Anonymity in legal proceedings***

59. **Section 15** protects the identity of parties to arbitration in civil legal proceedings relating to an arbitration. This protection only covers the parties' identities and not the other contents of any court judgement. Enforcement proceedings under section 12 are excluded, since a party not complying with an arbitral award should not be able to hide behind confidentiality. See also default rule 26 which provides that the arbitrator(s) and the parties must not disclose confidential information relating to the arbitration.
60. **Section 15(1)** provides that this anonymity may be available on an application to the court which has discretion as to whether to grant an order providing this protection. **Section 15(2)** however provides that the court must grant an application for anonymity unless satisfied that one of the exceptions in that subsection which would permit disclosure apply. The court's decision on whether to grant anonymity is not subject to appeal (**section 15(3)**) although the court can revisit its order to grant anonymity if the exceptions would apply.

### ***Statutory arbitration***

#### ***Section 16 – Statutory arbitration: special provisions***

61. The Act interacts with various other Acts (and subordinate legislation) which provide for particular arbitration procedures for particular statutory purposes. The Act will allow parties to those arbitrations the benefits of the procedures set out in the Act where appropriate.
62. The Act provides that where a dispute on a particular matter is referred to arbitration under such legislation, the Act will apply to any arbitration under that other legislation, as if the reference to arbitration was as a result of an agreement between the parties. Subsection (3) provides however that if the other legislation makes provision which is inconsistent with the Act, that other legislation prevails.
63. Subsection (4) provides that every statutory arbitration is to be seated in Scotland. In the case of domestic arbitration, the effect is to prevent parties to a statutory arbitration from agreeing to seat the arbitration outwith Scotland. This is however subject to conflict of law rules (for instance on the interaction with the equivalent section 95(2) of the Arbitration Act 1996 for the other jurisdictions of the UK).
64. Subsection (5) identifies the rules that do not apply to statutory arbitrations. Subsection (6) limits the circumstances in which statutory arbitrations covering different matters can be consolidated together (permitted by rule 40 where parties so agree).

#### ***Section 17 – Power to adapt enactments providing for statutory arbitration***

65. The subordinate legislation powers in paragraph (a) allow the Scottish Ministers by order to modify the rules (and other Act provisions) as they apply to statutory arbitrations and in paragraph (b) to amend any enactment which provides for arbitration to satisfactorily apply the rules (or other Act provisions) to arbitrations conducted under that specific legislation. The statutory instrument procedure requiring affirmative approval by the Scottish Parliament applies where primary legislation is amended.



## ***Recognition and enforcement of New York Convention awards***

### ***Section 18 – New York Convention awards***

66. Subsection (1) explains a “Convention award”. The awards recognised or enforced are arbitral awards made in the territory of a state which is a signatory to the New York Convention. The UK ratified the Convention on 24 September 1975. The [Arbitration Act 1975 \(c.50\)](#) provides for the enforcement of New York Convention awards in Scotland. Sections 18 to 22 are a consolidation of the relevant provisions of the 1975 Act.
67. Such agreements must be in writing (unlike arbitration agreements domestically which can be oral). The reference to “written” arbitration agreements will cover for instance telegrams or an exchange of letters as mentioned in the text of the New York Convention which this provision implements (according to the general interpretation rules which apply to Acts of the Scottish Parliament and subordinate legislation made under them – see the definition of “writing” in Schedule 2 to [S.S.I. 1999/1379](#)). By comparison, section 7(1) of the [Arbitration Act 1975 \(c.3\)](#) which this provision consolidates reflects the age of that Act.
68. There have in the past been difficulties where the seat of an arbitration has been held to be where the award was signed. Therefore, subsection (2) provides that such an award is treated as made at the seat of the arbitration regardless of where it was signed, despatched or delivered to any of the parties.
69. Under subsection (3), if the Queen by Order in Council which will be subject to negative resolution procedure in the Scottish Parliament declares a particular state is party to the New York Convention, so long as the relevant order is in force, this is to be conclusive evidence that the state in question is a party in respect of any territory for which it is responsible.

### ***Section 19 – Recognition and enforcement of New York Convention awards***

70. [Section 19](#) provides that New York Convention awards are recognised as binding on the parties between which they are made. Such an award is therefore capable of being relied upon by those parties as a defence, set-off or in any other way in any legal proceedings in Scotland. The court can order that such an award is enforceable in the same manner as a judgment or order of the court to the same effect.
71. A New York Convention award will also continue to be enforceable in accordance with the general law by summary diligence (as with enforcement under section 12 of the Act - see paragraph 49 above) provided the usual requirements are met. For instance, the arbitration agreement must contain consent to registration of the award in the Books of Council and Session for execution and the agreement and award must be so registered.

### ***Section 20 – Refusal of recognition or enforcement***

72. [Section 20\(1\)](#) allows the court to refuse to recognise or enforce under this procedure a New York Convention award only if the person against whom enforcement is sought can prove certain matters in accordance with this section. Subsections (2) to (4) prescribe the detailed circumstances in which recognition or enforcement of an award may be refused. If an award purports to decide matters which were not submitted to arbitration as well as those which were properly so submitted, the court is able to recognise or enforce those parts which were properly submitted so long as these can be separated from those which exceeded the jurisdiction of the arbitrator (subsection (5)).
73. Subsection (6) provides that where an award is challenged before the component authority of the country where the award was made or under whose law it was made, a court decision here as to its recognition and enforcement may be sisted (i.e. suspended)

and the party against whom recognition or enforcement is claimed ordered to provide suitable security. Subsection (7) defines the “competent authority” for these purposes.

### ***Section 21 – Evidence to be produced when seeking recognition or enforcement***

74. Under subsection (1) a party is obliged to provide a duly authenticated original award and the original arbitration agreement, or duly certified copies.
75. Where the award or agreement is in a language other than English, subsection (2) provides that the party is also obliged to produce a translation of it which has been certified by an official or sworn translator or by a diplomatic or consular agent.

### ***Section 22 – Saving for other bases of recognition or enforcement***

76. [Section 22](#) preserves the rights of a party to rely upon or enforce an award other than under this procedure, for instance at common law.

### ***Supplementary***

### ***Section 23 – Prescription and limitation***

77. Both positive and negative prescriptive periods whereby rights are created or expire are interrupted by arbitration. Section 23(2)(a) provides that interruption of the prescriptive period does not arise if an arbitrator is not appointed. If the appointment is made, the interruption is backdated to the notice to submit the claim to arbitration. This is to avoid the possibility that the running of the prescriptive period could be interrupted by arbitration but the arbitration does not proceed because no party to the arbitration moves to appoint an arbitrator.
78. By amending the Prescription and Limitation (Scotland) Act 1973, subsections (2) and (3) align the date deemed to be the date of judicial interruption with the “commencement” date when the arbitration begins (see Scottish Arbitration Rule 1 for the default position). The Act substitutes the definition of “preliminary notice” in the 1973 Act to that effect.
79. Subsections (4) and (6) alter rules on the limitation of court actions so that the periods that apply for the limitation of actions are interrupted by recourse to arbitration. Subsection (5) provides that the date of the interruption of the running of the limitation period is the “commencement” date of the arbitration. Limitation will continue as at present not to prevent recourse to arbitration.

### ***Section 24 – Arbitral appointments referee***

80. The Scottish Ministers are given the power to authorise by order who is to be an arbitral appointments referee who can appoint an arbitrator in default of the parties making provision for this (see rule 7 of the Scottish Arbitration Rules). The Scottish Ministers must have regard to the criteria for appointment laid out in subsection (2). 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.
81. Where an equivalent body has been specified in the arbitration agreement this will prevail over a statutory referee under this section (see section 9(3) and (4) and rule 7(1) (a)).
82. Arbitral appointments referees were duly authorised by the [Arbitral Appointments Referee \(Scotland\) Order 2010 \(S.S.I. 2010/196\)](#). Those authorised by that order to appoint are Agricultural Industries Confederation Ltd., the Chartered Institute of Arbitrators, the Dean of the Faculty of Advocates, the Institution of Civil Engineers, the Law Society of Scotland, the Royal Incorporation of Architects in Scotland, the Royal

Institution of Chartered Surveyors and the Scottish Agricultural Arbiters and Valuers Association.

### ***Section 25 – Power of judge to act as arbitrator or umpire***

83. [Section 25\(1\)](#) provides that a judge of the Court of Session is able to accept appointment as an arbitrator in a commercial dispute with the consent of the Lord President of the Court of Session. Subsection (2) gives Scottish Ministers the power by order, subject to negative resolution procedure in the Scottish Parliament, to set a fee for the judge's services to be paid to the administration office in the Court of Session. Subsection (3) provides that any jurisdiction exercisable by the Court of Session in a matter in which a judge is acting as arbitrator is to be exercisable by the Inner House. The decision of the Inner House is final. Section 25 consolidates section 17 of the [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1980 \(c.55\)](#).

### ***Section 26 – Amendments to UNCITRAL Model Law or Rules or New York Convention***

84. Scottish Ministers are given the power, subject to affirmative resolution procedure in the Scottish Parliament, to amend and update the Act, provision made under it, or other enactments in relation to arbitration in consequence of any future amendment to the UNCITRAL Model Law, the UNCITRAL Arbitration Rules or New York Convention.
85. Subsection (2) provides that the Scottish Ministers must consult those whom they consider to be interested in arbitration law before making those changes.

### ***Section 27 – Amendment of Conveyancing (Scotland) Act 1924 (c.27)***

86. The consequential amendment to section 46 of the Conveyancing (Scotland) Act 1924 means that if the court grants an enforcement order in respect of an arbitral award reducing a document registered in the Register of Sasines (see rule 49(c)), the arbitral award is to be registered in the Sasine Register. Third parties relying on the Register before the award is registered are protected by section 46 of the 1924 Act.

### ***Section 28 – Articles of Regulation 1695***

87. The 25th Act of the Articles of Regulation 1695 is disapplied from arbitration – it is replaced by the provisions of the Scottish Arbitration Rules permitting court challenges, in particular Part 8 and rule 68 (serious irregularity appeals).

### ***Section 29 – Repeals***

88. The repeals of enactments specified in column 1 of schedule 2 have effect to the extent specified in column 2.

### ***Section 30 – Arbitrability of disputes***

89. [Section 30](#) makes it clear that the Act does not make any dispute arbitrable where the subject-matter of the dispute means it would not otherwise be capable of arbitration under Scots law. For instance, matters which affect public rights or the status of parties in law may not be referred to arbitration.

### ***Final provisions***

### ***Section 31 – Interpretation***

90. [Section 31\(1\)](#) sets out definitions that apply throughout the Act except where the contrary intention appears.
91. Subsection (2) provides that the Act applies in the same way to three or more parties as it does to disputes between two parties.

### **Section 32 – Ancillary provision**

92. [Section 32](#) gives the Scottish Ministers power to make supplementary, incidental, consequential, transitional, transitory or saving provision by freestanding order to implement the Act, including by modifying enactments, instruments or documents.

### **Section 33 – Orders**

93. [Section 33](#) provides that any Ministerial power under the Act to make orders will be exercisable by statutory instrument. This section makes further provision for the relevant powers and procedures. Subsection (2) generally provides for negative resolution procedure in the Scottish Parliament except where primary legislation is being amended, under section 26 to update the Act to reflect amendments to the UNCITRAL Model Law, UNCITRAL Arbitration Rules or the New York Convention and under section 36(4) to end the transitional opt out from the Act. For those exceptions, the statutory instrument procedure required is affirmative resolution procedure (see subsection (3)).

### **Section 34 – Crown application**

94. The Act will bind the Crown. Where Her Majesty the Queen would be party to an arbitration in her personal capacity (for instance as private owner of the Balmoral estate) Her Majesty may be represented by such person as she may appoint. The Prince and Steward of Scotland may also be represented by such person as he may appoint.

### **Section 35 – Commencement**

95. [Section 35](#) provides for bringing the operative provisions of the Act into force by order.
96. The Act was brought into force for non-statutory arbitrations on 7th June 2010 by the [Arbitration \(Scotland\) Act 2010 \(Commencement No. 1 and Transitional Provisions\) Order 2010 \(S.S.I. 2010/195\)](#). That Order makes transitional provision, in addition to section 36,—
- excluding the Act from applying to court proceedings begun before 7th June 2010 in relation to arbitration;
  - preserving the old law in relation to contractual clauses which provide for equitable considerations to be relevant in relation to decisions on the merits of arbitration;
  - excluding the effect of rule 1 of the Scottish Arbitration Rules for enactments which provide for when arbitration begins; and
  - to make clear that for non-statutory arbitrations, in applying the transitional provisions in section 36, “commencement” is taken to be 7 June 2010.

### **Section 36 – Transitional provisions**

97. Subsection (1) provides that the Act will not apply to arbitrations which have already begun when the Act comes into force.
98. Subsections (2) and (3) provide that while the Act will apply to existing arbitration agreements, irrespective of when they were made, there is an opt out so that parties who have an arbitration agreement at the time of commencement of the Act and who wish to use the old law may agree to opt out of the new regime in the Act. All parties must agree to the opt out. The old law is therefore saved for those agreements where the parties choose to opt out of the Act.
99. Subsection (4) gives the Scottish Ministers the power by affirmative resolution procedure to remove this opt out after a suitable period. This power is not capable of being exercised for at least 5 years. Following due consultation (subsection (5)), after that period the ability to opt out and the old law can be repealed.

- 100. Subsection (6) provides, for the avoidance of doubt, that for the purposes of the Act, references to “arbiters” in existing arbitration agreements are to be taken to be references to “arbitrators”.
- 101. Subsection (7) makes clear that any reference in statute to a decree arbitral is to be taken to be a reference to a tribunal’s award for the purpose of applying section 10 (enforcement).
- 102. Subsection (8) makes transitional provision so that agreement to contract out of stated case procedure under section 3 of the Administration of Justice (Scotland) Act 1972 in an existing arbitration agreement will result in the exclusion of rule 41 (referral of point of law) and rule 69 (challenging an award for legal error).

### **Section 37 – Short title**

- 103. The Act is to be called the Arbitration (Scotland) Act 2010.

### **Schedule 1 – Scottish Arbitration Rules**

- 104. See paragraphs 10 and 11 and 30 to 35 of this Note for a general introduction to the effect of the Scottish Arbitration Rules.

## **Part 1 – Commencement and constitution of tribunal etc.**

### **Rule 1 – Commencement of arbitration *Default***

- 105. An arbitration will begin on service of notice by one of the parties submitting the dispute to arbitration. A third party can also commence an arbitration through or under a party to the arbitration agreement, for example on the assignation of a contract or in relation to changes in a group of companies. The significance of this date may be by virtue of the arbitration agreement or the Act default provisions, for example the parties or an arbitrator may set time limits from such a date, and the rules on prescription and limitation will apply from this date.

### **Rule 2 – Appointment of tribunal *Default***

- 106. Arbitration agreements only take effect when a dispute arises. If the parties have included provision in the arbitration agreement about the appointment of an arbitrator or arbitrators then those provisions will apply. If, however, no provision has been made in the arbitration agreement for the appointment of an arbitrator, if there are gaps in the provisions on appointment, or if the parties fail to carry out those provisions, then the Act provides default rules to allow for the appointment of an arbitrator to take the arbitration forward. This changes the common law position in Scots law and rule 2 makes clear how the structure of the appointment provisions in the rules apply. An arbitrator’s appointment may take effect on the appointment being made or at such time as may be agreed between the parties.

### **Rule 3 – Arbitrator to be an individual *Mandatory***

- 107. An arbitrator must be a natural person.

### **Rule 4 – Eligibility to act as arbitrator *Mandatory***

- 108. As an arbitrator may be chosen from fields as diverse as farming, construction, forestry, oil engineering or international law, the Act is not prescriptive about who should be eligible to become an arbitrator. An arbitrator must, however, be aged 16 and legally capable of acting as an arbitrator.

**Rule 5 – Number of arbitrators *Default***

109. If the arbitration agreement is silent on the number of arbitrators to be appointed, rule 5 provides a default rule that the arbitration is conducted by a sole arbitrator.

**Rule 6 – Method of appointment *Default***

110. The Act provides a default procedure for the appointment of arbitrators to allow the arbitration process to begin after a dispute arises. The parties may agree among themselves as to who the arbitrator should be, and on the procedure for appointment, but the Act provides a fallback system. To the extent that there is no agreement, rule 6 provides that for a sole arbitrator the parties appoint an eligible individual jointly. For 2 arbitrators, each of 2 parties can appoint an arbitrator, though all arbitrators must be independent of the parties that appoint them (see rule 77). For more arbitrators, the arbitrators appointed by each party make the additional appointments. There is a 28 day time-limit for any party to comply from when a request is made by the other party. See rule 7 for when this procedure fails.

**Rule 7 – Failure of appointment procedure *Mandatory***

111. Rule 7 is a mandatory rule. It only applies to allow an arbitrator to be appointed where the parties' preferred method of appointment or the default procedure in Scottish Arbitration Rule 6 fails. That is, where a party to an arbitration agreement refuses to do something which an agreement between the parties requires them to do to bring about the appointment of an arbitrator, or if they fail to do so within the requisite period, which may be the 28 day period required by rule 6. If one party appoints and the others do not then the referee steps in only in relation to the appointment of that individual arbitrator. Rule 7(2) provides that, unless the parties agree otherwise, either party may refer the appointment of the arbitrator to an arbitral appointments referee. The parties can agree to dispense with the notice procedure which leads to the arbitral appointments referee, as well as recourse to the referee, and instead can agree to go straight to court to have the arbitrator appointed. These provisions also apply if there are difficulties in appointing arbitrators in multi-party arbitrations.
112. Rules 7(3) to (5) provide a process for a party to object to the reference to an arbitral appointments referee. If no objection is made the arbitral appointments referee may appoint an arbitrator.
113. Rule 7(6) provides that if a party objects to the referee making an appointment, if the referee fails to make an appointment within 21 days of a referral or if the parties agree not to use a referee, any party can apply to the court to make the necessary appointment. There is no right of appeal against the decision of the court (paragraph (7)).
114. The arbitral appointments referee or the court will have to have regard to the matters set out in paragraph (8), the nature of the dispute, the arbitration agreement and the attributes of the appointee, when making the appointment.
115. Paragraph (9) means that an appointment made by the arbitral appointments referee will have the same effect as if made with the agreement of the parties, even if the composition of the tribunal appointed by the referee differs from the arbitration agreement.

**Rule 8 – Duty to disclose any conflict of interests *Mandatory***

116. Rule 8 requires an arbitrator (and any umpire, see rule 82) - including when asked to act but not yet appointed - to disclose, without delay, to the parties any circumstances which might reasonably be considered relevant when considering if he or she is impartial or independent. The obligation to disclose continues throughout the arbitral proceedings. If an arbitrator fails to disclose, the court can take that into account as regards his or her expenses in removing them (rule 78).



117. Paragraph (2)(b) extends this duty of disclosure as it applies to a prospective arbitrator (before appointment) to any arbitral appointments referee, other third party or court whom the parties have asked to appoint an arbitrator.
118. The mandatory effect of the rule requires disclosure only. The parties are free to ignore disclosure and appoint a non-independent arbitrator if satisfied that he or she will nevertheless act impartially. A challenge to that arbitrator or an award would only be successful if substantial injustice is shown to have resulted in lack of impartiality, independence or fairness, which may be unlikely in the event of disclosure where the parties have agreed to proceed.

### **Rule 9 – Arbitrator’s tenure *Default***

119. Rule 9 lists the circumstances in which the appointment of an arbitrator comes to an end before the natural end of the arbitration.

### **Rule 10 – Challenge to appointment of arbitrator *Default***

120. Rule 10 is a default rule, in the absence of agreement to the contrary between the parties, to allow a party to object to the appointment of an arbitrator or umpire. The grounds, in paragraph (2)(a), are lack of impartiality and independence, fairness and lack of qualifications as agreed by the parties. The rest of paragraph (2) sets out how a competent objection is to be made. Paragraph (3) provides that dismissal is not automatic as the tribunal can confirm or revoke the appointment. Under paragraph (4) revocation is presumed if the tribunal does not make a decision within 14 days of a competent objection being made.

### **Rule 11 – Removal of arbitrator by parties *Default***

121. Rule 11 is a default rule for the parties to agree to remove an arbitrator. This is instigated by one of the parties though the parties must act jointly to remove the arbitrator. A removal is effected by jointly giving notice to the arbitrator (formally in accordance with rule 83).

### **Rule 12 – Removal of arbitrator by court *Mandatory***

122. Rule 12 makes mandatory provision for removal of an arbitrator or umpire by the court because of lack of impartiality, independence, fairness or lack of qualifications, as opposed to by the parties and any other arbitrators or umpires on application by any party. The court can also judge under rule 12(c) that the arbitrator is incapable (or there are doubts about capacity) of acting, which includes the eligibility requirement on capability in rule 4 - someone may be capable under the [Adults with Incapacity \(Scotland\) Act 2000 \(asp 4\)](#), but may still be incapable of acting as an arbitrator under this provision.
123. Rule 12(e) allows individual arbitrators to be challenged on grounds of failure to conduct the arbitration in accordance with the arbitration agreement (subject to any contrary mandatory rule) where there has been or will be substantial injustice caused to a party. The “substantial injustice” test means that minor procedural breaches will not permit removal or dismissal or challenge of an award. This will, for example, cover failure to take reasonable steps to prevent unauthorised disclosure of confidential information under rule 26(2) – if that default rule applies - only if any breach of confidence has caused substantial injustice.

### **Rule 13 – Dismissal of tribunal by court *Mandatory***

124. The power for the Outer House of the Court of Session (“the Outer House”) in rule 13 to dismiss the entire tribunal is a mandatory provision. The tribunal may not be conducting proceedings without unnecessary delay or in accordance with the parties’ wishes (subject to any contrary mandatory rule) or agreed procedure, for example. This

is however subject to the caveat that substantial injustice has been or will be caused to the aggrieved party.

#### **Rule 14 – Removal and dismissal by court: supplementary *Mandatory***

125. Rule 14 makes mandatory provision to further limit the ability of the Outer House to remove an arbitrator or umpire or dismiss a tribunal. Paragraph (1)(a) provides that an arbitrator or tribunal must be given notice of the challenge and the opportunity to make representations. Paragraph (1)(b) provides that any other available recourse to the tribunal must have been exhausted. Paragraph (2) provides that there is no appeal against a court's decision under rule 12 or 13.
126. Paragraph (3) provides that the arbitration may continue while the objection is heard. This avoids the possibility that (notwithstanding there might be good grounds for attempting to remove an arbitrator) the rule may be used as a means of delaying or frustrating the arbitration. These provisions apply across the court proceedings on removal and dismissal.

#### **Rule 15 – Resignation of arbitrator *Mandatory***

127. Rule 15 is a mandatory rule which sets out the circumstances in which an arbitrator is permitted to resign. If an arbitrator wishes to resign and the parties concur, there is no difficulty. Rule 15(1)(e) and (2) provide that the Outer House may authorise a resignation if satisfied that is reasonable. There is no appeal against the Outer House's decision. See rule 16(2) for the consequences where an arbitrator resigns without complying with rule 15. Rules 15 and 16 replace the common law restrictions on resignation by an arbitrator.

#### **Rule 16 – Liability etc. of arbitrator when tenure ends *Mandatory***

128. Rule 16(1) allows the Outer House to make such order as it thinks fit with respect to the arbitrator's entitlement, if any, to fees or expenses, the repayment of any fees or expenses already paid or where an arbitrator has resigned, to grant relief from liability incurred or to impose liability.
129. Rule 16(2) provides that the court must, when considering making any order about liability etc., have regard to whether any resignation was in breach of rule 15. There is no appeal against the Outer House's decision.

#### **Rule 17 – Reconstitution of tribunal *Default***

130. Rule 17 is a default rule for the reconstitution of the tribunal when an arbitrator's tenure ends. Paragraph (1) provides that this can be done either by the same procedure as for the original tribunal or under the default rules for appointment of arbitrators. Under rule 17(2), the reconstituted tribunal decides the extent to which things done previously as part of the arbitration stand, subject to the parties' agreement otherwise. Parties also retain any right to object or appeal on any ground they previously had available.

#### **Rule 18 – Arbitrators nominated in arbitration agreements *Default***

131. Rule 18 is a default rule, in the absence of agreement to the contrary between the parties, that any provision in an arbitration agreement which nominates a particular individual as a tribunal member has no effect when their tenure comes to an end (see rule 9). The original arbitrator can, however, be appointed again if there are further disputes which invoke the arbitration agreement.

## **Part 2 – Jurisdiction of tribunal**

### **Rule 19 – Power of tribunal to rule on own jurisdiction *Mandatory***

132. Rule 19 provides for a clear power for the arbitrator to decide his or her own jurisdiction. The extent of an arbitrator's jurisdiction and his or her power to decide his or her own jurisdiction is important in arbitration since it determines exactly what issues the arbitrator is to decide.

### **Rule 20 – Objections to tribunal's jurisdiction *Mandatory***

133. Rule 20 is a mandatory rule. If a party considers that the tribunal does not have jurisdiction, the party may object to the tribunal. Paragraph (2) requires an objection to be raised as soon as reasonably practicable after the matter is first raised in the arbitration, or such later time as the tribunal allows if it considers the circumstances justify it (before the tribunal makes its last award). The only recourse at that point is a court challenge to the award on grounds of lack of jurisdiction.
134. Under paragraph (3), if a tribunal upholds an objection, it has the general power to terminate an arbitration insofar as it does not have jurisdiction and to set aside any interim or partial award insofar as there is no jurisdiction. If a final award has been made the party should appeal under rule 67.
135. Paragraph (4) gives the tribunal the option of ruling on an objection to its jurisdiction in an award as to jurisdiction, or to delay and rule in the award on the merits of the dispute, unless the parties agree which course it should take. Where the tribunal does delay, any appeal will have to be made as a jurisdictional appeal against an award (under rule 67) rather than as an appeal against the decision on the objection to jurisdiction (rule 21).

### **Rule 21 – Appeal against tribunal's ruling on jurisdictional objection *Mandatory***

136. Rule 21(1) provides that within 14 days after the tribunal's decision, an application can be made to the Outer House on a question of an arbitrator's jurisdiction. Paragraph (2) provides that the arbitral proceedings will be able to continue until the court comes to a decision on the objection to jurisdiction to avoid vexatious objections being taken to the court to delay the whole process. Rule 21(3) provides that the Outer House's decision on appeal is final.

### **Rule 22 – Referral of point of jurisdiction *Default***

137. Rule 22 is a default rule which, unless the parties agree otherwise, allows a party to ask the Outer House to determine a point of jurisdiction. This recognises that there may be difficult issues of jurisdiction where the tribunal's ruling is almost certain to be challenged where referral to the court would assist the parties and the tribunal.

### **Rule 23 – Jurisdiction referral: procedure etc. *Mandatory***

138. Where rule 22 applies between the parties, rule 23 restricts the right to apply to the Outer House to determine a point of jurisdiction under rule 22. An application may be made if all parties agree or the tribunal has consented and the court is satisfied that its determination is likely to produce substantial cost savings and there has been no delay by the party in making the application. In addition the court must be convinced that there are good reasons why it, and not the tribunal, should decide the matter.
139. Rule 23(3) provides that the arbitral proceedings will be able to continue until the court comes to a decision on the referral.
140. Rule 23(4) means that there is no appeal against the decision of the Outer House on the referral or whether an application is valid.

### **Part 3 – General duties**

#### **Rule 24 – General duty of the tribunal *Mandatory***

141. Rule 24 is a mandatory rule. Rule 24(1) provides that an arbitral tribunal (and any umpire) conducting an arbitration must comply with its general duty - to be impartial, independent and fair. Treating the parties fairly does not necessarily mean treating them in exactly the same way.
142. The general duty is also that the tribunal (and umpire) must conduct the arbitration without unnecessary delay and without incurring unnecessary expense. “Without unnecessary delay” recognises the possibility of delay for the purposes of the arbitration and unnecessary expense recognises that the tribunal can incur expense where necessary.
143. Under rule 24(2), the tribunal must allow parties a reasonable opportunity to put their case and respond to the other party’s case.

#### **Rule 25 – General duty of the parties *Mandatory***

144. Rule 25 imposes a general duty on the parties to ensure that the arbitration is conducted without unnecessary delay and without incurring unnecessary expense. “Without unnecessary delay” recognises the possibility of delay for the purposes of the arbitration and unnecessary expense recognises that the tribunal and the parties may need to incur expense where necessary.

#### **Rule 26 – Confidentiality *Default***

145. Rule 26 is a default rule which provides that the arbitrator(s) and the parties must not disclose confidential information as defined in rule 26(4) relating to the arbitration. There are various exceptions to this. The effect is that disclosure will be a breach of an obligation of confidence unless the parties agree otherwise.
146. The parties are placed under a duty of confidentiality towards each other and to the tribunal. The tribunal is likewise placed under a similar duty towards the parties. A breach of the obligation of confidence will be actionable by the party or parties to whom the duty was owed. The available remedy will depend on the circumstances, but might be interdict or damages. Breach of the duty of confidentiality will also for instance allow removal of an arbitrator under rule 12 where it leads to substantial injustice.
147. The exception allowing disclosure in paragraph (1)(a) covers disclosure of information, for example, to the tribunal, other parties, advisers, experts and witnesses authorised by the parties. In addition, paragraph (1)(b) allows any disclosure by the tribunal or for the conduct of the arbitration.
148. Paragraph (1)(c) covers disclosure required by enactment or rule of law (including compliance with court orders), for the fulfilment of any public duty or function and where public officials seek information in pursuance of regulatory functions.
149. Paragraph (1)(d) covers disclosure where this is needed to protect a person’s lawful interests. In the Court of Appeal in the English law case of *Emmott v Michael Wilson & Partners Ltd.*, Lawrence Collins LJ, said “that disclosure was permissible when, and to the extent to which, it was reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by that third party. It would be this exception which would apply where insurers have to be informed about the details of arbitral proceeding”<sup>1</sup>.

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<sup>1</sup> [2008] EWCA Civ 184; WLR (D) 82 at paragraph 101.

150. Paragraph (1)(e) covers disclosure in the public interest and (1)(f) in the interests of justice. Paragraph (1)(g) permits disclosure in circumstances which would attract a defence of absolute privilege in a defamation action (for instance in Parliamentary proceedings).
151. The duty of confidentiality is not imposed on third parties, for example professional advisers and expert witnesses. However, it is expected that the parties or tribunal will enter into private arrangements with third parties under which an agreement or undertaking to keep matters confidential is obtained. Disclosure by third parties is not a breach of any duty of confidentiality imposed by rule 26.
152. Rule 26(2) imposes an express duty on the tribunal and the parties to take all reasonable steps to prevent unauthorised disclosure by third parties, for instance by informing them of the requirement of confidentiality or seeking confidentiality undertakings from them if appropriate. Rule 26(3) imposes a duty on the tribunal to inform the parties at the outset of the arbitration whether any proceedings they will be involved with are to be confidential.
153. If the tribunal breaches the duties in rules 26(2) and (3), this may be grounds for removal of the arbitrator under rules 12 and 13. If the parties are unhappy about a disclosure by an arbitrator, they could agree to remove under rules 11 or 12. If the parties breach the duty under rule 26(2), the tribunal can take this into account when allocating the parties' liability for expenses between themselves under rule 60. Failure by the tribunal to comply with any of the duties in rule 26 may also be a ground for a serious irregularity appeal where non-compliance causes substantial injustice.

#### **Rule 27 – Tribunal deliberations *Default***

154. Rule 27 is a default rule which provides that the tribunal is not required to share its deliberations with the parties, except for the information in rule (2) – which they are required to share. Failure by an arbitrator to comply may attract the same consequences as noted in the preceding paragraph for rules 26(2) and (3).

### **Part 4 – Arbitral proceedings**

#### **Rule 28 – Procedure and evidence *Default***

155. Rule 28 is a default rule, that in the absence of agreement between the parties, the arbitrator can determine the procedure to be followed and evidential matters.
156. Rule 28(2) provides an illustrative, but not exhaustive, list of such powers for the tribunal. Arbitrators are for instance allowed to act inquisitorially (rule 28(2)(e)) and can generally disapply the law of evidence (rule 28(2)(h)).

#### **Rule 29 – Place of arbitration *Default***

157. Rule 29 is a default rule which permits an arbitration seated in Scotland to meet elsewhere.

#### **Rule 30 – Tribunal decisions *Default***

158. Rule 30 is a default rule. In the absence of agreement between the parties, rule 30(1) provides on a default basis that decisions, orders and awards can be made by all or a majority of the arbitrators.
159. Where there is neither unanimity nor a majority, rule 30(2)(a) provides that any chair will have the casting vote. Rule 30(2)(b) provides that where there is neither unanimity nor a majority decision and there is no agreement as to who is to chair an arbitral tribunal and so take the decision, where there are 3 or more arbitrators, the decision will be made by the last arbitrator appointed and where there are 2 arbitrators, the decision will be made by an umpire, and for appointment of such an umpire in those circumstances.

**Rule 31 – Tribunal directions *Default***

160. Rule 31 is a default rule giving the tribunal the power to give directions to the parties for the purposes of conducting the arbitration and requires the parties to comply with these in the time specified.

**Rule 32 – Power to appoint clerk, agents or employees etc. *Default***

161. Rule 32 is a default rule that an arbitrator can appoint a clerk (and others) to assist in the arbitration. However, the parties' consent will be required for the appointment of clerks and other staff if significant costs are likely to arise. See rule 24(1)(c)(ii) and the need for the tribunal to avoid unnecessary expenses. Disputes about the "significance" of expenses in rule 32(2) may be resolved by taxation by the auditor of court (which is a process of review of expenses).

**Rule 33 – Party representatives *Default***

162. Rule 33 is a default rule that a party may be represented by a lawyer or any other person chosen by the party. Rule 33(2) provides that any representation of a party must be communicated to the tribunal and other party at the beginning of the arbitral process or as soon as that representation is engaged.

**Rule 34 – Experts *Default***

163. Rule 34 is a default rule, in the absence of agreement to the contrary, that an arbitrator has the power to instruct an expert (also known as a man of skill or an assessor) to provide an opinion on areas outwith the arbitrator's knowledge to allow a decision in the case. Rule 34(2)(a) provides that the parties must be given a reasonable opportunity to comment on the expert's written opinion. If the information is to be given in person, rule 34(2)(b) provides that it must be at a hearing at which the parties may ask the expert questions.

**Rule 35 – Powers relating to property *Default***

164. Rule 35 is a default rule which makes provision for protective measures relating to property, including evidence. It gives a tribunal the power to make orders for the production, preservation etc. of property owned or possessed by a party as a protective measure pending the outcome of an arbitration or for the purpose of being used as evidence during the proceedings. These are similar to the powers of a court.

**Rule 36 – Oaths or affirmations *Default***

165. Rule 36 is a default which provides that parties and witnesses may be examined under oath or affirmation which the tribunal may administer.

**Rule 37 – Failure to submit claim or defence timeously *Default***

166. Rule 37 is a default rule. In the absence of agreement between the parties, the arbitrator will have powers to deal with late submission of statements of claim, counterclaims and defences. In rule 37(1) if there is no good reason for delay in submitting a claim and it is likely to give rise to a substantial risk that issues cannot be decided fairly or the defender will be seriously prejudiced the tribunal must terminate the arbitration in so far as it relates to the subject-matter of the claim. Where this happens, the tribunal can make an award which can take the delay into account when allocating liability for recoverable expenses.
167. Rule 37(2) provides that if there is no good reason for the delay in submitting a defence the tribunal must proceed with the arbitration (but it is treated as no admission).



**Rule 38 – Failure to attend hearing or provide evidence *Default***

168. Rule 38 is a default rule. In the absence of agreement to the contrary, if a party fails to attend a hearing (on reasonable notice) or produce any document or other evidence as requested by the tribunal and there is no good reason for not doing so, the tribunal can proceed and make an award based on the information it has.

**Rule 39 – Failure to comply with tribunal direction or arbitration agreement *Default***

169. Rule 39 is a default rule which in paragraph (1) provides the tribunal with power to order a party breaching a direction of the tribunal or the rules and arbitration agreement governing the arbitration to comply. Rule 39(1)(b) means that a tribunal does not have to formally direct a defaulting party to comply with the arbitration agreement before making a compliance order.
170. Rule 39(2) gives the tribunal a number of powers when a party does not comply with an order including taking non-compliance into account when allocating liability for recoverable expenses.

**Rule 40 – Consolidation of proceedings *Default***

171. Rule 40 is a default rule which allows the parties to agree to consolidate the arbitration with another arbitration, or hold concurrent hearings, but the tribunal may not do so on its own initiative. Section 16(6) of the Act states that for statutory arbitrations, notwithstanding rule 40, consolidation is only possible for other arbitrations under the same statutory provision.

**Part 5 – Powers of court in relation to arbitral proceedings**

**Rule 41 – Referral of point of law *Default***

172. Rule 41 allows a party to ask the Outer House to determine any point of Scots law arising in the arbitration. The rule is a default rule and so the parties can exclude the jurisdiction of the court.

**Rule 42 – Point of law referral: procedure etc. *Mandatory***

173. Where rule 41 applies, rule 42 restricts the right to apply to the Outer House to determine any point of Scots law arising in the arbitration under that rule. An application may be made if all parties agree or the tribunal has consented and the court is satisfied that its determination is likely to produce substantial cost savings and there has been no delay by the party in making the application. In addition the court must be convinced that there is a good reason why it and not the tribunal should decide the matter.
174. Rule 42(3) provides that the arbitral proceedings will be able to continue until the court comes to a decision on the referral.
175. Rule 42(4) means that there is no appeal of the decision of the Outer House.

**Rule 43 – Variation of time limits set by parties *Default***

176. Rule 43 is a default rule which allows the court on the application of the tribunal or any party to vary time limits agreed by the parties.

**Rule 44 – Time limit variation: procedure etc. *Mandatory***

177. Where rule 43 applies between the parties, the court may vary time limits under that rule only if the court is satisfied that someone would suffer a substantial injustice and any available arbitral process for varying time limits has been exhausted.

178. There is no appeal against or review of the decision of the court.

**Rule 45 – Court’s power to order attendance of witnesses and disclosure of evidence *Mandatory***

179. Rule 45 makes mandatory provision that the court has the same power in arbitration proceedings as it would have in ordinary civil proceedings to order the attendance of a witness or the taking of evidence on commission.
180. There is no appeal against or review of the decision of the court.

**Rule 46 – Court’s other powers in relation to arbitration *Default***

181. Rule 46 is a default rule so, if the parties agree, the court powers specified do not apply to a particular arbitration. Otherwise, the court has the same power in arbitration proceedings as it would have in ordinary civil proceedings. The rule retains the existing law and sets out a range of powers including making an order under section 1 of the Administration of Justice (Scotland) Act 1972 to order the inspection, photographing, preservation, custody and detention of documents and other property (including land) which appear to the court may be relevant to the arbitration proceedings.
182. Rule 46(2) provides that the court has these powers only on application by a party and if an application for an order is made after the arbitration has commenced, then the consent of the arbitrator is required unless the case is one of urgency. The arbitration may continue notwithstanding the application to the court.
183. Rule 46(4) applies rule 46 to arbitrations which have begun and to disputes which have or might arise, where an arbitration agreement provides for the dispute to be resolved by arbitration.
184. Rule 46(5) means that the rule does not affect the court’s powers under any rule of law or the tribunal’s powers (see in particular rule 35).

**Part 6 – Awards**

**Rule 47 – Rules applicable to the substance of the dispute *Default***

185. Rule 47 is a default rule. The dispute will be decided in accordance with the substantive rules decided on by the parties where possible according to the law. If the parties have made no such choice then the tribunal must decide, applying the conflict of law rules.
186. Rule 47(2) provides that a tribunal may only decide the dispute according to concepts like justice, fairness or equity if they form part of the law concerned or if the parties so agree. Because this is a default rule, the parties can agree that the arbitrator should have regards to other considerations.
187. Rule 47(3) provides that commercial and trade usage, custom or practices should also be taken into account as should any other relevant matters.

**Rule 48 – Power to award payment and damages *Mandatory***

188. Rule 48 is a mandatory rule giving the tribunal the power to award payment and damages. There is no general obligation on an arbitrator to award damages. Paragraph (2) ensures that designation of currency is left to agreement of the parties, whom failing the tribunal.

**Rule 49 – Other remedies available to tribunal *Default***

189. Rule 49 is a default rule, in the absence of agreement to the contrary between the parties, which sets out the remedies available to the tribunal in its award. In relation to the rectification or reduction of a deed or document, it will not be possible for an arbitrator

to reduce a court decree. See section 11 for restrictions on this power against third parties.

### **Rule 50 – Interest *Mandatory***

190. Rule 50 is a mandatory rule. It gives the tribunal detailed powers to award interest although there is no general obligation on the tribunal to do so. Rule 50(1) covers both the pre- and post- award period. Rule 50(2) provides the tribunal with the power to specify the interest rate and the period for which it is payable. This can be different for different amounts (rule 50(3)). Rule 50(4) provides that an award may in particular specify the manner in which interest is calculated, including compound interest, unless the parties agree otherwise. Rule 50(5) preserves any power of the tribunal to award interest otherwise than under this rule.

### **Rule 51 – Form of award *Default***

191. Rule 51 is a default rule for the form of a tribunal's award. The consequence of an award not being in proper form is that it could be a ground for challenge of the award. Rule 51(1) provides that an award must be signed by all the arbitrators or at least by those assenting to it.
192. Paragraph (2)(a) provides that the award must state where the arbitration is seated, i.e. in Scotland. Were it not for this, the juridical seat of the arbitration might not be clear from the award. Paragraph (2)(b) provides that the award must state when it is made and the date on which the award takes effect. Paragraph (2)(c) requires the tribunal to give its reasons for the award. Paragraph (2)(d) provides that if there has been a previous provisional or part award, an award must contain details of the previous award and, in the case of a previous provisional award, specify the extent to which that award is superseded or confirmed.
193. Under rule 51(3) the award is made by delivering it to each of the parties in accordance with rule 83. This is subject to the power of the arbitrator to withhold the award in case of non-payment of the fees and expenses of the arbitrator (rule 56).

### **Rule 52 – Award treated as made in Scotland *Default***

194. It may not always be possible or convenient to sign the award in the place where the arbitration was held and there have been cases where a signature was applied away from the seat of arbitration leading to difficulties establishing what the applicable law is. Rule 52 is therefore a default rule that given that the arbitration is seated in Scotland, an award is to be treated as having been made in Scotland even if it is signed outwith Scotland.

### **Rule 53 – Provisional awards *Default***

195. Rule 53 is a default rule that that in the absence of agreement to the contrary between the parties an arbitral tribunal is able to make provisional awards for relief. This will avoid the need for a party to go to court to seek interdict.

### **Rule 54 – Part awards *Mandatory***

196. Rule 54(1) is a mandatory rule which provides that the tribunal may make more than one award during the arbitration. Rule 54(2) provides that awards dealing with only part of the dispute are to be known as "part awards". A part award must specify the matters to which it relates (rule 54(3)).

### **Rule 55 – Draft awards *Default***

197. Rule 55 is a default rule that in the absence of agreement between the parties, the tribunal may (it does not have to) issue an award in draft to the parties and then must allow

the parties to make representations before the award is actually made. It is thought to be good practice for arbitrators to issue awards in draft form to the parties who will therefore have an opportunity to comment and point out any errors, ambiguity, etc, though it is acknowledged that it will not always be possible to do this due to time constraints.

### **Rule 56 – Power to withhold award on non-payment of fees or expenses**

#### ***Mandatory***

198. Rule 56 is a mandatory rule. Rule 56(1) provides that the tribunal may refuse to deliver or send an award to the parties unless all the fees and expenses of the tribunal have been paid in full.
199. Rule 56(2) provides that where the tribunal refuses to deliver its award on this basis, a party can apply to the court for an order on delivery on payment into court by the applicant of the fees demanded. The applicant will have to provide the full amount of fees and expenses (or a lesser amount specified by the court). The applicant may have to seek payment of the other party's share separately from the other party or parties to the arbitration. The court then directs how the fees and expenses "properly payable" are to be determined and these are met from the funds in court. Any balance will be paid back to the applicant. This provides a remedy for a party who wants to take up the award but considers the tribunal's fees are excessive and wants them reviewed - although it will not assist a party who considers the fees to be excessive where the other party has already paid the tribunal's fees (in which case the remedy would be an application under rule 62). Rule 56(3) provides that the procedure is not available if the arbitration agreement provides for any process for appeal or review of the fees and expenses demanded which has not been exhausted. Rule 56(4) provides that the decision of the court is final.

### **Rule 57 – Arbitration to end on last award or early settlement *Default***

200. Rule 57 is a default rule. Rule 57(1) provides that the end of an arbitration, when the arbitral tribunal's powers are to cease, will be when the last, or terminating, award to be made in the arbitration is made (see rule 51) and no claim is outstanding. This is, however, subject to rule 57(2) which provides exceptions in cases of objection to the arbitrator's jurisdiction (rule 20(3)) or failure to submit a claim (rule 37).
201. Rule 57(3) provides that the parties may end the dispute by notifying the tribunal that they have settled the dispute. Under rule 57(4) an award may reflect the terms of the settlement of the dispute. The Scottish Arbitration Rules (with the exception of rule 51(2)(c) – the tribunal's statement of reasons for an award – and Part 8 (challenging awards)) apply to such an award.
202. Rule 57(5) means that the fact that arbitral proceedings have ended does not affect the operation of other rules.

### **Rule 58 – Correcting an award *Default***

203. Rule 58 is a default rule which gives arbitrators a power to correct certain defects in any final award they make. This rule applies to part awards and provisional awards as it applies to final awards. Rule 58 provides a procedure for such corrections.
204. Rule 58(2) provides that the tribunal may on its own initiative or on the application of a party make a correction. Rule 58(8) provides that a corrected award should be treated as though it had been in corrected form on the date it first took effect. While there is a risk that parties may implement awards which are corrected, the parties will be on notice that this can happen, and this possibility is time limited (see rule 58(4) and (6)). In rule 58(4) the ability of the Outer House or sheriff to extend time limits for correcting an award is final. When a party applies for correction, rule 58(3) means that they are

obliged to send a copy of the application to the other party, which will give the other party warning.

205. Rule 58(7) provides that where a correction has, in the judgement of the tribunal, a consequential effect on another part of the corrected award or any other award, whether on some part of the substance of the dispute, or on expenses or interest, the tribunal may make consequential correction of that award.

## **Part 7 – Arbitration expenses**

### **Rule 59 – Arbitration expenses *Default***

206. Rule 59 is a default rule which defines “arbitration expenses”. The fees and expenses incurred by the arbitrator (including any umpire – see rule 82) and the parties are included. Also, if a fee is paid to the arbitral appointments referee or third party, that can be considered part of the expenses of the arbitration.

### **Rule 60 – Arbitrators’ fees and expenses *Mandatory***

207. Rule 60 is a mandatory rule for the payment of such reasonable fees and expenses of the arbitrator as are appropriate in the circumstances. These provisions apply to arbitrators who have ceased to act and cover the tribunal, arbitral appointments referee and other third parties. Contractual rights to payment of fees or expenses remain relevant. Rule 60 applies in the same way to the fees and expenses of any umpire as it does to those of an arbitrator (rule 82).
208. Rule 60(1) provides that the parties to the arbitration are to be severally liable to the arbitrator(s) for payment of the arbitrators’ own fees and expenses as well as those of the tribunal. The fees and expenses are treated as a whole, so there is no question of the award being delivered to only one party on payment by that party of his or her “share” of the fees and expenses. “Several liability” means that arbitrators can recover the full amount of fees and expenses from either party. The party’s liability between themselves is not necessarily joint – it will depend on how they agree, or on how the tribunal decides, recoverable expenses are to be split (rule 62). The parties are not made “jointly” liable between themselves as rule 60 is mandatory and liability between the parties may not be joint at all times but rather as agreed by the parties or determined by the tribunal under rule 62.
209. Rule 60(2) extends the several liability of the parties to the fees and expenses of the arbitral appointments referee and other third parties.
210. Rule 60(3) provides a right for any party, arbitrator, arbitral appointments referee or other third party to apply for the fees and expenses to be fixed by the Auditor of Court. This will cover the situation where there has been no agreement as to the basis for payment of fees and expenses. Rule 60(4) provides that, unless the Auditor decides otherwise, the amount of any fee will be determined by the Auditor to reflect a reasonable commercial rate of charge and to allow a reasonable amount for all reasonably incurred expenses. The tribunal also has the power to apply to the Auditor to cover the situation in which, for example, there has been simply no agreement on fees and expenses and parties refuse to pay what the tribunal demands.
211. Where the application to the Auditor of Court is made after payment has been made, under rule 60(5), the Auditor may order repayment of any amount as is shown to be excessive. The purpose of this is to cover the situation where a party who has not agreed the level of fees with the tribunal (because it is claimed the tribunal’s demands are excessive) is unable to obtain delivery of the award without paying those fees in full because the tribunal refuses to deliver the award pending full payment. An order by the Auditor has effect as if it was made by the sheriff.

212. Rule 60(6) provides that the rule does not affect the Outer House's power to make an order under rule 16.

### **Rule 61 – Recoverable arbitration expenses *Default***

213. Rule 61 provides that the arbitrator's fees and expenses and the tribunal's expenses in conducting the arbitration are recoverable. It provides that the amount of the parties' legal and other expenses (see rule 59) which are recoverable, as opposed to the arbitrator's fees and expenses (dealt with in rule 60), will be determined by the tribunal or the Auditor and, unless they decide otherwise, this will be on the basis of a reasonable amount for reasonably incurred expenses. Any doubt when determining the amount of other expenses recoverable must be resolved in favour of the person liable to pay them.
214. Rule 61 applies in the same way to the fees and expenses of any umpire as it does to those of an arbitrator (rule 82).

### **Rule 62 – Liability for recoverable arbitration expenses *Default***

215. Rule 62 allows the tribunal to allocate liability for the recoverable expenses (or any part of those expenses) between the parties and decide how much one party may recover from the other. For example, if the parties have paid an equal share of the arbitrator's fees and expenses in advance and the tribunal makes an award allocating liability for expenses 70% to party A and 30% to party B then party A has the right to recover 20% of the expenses from party B.
216. As this is a default rule, parties are free to agree how to divide these expenses between themselves. Failing such agreement, rule 62(1) gives the tribunal the power to allocate expenses as it thinks fit. Rule 62(2) provides that this must be done with regard to principle that expenses follow award. In making an award allocating the parties' liability for expenses, the tribunal can take into account whether the parties have fulfilled their duties towards the arbitral process and whether, for example, they have been guilty of delay or obstruction.
217. Until an award for recoverable expenses is made or where the tribunal does not make an award, rule 62(3) imposes joint liability on the parties for any part of the recoverable arbitration expenses in respect of which the tribunal does not allocate liability by award (and so makes each liable, as between themselves, for a 50% share). This express right of relief in the Act is why it is unnecessary to make this liability "joint and several".
218. Rule 62(4)(a) makes it clear that parties' liability to each other in respect of recoverable tribunal fees and expenses (and other recoverable third party expenses) does not relieve the parties of their own liability to the tribunal or third parties, for example, just because a tribunal orders Party A to reimburse Party B in respect of legal costs does not relieve Party B of its liability to pay its lawyers. Rule 62(4)(b) makes it clear that the rule does not create a *jus quaestium tertio* (that is, continuing the example, it does not give the third party lawyers a title to sue Party A).

### **Rule 63 – Ban on pre-dispute agreements about liability for arbitration expenses *Mandatory***

219. Rule 63 makes mandatory provision that a party can only be liable to pay the whole or any part of the expenses of arbitration if the agreement on expenses is made after the dispute in question arises. This is an important protection for parties in an unequal bargaining position.
220. This rule does not affect other matters relating to expenses, for instance institutional rules for example on the taking of deposits where the monies remain the property of the parties until drawn on. Under such rules, deposits have no effect on the final expenses award - if the parties have overpaid, they get a refund, if they have underpaid they have to pay the difference.



### **Rule 64 – Security for expenses *Default***

221. Rule 64 is a default rule that, in the absence of agreement to the contrary, an arbitrator has the power to order a claimant or counterclaimant to provide security for the expenses of the arbitration and if that order is not complied with to make an award dismissing any claim by that party. Security should be at the arbitrator's discretion, exercised according to the general principles of the Act. Rule 64(2) provides that residence outside the UK may not be the sole reason for requiring security (otherwise it may be unfair to those involved in international arbitration) nor should incorporation or management of a company outwith the UK.

### **Rule 65 – Limitation of recoverable arbitration expenses *Default***

222. Rule 65 is a default rule which gives the tribunal the power to make a provisional or part award to cap a party's liability for arbitration expenses – a power which could for instance be used if one of the parties has enough financial resources that they could take advantage of their financial position against another party with more limited resources. In this way, even if the expenses exceed the specified amount, the amount recoverable from that party can be capped.
223. Rule 65(2) provides that an award imposing a cap on expenses must be made in advance of the expenses being incurred.

### **Rule 66 – Awards on recoverable arbitration expenses *Default***

224. Rule 66 is a default rule providing that expenses awards can be separate from final awards.

## **Part 8 – Challenging awards**

### **Rule 67 – Challenging an award: substantive jurisdiction *Mandatory***

225. Rule 67 is a mandatory rule. Rule 67(1) provides that a party can apply to the court to challenge the arbitrator's jurisdiction and rule 67(2) gives the court powers in relation to the award made. There is other provision in the rules (rule 19) for the arbitrator to rule on his or her own jurisdiction, and an appeal under rule 67 is also subject to the limits on review in rule 71(2) and (4) (including the requirement to use any available arbitral process of review). It is however necessary to make provision for an appeal after the final award has been made since it may only be at that stage that it becomes apparent that the arbitrator has acted outwith his or her jurisdiction. Rule 67(3) provides that any variation in the award has effect as part of the tribunal's award.
226. Rule 67(4) provides that an appeal against the Outer House's decision on a jurisdictional appeal may be made to the Inner House but only with leave of the Outer House. Leave may be given only where there is an important point of principle or practice or another compelling reason for the Inner House to consider the appeal (rule 67(5)). The Outer House's decision on granting leave is final (rule 67(6)), as is the decision of the Inner House on a jurisdictional appeal (rule 67(7)).

### **Rule 68 – Challenging an award: serious irregularity *Mandatory***

227. Rule 68 is a mandatory rule. It sets out comprehensive grounds (in paragraph (2)) on which an award may be challenged for serious irregularity and gives the court powers in relation to the award made. The Act guards against vexatious or frivolous challenges which may be undertaken simply to delay the arbitral procedure or the enforcement of an award and so the challenge procedure is only available in cases of serious irregularity. An irregularity is to be regarded as being serious only if it gives rise to a substantial injustice. The responsibility of the court is to review the process on how the arbitrator came to a decision. It is also subject to the limits set out in rule 71.

228. Rule 68(5) provides that an appeal may be made to the Inner House against the Outer House's decision on a serious irregularity appeal, but only with the leave of the Outer House. Leave may be given only where there is an important point of principle or practice or another compelling reason for the Inner House to consider the appeal (rule 68(6)). The Outer House's decision on granting leave is final (rule 68(7)), as is the decision of the Inner House on a serious irregularity appeal (rule 68(8)).

### **Rule 69 – Challenging an award: legal error *Default***

229. Rule 69 is a default rule. The Act repeals section 3 of the Administration of Justice (Scotland) Act 1972 (the "stated case" procedure). The Act replaces the stated case procedure with a default appeal for error of law to the Outer House, but only against a final award of the arbitrator. A final award includes a part award, but not a provisional award. The appeal is for error of law on the basis of the findings of fact in the award, including facts which the tribunal treated as established for the purpose of deciding the point. The error of law jurisdiction of the court only extends to the law of Scotland.
230. Rule 69(2) means that the court does not have the jurisdiction to hear an appeal where, by agreement of the parties, the award contains no reasons.

### **Rule 70 – Legal error appeals: procedure etc. *Mandatory***

231. Rule 70 applies only where rule 69 applies between the parties.
232. Where parties have elected not to contract out of the appeal on error of law, that appeal should not be severely restricted if the parties do not wish it to be so. Rule 70(2) makes clear the parties can agree to bypass the hurdle of applying for leave to appeal on grounds of legal error.
233. Rule 70(3) means that an appeal will only be considered by the Outer House if a party's rights will be substantially affected by the decision and the arbitrator was asked to consider the issue. Rule 70(3)(c) means that the court will consider the findings of fact in the award (including assumed facts), but will not open up the facts of the award. The appeal is subject to a requirement to obtain leave of the court for the review on the basis that the decision was wrong or the point is open to doubt. The limits in rule 71 also apply here.
234. Rule 70(5) creates a presumption that the court should proceed with an application for leave without a hearing unless satisfied otherwise. There is no appeal against the Outer House's decision on a leave application (rule 70(6)). The appeal must be made within 7 days once leave to appeal is granted unless made with the agreement of the parties (rule 70(7)).
235. The Outer House may give leave to appeal its decision on a legal error appeal to the Inner House where the proposed appeal would raise an important point of principle or practice or there is another compelling reason for the Inner House to consider the appeal (rule 70(9) and (10)). The Outer House's decision on granting such leave is final (rule 70(11)). Nor is there an appeal against the decision of the Inner House on a legal error appeal (rule 70(12)).

### **Rule 71 – Challenging an award: supplementary *Mandatory***

236. Rule 71 is a mandatory rule setting out a number of conditions which are intended to discourage frivolous applications and appeals. Appeals must be made within 28 days of the award (or any correction or appeal), after exhausting other avenues of appeal or review. Leave to appeal against a decision of the Outer House must be made within 28 days of that decision and that leave to appeal, if granted, expires after 7 days. The rule also sets out further provision about the handling of appeals including appeals to the Inner House against decisions of the Outer House in relation to the supplementary powers of the court on hearing arbitral appeals in rule 71(7) to (11), including in

subsection (9) to cater for arbitration agreements which provide that no action is to be brought on a contract until an arbitration award has been made. The Inner House has power when hearing appeals to make the same orders and other decisions as the Outer House. The same appeal rules and restrictions apply to the supplementary powers of the court on appeal as to the main appeal decisions.

### **Rule 72 – Reconsideration by tribunal *Mandatory***

237. Rule 72 is a mandatory rule. Rule 72(1) means that, following the decision of the Outer or Inner House, the tribunal has 3 months to make a new award or confirm the original award unless directed otherwise. Rule 72(2) provides that the Scottish Arbitration Rules apply to the new award as they apply in relation to the appealed award.

## **Part 9 – Miscellaneous**

### **Rule 73 – Immunity of tribunal etc. *Mandatory***

238. Rule 73 is a mandatory rule which ensures that the role of arbitrators is not compromised by lack of immunity, and that actions for damages against arbitrators are not used as a way for a party to the arbitration to challenge or re-open the arbitration itself.
239. Rule 73(1) provides that an arbitrator is not to be liable in damages for anything done or omitted in the exercise or discharge of his or her functions as arbitrator, unless under rule 73(2)(a) that act or omission is shown to have been in bad faith. This means that immunity will extend to all the arbitrators functions, namely those under the Act and also those supplemented by contractual provisions of a separate arbitration agreement.
240. In relation to resignation, rule 73(2)(b) provides that the immunity does not affect any liability incurred by the arbitrator by reason of his resigning. Rule 16(1)(c) on the resignation of the arbitrator provides protection for a resigning arbitrator by allowing the court to grant relief from liability if it is satisfied that in all the circumstances it was reasonable for the arbitrator to resign.
241. Rule 73(3) extends immunity to any clerk, employee or agent of the arbitrator or any other person assisting the tribunal to perform its functions.

### **Rule 74 – Immunity of appointing arbitral institution etc. *Mandatory***

242. The principal difference between nominating and appointing bodies is that nominating bodies put forward the name of an arbitrator who is then appointed by the parties while appointing bodies themselves appoint the arbitrator.
243. In most cases the parties will agree on the identity of the arbitrator but there will be situations when this does not happen. Rule 7 provides for failure of the appointment procedure.
244. Rule 74 is a mandatory rule. Rule 74(1) provides that nominating or appointing bodies or individuals who appoint or nominate arbitrators are not to be liable for damages for anything done or omitted in the exercise or discharge of that function unless under rule 74(1)(a) that act or omission is shown to have been in bad faith.
245. Rule 74(1)(b) provides that nominating and appointing bodies will also not be liable for the acts or omissions of the arbitrator whom it nominates or appoints nor for the tribunal the arbitrator forms part of or any clerk agent or employee of the tribunal.
246. Rule 74(2) extends immunity to employees or agents of nominating or appointing bodies.

**Rule 75 – Immunity of experts, witnesses and legal representatives *Mandatory***

247. As arbitration is a private version of judicial proceedings, the Act places experts, witnesses and legal representatives in no more vulnerable a position if they are taking part in arbitration proceedings than if they are taking part in civil court proceedings. Rule 75 therefore makes mandatory provision for this immunity for experts, witnesses and legal representatives in arbitration.

**Rule 76 – Loss of right to object *Mandatory***

248. Rule 76 is a mandatory rule. As a matter of effective, fair and efficient dispute resolution, an arbitration should not proceed if circumstances exist which compromise the arbitrator or the process. Rule 76(1) provides a number of grounds on which a party may object. The right to object will be lost (as will the right to make a later appeal to the court) and the arbitration will continue if the objection is not made timeously (unless the delay is because the party did not know of the ground for objection and could not with reasonable diligence discover the information - rule 76(3)). Rule 76(2) explains what is meant by timeous. Rule 76(4) means that a party cannot raise a timely objection on a matter which it is not allowed to object to.

**Rule 77 – Independence of arbitrator *Mandatory***

249. Rule 77 is mandatory and defines “independence” as meaning anything which gives rise to justifiable doubts as to the arbitrator’s impartiality.

**Rule 78 – Consideration where arbitrator judged not to be impartial and independent *Default***

250. Rule 78 is a default rule which applies (subject to the agreement of the parties) where an arbitrator is adjudged not to be impartial or independent. Rule 78(2) provides that the court can consider whether an arbitrator has complied with rule 8 by disclosing, without delay, to the parties any circumstances likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence when considering whether to make an order about the arbitrator’s fees and expenses.

**Rule 79 – Death of arbitrator *Mandatory***

251. Rule 79 is a mandatory rule providing that the arbitrator’s authority ceases on death.

**Rule 80 – Death of party *Default***

252. Rule 80 is a default rule that subject to agreement of the parties, an arbitration agreement is not discharged by the death of a party.

**Rule 81 – Unfair treatment *Default***

253. Rule 81 ensures for the avoidance of doubt that only one of the parties need have been treated unfairly for the purposes of the rules. Evidence in relation to other parties does not necessarily have to be shown by comparison in order to make out a case for unfairness.

**Rule 82 – Rules applicable to umpires *Mandatory***

254. Rule 82 is a mandatory rule. Rule 82(1) clarifies the application of certain specific Scottish Arbitration Rules to umpires. Rule 82(2) clarifies that the parties cannot choose to disapply mandatory rules in relation to umpires, but can modify or disapply the default rules.

### **Rule 83 – Formal communications *Default***

255. Rule 83 provides default rules for the means of intimating certain formal notices or documents under the arbitration agreement or in the course of arbitral proceedings, in the event that this is not already agreed between the parties. References in the Act to “notifying” things are caught by rule 83 as it applies to “notice” having to be given. Rule 83(2) provides that the “formal communication” as defined in rule 83(1) must be in writing. Rule 83(3) makes provision for the delivery of a formal communication and rule 83(4) provides that any electronic communication will be treated as being in writing only if it gets to its destination in a readable state and can be used as a record. Rule 83(5) provides for where formal communication is to be deemed to have been made, given or served.
256. Rule 83(6) provides that where it is not reasonably practicable for formal communication to be made, given or served, the arbitrator will have the power to determine that another means of intimation is used or for dispensing with intimation. This will allow the arbitrator to move the arbitral process along and will also reduce court involvement. Specific provision for review by the court on this matter has not been made but in some cases the general provisions in Part 8 on challenging the decision of an arbitrator might be relevant.
257. Rule 83(7) means that the rule only applies to documents which are being intimated under the arbitration agreement or as part of the arbitration proceedings. If the documents relate to proceedings of the court, then the rules of court in relation to delivery and service of documents will apply.

### **Rule 84 – Periods of time *Default***

258. Rule 84 provides default provisions for calculating time periods in the absence of agreement between the parties.

### ***Index***

259. The index highlights a number of expressions used in the rules and where they are explained.

### ***Schedule 2 – Repeals***

#### **Arbitration (Scotland) Act 1894, Arbitration Acts 1950 and 1975**

260. These repeals reflect the consolidation, replacement or re-enactment of equivalent provisions in the Arbitration (Scotland) Act. The 1950 and 1975 Act are repealed in so far as they form part of Scots law. The 1950 Act can be repealed because the international obligations under the Geneva Convention on the Execution of Foreign Arbitral Awards which it implements are superseded on the adoption by all relevant States of the New York Convention, which expressly supersedes the relevant provisions of the Geneva Convention.

#### **Administration of Justice (Scotland) Act 1972**

261. The ability to state a case on point of law at any stage of an arbitration under section 3 of the 1972 Act is repealed.

#### **Law Reform (Miscellaneous Provisions) (Scotland) Act 1980**

262. [Section 17](#) is repealed. It permits a Senator of the College of Justice (if he or she thinks fit and with the consent of the Lord President) to accept appointment as an arbitrator where the dispute appears to him or her to be of a commercial character. The provision regulates the appointment of judges as public officials. It is consolidated in section 23 of the Act.

## **Law Reform (Miscellaneous Provisions) (Scotland) Act 1990**

263. The UNCITRAL (United Nations Commission on International Trade Law) Model Law provisions contained in section 66 of, and Schedule 7 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 are repealed. Parties can still use their arbitration agreements to adopt the Model Law as the basis for their arbitration in preference to the default Scottish Arbitration Rules in the Act which should fill some gaps in the Model Law such as the lack of powers to award damages and interest. However that is subject to the mandatory Scottish Arbitration Rules in schedule 1 to the Act. Subject to those restrictions, parties can also adopt the adaptation of the Model Law in the 1990 Act even though it has been repealed.

## **PARLIAMENTARY SCRUTINY**

The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings, the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports and other papers.

<i><b>Proceedings and Reports</b></i>	<i><b>Reference</b></i>
<b>Introduction</b>	
29 January 2009	Bill as introduced (SP Bill 19A)
<b>Stage 1</b>	
<i><b>(a) Economy, Energy and Tourism Committee</b></i>	
10th Meeting, 18 March 2009	Col 1865
16th Meeting, 20 May 2009	Cols 2122-2150
17th Meeting, 27 May 2009	Cols 2157-2188
18th Meeting, 3 June 2009	Cols 2235-2256
19th Meeting, 10 June 2009	Col 2262
20th Meeting, 17 June 2009	In private
5th Report, 2009 (Session 3), 18 June 2009	Stage 1 Report on the Arbitration (Scotland) Bill (SP Paper 302)
<i><b>(b) Finance Committee</b></i>	
4th Meeting, 10 February 2009	Col981
<i><b>(c) Subordinate Legislation Committee</b></i>	
9th Meeting, 10 March 2009	Col516
11th Meeting, 24 March 2009	Col 527
Report to Economy, Energy and Tourism Committee, 27 March 2009	Report on Arbitration (Scotland) Bill
<i><b>(d) Consideration by the Parliament</b></i>	
Stage 1 Debate, 25 June 2009	Cols 18954-18981, 18988
<b>Stage 2</b>	



*These notes relate to the Arbitration (Scotland) Act 2010  
(asp 1) which received Royal Assent on 5 January 2010*

<b><i>Proceedings and Reports</i></b>	<b><i>Reference</i></b>
<b><i>(a) Economy, Energy and Tourism Committee</i></b>	
22nd Meeting, 9 September 2009	<a href="#">Cols 2334-2335</a>
23rd Meeting, 16 September 2009	<a href="#">Cols 2396-2398</a>
25th Meeting, 30 September 2009	<a href="#">Cols 2476-2477</a>
26th Meeting, 7 October 2009	<a href="#">Cols 2501-2518</a>
Bill as amended at Stage 2	<a href="#">Bill as amended(SP Bill 19A)</a>
<b><i>(b) Subordinate Legislation Committee</i></b>	
29th Meeting, 10 November 2009	<a href="#">Col 782</a>
45th Report, 2009 (16 November 2009): Arbitration (Scotland) Bill as amended at Stage 2	<a href="#">SP Paper 339</a>
<b>Stage 3</b>	
<b><i>Consideration by the Parliament</i></b>	
Stage 3 Debate, 18 November 2009	<a href="#">Cols 21260-21293, 21297</a>
Bill passed, 18 November 2009	<a href="#">Bill as passed (SP Bill 19A)</a>
<b>Royal Assent -</b>	<a href="#">SP Business Bulletin No 2/2010</a>