

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Final provisions

Schedule 1 – 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.