

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Final provisions

Schedule 1 – Scottish Arbitration Rules

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.