

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Final provisions

Schedule 1 – Scottish Arbitration Rules

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.