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

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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"[1].

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.

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

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 if 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.