

## SCHEDULE

### ACAS (FLEXIBLE WORKING) ARBITRATION SCHEME

## PART XXIII

### CHALLENGING THE AWARD

#### Challenges on grounds of substantive jurisdiction: English/Welsh arbitrations

**138EW.** *Section 67 of the Arbitration Act 1996(1) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

(i) *In subsection (1)—*

(a) *for “(upon notice to the other parties and to the tribunal) apply to the court” substitute “(upon notice to the other party, to the arbitrator and to ACAS) apply to the High Court or the Central London County Court”;*

(b) *for “(see section 73)” substitute “(see Part XXIV of the Scheme)”;* and

(c) *after “section 70(2) and (3)” insert “as modified for the purposes of the Scheme”.*

(ii) *After subsection (1) insert—*

*“(1A) In this section—*

*“Arbitration Agreement” means an agreement to refer a dispute to arbitration in accordance with, and satisfying the requirements of, the Scheme;*

*“the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004; and*

*“substantive jurisdiction” means any issue as to—*

---

(1) 1996 c. 23. Section 67 of the Arbitration Act 1996 provides as follows:

**“67.—(1)** A party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –

- (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
- (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

- (a) confirm the award,
- (b) vary the award, or
- (c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.”

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

- (a) *the validity of the Arbitration Agreement and the application of the Scheme to the dispute or difference in question;*
- (b) *the constitution of the arbitral tribunal; or*
- (c) *the matters which have been submitted to arbitration in accordance with the Arbitration Agreement.”*

### **Challenges on grounds of substantive jurisdiction: Scottish arbitrations**

**139S.** A party to a Scottish arbitration may appeal to the Court of Session—

- (i) challenging any award of the arbitrator as to his or her substantive jurisdiction; or
- (ii) on the ground that an award made by the arbitrator on the merits is of no effect, in whole or in part, because the arbitrator did not have substantive jurisdiction.

**140S.** A party may lose the right to appeal under paragraph 139S in accordance with Part XXIV below.

**141S.** Appeals under paragraph 139S are subject to the provisions of paragraphs 157S, 158S and 159S below.

**142S.** For the purposes of paragraph 139S, “substantive jurisdiction” means any issue as to—

- (i) the validity of the arbitration agreement and the application of the Scheme to the dispute or difference in question;
- (ii) the constitution of the arbitral tribunal; or
- (iii) the matters which have been submitted to arbitration in accordance with the Arbitration Agreement.

**143S.** The arbitrator may continue the arbitral proceedings and make a further award while an appeal to the Court under paragraph 139S is pending in relation to an award of the arbitrator as to his substantive jurisdiction.

**144S.** On the appeal under paragraph 139S the Court may (without prejudice to any other power which it may exercise or remedy which it may grant)—

- (i) confirm the award;
- (ii) vary the award;
- (iii) declare the award to be of no effect in whole or in part; or
- (iv) reduce the award in whole or in part.

### **Challenges for serious irregularity: English/Welsh arbitrations**

**145EW.** *Section 68 of the Arbitration Act 1996(2) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

---

(2) [1996 c. 23](#). Section 68 of the Arbitration Act provides as follows:

“**68.**—(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

(i) *In subsection (1) –*

- (a) for “(upon notice to the other parties and to the tribunal) apply to the court” substitute “(upon notice to the other party, to the arbitrator and to ACAS) apply to the High Court or Central London County Court”;
- (b) for “(see section 73)” substitute “(see Part XXIV of the Scheme)”;
- (c) after “section 70(2) and (3)” insert “as modified for the purposes of the Scheme”.

(ii) *In subsection (2)–*

- (a) in paragraph (a) for “section 33 (general duty of tribunal)” substitute “Part X of the Scheme (General Duty of the Arbitrator)”;
- (b) in paragraph (b) after “see section 67” insert “as modified for the purposes of the Scheme”; and
- (c) in paragraph (c) for “agreed by the parties” substitute “as set out in the Scheme”;
- (d) in paragraph (e) for “any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award” substitute “ACAS”;
- (e) omit paragraph (h);
- (f) in paragraph (i) for “any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award” substitute “ACAS”.

(iii) *In subsection (3)–*

- (a) in paragraph (b) insert “vary the award or” before “set the award aside”;
- (b) omit “The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it

- 
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
  - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
  - (d) failure by the tribunal to deal with all the issues that were put to it;
  - (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
  - (f) uncertainty or ambiguity as to the effect of the award;
  - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
  - (h) failure to comply with the requirements as to the form of the award; or
  - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
- (a) remit the award to the tribunal, in whole or in part, for reconsideration;
  - (b) set the award aside in whole or in part; or
  - (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

- (4) The leave of the court is required for any appeal from a decision of the court under this section.”

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

*would be inappropriate to remit the matters in question to the tribunal for reconsideration.”.*

(iv) *After subsection (4) insert—*

*“(5) In this section, “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.”*

### **Challenges for serious irregularity: Scottish arbitrations**

**146S.** A party to a Scottish arbitration may appeal to the Court of Session against an award in the proceedings on the ground of serious irregularity affecting the arbitrator, the proceedings or the award.

**147S.** A party may lose the right to appeal under paragraph 146S above in accordance with section XXIV below.

**148S.** Appeals under paragraph 146S are subject to the provisions of paragraphs 157S, 158S and 159S below.

**149S.** For the purpose of paragraphs 146S “serious irregularity” means an irregularity of one or more of the following kinds which the Court considers has caused or will cause substantial injustice to the appellant—

- (i) failure by the arbitrator to comply with Part X above (General Duty of Arbitrator);
- (ii) the arbitrator exceeding his or her powers (otherwise than by exceeding his or her substantive jurisdiction as defined in paragraph 142S above);
- (iii) failure by the arbitrator to conduct the proceedings in accordance with the procedure set out in the Scheme;
- (iv) failure by the arbitrator to deal with all the issues put to him or her;
- (v) ACAS exceeding its powers;
- (vi) uncertainty or ambiguity as to the effect of the award;
- (vii) the award having been obtained by fraud or the way in which it was procured being contrary to public policy; or
- (viii) any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitrator or ACAS.

**150S.** If there is shown to be serious irregularity affecting the arbitrator, the proceedings or the award, the Court may (without prejudice to any other power which it may exercise or remedy which it may grant)—

- (i) remit the award to the arbitrator, in whole or in part, for reconsideration;
- (ii) vary the award;
- (iii) declare the award to be of no effect in whole or in part; or
- (iv) reduce the award in whole or in part.

### **Appeals on questions of EC law, the Human Rights Act 1998 and devolution issues: English/Welsh arbitrations**

**151EW.** *Section 69 of the Arbitration Act 1996(3) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

---

(3) 1996 c. 23. Section 69 of the Arbitration Act 1996 provides as follows:

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

- (i) *In subsection (1)—*
  - (a) *omit “Unless otherwise agreed by the parties”;*
  - (b) *for “(upon notice to the other parties and to the tribunal) appeal to the court” substitute “(upon notice to the other party, to the arbitrator and to ACAS) appeal to the High Court or Central London County Court”;*
  - (c) *for “a question of law” substitute “a question (a) of EC law, or (b) concerning the application of the Human Rights Act 1998, or (c) any devolution issue”;*
  - (d) *omit “An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section”.*

---

**“69.—**(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

- (2) An appeal shall not be brought under this section except—
  - (a) with the agreement of all the other parties to the proceedings, or
  - (b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70(2) and (3).
- (3) Leave to appeal shall be given only if the court is satisfied—
  - (a) that the determination of the question will substantially affect the rights of one or more of the parties,
  - (b) that the question is one which the tribunal was asked to determine,
  - (c) that, on the basis of the findings of fact in the award—
    - (i) the decision of the tribunal on the question is obviously wrong, or
    - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
  - (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
- (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
- (5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
- (6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
- (7) On an appeal under this section the court may by order—
  - (a) confirm the award,
  - (b) vary the award,
  - (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court’s determination, or
  - (d) set aside the award in whole or in part.
- (8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.”

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

- (ii) *In subsection (2) after “section 70(2) and (3)” insert “as modified for the purposes of the Scheme”.*
- (iii) *In subsection (3)—*
  - (a) *omit paragraph (b);*
  - (b) *in paragraph (c) after the words “on the basis of the findings of fact in the award” insert “, in so far as the question for appeal raises a point of EC law, the point is capable of serious argument, and in so far as the question for appeal does not raise a point of EC law”.*
- (iv) *In subsection (7) omit “The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration”.*
- (v) *After subsection (8) insert—*
  - “(9) *In this section—*
    - “*EC law*” *means –*
      - (a) *any enactment in the domestic legislation of England and Wales giving effect to rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties, and*
      - (b) *any such rights, powers, liabilities, obligations and restrictions which are not given effect by any such enactment; and*
    - “*devolution issue*” *means a devolution issue as defined in paragraph 1 of Schedule 6 of the Scotland Act 1998 or a devolution issue as defined in paragraph 1 of Schedule 8 of the Government of Wales Act 1998; and*
    - “*the Scheme*” *means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.”*

### **Appeals on questions of EC law, the Human Rights Act 1998 and devolution issues: Scottish arbitrations**

**152S.** A party to a Scottish arbitration may appeal to the Court of Session—

- (i) on a question of EC law,
- (ii) on a question concerning the application of the Human Rights Act 1998, or
- (iii) on a devolution issue

arising out of an award made in the arbitration .

**153S.** An appeal shall not be brought under paragraph 152S except—

- (i) with the agreement of all the other parties to the proceedings; or
- (ii) with the leave of the Court.

**154S.** Leave to appeal shall be given only if the Court is satisfied—

- (i) that the determination of the question will substantially affect the rights of one or more of the parties;
- (ii) that on the basis of the findings of fact in the Note issued with the award, insofar as the question for appeal raises a point of EC law, the point is capable of serious argument, and insofar as the question for appeal does not raise a point of EC law—
- (iii) the decision of the arbitrator on the question is obviously wrong, or
- (iv) the question is one of general public importance and the decision of the arbitrator is at least open to serious doubt, and

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

- (v) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the Court to determine the question.

**155S.** On an appeal under paragraph 152S the Court may (without prejudice to any other power which it may exercise or remedy which it may grant)—

- (i) confirm the award;
- (ii) vary the award;
- (iii) remit the award to the arbitrator, in whole or in part, for reconsideration in light of the Court’s determination;
- (iv) declare the award to be of no effect in whole or in part;
- (v) reduce the award in whole or in part; or
- (v) recall the award in whole or in part.

### **Time limits and other procedural restrictions on challenges to awards: English/Welsh arbitrations**

**156EW.** *Section 70 of the Arbitration Act 1996(4) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications—*

- (i) *In subsection (1) after “section 67, 68 or 69” insert “(as modified for the purposes of the Scheme)”.*

(4) **1996 c. 23.** Section 70 of the Arbitration Act 1996 provides as follows—

“**70.**—(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

- (a) any available arbitral process of appeal or review, and
- (b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—

- (a) does not contain the tribunal’s reasons, or
- (b) does not set out the tribunal’s reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is –

- (a) an individual ordinarily resident outside the United Kingdom, or
- (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions.”

**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (ii) *In subsection (2)—*
  - (a) *omit paragraph (a);*
  - (b) *in paragraph (b) for “section 57 (correction of award or additional award)” substitute “Part XXI of the Scheme (Correction of Awards)”.*
- (iii) *In subsection (3) for “of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process” substitute “the award was despatched to the applicant or appellant by ACAS or, if an application for a correction or additional award under paragraph 124 has been made and declined, the date on which the arbitrator’s decision was despatched to the applicant or appellant by ACAS”;*
- (iv) *Omit subsection (5).*
- (v) *After subsection (8) insert—*
  - “(9) *In this section, “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.*”

#### **Time limits and other procedural restrictions on challenges to awards: Scottish Arbitrations**

**157S.** An appeal under paragraphs 139S, 146S or 152S may not be brought if the appellant has not first exhausted any available recourse under Part XXI of the Scheme (Correction of Awards).

**158S.** An appeal under paragraphs 139S, 146S or (where parties have agreed under paragraph 153S(i)) 152S or an application for leave to appeal under paragraph 153S(ii) shall be lodged within 28 days of whichever is the later of—

- (i) the date on which the award was despatched to the appellant by ACAS;
- (ii) where a correction or additional award has been made in accordance with Part XXI above, the date on which a memorandum of correction or additional award under Part XXI above was despatched to the appellant by ACAS; and
- (iii) where a party has applied for a correction or additional award under paragraph 124 above but the arbitrator has declined to make any correction or additional award, the date on which intimation of the arbitrator’s decision was despatched to the appellant by ACAS.

**159S.** If on an appeal under paragraph 139S, 146S or 152S it appears to the Court that the award and the arbitrator’s Note

- (i) do not contain the arbitrator’s reasons, or
- (ii) do not set out the arbitrator’s reasons in sufficient detail to enable the court to properly consider the application or appeal,

the Court may order the arbitrator to state the reasons for his or her award in sufficient detail for that purpose.

#### **Common law challenges and saving**

**160EW.** *Sections 81(1)(c) and 81(2) of the Arbitration Act 1996(5) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme.*

(5) 1996 c. 23. Sections 81(1)(c) and 81(2) of the Arbitration Act 1996 provide as follows—

“**81.**—(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to —



*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

**161S.** Nothing in this Part of the Scheme shall be construed as excluding the operation of any rule of law as to the refusal of recognition or enforcement of an arbitral award in a Scottish arbitration on grounds of public policy.

#### **Exclusion of stated case procedure**

**162S.** Section 3 of the Administration of Justice (Scotland) Act 1972<sup>(6)</sup> shall not apply to an arbitration under the scheme.

#### **Challenge or appeal: effect of order of the court**

**163EW.** Section 71 of the Arbitration Act 1996<sup>(7)</sup> shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications—

- (i) In subsection (1) after “section 67, 68 and 69” insert “(as modified for the purposes of the Scheme)”;
- (ii) After subsection (3) insert—

“(3A) In this section, “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004”
- (iii) Omit subsection (4).

**164S.** The following provisions have effect where the Court makes an order under paragraph 144S, 150S or 155S of the Scheme with respect to an award—

- (i) Where the award is varied, the variation has effect as part of the arbitrator’s award;
- (ii) Where the award is remitted to the arbitrator in whole or in part for reconsideration the arbitrator shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the Court may direct.

---

...

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.”

<sup>(6)</sup> 1972 c. 59.

<sup>(7)</sup> 1996 c. 23. Section 71 of the Arbitration Act 1996 provides as follows—

“71.—(1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.

(2) Where the award is varied, the variation has effect as part of the tribunal’s award.

(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.”