These documents relate to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 29 January 2009

ARBITRATION (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Arbitration (Scotland) Bill introduced in the Scottish Parliament on 29 January 2009:
   • Explanatory Notes;
   • a Financial Memorandum;
   • a Scottish Government Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

   A Policy Memorandum is printed separately as SP Bill 19–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

4. Arbitration is a legal procedure where parties submit a dispute between them to a third party, who often has specialist expertise or knowledge, who will act as a private tribunal to produce a final and binding decision on the dispute. Some statutory regimes refer matters to arbitration, but for other cases by agreeing to go to arbitration the parties voluntarily deny themselves recourse to the courts or other methods of dispute resolution. The agreement to go to arbitration may be contained in a contract concluded between the parties possibly years before they come into dispute, or agreed in a submission when the dispute arises.

5. The arbitrator’s decision or “award” is final and binding without further court hearing of the issues. An award may be enforced like a court decree. Within countries which have ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention) or the 1961 Geneva Convention (European Convention on International Commercial Arbitration), agreements to arbitrate and awards made in other countries will be recognised with no need – in the case of most awards – for further review of the issues.

6. Domestic Scots arbitration law derives primarily from case law and has not been codified into statute. The law is often not clear or readily accessible, nor does it reflect modern practice on arbitration. Section 66 of, and Schedule 7 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) adopted the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on arbitration into Scots law for international commercial arbitration, but not for non-commercial arbitration or domestic arbitration where both parties are domiciled in Scotland.

THE BILL

7. The Bill has drawn from the UNCITRAL Model Law (adopted on 21 June 1985), the UK Arbitration Act 1996 (c.23), from the work done in a draft Bill for Scotland developed by a working group chaired by Lord Dervaird in 2002 and from consultation comments by parties interested in the promotion of arbitration in Scotland. The Scottish Law Commission 1984 Report on Breach of Confidence (Scot. Law. Comm. No. 90) was also drawn from in drafting the confidentiality provisions in Scottish Arbitration Rule 25 in schedule 1 to the Bill.
8. The approach in the Bill is broadly consistent with the UNCITRAL Model Law and the regime for the rest of the UK in the Arbitration Act 1996 where appropriate. It establishes a statutory regime for arbitration in Scotland. Schedule 1 to the Bill lays out a standard set or code of clauses (“the Scottish Arbitration Rules”) that form a regime for parties who voluntarily agree to go to arbitration, where that arbitration is ultimately governed by the law of Scotland.

9. Which law ultimately governs any arbitration is governed by the “seat” of the arbitration, also known as the “juridical seat” or “place” of the arbitration. This concept is important because arbitrations are often between parties in different countries and so cross jurisdictional borders. The concept of the “seat” describes the country where the arbitration is based and which legal system, including the rules of Scots law enshrined in the Bill, therefore governs any arbitration. It is important to realise that governing legal system can be different from the law which applies to the substance of the dispute, or even (in some jurisdictions) from the rules regulating particular aspects of arbitration procedure. Where an arbitration is seated may depend on the choice of the parties as to which law applies, and the conflict of law rules in the different legal systems which may become involved.

10. The regime in the Bill will also apply to a greater or lesser degree to arbitration under specific statutes, so far as not inconsistent with those statutes, and as applied under the Bill.

11. The Bill and the Scottish Arbitration Rules contain a number of “mandatory” rules, which cannot be departed from even by agreement of the parties if they have agreed to go to arbitration at all under Scots law. However, the majority of the Scottish Arbitration Rules are “default” rules – parties are free to make their own arrangements, by agreement, on the matters covered by the default rules. Where the parties agree on different rules, or agree to disapply the default rules, either before or after the dispute arises between the parties, the default rule or rules will not apply (section 8 of the Bill). For instance, default rules will not apply if they are inconsistent with the parties’ agreement to arbitrate or anything done with the parties’ agreement, or if the parties choose another law to apply instead. The code in the Scottish Arbitration Rules can also be adopted wholesale by parties and used by their arbitrator.

12. Although the Scottish Arbitration Rules set out in schedule 1 – both mandatory and default rules – may affect the operation of parties’ arbitration agreements, they remain statutory rules. In particular, default rules do not lose their statutory nature because they appear in a schedule to the Bill or apply only in certain circumstances, e.g. in the absence of contrary agreement by the parties.

13. The Bill applies the same rules to domestic, cross-border (with other parts of the UK) and international arbitrations, where the Scottish courts have jurisdiction over an arbitration whose seat is in Scotland. Accordingly, the separate treatment in Scotland of international commercial arbitrations under the UNCITRAL Model Law will be replaced by a single code informed by the UNCITRAL Model Law principles. The Bill also provides for the enforcement of arbitral awards, foreign and domestic (section 10), and consolidates a separate procedure for the enforcement of foreign arbitral awards to which the New York Convention applies (sections 16 to 20).
Terminology – “arbitrator”

14. In Scots common law there is a technical difference between the term “arbiter”, more commonly used, and the term “arbitrator”, where an arbiter decides in accordance with the law while an arbitrator can decide in terms of general equitable considerations (known as “ex aequo et bono”). The term “arbitrator” is however employed throughout the regime established by the Bill following modern international arbitral practice.

Statutory arbitrations

15. A wide range of statutes, for example, employment legislation, use arbitration to resolve disputes which arise under those statutes. The Bill includes provision to apply, to the extent that they are not inconsistent with the statutory provision, the general rules of arbitration in the Bill to such arbitrations and a power for the Scottish Ministers, with the approval of the Scottish Parliament, to vary by order how those rules apply (sections 14 and 15).

Consumer arbitrations


COMMENTARY ON SECTIONS

Introductory

Section 1 – Founding principles

17. Section 1 sets out the founding principles of the Bill. The purpose of the founding principles is to inform and steer the interpretation and application of the provisions of the Bill. The principles reflect the principles found in the Arbitration Act 1996. The founding principles are not ranked; therefore there is no hierarchy of principles.

18. The first founding principle establishes fairness and impartiality as the standards by which disputes are to be resolved by arbitration. It is also part of this principle that resolution of the dispute is to be effected without unnecessary delay and without incurring unnecessary expense.

19. Although much of the code set out in the Scottish Arbitration Rules and in the Bill is made up of rules which will only apply in the absence of agreement between the parties, the second founding principle reinforces the idea that parties are to be free to decide themselves on procedures for the resolution of their disputes, subject only to public interest safeguards.

20. The third principle is that the court should not intervene in the arbitration process except as provided by the Act. This principle will assist the courts to limit unnecessary intervention.
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The court should only intervene if it is necessary to support the arbitration process, for example to get the process back on track or by enforcing orders by the arbitrator.

Section 2 – Key terms

21. Section 2 explains certain important terms used in the Bill. These include:

“Arbitration” – The Bill and Scottish Arbitration Rules will apply to domestic arbitration, cross-border arbitration between parties in the different jurisdictions of the UK and international arbitrations whose seat is in Scotland. (Although sections 9 and 10 extend more widely.)

“Dispute” – The definition is inclusive rather than exclusive and may include disputes other than the kinds mentioned. A “dispute” for the purposes of the Bill generally and section 9 on the suspension (or “sisting”) of legal proceedings in particular, includes a refusal to accept a claim, for instance even if it can be claimed that the matters in question are indisputable or beyond dispute. It also includes any other difference, contractual or otherwise.

Section 3 – Seat of arbitration

22. As noted at paragraph 9 above, the seat of an arbitration is the country in which an arbitration is based from which the legal system which ultimately governs the arbitration is drawn. It may affect the procedures to be adopted in the arbitration, for instance for an arbitration seated in Scotland under the Bill the mandatory Scottish Arbitration Rules will apply. The Bill provides that the seat may be designated by the parties, an institution or individual where authorised explicitly by the parties or by the arbitral tribunal. The seat of the arbitration may also be determined, for instance, by the courts according to the rules of private international law.

23. Choosing to arbitrate in Scotland in accordance with the Bill does not affect the substantive law used to decide the dispute itself, for instance it does not mean that it must be determined in accordance with Scots law.

Arbitration agreements

Section 4 – Arbitration agreement

24. The agreement to go to arbitration can be in a past agreement between the parties or in a submission to the arbitrator when the dispute arises. It can include arbitration clauses in separate agreements incorporated in the arbitration agreement.

25. Arbitration agreements are recognised by the Bill whether they are concluded orally or in writing. Accordingly, all arbitrations in Scotland may in principle be subject to the Bill. However, other specific laws may require arbitration agreements to be in writing, for instance the Requirements of Writing (Scotland) Act 1995 (c.7) in relation to heritable property. A written arbitration agreement may also be necessary for the resulting arbitral award to be enforceable, either in Scotland by summary diligence following registration for execution in the Books of Council and Session, or in foreign countries under the New York Convention.
26. As noted above, there are also other specific legal protections for consumers who might be inadvertently caught by low-value arbitration clauses.

Section 5 – Separability

27. Section 5(1) provides that an arbitration agreement which is part of another agreement is to be treated as separate from the principal contract. Accordingly, section 5(2) means that where it is alleged that the principal contract is void or non-existent, voidable or otherwise unenforceable, the arbitrator will not lack jurisdiction over the dispute in question only as a result of that fact. Section 5(3) means that a tribunal can rule on whether an agreement that includes an arbitration agreement is valid in accordance with that arbitration agreement.

Scottish Arbitration Rules

Section 6 – Scottish Arbitration Rules

28. Schedule 1 to the Bill sets out the Scottish Arbitration Rules in the form of a single code. The Rules govern every arbitration seated in Scotland and form part of the general law of Scotland in the same way as the body of the Act, and not as a matter of contract between the parties. Whether a provision is included in the body of the Act or the schedule is irrelevant to its status as statutory law. Section 6 is however subject to section 8 whereby parties can agree that a default rule does not apply. The arbitration agreement between the parties will always have to be considered together with the Bill.

Section 7 – Mandatory rules

29. The mandatory rules take precedence over any agreement between the parties which conflicts with those rules. If an arbitration is not conducted in accordance with the rules which apply to it (including the mandatory rules), the tribunal or arbitrator may, depending on the breach, be open to removal or dismissal (with potential consequences for their expenses), and an award may be liable to challenge.

30. The mandatory rules are listed in section 7. They are also identified in the Scottish Arbitration Rules in schedule 1 for the ease of the reader by an “M” at the end of the rule heading.

Section 8 – Default rules

31. Parties are free to make their own arrangements, by agreement, on matters covered by the default rules. Only where there is no such agreement will the default rules apply. Default rules do not lose their statutory nature because they apply only in certain circumstances, for instance in the absence of contrary agreement by the parties.

32. Subsections (2) to (4) make detailed provision making clear that the parties can agree to vary any or all of the default rules, insofar as they agree to modify or disapply them. This can be done in the arbitration agreement or elsewhere, and at any time before or after the arbitration begins. Subsection (4) makes clear that inconsistent provision in the arbitration agreement takes precedence, and that the parties can choose to adopt, for example, the UNCITRAL Arbitration Rules, the Chartered Institute of Arbitrators’ Scottish Arbitration Code, industry standard rules
or the procedural rules of other legal systems (subject to the mandatory Scottish Arbitration Rules which cannot be contracted out of).

33. The default rules are identified in the Scottish Arbitration Rules in schedule 1 for the ease of the reader by a “D” at the end of the rule heading.

Suspension of legal proceedings

Section 9 – Suspension of legal proceedings

34. Section 9(1) and (2) mean that a court must suspend legal proceedings insofar as the matter in dispute is the subject of a valid agreement to arbitrate. This is subject to the conditions in subsection (3) which mean the party seeking to suspend the legal proceedings must notify the parties in those proceedings and must apply to suspend the proceedings after taking any necessary procedural step under the court rules in those proceedings to acknowledge the proceedings, but before answering the substantive claim (for instance by lodging formal answers). Subsection (4) provides that arbitration agreements cannot prevent parties bringing legal proceedings in relation to matters which the court refuses to sist, but this does not apply to statutory arbitrations (see section 14(2)).

35. Section 9(5) applies the provisions to arbitrations seated outwith Scotland, in order that the Scottish courts have a duty to sist proceedings in relation to arbitrations seated in England and Wales or Northern Ireland or elsewhere.

Enforcing and challenging arbitral awards etc.

Section 10 – Enforcement of arbitral awards

36. Section 10 deals with the options available to a successful party in the event that the unsuccessful party fails to comply with the terms of the arbitral award.

37. Section 10(1) provides that an application may be made to the sheriff or the Court of Session for an order enforcing an arbitral award with the same effect as a court order bearing a warrant for execution. The effect is that where a court grants an order under this rule, the tribunal’s award may be enforced by executing diligence in the same way as a court decree may be enforced (without a further warrant).

38. The court will not make such an order, or may restrict its extent to part of the award, if satisfied that the tribunal lacked jurisdiction (section 10(2)). Under section 10(3), the party against whom an arbitral award is made can object on the basis that the arbitrator had no jurisdiction only where the person has not lost the right to object under the Scottish Arbitration Rules (in particular rule 73).

39. Arbitral awards will continue to be registrable for execution in the Books of Council and Session or sheriff court books where the parties have so agreed in the arbitration agreement. (This is separate to the procedure in subsections (1) to (3)). In those circumstances, awards continue to be enforceable by summary diligence in accordance with the law of diligence (see the Debtors (Scotland) Act 1987 (c.18) and the Debt Arrangement and Attachment (Scotland)
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Act 2002 (asp 17), amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3)). The arbitration agreement will continue to require consent to registration for execution, and to be registered. Section 10(4) makes limited provision to that end, providing that, where the other requirements for enforcement are met, arbitral awards are so registrable despite not being self-proving in accordance with the Requirements of Writing (Scotland) Act 1995, unless the parties agree otherwise.

40. Section 10(5) means enforcement is available in the Scottish courts for those with arbitrations seated elsewhere.

41. Section 10 does not affect any other right to enforce an award under sections 17 to 19 (New York Convention awards) or under any other enactment or rule of law.

Section 11 – Court intervention in arbitrations

42. Section 11 does not allow legal proceedings in respect of the tribunal’s award or any other act or omission of the tribunal other than in accordance with the Bill. It particularly excludes judicial review or other types of review or appeal of arbitral awards.

43. Section 11(3) limits, to certain specific procedures under the Bill, the occasions when jurisdictional questions may be raised with the courts.

Section 12 – Persons who take no part in arbitral proceedings

44. Section 12 protects the rights of those who are alleged to be a party to the arbitral proceedings, but who do not participate in the arbitration. Subsection (1) allows such a party to challenge the jurisdiction of the tribunal on the same grounds as a party, by court proceedings.

45. Subsection (2) gives an alleged party the same rights as an actual party to the proceedings to challenge an award under rules 65 or 66 but relieves him or her of any duty to exhaust available arbitral procedures.

Section 13 – Anonymity in legal proceedings

46. Section 13(1) protects the identity of a party in legal proceedings with any disclosure outwith court by the court or in reports of the court proceedings without the consent of all parties being treated as a breach of an obligation of confidence. The duty of confidentiality is subject to the exemptions in 13(2). Section 13 only covers the parties’ identities and not the other contents of any court judgement. See also default rule 25 which provides that the arbitrator(s) and the parties must not disclose confidential information relating to the arbitration.

Statutory arbitration

Section 14 – Statutory arbitration: special provisions

47. The Bill interacts with various other Acts (and subordinate legislation) which provide for particular arbitration procedures for particular statutory purposes. The Bill will allow parties to those arbitrations the benefits of the procedures set out in the Bill where appropriate.
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48. The Bill provides that where a dispute on a particular matter is referred to arbitration under such legislation, the Bill will apply to any arbitration under that other legislation, as if the reference to arbitration was as a result of an agreement between the parties. Subsection (3) provides however that if the other legislation makes provision which is inconsistent with the Bill, that other legislation prevails.

49. Subsection (4) provides that every statutory arbitration is to be seated in Scotland. In the case of domestic arbitration, the effect is to prevent parties to a statutory arbitration from agreeing to seat the arbitration outwith Scotland. This is however subject to conflict of law rules (for instance on the interaction with the equivalent section 95(2) of the Arbitration Act 1996 for the other jurisdictions of the UK).

50. Subsection (5) identifies the rules that do not apply to statutory arbitrations. Subsection (6) limits the circumstances in which statutory arbitrations covering different matters can be consolidated together (permitted by rule 39 where parties so agree).

Section 15 – Power to adapt enactments providing for statutory arbitration

51. The subordinate legislation powers in paragraph (a) allow the Scottish Ministers by order to modify the rules (and other Bill provisions) as they apply to statutory arbitrations and in paragraph (b) to amend any enactment which provides for arbitration to satisfactorily apply the rules (or other Bill provisions) to arbitrations conducted under that specific legislation. The statutory instrument procedure requiring affirmative approval by the Scottish Parliament applies where primary legislation is amended.

Recognition and enforcement of New York Convention awards

Section 16 – New York Convention awards

52. Subsection (1) explains a “Convention award”. The awards recognised or enforced are arbitral awards made in the territory of a state which is a signatory to the New York Convention. The UK ratified the Convention on 24 September 1975. The Arbitration Act 1975 (c.50) provides for the enforcement of New York Convention awards in Scotland. Sections 16 to 20 are a consolidation of the relevant provisions of the 1975 Act.

53. Such agreements must be in writing (unlike arbitration agreements domestically which can be oral). The reference to “written” arbitration agreements will cover for instance telegrams or an exchange of letters as mentioned in the text of the New York Convention which this provision implements (according to the general interpretation rules which apply to Acts of the Scottish Parliament and subordinate legislation made under them – see the definition of “writing” in Schedule 2 to S.S.I. 1999/1379). By comparison, section 7(1) of the Arbitration Act 1975 (c.3) which this provision consolidates reflects the age of that Act.

54. There have in the past been difficulties where the seat of an arbitration has been held to be where the award was signed. Therefore, subsection (2) provides that such an award is treated as made at the seat of the arbitration regardless of where it was signed, despatched or delivered to any of the parties.
55. Under subsection (3), if the Queen by Order in Council which will be subject to negative resolution procedure in the Scottish Parliament declares a particular state is party to the New York Convention, so long as the relevant order is in force, this is to be conclusive evidence that the state in question is a party in respect of any territory for which it is responsible.

Section 17 – Recognition and enforcement of New York Convention awards

56. Section 17 provides that New York Convention awards are recognised as binding on the parties between which they are made. Such an award is therefore capable of being relied upon by those parties as a defence, set-off or in any other way in any legal proceedings in Scotland. The court can order that such an award is enforceable in the same manner as a judgment or order of the court to the same effect.

57. A New York Convention award will also continue to be enforceable in accordance with the general law by summary diligence (as with enforcement under section 10 of the Bill - see paragraph 39 above) provided the usual requirements are met. For instance, the arbitration agreement must contain consent to registration of the award in the Books of Council and Session for execution and the agreement and award must be so registered.

Section 18 – Refusal of recognition or enforcement

58. Section 18(1) allows the court to refuse to recognise or enforce under this procedure a New York Convention award only if the person against whom enforcement is sought can prove certain matters in accordance with this section. Subsections (2) to (4) prescribe the detailed circumstances in which recognition or enforcement of an award may be refused. If an award purports to decide matters which were not submitted to arbitration as well as those which were properly so submitted, the court is able to recognise or enforce those parts which were properly submitted so long as these can be separated from those which exceeded the jurisdiction of the arbitrator (subsection (5)).

59. Subsection (6) provides that where an award is challenged before the component authority of the country where the award was made or under whose law it was made, a court decision here as to its recognition and enforcement may be adjourned and the party against whom recognition or enforcement is claimed ordered to provide suitable security. Subsection (7) defines the “competent authority” for these purposes.

Section 19 – Evidence to be produced when seeking recognition or enforcement

60. Under subsection (1) a party is obliged to provide a duly authenticated original award and the original arbitration agreement, or duly certified copies.

61. Where the award or agreement is in a language other than English, subsection (2) provides that the party is also obliged to produce a translation of it which has been certified by an official or sworn translator or by a diplomatic or consular agent.

Section 20 – Saving for other bases of recognition or enforcement

62. Section 20 preserves the rights of a party to rely upon or enforce an award other than under this procedure, for instance at common law.
Supplementary

Section 21 – Prescription and limitation

63. Both positive and negative prescriptive periods whereby rights are created or expire are interrupted by arbitration. By amending the Prescription and Limitation (Scotland) Act 1973, subsections (2) and (3) align the date deemed to be the date of judicial interruption with the “commencement” date when the arbitration begins (see Scottish Arbitration Rule 1 for the default position). The Bill substitutes the definition of “preliminary notice” in the 1973 Act to that effect.

64. Subsections (4) and (6) alter rules on the limitation of court actions so that the periods that apply for the limitation of actions are interrupted by recourse to arbitration. Subsection (5) provides that the date of the interruption of the running of the limitation period is the “commencement” date of the arbitration. Limitation will continue as at present not to prevent recourse to arbitration.

Section 22 – Arbitral appointments referee

65. The Scottish Ministers are given the power to authorise by order who is to be an arbitral appointments referee who can appoint an arbitrator in default of the parties making provision for this (see rule 7 of the Scottish Arbitration Rules). The Scottish Ministers must have regard to the criteria for appointment laid out in subsection (2). Where an equivalent body has been specified in the arbitration agreement this will prevail over a statutory referee (see section 8(3) and (4) and rule 7(1)(a)).

Section 23 – Power of judge to act as arbitrator or umpire

66. Section 23(1) provides that a judge of the Court of Session is able to accept appointment as an arbitrator in a commercial dispute with the consent of the Lord President of the Court of Session. Subsection (2) gives Scottish Ministers the power by order, subject to negative resolution procedure in the Scottish Parliament, to set a fee for the judge’s services to be paid to the administration office in the Court of Session. Subsection (3) provides that any jurisdiction exercisable by the Court of Session in a matter in which a judge is acting as arbitrator is to be exercisable by the Inner House. The decision of the Inner House is final. Section 23 consolidates section 17 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55).

Section 24 – Amendments to UNCITRAL Model Law or New York Convention

67. Scottish Ministers are given the power, subject to affirmative resolution procedure in the Scottish Parliament, to amend and update the Act or provision made under it in consequence of any future amendment to the UNCITRAL Model Law or New York Convention.

Section 25 – Amendment of Conveyancing (Scotland) Act 1924 (c.27)

68. The consequential amendment to section 46 of the Conveyancing (Scotland) Act 1924 means that if the court grants an enforcement order in respect of an arbitral award reducing a document registered in the Sasine Register (see rule 45(d)), the arbitral award is to be registered
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in the Sasine Register. Third parties relying on the Register before the award is registered are protected by section 46 of the 1924 Act.

Section 26 – Articles of Regulation 1695

69. The 25th Act of the Articles of Regulation 1695 is disapp lied from arbitration – it is replaced by the provisions of the Scottish Arbitration Rules permitting court challenges, in particular Part 8 and rule 66.

Section 27 – Repeals

70. The repeals of enactments specified in column 1 of schedule 2 have effect to the extent specified in column 2.

Section 28 – Arbitrability of disputes

71. Section 28 makes it clear that the Bill does not make any dispute arbitrable where the subject-matter of the dispute means it would not otherwise be capable of arbitration under Scots law. For instance, matters which affect public rights or the status of parties in law may not be referred to arbitration.

Final provisions

Section 29 – Interpretation

72. Section 29(1) sets out definitions that apply throughout the Bill except where the contrary intention appears.

73. Subsection (2) provides that the Bill applies in the same way to three or more parties as it does to disputes between two parties.

Section 30 – Ancillary provision

74. Section 30 gives the Scottish Ministers power to make supplementary, incidental, consequential, transitional, transitory or saving provision by freestanding order to implement the Bill, including by modifying enactments, instruments or documents.

Section 31 – Orders

75. Section 31 provides that any Ministerial power under the Bill 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 procedure except where primary legislation is being amended or under section 24 to update the Bill to reflect amendments to the UNCITRAL Model Law or the New York Convention, where the statutory instrument procedure requires an affirmative resolution of the Scottish Parliament (see subsection (3)).

Section 32 – Crown application

76. The Bill 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 33 – Commencement

77. Section 33 provides for bringing the operative provisions of the Bill into force by order.

Section 34 – Short title

78. The Bill, once enacted, is to be called the Arbitration (Scotland) Act 2009.

SCHEDULE 1 – SCOTTISH ARBITRATION RULES

Part 1 – Commencement and constitution of tribunal etc.

Rule 1 – Commencement of arbitration Default

79. An arbitration will begin on service of notice by one of the parties submitting the dispute to arbitration. The significance of this date may be by virtue of the arbitration agreement or the Bill 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

80. 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 Bill 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

81. An arbitrator must be a natural person.

Rule 4 – Eligibility to act as arbitrator Default

82. As an arbitrator may be chosen from fields as diverse as farming, construction, forestry, oil engineering or international law, the Bill is not prescriptive about who should be eligible to become an arbitrator. Unless the parties agree otherwise, an arbitrator must, however, be legally capable of acting as an arbitrator; otherwise any award made by him or her may be liable to nullification.

Rule 5 – Number of arbitrators Default

83. 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

84. The Bill 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 Bill 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 74). 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 Default

85. Rule 7 is a default rule. Paragraph (1) provides that 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 28 day period required by rule 6, either party may refer the appointment of the arbitrator to the arbitral appointments referee. If one party appoints and the others do not then the referee steps in only in relation to the appointment of that individual arbitrator.

86. Rules 7(2) to (4) 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.

87. Rule 7(5) 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 (6)).

88. The arbitral appointments referee or the court will have to have regard to the matters set out in paragraph (7), the nature of the dispute, the arbitration agreement and the attributes of the appointee, when making the appointment.

89. Paragraph (8) 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

90. Rule 8 requires an arbitrator (and any umpire see rule 78) - including when asked 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 75).
91. 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**

92. 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**

93. Rule 10 is a default rule, in the absence of agreement 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 a decision is not made within 14
days of the tribunal receiving the objection.

**Rule 11 – Removal of arbitrator by parties Default**

94. 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 notifying the arbitrator.

**Rule 12 – Removal of arbitrator by court Mandatory**

95. 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.

96. 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 25(2) – if that default rule applies
- only if any breach of confidence has caused substantial injustice.

**Rule 13 – Dismissal of tribunal by court Mandatory**

97. 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*

98. 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.

99. 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*

100. 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. 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*

101. 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.

102. 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.

**Rule 17 – Reconstitution of tribunal** *Default*

103. 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

104. Rule 18 is a default rule, in the absence of agreement 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).

Part 2 – Jurisdiction of tribunal

Rule 19 – Power of tribunal to rule on own jurisdiction Mandatory

105. 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

106. 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.

107. 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 65.

108. 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 65) 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

109. 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

110. 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.
Paragraph (2) restricts the right to apply. An application can 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.

Paragraph (3) provides that the arbitral proceedings will be able to continue until the court comes to a decision on the referral.

Rule 22(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 23 – General duty of the tribunal Mandatory

Rule 23 is a mandatory rule. Rule 23(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.

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.

Under rule 23(2), the tribunal must allow parties a reasonable opportunity to put their case and respond to the other party’s case.

Rule 24 – General duty of the parties Mandatory

Rule 24 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 25 – Confidentiality Default

Rule 25 is a default rule which provides that the arbitrator(s) and the parties must not disclose confidential information as defined in rule 25(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.

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.

120. 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.

121. 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.

122. 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.

123. 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).

124. 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 25.

125. Rule 25(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 25(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.

126. If the tribunal breaches the duties in rules 25(2) and (3), this may be grounds for removal of the arbitrator under rules 12 and 13. If both 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 25(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 25 may also be a ground for a serious irregularity appeal where non-compliance causes substantial injustice.

¹ [2008] EWCA Civ 184; WLR (D) 82 at paragraph 101.
Rule 26 – Tribunal deliberations Default

127. Rule 26 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 25(2) and (3).

Part 4 – Arbitral proceedings

Rule 27 – Procedure and evidence Default

128. Rule 27 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.

129. Rule 27(2) provides an illustrative, but not exhaustive, list of such powers for the tribunal. Arbitrators are for instance allowed to act inquisitorially (rule 27(2)(e)) and can generally disapply the law of evidence (rule 27(2)(h)).

Rule 28 – Place of arbitration Default

130. Rule 28 is a default rule which permits an arbitration seated in Scotland to meet elsewhere.

Rule 29 – Tribunal decisions Default

131. Rule 29 is a default rule. In the absence of agreement between the parties, rule 29(1) provides on a default basis that decisions, orders and awards can be made by all or a majority of the arbitrators. Where there is neither unanimity nor a majority, rule 29(2) provides that any chair or if no person has been so nominated, an umpire, will have the casting vote, and for appointment of such an umpire.

Rule 30 – Tribunal directions Default

132. Rule 30 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 31 – Power to appoint clerk, agents or employees etc. Default

133. Rule 31 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 23(1)(c)(ii) and the need for the tribunal to avoid unnecessary expenses. Disputes about the “significance” of expenses in rule 31(2) may be resolved by taxation by the auditor of court (which is a process of review of expenses).

Rule 32 – Party representatives Default

134. Rule 32 is a default rule that a party may be represented by a lawyer or any other person chosen by the party. Rule 32(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 33 – Experts Default

135. Rule 33 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 33(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 33(2)(b) provides that it must be at a hearing at which the parties may ask the expert questions.

Rule 34 – Powers relating to property Default

136. Rule 34 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 35 – Oaths or affirmations Default

137. Rule 35 is a default which provides that parties and witnesses may be examined under oath or affirmation which the tribunal may administer.

Rule 36 – Failure to submit claim or defence timeously Default

138. Rule 36 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 36(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.

139. Rule 36(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 37 – Failure to attend hearing or provide evidence Default

140. Rule 37 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 38 – Failure to comply with tribunal direction or arbitration agreement Default

141. Rule 38 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
These documents relate to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 29 January 2009

arbitration to comply. Rule 38(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.

142. Rule 38(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 39 – Consolidation of proceedings Default

143. Rule 39 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 14(6) of the Bill states that for statutory arbitrations, notwithstanding rule 39, consolidation is only possible for other arbitrations under the same statutory provision.

Part 5 – Powers of court in relation to arbitral proceedings

Rule 40 – Referral of point of law Default

144. Rule 40 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 40(2) restricts the right to apply. An application can 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 sound reasons why it and not the tribunal should decide the matter.

145. Rule 40(3) provides that the arbitral proceedings will be able to continue until the court comes to a decision on the referral.

146. Rule 40(4) means that there is no appeal of the decision of the Outer House.

Rule 41 – Variation of time limits set by parties Default

147. Rule 41 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 where anyone would suffer a substantial injustice and any available arbitral process for varying time limits has been exhausted.

Rule 42 – Court’s power to order attendance of witnesses and disclosure of evidence Mandatory

148. Rule 42 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.

Rule 43 – Court’s other powers in relation to arbitration Default

149. Rule 43 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.

150. Rule 43(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.

151. Rule 43(3) applies rule 43 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.

152. Rule 43(4) 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 34).

**Part 6 – Awards**

*Rule 44 – Rules applicable to the substance of the dispute Default*

153. Rule 44 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.

154. Rule 44(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.

155. Rule 44(3) provides that commercial and trade usage, custom or practices should also be taken into account as should any other relevant matters.

*Rule 45 – Remedies available to tribunal Default*

156. Rule 45 sets out the remedies available to the tribunal in its award, including a sum in respect of damages or to rectify or reduce a deed or document (see rule 47 and 54(2) for restrictions on this).

*Rule 46 – Interest Default*

157. Rule 46 is a default rule. It gives the tribunal detailed powers to award interest. Rule 46(1) covers both the pre- and post-award period. Rule 46(2) provides the tribunal with the power to specify the interest rate, how it is to be calculated and the period for which it is payable. This can be different for different amounts (rule 46(3)). Rule 46(4) preserves any power of the tribunal to award interest otherwise than under this rule.
These documents relate to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 29 January 2009

Rule 47 – Restriction on awards Default
158. Rule 47 provides that a tribunal award may not order anything a court would be unable to order in the circumstances.

Rule 48 – Form of award Default
159. Rule 48 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 48(1) provides that an award must be signed by all the arbitrators or at least by those assenting to it.

160. 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.

161. Under paragraph 48(3) the award is made by delivering it to each of the parties in accordance with rule 79. 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 53).

Rule 49 – Award treated as made in Scotland Default
162. 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 49 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 50 – Provisional awards Mandatory
163. Rule 50 is a mandatory rule that an arbitrator is able to make provisional awards for relief. This will protect parties in cases where there is inequality of arms and will, for example, avoid the need for a party to go to court to seek interdict. This rule is mandatory because if one of the parties was pre-disposed towards taking some action which would have the effect of frustrating or avoiding the likely or possible outcome of arbitration, then they may have been unlikely to agree that the arbitrator should have power to make provisional orders.

Rule 51 – Part awards Default
164. Rule 51(1) is a default rule that in the absence of agreement between the parties, the tribunal has a general power to make more than one award during the arbitration. Rule 51(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 51(3)).
Rule 52 – Draft awards Default

165. Rule 52 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 53 – Power to withhold award on non-payment of fees or expenses Mandatory

166. Rule 53 is a mandatory rule. Rule 53(1) provides that the tribunal may refuse to deliver an award to the parties unless all the fees and expenses of the tribunal have been paid in full.

167. Rule 53(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 60). Rule 53(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 53(4) provides that the decision of the court is final.

Rule 54 – Award to be final and binding Default

168. Rule 54 is a default rule. Rule 54(1) provides that an award, including a part award, is to be final and binding on the parties and persons claiming through or under them. Rule 54(2) protects the interest of third parties where the order seeks to rectify or reduce a deed or other document. Rule 54(3) provides that parties can still challenge the award by any available arbitral process or under Part 8 of these rules.

Rule 55 – Arbitration to end on last award or early settlement Default

169. Rule 55 is a default rule. Rule 55(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 48) and no claim is outstanding. This is, however, subject to rule 55(2) which provides exceptions in cases of objection to the arbitrator's jurisdiction (rule 20(3)) or failure to submit a claim (rule 36).

170. Rule 55(3) provides that the parties may end the dispute by notifying the tribunal that they have settled the dispute. Under rule 55(4) an award may reflect the terms of the settlement of the dispute. The Scottish Arbitration Rules (with the exception of rule 48(2)(c) – the tribunal’s statement of reasons for an award – and Part 8 (challenging awards)) apply to such an award.
171. Rule 55(5) means that the fact that arbitral proceedings have ended does not affect the operation of other rules.

**Rule 56 – Correcting an award Default**

172. Rule 56 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 56 provides a procedure for such corrections.

173. Rule 56(2) provides that the tribunal may on its own initiative or on the application of a party make a correction. Rule 56(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 56(4) and (6)). When a party applies for correction, rule 56(3) means that they are obliged to send a copy of the application to the other party, which will give the other party warning.

174. Rule 56(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 57 – Arbitration expenses Default**

175. Rule 57 is a default rule which defines “arbitration expenses”. The fees and expenses incurred by the arbitrator (including any umpire – see rule 78) 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 58 – Arbitrators’ fees and expenses Mandatory**

176. Rule 58 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 58 applies in the same way to the fees and expenses of any umpire as it does to those of an arbitrator (rule 78).

177. Rule 58(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 60). The parties are not made "jointly" liable between themselves as rule 58 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 60.
178. Rule 58(2) extends the several liability of the parties to the fees and expenses of the arbitral appointments referee and other third parties.

179. Rule 58(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 58(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.

180. Where the application to the Auditor of Court is made after payment has been made, under rule 58(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.

181. Rule 58(6) provides that the rule does not affect the Outer House’s power to make an order under rule 16.

Rule 59 – Recoverable arbitration expenses Default

182. Rule 59 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 57) which are recoverable, as opposed to the arbitrator’s fees and expenses (dealt with in rule 58), 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.

183. Rule 59 applies in the same way to the fees and expenses of any umpire as it does to those of an arbitrator (rule 78).

Rule 60 – Liability for recoverable arbitration expenses Default

184. Rule 60 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.

185. As this is a default rule, parties are free to agree how to divide these expenses between themselves. Failing such agreement, rule 60(1) gives the tribunal the power to allocate expenses as it thinks fit. Rule 60(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.

186. Rule 60(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). Rule 60(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 60(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 61 – Ban on pre-dispute agreements about liability for arbitration expenses** **Mandatory**

187. Rule 61 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.

188. 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 62 – Security for expenses** **Default**

189. Rule 62 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 Bill. Rule 62(2) provides that residence outside the UK may not be a 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 63 – Limitation of recoverable arbitration expenses** **Default**

190. Rule 63 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.

191. Rule 63(2) provides that an award imposing a cap on expenses must be made in advance of the expenses being incurred.

**Rule 64 – Awards on recoverable arbitration expenses** **Default**

192. Rule 64 is a default rule providing that expenses awards can be separate from final awards.
Part 8 – Challenging awards

Rule 65 – Challenging an award: substantive jurisdiction **Mandatory**

193. Rule 65 is a mandatory rule. Rule 65(1) provides that a party can apply to the court to challenge the arbitrator’s jurisdiction and rule 65(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 65 is also subject to the limits on review in rule 68(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 65(3) provides that any variation in the award has effect as part of the tribunal’s award.

194. Rule 65(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 65(5)). The decision of the Inner House is final (rule 65(6)).

Rule 66 – Challenging an award: serious irregularity **Mandatory**

195. Rule 66 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 Bill 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. Any irregularity has to amount to 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 68(2) and (4).

196. Rule 66(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 66(5)). The decision of the Inner House is final (rule 66(6)).

Rule 67 – Challenging an award: legal error **Default**

197. Rule 67 is a default rule. The Bill repeals section 3 of the Administration of Justice (Scotland) Act 1972 (the “stated case” procedure). The Bill replaces the stated case procedure with a default appeal for error on a point of Scots law (on the basis of the findings of fact in the award) to the Outer House, but only against a final award of the arbitrator. A final award includes a part award. The error of law jurisdiction of the court only extends to the law of Scotland.

198. Rule 67(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.

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199. Rule 67(4) 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. 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 or the court should consider it. The limits in rule 68(2) and (4) also apply here.

200. The Outer House may give leave to appeal its decision 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 68(8) to (10)).

**Rule 68 – Challenging an award: supplementary Mandatory**

201. Rule 68 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, after exhausting other avenues of appeal. It also sets out further provision about the handling of appeals.

**Rule 69 – Reconsideration by tribunal Mandatory**

202. Rule 69 is a mandatory rule. Rule 69(1) means that the tribunal has 3 months to make a new award or confirm the original award unless directed otherwise. Rule 69(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 70 – Immunity of tribunal etc. Mandatory**

203. Rule 70 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.

204. Rule 70(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 70(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 Bill and also those supplemented by contractual provisions of a separate arbitration agreement.

205. In relation to resignation, rule 70(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.

206. Rule 70(3) extends immunity to any clerk, employee or agent of the arbitrator or any other person assisting the tribunal to perform its functions.
These documents relate to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the
Scottish Parliament on 29 January 2009

Rule 71 – Immunity of appointing arbitral institution etc. Mandatory
207. 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.

208. 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.

209. Rule 71 is a mandatory rule. Rule 71(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 71(1)(a) that act or omission is shown to have been in bad faith.

210. Rule 71(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.

211. Rule 71(2) extends immunity to employees or agents of nominating or appointing bodies.

Rule 72 – Immunity of experts, witnesses and legal representatives Mandatory
212. As arbitration is a private version of judicial proceedings, the Bill 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 72 therefore makes mandatory provision for this immunity for experts, witnesses and legal representatives in arbitration.

Rule 73 – Loss of right to object Mandatory
213. Rule 73 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 73(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 73(3)). Rule 73(2) explains what is meant by timeous. Rule 73(4) means that a party cannot raise a timely objection on a matter which it is not allowed to object to.

Rule 74 – Independence of arbitrator Mandatory
214. Rule 74 is mandatory and defines “independence” as meaning anything which gives rise to justifiable doubts as to the arbitrator’s impartiality.

Rule 75 – Consideration where arbitrator judged not to be impartial and independent Default
215. Rule 75 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 75(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 76 – Death of arbitrator Mandatory**

216. Rule 76 is a mandatory rule providing that the arbitrator’s authority ceases on death.

**Rule 77 – Death of party Default**

217. Rule 77 is a default rule that subject to agreement of the parties, an arbitration agreement is not discharged by the death of a party.

**Rule 78 – Rules applicable to umpires Mandatory**

218. Rule 78 is a mandatory rule. Rule 78(1) clarifies the application of certain specific Scottish Arbitration Rules to umpires. Rule 78(2) clarifies that the parties cannot choose to disapply mandatory rules in relation to umpires, but can modify or disapply the default rules.

**Rule 79 – Formal communications Default**

219. Rule 79 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. Rule 79(2) provides that the “formal communication” as defined in rule 79(1) must be in writing. Rule 79(3) makes provision for the delivery of a formal communication and rule 79(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 79(5) provides for where formal communication is deemed to have been made, given or served.

220. Rule 79(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.

221. Rule 79(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 80 – Periods of time Default**

222. Rule 80 provides default provisions for calculating time periods in the absence of agreement between the parties.
Index

223. The index highlights a number of expressions used in the rules and where they are explained.

SCHEDULE 2 – REPEALS

Arbitration (Scotland) Act 1894, Arbitration Acts 1950 and 1975

224. These repeals reflect the consolidation and re-enactment of equivalent provisions in the Arbitration (Scotland) Bill. The 1950 and 1975 Act are repealed in so far as they form part of Scots law.

Administration of Justice (Scotland) Act 1972

225. The ability to state a case on point of law at any stage of an arbitration under section 3 is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1980

226. Section 17 is repealed. It permits a Senator of the College of Justice (if he or she thinks fit and with the consent of the Lord President) to accept appointment as an arbitrator where the dispute appears to him or her to be of a commercial character. The provision regulates the appointment of judges as public officials. It is consolidated in section 23 of the Bill.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

227. The UNCITRAL (United Nations Commission on International Trade Law) Model Law provisions contained in section 66 of, and Schedule 7 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 are repealed. Parties can still use their arbitration agreements to adopt the Model Law as the basis for their arbitration in preference to the default Scottish Arbitration Rules in the Bill which should fill some gaps in the Model Law such as the lack of powers to award damages and interest. However that is subject to the mandatory Scottish Arbitration Rules in schedule 1 to the Bill. Parties can also adopt the adaptation of the Model Law in the 1990 Act even though it has been repealed.

FINANCIAL MEMORANDUM

INTRODUCTION

228. This document relates to the Arbitration (Scotland) Bill introduced in the Scottish Parliament on 29 January 2009. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.
Costs and benefits of arbitration

229. Overall it is not considered that there will be any negative cost impact as a result of the Bill, because arbitration is a voluntary process.

230. Due to the confidential and private nature of arbitration, reliable and accurate data on arbitration in Scotland is difficult to obtain. Estimates have been made in the past that there are around 300 arbitrations in Scotland per annum. A large proportion of these are likely to be low cost consumer arbitrations.

231. Research carried out by Analytical Services Division (ASD) of the Scottish Government suggests that almost 60% of those who responded considered that arbitration is less expensive as a means of dispute resolution than going to court. 65% took the view that arbitration was quicker than going to court. This is compared to 26% who considered arbitration to be more expensive and 15% who considered that arbitration was more expensive and time-consuming than going to court. These impressions relate of course to arbitrations under the current law. It is virtually impossible to make an accurate comparison between the costs of arbitration and going to court since no statistics are held centrally, partly because the fees charged by solicitors and advocates are considered to be commercially confidential.

232. There are benefits to be derived in arbitration from the fact that the arbitrator can adopt procedures which are most appropriate to deal with the circumstances of the particular case, whereas cases which are dealt with by litigation are bound by the rules of the courts. Arbitration can therefore provide flexible procedures (as it is privately funded and initiated) and because it is within the parties’ control, the location, timing and other arrangements can be planned to suit their particular needs.

233. The fee of an arbitrator in general terms is likely to relate to the type and complexity of the dispute. At present it is understood that hourly rate for an arbitrator is £150-£200 per hour. Costs rise to around £240 or more per hour for senior counsel who are acting as arbitrators.

234. There is no such thing as an average dispute, because a high value dispute may only involve one issue which is relatively easy to determine, while a low value one may involve several difficult legal issues. It has been estimated by a stakeholder, however, that a dispute for £100,000 resolved by arbitration would typically involve a fee of £5-10,000 for the arbitrator and might also involve legal expenses of £25,000 for both sides’ legal representation.

235. A number of stakeholders have commented that the main way in which the Bill may lead to lower costs for arbitrations in Scotland is if the process is quicker and the arbitrator conducts the arbitration more proactively. The Bill therefore places a duty on the arbitrator(s) to conduct an arbitration as quickly as is reasonably practicable and without incurring unnecessary expense. Similar duties are placed on the parties to the dispute and the Bill seeks to limit the opportunities for seeking to delay the process by making unnecessary or spurious applications to a court. Arbitrators and parties are therefore required to drive the arbitral process forward without unnecessary delay.
236. There are a number of other ways in which the Bill will contribute to the greater efficiency of arbitration in Scotland and thus hopefully lower costs:

- An up-to-date, modern arbitration law which reflects the best of modern arbitral practice will increase the attraction of using arbitration as a method of dispute resolution for parties to disputes in preference to going to court, with all of the cost, stress and possible delay that entails.

- If use of arbitration increases in the resolution of commercial and consumer disputes, this will reduce the pressure of business on the courts.

- Designating an arbitral appointments referee to appoint the arbitrator(s) where no procedure is agreed by the parties, or where that procedure fails, rather than parties routinely having to go to court.

- An arbitrator may decide to rule on a dispute on the basis of documents only rather than holding expensive hearings.

- The provision of a set of rules on a default basis (though some are mandatory) means that even if the parties have agreed nothing beyond a bare agreement to use arbitration as their method of dispute resolution, then those rules guide the arbitrator and the parties through the process. The arbitration can begin immediately with no protracted exchange of submissions as to which rules are to be followed.

- The rules are not too prescriptive: the arbitrator is obliged to adopt procedures which are appropriate to the circumstances of the case, bearing in mind his duty to conduct the arbitration as quickly as possible. It is hoped that arbitrators will take a more dynamic, proactive role in procedural matters.

- A rule which permits arbitrators to rule on their own jurisdiction (i.e. to decide what they have been engaged to arbitrate on). In the past this would usually have required a decision by a court which would involve more time and expense and could be used as a delaying tactic by a reluctant party.

- In the past, clerks (usually solicitors) were often employed by non-lawyer arbitrators to organise the arbitration, keep track of papers and advise on the law. Sometimes clerks were paid a higher hourly rate than the arbitrator. The use of clerks has declined in recent years and it is hoped that the rules in the Bill will reduce the need to employ clerks yet further (though provision is still made to cover the possibility).

- Strictly limited availability of recourse to the courts.

237. It is, however, impossible to accurately predict as to how much these factors will actually reduce the costs of arbitration in Scotland for commercial and other parties or how much of a benefit to the courts this will prove to be in terms of lowered pressure of business.

238. We understand that one of the professional bodies for arbitrators in Scotland, the Scottish branch of the Chartered Institute of Arbitrators intends, in support of the Bill, to undertake a UK-wide marketing exercise to promote the availability of arbitral services in Scotland and the advantages of arbitration in Scotland as a method of dispute resolution. We also understand that they will be producing new “short form” rules based on the Bill which will be offered for use in smaller value disputes including consumer disputes and consumer arbitration schemes.
239. Some low cost arbitration schemes are already operated by the Association of British Travel Agents (ABTA), the Scottish Motor Trade Association and the Institute of Chartered Accountants, so that consumers in dispute with members of such bodies are not faced with the stress and expense associated with going to court. We understand that the Chartered Institute of Arbitrators is involved with 30 or 40 low cost consumer arbitration schemes in total.

240. In the case of ABTA, for example, a claim of up to £5000 may be raised for under £100: claims up to £10,000 can be raised for £172. That is the full cost to the consumer, since the scheme is subsidised by the industry. The dispute is handled by a professional arbitrator who is independent of ABTA and who will make an award based on the documents presented to him – there is therefore no need to go to court.

241. Although we understand that the major oil companies insert clauses into contracts requiring the use of English law and English courts for dispute resolution, an arbitration seminar in Aberdeen two years ago targeted at those involved in the oil and gas industry attracted considerable interest and so it may be that there is a market for arbitration services among service and supply companies who are not contractually bound to use English law and English courts. For the same reasons of cost and convenience they also may not wish to have to go to the Court of Session to resolve disputes. There also seems an obvious opportunity for arbitration to be used in the relatively new industry of renewable energy.

242. It has been suggested that as more Middle Eastern oil companies buy operations in the North Sea, the use of arbitration may become more common as arbitration is a common method of dispute resolution in places like Dubai and Abu Dhabi. Taqa Energy, the national oil company of Abu Dhabi, has recently opened a subsidiary company here.

243. Although adjudication under the Housing Grants, Construction and Regeneration Act 1996 has become the main method of dispute resolution in the construction field, it is mainly used for small, single issue, low value disputes since the 28 day time limit does not make adjudication suitable for more complex disputes which may be more suitable for arbitration.

**International arbitration**

244. It is estimated that overall the City of London has around £3 billion worth of arbitration business annually, the great majority of it international arbitration business. If even a small fraction of that business could be attracted to Scotland, this would provide a significant boost to the Scottish economy.

245. There has until now been little international arbitration business in Scotland. The ASD research suggests that this is in part due to the unsatisfactory nature of the underlying arbitration law and legal uncertainty. These factors will be addressed by the enactment of the Bill. The enactment of a new arbitration statute would appear to be an obvious time for those providing and marketing arbitration services here to stimulate interest in Scotland as an arbitral venue in an effort to attract international business here. There are a number of reasons why Scotland may be attractive as a venue for international arbitration post-Bill:
• It has been estimated that arbitration in Scotland could be around one third cheaper than in London. Senior counsel in Scotland may charge £240 per hour or more, but in London the figure is more likely to be of the order of £400 per hour or more.

• There is a mature legal system here and one which is distinctive from London: it has been suggested that a foreign company in dispute with an English body may be attracted to the idea that a Scottish arbitrator may be “neutral”.

• The fact that English is spoken in Scotland is another advantage since English is the common language of arbitration around the world.

• International arbitration tends to take place in more attractive cities around the world and the combination of high class legal services here combined with Scotland as a tourist destination may well prove to be an attractive option to parties looking for a venue in which to arbitrate.

246. It would be wrong, however, to under-estimate the difficulties of attracting international arbitration business away from London, in particular. Often contracts, particularly between multi-national corporations, and particularly in international maritime cases, will specify the use of English law as that applicable in the event of disputes. While a dispute under English law could still be arbitrated in Scotland, it would not be an obvious choice of venue, though lower costs may attract some business. As noted, in the oil and gas industry, it is understood that all of the major players in the UK sector use contracts which specify not only English law but also the use of the English courts as the venue for dispute resolution.

247. While it may be expected that Scottish lawyers can be expected to specify Scots law as the law which will apply to arbitration agreements in contracts, lawyers in other parts of the UK, never mind other parts of the world, are unlikely to do so. To a large extent, the choice of Scotland as an international venue for dispute resolution will depend on the development of an efficient and effective arbitration culture which it is an aim of the Bill to promote.

248. If Scotland is going to attract international arbitrations, therefore, it is essential that it first has an effective, comprehensive, modern arbitration statute which will hopefully encourage the use of domestic arbitration. If Scotland can develop the domestic business then the lower costs of arbitration here, the use of the English language, the quality of available legal advice, the mature nature of the legal system and the physical safety, “neutrality” and attractiveness of the venue may prove to be an increasing draw over time. It is however impossible at this stage to make a meaningful estimate of any future benefit to the Scottish economy.

COSTS ON THE SCOTTISH GOVERNMENT

249. It is a question of choice and convenience to the Scottish Government as to whether it will in future seek to make greater use of arbitration or any other form of alternative dispute resolution as an alternative to litigation. In making its decision, the Government will wish to consider the potential savings in terms of time and expense.

250. There will be no other costs which will fall on the Government as a result of the provisions of the Bill.
251. If the Bill succeeds in making arbitration more popular as a method of dispute resolution in the commercial sphere and also in consumer disputes, it is hoped that the pressure on the civil courts will be reduced, possibly leading to savings in terms of Government spending. There may be the possibility of some court involvement in international arbitrations attracted by new regime but because the whole basis of international arbitration is that parties do not want to deal with courts, this is expected to be minimal.

252. The SNP manifesto noted that “Scotland, with its international reputation in finance and law, is ideally placed to offer world-class arbitration services”. It went on to commit the Government to working with Scotland’s legal community to take forward plans to create a Scottish International Arbitration Centre. Discussions have taken place with interested parties and a steering group has been set up to take this forward, though the focus now is more on the establishment of a more general dispute resolution centre offering a range of methods of dispute resolution. The Bill is separate from this policy initiative and makes no provision for such a dispute resolution centre.

253. As methods of alternative dispute resolution (ADR) such as arbitration, mediation, expert determination and assisted negotiation are essentially private methods of dispute resolution, the Government is looking to those who wish to provide and use such services to support the establishment of a dispute resolution centre. Ultimately it is anticipated that a multi-ADR centre would be self-financing through fees paid for its use by those engaging in arbitration and other forms of ADR in Scotland. It is hoped that the enactment of this Bill will act as a spur to those interested in the establishment of such a centre.

254. In relation to the possibility that a Court of Session judge may act as an arbitrator under provisions to be consolidated in the Bill, we understand that no judge has acted as an arbiter over the last 10 years. The fee paid for the services of a judge in such a situation is treated as a Court fee and is payable in the Court of Session. No sum has actually been paid to the Court of Session in relation to the services of a judge during that period of time. In terms of the possibility that a fee may have to be paid in the future to cover backfill for a judge who is temporarily acting as an arbitrator, the Scottish Court Service will take responsibility for the payment of temporary judges and related matters in April 2010. It is not considered that there is any likelihood of a judge acting as an arbitrator in the next few years due to the current workload pressures in the Court of Session.

COSTS ON LOCAL AUTHORITIES

255. As with other corporate bodies, it will be a matter of commercial choice for local authorities as to whether they choose to resolve their disputes by using arbitration, another form of dispute resolution or litigation. The Bill does not regulate the local authorities so as to imply unavoidable costs for councils.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on businesses and other bodies

256. The Bill is largely a codification and modernisation of the law on arbitration in Scotland. As noted above, it will be a matter of commercial choice for businesses and other bodies as to
These documents relate to the Arbitration (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 29 January 2009

whether they choose to resolve their disputes by using arbitration, another form of dispute resolution or litigation. The Bill will therefore affect businesses and other bodies in the same way that it will affect all other potential parties to a dispute by providing a framework of rules for the conduct of an arbitration which (in the case of the default rules) they can choose to adopt or alternatively agree something to the contrary. The mandatory rules in the Bill are intended to ensure the fairness of the process and are not considered to involve any additional costs to the parties. The law will be simpler, clearer and more accessible. It will not regulate businesses so as to imply unavoidable costs on business.

Costs on individuals

257. The Bill seeks to extend the option of using arbitration as a more efficient and user-friendly method of dispute resolution to individuals in the same way as to any other body or business. It does not prescribe any regulation which will lead to unavoidable costs, since both (or all) parties to a dispute must agree that arbitration will be the method of dispute resolution which they want.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

258. On 29 January 2009, the Cabinet Secretary for Justice (Kenny MacAskill) made the following statement:

“In my view, the provisions of the Arbitration (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

259. On 29 January 2009, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Arbitration (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”