

# Arbitration (Scotland)

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## **ENTITLED**

An Act of the Scottish Parliament to restate and improve the law relating to Arbitration pursuant to an Arbitration Agreement; to make other provisions relating to Arbitration and Arbitration awards; and for connected purposes. AD 2002

Be it enacted .....

## **Part I**

### **Arbitration pursuant to an Arbitration Agreement**

#### *Introductory*

#### **General principles**

**1.?** (1) The provisions of this Part are founded on the following principles and shall be construed accordingly ?

- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) the parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest;
- (c) in the matters governed by this Part; the court should not intervene except as provided by this Part.

#### **Scope of application of provisions**

**2.?** (1) The provisions of this Part apply where the seat of the arbitration is in Scotland;

(2) The following sections apply even if the seat of the arbitration is outside Scotland or no seat has been designated or determined ?

- (a) section 20 (sist of legal proceedings, etc.), and
- (b) section 42 (enforcement of arbitral awards).

(3) The powers conferred by section 33 apply even if the seat of the arbitration is outside Scotland or no seat has been designated or determined;

but the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside Scotland or that when designated or determined the seat is likely to be outside Scotland, makes it inappropriate to do so.

(4) The court may exercise a power conferred by any provision of this Part not mentioned in subsections (2) or (3) for the purpose of supporting the arbitral process where –

- (a) no seat of the arbitration has been designated or determined, and
- (b) by reason of a connection with Scotland the court is satisfied that it is appropriate to do so.

(5) Section 6 (separability of arbitration agreement) and section 7 (death of a party) apply where the law applicable to the arbitration agreement is the law of Scotland even if the seat of the arbitration is outside Scotland or has not been designated or determined.

## **The seat of the arbitration**

**3. ? (1)** In this part “the seat of the arbitration” means the juridical seat of the arbitration designated -

- (a) expressly or impliedly by agreement between the parties, or
- (b) by any person or institution vested by the parties with powers in that regard, or
- (c) having regard to the parties’ agreement in the whole relevant circumstances, or
- (d) (in the absence of any such designation) by the tribunal.

(2) Notwithstanding section 3(1) the tribunal may meet at any place which it considers appropriate.

## **Definition of arbitration agreement**

**4. ? (1)** In this Part an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) An arbitration agreement may be oral or in writing.

(3) An arbitration agreement –

- (a) need not name the arbitrator, or the arbitrators; and
- (b) may provide for an arbitrator to be nominated by a person other than the parties.

## **Agreements in writing**

**5. ? (1)** There is an agreement in writing -

- (a) if the agreement is made in writing (whether or not it is signed by the parties),
- (b) if the agreement is made by exchange of communications in writing, or
- (c) if the agreement is evidenced in writing.

(2) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(3) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded in writing by one of the parties, or by a third party, with the authority of the parties to the agreement.

(4) An exchange of written submissions in arbitration or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in response constitutes as between those parties an agreement in writing to the effect alleged.

(5) References in this Part to anything being written or in writing include written words being generated, recorded or preserved by any data recording means.

(6) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make the clause part of the agreement.

## **Separability of arbitration agreement**

**6. ? (1)** Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) is not invalid, non-existent or ineffective solely because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

(2) A dispute or difference as to the validity of or legality of a contract which includes an arbitration agreement may be determined by arbitration in accordance with that agreement.

## **Whether agreement discharged by death of a party**

**7. ? (1)** Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.

(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

## **Arbitrators and oversmen**

8. Only a natural person may act as an arbitrator or oversman.

## **Appointment of arbitrator**

9.- (1) The parties are free to agree on the procedure for appointing the arbitrator or arbitrators including any chairman or oversman.

(2) If, or to the extent that there is no such agreement, the following provisions apply:-

(a) if there is to be a sole arbitrator the parties shall jointly appoint an arbitrator within 30 days after service of a request in writing by either party to do so.

(b) if the tribunal is to consist of two arbitrators each party shall appoint one arbitrator within 30 days after service of a request in writing by either party to do so.

(c) if the tribunal is to consist of three arbitrators each party shall appoint one within 30 days after service of a request in writing by either party to do so and the two so appointed shall forthwith appoint a third arbitrator to be the chairman of the tribunal.

(3) The following provisions of this section 9 apply where?

(a) a party to an arbitration agreement refuses to do anything which that party requires to do to effect the appointment of an arbitrator, or

(b) a party or any other person fails, for a period of 30 days following a written demand from a party that he do so, to do anything which, under the arbitration agreement, he is expected to do to effect the appointment of an arbitrator,

and the agreement makes no provision for the appointment of an arbitrator in the circumstances in question or any such provision has failed.

(4) In such a case the court may, on the application of any party, appoint an arbitrator.

(5) An arbitrator appointed under subsection (2) has the same powers and duties as if they had been appointed in accordance with the arbitration agreement.

(6) An arbitration agreement which makes no provision as to the number of arbitrators to be appointed is to be treated as providing for the appointment of a single arbitrator.

## **Appointment of oversman**

10.- (1) Unless the parties otherwise agree, in any arbitration by a tribunal with an even number of members the tribunal may, if it fails to reach a decision, nominate an oversman to decide the reference or matters on which it has failed to reach a decision.

(2) Where the tribunal is unable to reach a decision on the nomination of an oversman the court may, on the application of a party or a member of the tribunal, appoint an oversman.

(3) Subject to sections 46, 47 and 48, the decision of an oversman, whether appointed by the tribunal or by the court, is final.

## **Matters to be disclosed**

11.- (1) A person requested to act as arbitrator or oversman or clerk shall, without delay, disclose to -

(a) the parties, and

(b) any other person who, under the arbitration agreement, is empowered or required to appoint an arbitrator or oversman,

any circumstances likely to give rise to justifiable doubts as to the impartiality or independence of the person so requested..

(2) An arbitrator or oversman, from the time of appointment until the conclusion of the arbitration, shall disclose to the parties without delay any such circumstances, unless those circumstances have already been disclosed under subsection (1).

## **Irrevocability of appointment**

**12.-** (1) The appointment of an arbitrator or oversman, once made, continues until the conclusion of the arbitration, except in the following cases.

- (2) The appointment of an arbitrator or oversman terminates -
- (a) if they die or become physically or mentally incapable of performing the functions of an arbitrator or oversman as the case may be,
  - (b) if they are adjudged bankrupt, their estate is sequestrated or they make a composition or arrangement with or grant a trust deed to their creditors,
  - (c) in the circumstances set out in section 13,
  - (d) if they are removed by the court on an application under section 14 or 15, or
  - (e) if they resign in accordance with section 16,
  - (f) if their appointment is revoked under section 28.

## **Challenge of appointment**

**13.-** (1) The appointment of an arbitrator or oversman may be challenged by a party before the arbitral tribunal or the oversman only on the following grounds -

- (a) that circumstances exist which give rise to justifiable doubts as to the impartiality or independence of the arbitrator or oversman;
- (b) that the arbitrator or oversman does not possess any qualifications which the parties agreed in writing prior to the appointment were necessary.

(2) A party may challenge the appointment of an arbitrator nominated by or with the concurrence of that party only if the facts on which the challenge is based first came to their knowledge after the appointment was made.

(3) Unless the parties agree a procedure for challenging the appointment of an arbitrator or oversman the procedure set out in subsection (4) applies.

(4) A party who intends to challenge the appointment of an arbitrator or oversman shall, within 15 days of becoming aware of -

- (a) the circumstances mentioned in subsection (1)(a), where the challenge is under that provision, or
- (b) the appointment of an arbitrator or oversman, where the challenge is under subsection (1)(b),  
send to the tribunal or oversman and to every other party a written statement of the reasons for challenge.

(5) Where, on a challenge in accordance with subsection (4) -

- (a) the arbitrator or oversman in question resigns from their appointment.
- (b) the other parties agree in writing with the challenge, or
- (c) the tribunal or oversman decide that the ground of the challenge is established,  
the appointment in question terminates.

(6) Where the appointment of an arbitrator to a tribunal consisting of more than one member terminates under subsection (5) the tribunal may set aside in whole or in part any award made by the tribunal while the arbitrator was a member.

(7) Where the appointment of a sole arbitrator or of an oversman terminates under subsection (5) the court may, on an application by a party, set aside in whole or in part any award made by the arbitrator or oversman

(8) The tribunal or oversman shall consider a challenge in accordance with subsection (4) within 15 days of receiving the statement referred to in that subsection.

## **Removal by court following challenge**

**14.-** (1) Where the tribunal or oversman rejects a challenge under section 13 (whether under a procedure agreed by the parties or in accordance with subsection (4) of that section) any party may, within 30 days of the date of the decision of the tribunal or oversman, make an application to the court for the removal of an arbitrator or oversman on any ground specified in the challenge.

(2) Where an arbitrator whose appointment is being challenged was appointed by a court under section 9 the application must be to that court.

(3) Until the court decides the application the tribunal or oversman may continue with the arbitration and may make one or more awards.

(4) Where the court, in deciding the application, removes an arbitrator or oversman it may set aside in whole or in part any award made by that arbitrator or oversman or by a tribunal of which that arbitrator was a member.

(5) Where the court removes an arbitrator or oversman, it may make such order as it thinks fit with respect to entitlement (if any) to expenses, or to the repayment of any fees or expenses already paid.

(6) The decision of the court on the application is final.

### **Removal of arbitrator in other circumstances**

**15.-** (1) Subsection (2) applies where, on an application by a party, the court is satisfied that?

(a) if the arbitrator or oversman becomes physically or mentally incapable of conducting the proceedings or justifiable doubts exist as to the capacity to do so, or

(b) The arbitrator or oversman has refused or failed to properly conduct proceedings or to use all reasonable despatch in conducting proceedings or in making an award, and that substantial injustice has been or will be caused to the applicant.

(2) Notwithstanding sections 13 and 14, the court may do either or both of the following -

(a) remove the arbitrator or oversman;

(b) set aside in whole or in part any award made by the tribunal of which the arbitrator or oversman was a member.

(3) Where the appointment of an arbitrator or oversman may be challenged under section 13 on the ground specified in subsection (1)(a) of that section, an application on that ground under subsection (1) of this section is not competent.

(4) Where an arbitrator to whom an application under subsection (1) relates was appointed by a court under section 9 the application must be to that court.

(5) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(6) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

### **Resignation**

**16.-** (1) An arbitrator or oversman may resign from the appointment only -

(a) on a challenge under section 13.

(b) after the parties have so agreed in writing, or

(c) if the court is satisfied, on an application by the arbitrator or oversman, that there is sufficient reason for doing so.

(2) The resignation of an arbitrator or oversman under subsection (1) must be in writing and takes effect on the date on which it is intimated to the parties.

(3) The parties are free to agree with the arbitrator as to the consequences of resignation as regards:-

(a) the entitlement (if any) to fees or expenses, and

(b) any liability incurred by the arbitrator.

(4) If or to the extent that there is no such agreement an arbitrator who resigns may apply to the court to grant relief from any liability incurred and to make such order as it thinks fit with respect to the arbitrators' entitlement (if any) to fees or expenses (or as to repayment of fees or expenses already paid).

### **Effect of termination of appointment and setting aside of award**

**17.-** (1) Subsections (2), (3) and (8) apply where the appointment of an arbitrator terminates (other than on the conclusion of the arbitration) or an award of a tribunal is set aside in whole or in part.

(2) The parties may agree whether and, if so, to what extent the previous proceedings in the arbitration should stand.

(3) Failing agreement in accordance with subsection (2) the tribunal (if reconstituted) shall determine whether and if so to what extent the previous proceedings should stand.

(4) Subsections (5) to (8) apply where the appointment of an oversman terminates (other than on the conclusion of the arbitration) or an award of an oversman is set aside in whole or in part.

(5) Where the oversman was nominated by the tribunal, the tribunal may agree whether and, if so, to what extent the previous proceedings in the reference to the oversman should stand.

(6) In any other cases, the parties may so agree.

(7) If or to the extent that there is no such agreement the court may, on an application by any party, determine whether and, if so, to what extent the previous proceedings in the reference to the oversman should stand.

(8) Where the appointment of an arbitrator or oversman is terminated, or the award is set aside, by the court under section 14, 15 or in pursuance of section 46, an application under subsection (3) or (7) must be to that court.

### **Appointment of substitute arbitrator or oversman**

**18.-** (1) Unless the parties otherwise agree, where the appointment of an arbitrator terminates, for whatever reason, a substitute arbitrator shall be appointed.

(2) Any provisions of the arbitration agreement relating to the appointment of the arbitrator being replaced apply to the appointment of a substitute arbitrator under subsection (1).

(3) Where -

(a) an arbitration agreement provides for the appointment of an arbitrator by a person other than the parties, and

(b) the arbitrator is removed by the court under sections 14 or 15 the parties may, notwithstanding the agreement, appoint a substitute arbitrator.

(4) Where the appointment of an oversman terminates, for whatever reason, a substitute oversman shall be appointed in accordance with the same procedure (whether or not in the arbitration agreement) as applied to the original appointment.

This does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office.

### **The restriction of liability for damages**

**19.** No arbitrator, clerk or nominating body shall be liable to any party for any act or omission in connection with any arbitration except for the consequences of conscious and deliberate wrongdoing.

### **Sist of legal proceedings**

**20.?** (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to sist the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings or after taking any step in those proceedings to answer the substantive claim.

(4) On the application under this section the court shall grant a sist unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(5) If the court refuses to sist the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

## ***The role of the Tribunal***

### **General powers exercisable by the Tribunal**

**21.?** (1) The parties are free to agree on the powers exercisable by the tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

(3) The tribunal may order a claimant to provide security for the expenses of the arbitration.

This power may not be exercised on the sole ground that the claimant is?

(a) an individual ordinarily resident outside the United Kingdom, or

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

(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings?

(a) for the inspection, photographing, preservation, custody or detention of the property by the arbitrator, an expert or a party, or

(b) ordering that samples be taken from, or any observations be made of or experiment conducted from, the property.

(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

(7) An tribunal shall when intimating any award, finding or ruling to a party, intimate it to every other party.

(8) This section does not affect any other enactment or rule of law which requires intimation of any matter to or by a party in particular circumstances.

### **Additional Powers**

**22.-** (1) In addition to the powers conferred generally or specifically on the tribunal elsewhere in this Act, the tribunal has the following powers (unless the parties otherwise agree):-

(a) Power to make interim, provisional or partial awards

(b) Power to award damages

(c) Power to rectify the terms of any contract to the extent permitted by the law applicable to that contract

(d) Power to order that simple or compound interest shall be paid by any party on any sum awarded at such rate or rates and with such rests as the tribunal determines to be appropriate without being bound by legal rates of interest imposed by any State, court or any agreement between the parties in respect of any period which the tribunal determines to be appropriate including a date prior to the appointment of the tribunal and ending not later than the date upon which the award was complied with.

(e) Power to vary time limits whether imposed by the tribunal or any applicable rules or the parties whenever it seems appropriate to so do.

(f) Power in the event that a party is unduly dilatory in presenting its claim, counterclaim or defences to the prejudice of the other party to dismiss the claim or counterclaim or exclude the defences as the case may be.

(g) Power to appoint a clerk, whose fees, outlays and expenses shall be included in the expenses of the arbitration.

(h) The tribunal may make a declaration as to any matter to be determined in the proceedings.

(i) The tribunal may order the payment of a sum of money in any currency.

(j) The tribunal has the same powers as the court

(i) to order a party to do or refrain from doing anything

(ii) to order specific performance of the contract

(iii) to order the reduction of a deed or other document

### **Power to order provisional relief**

- 23.?** (1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which the tribunal would have power to grant in a final award.
- (2) This includes, for instance, making
- (a) a provisional order for the payment of money or the disposition of property as between the parties, or
  - (b) an order to make an interim payment on account of the expenses of the arbitration.
- (3) Any such order shall be subject to the tribunal's final determination; and the tribunal's final award, on the merits or as to expenses, shall take account of any such order.
- (4) Unless the parties agree to confer such power on the tribunal,, the tribunal has no such power.

This does not affect the tribunal's powers under section 35 (awards on different issues, &c).

### **General duties of parties**

- 24.?** (1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitration proceedings.
- (2) This includes:-
- (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and
  - (3) Each party shall, when submitting any document to the tribunal, send a copy of it to every other party.
- (4) In subsection (3) above "document" includes, in addition to a document in writing -
- (a) any map, plan, graph or drawing,
  - (b) any photograph,
  - (c) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom, and
  - (d) any film (including microfilm, negative, tape, disc or other device) in which one or more visual images are recorded so as to be capable (as aforesaid) of being reproduced therefrom.

### **General duties of the tribunal**

- 25.?** (1) The tribunal shall?
- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting that party's case and dealing with that of the opponent, and
  - (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
- (2) The tribunal shall comply with that general duty in conducting the arbitration proceedings, in deciding on matters of procedure and evidence and in exercising any other powers.

### **Powers of tribunal in case of default of party**

- 26.-** (1) Subsection (2) applies where -
- (a) the arbitration agreement provides for a party's written statement of claim to be submitted to the tribunal,
  - (b) the agreement with the tribunal specifies a period within which the statement of claim is to be submitted, and
  - (c) the party fails to submit a statement of claim to the tribunal within that period.
- (2) The tribunal shall, unless satisfied that there is a good reason for the failure or the parties otherwise agree, terminate the proceedings in respect of that claim.

- (3) Subsections (4) and (5) apply where -
- (a) the tribunal specifies a period within which a party's defence is to be submitted to the tribunal, and
  - (b) the party fails to submit a defence within that period.
- (4) If the arbitration agreement so provides and the tribunal is satisfied that there is a good reason for the failure, the tribunal may specify a further period for the submission of the defence.
- (5) In any other case, unless the parties otherwise agree, the tribunal shall continue the proceedings without treating such failure as being in itself an admission of the allegations in the statement of claim.
- (6) Where a party fails-
- (a) to appear at a hearing
  - (b) when requested by the tribunal to do so, to produce documentary evidence, or
  - (c) to comply with any other request or any order of the tribunal relating to the conduct of the arbitration,
  - (d) to comply with a term of the arbitration agreement relating to the conduct of the proceedings
- the tribunal may, unless satisfied that there is a good reason for the failure or the parties otherwise agree, continue the proceedings and make an award on the evidence (if any) before it.
- (7) In this section "claim" includes a counterclaim.

### **Decision-making where no chairman or oversman**

- 27.?** (1) Where the parties agree that there shall be two or more arbitrators with no chairman or oversman, the parties are free to agree how the tribunal is to make decisions, orders and awards.
- (2) If there is no such agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators subject to any statutory provision.
- (3) If there is no majority then the tribunal shall appoint an oversman or refer to a nominating body or authority to appoint an oversman who shall decide the matter.

### **Revocation of tribunal's authority**

- 28.?** (1) The parties are free to agree in what circumstances the authority of a tribunal may be revoked.
- (2) If or to the extent that there is no such agreement the following provisions apply.
- (3) The authority of the tribunal may not be revoked except:-
- (a) by the parties acting jointly, or
  - (b) by an arbitral or other institution or person vested by the parties with powers in that regard.
- (4) Revocations of the authority of a tribunal by the parties acting jointly must be agreed in writing unless the parties also agree (whether or not in writing) to terminate the arbitration agreement.
- (5) Nothing in this section affects the power of the court
- (a) to remove a tribunal, or an arbitrator within a tribunal on the grounds specified in sections 14 and 15. .

### **Power to obtain expert opinion**

- 29. ?** (1) Unless the parties otherwise agree prior to the commencement of the arbitration, a tribunal may obtain the opinion of an expert on any matter arising in the arbitration.
- (2) Where a tribunal obtains such an opinion in writing, the tribunal shall intimate a copy of it to every party and give each party an opportunity to make representations regarding the opinion.
- (3) Where a tribunal is to receive such an opinion orally, the tribunal shall intimate that fact to every party and give each party an opportunity to be present, to ask questions of the expert and to make representations regarding the opinion.

### **Objections to jurisdiction of the tribunal**

**30.** (1) The tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) Any objection by a party that the tribunal does not have jurisdiction must be made not later than the date of submission of his defence.

(3) A party is not precluded from making such an objection by the fact that the party appointed, or took any step in connection with the appointment of, the tribunal.

(4) An objection that a tribunal is exceeding the scope of its authority must be made as soon as the matter alleged to be beyond the scope of its authority is raised in the course of the arbitration.

(5) The tribunal may admit an objection later than the time specified in subsection (1) or (3) if it considers the delay justified.

(6) Where the tribunal upholds an objection under subsection (1) or (3) it may set aside in whole or in part any award made by it.

(7) Where the tribunal rejects an objection under subsection (1) or (3) any party may, within 30 days of the decision, apply to the court for a decision on the objection.

(8) Until the court decides the application the tribunal may continue with the arbitration and may make one or more awards.

(9) Where the court, in deciding the application, upholds the objection it may set aside in whole or in part any award made by the tribunal.

(10) The decision of the court on the application is final.

### **Enforcement of orders of the tribunal**

**31.** ? (1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with an order made by the tribunal.

(2) An application for an order under this section may be made -

(a) by the tribunal (upon notice to the parties),

(b) by a party to the arbitration proceedings with the permission of the tribunal (and upon notice to the other parties), or

(c) where the parties have agreed that the powers of the court under this section shall be available,

(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of a failure to comply with the tribunal's order.

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.

(5) The decision of the court upon any application hereunder shall be final.

### *Arbitration proceedings*

### **Procedure and evidence**

**32.** ? (1) The parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings.

(2) Unless the parties otherwise agree, a tribunal shall determine?

(a) the procedure to be followed in conducting the arbitration, and

(b) the admissibility, relevance, materiality and weight of any evidence.

(3) The power of the tribunal under subsection (2) is subject to any enactment or rule of law which applies in relation to the arbitration in question.

### **Court's powers in relation to arbitration proceedings**

**33.** ? (1) In relation to an arbitration commenced or likely to be commenced the court, on the application of a party, has the same power to-

- (a) make an order under section 1 of the Administration of Justice (Scotland) Act 1972 (extended power to order inspection, preservation etc. of documents and other property),
  - (b) order the sale of any property in dispute in the arbitration,
  - (c) make an order securing any amount in dispute in the arbitration,
  - (d) order the attendance of a witness or the taking of evidence on commission,
  - (e) grant warrant for arrestment or inhibition, or
  - (f) grant interdict whether interim or permanent or other interim or permanent order as it has in relation to civil proceedings brought or likely to be brought before it.
- (2) The powers of the court specified in subsection (1) do not apply in relation to an arbitration if, and to the extent that, the parties so agree.
- (3) An application for an order under subsection (1), if made after the commencement of an arbitration, requires the consent of the tribunal.
- (4) Subsection (3) does not apply in a case where, for any reason, the tribunal cannot competently give its consent.
- (5) Nothing in subsection (1) or (2) affects the powers of the court under any rule of law or the powers of the tribunal.
- (6) Where an arbitration agreement confers specific powers on a tribunal in relation to a contract a court may, if the parties so agree, exercise any such powers in any proceedings before it in relation to the contract.

#### *The award*

#### **Rules applicable to substance of dispute**

- 34. ?** (1) The tribunal shall apply the substantive law expressly or impliedly agreed by the parties as applicable to the dispute. Failing such agreement, the tribunal shall apply such law or laws as it determines to be appropriate.
- (2) In all cases the tribunal shall take account of the provisions of the contract and usage of the trade applicable to the contract.
- (3) The tribunal shall not decide as *amiable compositeur* nor *ex bono et aequo* unless the parties have expressly authorised it to do so.

#### **Other provisions relating to awards**

- 35. ?** (1) The tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the tribunal.
- (2) Where there are three or more arbitrators and the tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the chairman of the tribunal shall decide that issue.
- (3) If any arbitrator refuses or fails to sign the award, the signatures of the majority shall be sufficient provided that the reason for the omitted signature is stated in the award.
- (4) The tribunal shall make its award in writing and unless the parties agree otherwise shall state the reasons upon which its award is based. The award shall also state the date when the award was made and the seat of the arbitration and shall be signed by the arbitrators (or the majority of them assenting to it).
- (5) Unless otherwise agreed, the sole arbitrator or the Chairman of the tribunal shall be responsible for delivering copies of the award to the parties.

#### **Extension of time limit for making award**

**36.?** Where a tribunal is under a duty to make an award by a specified date or within a specified period the court may, on an application by any party or the tribunal, on cause shown specify a later date by which, or extend the period within which, the tribunal shall make the award.

### **Correction of award**

**37. ?** (1) Within 30 days of the date of the award a party may, by application in writing, request the tribunal to amend the award to correct any clerical or typographical error or any error arising by accident or omission.

(2) A party receiving a copy of an application under subsection (1) may, within 15 days of such receipt make written representations to the tribunal regarding the application.

(3) Not less than 30 days nor more than 60 days after the receipt by it of an application under subsection (1), the tribunal shall make such amendments to the award as it considers necessary in light of the application and of any such representations.

(4) The tribunal may, within 30 days of the date of the award, on its own initiative correct any error of a type referred to in subsection (1).

(5) On an application to it by a party, the court may substitute for the period mentioned in subsection (1) such longer period as it thinks fit.

### **Partial setting aside of award**

38. On an application to the court (whether or not made in the course of other proceedings) to set aside an award of a tribunal, the court may, instead of setting aside the award in full, set aside the award in part only.

### **Place of award**

39. Where the law of Scotland applies to an arbitration any award in the arbitration is to be treated as having been made in Scotland regardless of where it was signed.

### **Repeal of section 3 of Administration of Justice (Scotland) Act 1972**

**40.** Section 3 of the Administration of Justice (Scotland) Act 1972 (power of arbitrator to state case to Court of Session) shall cease to have effect, except in relation to any arbitrations in respect of which any arbitrator or substitute arbitrator is appointed before this section comes into force.

### **Effect of award**

**41.?** (1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any person claiming through or under them from the date upon which it is made.

(2) The parties must carry out any award immediately and without delay subject to (Section 43) and the parties have no right to any form of appeal, review or recourse to any state, court or other judicial authority.

(3) This does not affect the right of any person to challenge the award by any available arbitral process of appeal or in accordance with the provisions of this Part.

### **Enforcement of the award**

**42.?** (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner, as a judgment or order of the court, and to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award...

The right to raise such an objection may have been lost (see section 49).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under the Geneva Convention) or the provisions of Part IV of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

#### **Determination of a point of law**

**43.---(1) Unless otherwise agreed by the parties at any time, the court may on the application of a party to the arbitration proceedings (upon notice to the other parties and to the tribunal) determine any question of law arising out of an award made in those proceedings including any award which is not a final award. An agreement to dispense with the reasons for the tribunal's award shall be considered agreement to exclude the court's jurisdiction under this section. Pending the determination of such an application the tribunal shall continue with further procedure in the arbitration if it considers it appropriate to do so.**

**(2) An application shall not be brought under this section except with leave of the Court. (The right to make such an application is also subject to the restrictions in subsection (3).**

**(3) The request for leave shall be included in the application and shall be granted only if the court is satisfied –**

**(a) that the determination of the question will substantially affect the rights of one or more of the parties to the arbitration proceedings.**

**(b) that the question is one which the tribunal was asked to determine; and**

**(c) that, on the basis of the findings of fact in the award-**

**(i). the decision of the tribunal on the question is obviously wrong, or**

**(ii). the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and**

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

**(4) An application under this section shall identify the question, or questions, of law to be determined and state the grounds on which it is alleged that the request for leave to make the application should be granted.**

**(5) The court shall determine the request for leave under this section without a hearing unless it appears to the court that a hearing is required.**

**(6) The leave of the court is required for any appeal from a decision granting or refusing leave to proceed with the application.**

**(7) On an application made under this section the court may make an order:-**

**(a) confirming the award,**

**(b) remitting the award to the tribunal in whole or in part, for reconsideration in light of the court's determination, or**

**(c) setting aside the award in whole or in part, if it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.**

**(8) The decision of the court on an application under this section shall be final. No appeal shall lie to the Inner House of the Court of Session, the House of Lords or the Privy Council.**

**(9) The court may order the applicant to provide security for the costs of any application and may direct that the application be dismissed if the order is not complied with. The power to order security for costs shall not be exercised on the sole ground that the applicant is:-**

**(a) an individual ordinarily resident outside the United Kingdom, or;**

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

**(12) The court may order that any monies payable under the award shall be secured**

**pending the determination of any application and may direct that the application be dismissed if the order is not complied with.**

**(13) (In any judgement issued in relation to any application brought under this section the identities of the parties shall not be disclosed nor shall they be disclosed in any law reports reporting any such judgement).**

#### **Determination of point of European Law**

44.- The court shall be entitled to make a reference to the Court of Justice of the European Communities upon the application to do so by any party to arbitration proceedings.

#### **Challenging the award: substantive jurisdiction**

45. ? (1) A party to arbitration proceedings may (upon notice to the other parties and to the tribunal) apply to the court?

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

(c) A party may lose the right to object (see section 49) and it is subject to the restriction that the applicant must first exhaust any available arbitral process of appeal or review or any available recourse under section 37.

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

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

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

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

#### **Challenging the award: serious irregularity**

46. ? (1) A party to arbitration proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the oversman, the proceedings or the award.

A party may lose the right to object (see section 49) and it is subject to the restriction that the applicant must first exhaust any available arbitral process of appeal or review or any available recourse under section 37.

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

- (a) failure by an arbitrator to comply with section 25 (general duties of the tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction).
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or

- (i) any irregularity in the conduct of the proceedings or in the award which is committed by the tribunal or by any institution or person vested by the parties with powers in relation to the proceedings or the award.
  - (3) If there is shown to be misconduct affecting the tribunal, the arbitration proceedings or the award, the court may?
    - (a) remit the award to the tribunal, in whole or in part for reconsideration,
    - (b) set aside the award in whole or in part, or
    - (c) declare the award to be of no effect, in whole or in part.
- The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for a reconsideration.
- (4) The leave of the court is required for any appeal from a decision of the court under this section.

**Challenge: supplementary provisions**

- 47.** ? (1) The following provisions apply to an application under sections 45 and 46.
- (2) An application appeal may not be brought if the applicant has not first exhausted?
    - (a) any available arbitral process of appeal or review, and
    - (b) any available recourse under section 37 (correction of award or additional award).
  - (3) Any application must be brought within 30 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant was notified of the result of that process.
  - (4) If on an application it appears to the court that the award?
    - (a) does not contain the tribunal's reasons, or
    - (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,
- the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.
- (5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.
  - (6) The court may order the applicant to provide security for the costs of the application, and may direct that the application be dismissed if the order is not complied with.
- The power to order security for costs shall not be exercised on the ground that the applicant is?
- (a) an individual ordinarily resident outside the United Kingdom, or
  - (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.
- (7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application, and may direct that the application be dismissed if the order is not complied with.
  - (8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).
- This does not affect the general discretion of the court to grant leave subject to conditions.

**Challenge: effect of order of court**

- 48.** ? (1) The following provisions have effect where the court makes an order under sections 45(3) and 46(3) with respect to an award.
- (2) Where the award is varied, the variation has effect as part of the tribunal's award.
  - (3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.
  - (4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.

## **Loss of right to object**

**49. ?** (1) If a party to arbitration proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection?

- (a) that the tribunal lacks substantive jurisdiction,
- (b) that the proceedings have been improperly conducted,
- (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
- (d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the tribunal rules that it has substantive jurisdiction and a party to the arbitration proceedings who could have questioned that ruling?

- (a) by any available arbitral process of appeal or review, or
- (b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of the ruling.

## **Intimation of notices, &c.**

**50.?** (1) The parties are free to agree on the manner of intimation of any notice or other document required or authorised to be given or intimated in pursuance of an arbitration agreement or for the purposes of the arbitration proceedings.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be intimated on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post-

- (a) to the addressee's last known principal residence or, if they have been carrying on a trade, profession or business, their last known principal business address, or
- (b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively intimated.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to giving or intimating a notice or other document shall be construed accordingly.

## **Powers of court**

**51. ?** (1) This section applies where service of a document on a person in the manner agreed by the parties, or in accordance with the provisions of section 50 having effect in default of agreement, is not reasonably practicable.

(2) Unless otherwise agreed by the parties, the court may make such order as it thinks fit-

- (a) for service in such manner as the court may direct, or
- (b) dispensing with service of the document.

(3) Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter.

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

## **Reckoning periods of time as a whole**

**52. ?** (1) The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement.

(2) If or to the extent that there is no such agreement, periods of time shall be reckoned in accordance with the following provisions.

(3) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

(4) Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.

### **Power to withhold award in case of non-payment**

**53. ?** (1) The tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators.

(2) If the tribunal refuses on that ground to deliver an award, a party to the arbitration proceedings may, upon notice to the other parties and the tribunal apply to the court, which may order that:-

(a) the tribunal shall deliver the award on payment into court by the applicant of the fees and expenses demanded, or such lesser amounts as the court may specify,

(b) the amount of the fees and expenses properly payable shall be determined by such means and upon such terms as the court may direct, and

(c) out of the money paid into court there shall be paid out such fees and expenses as may be found to be properly payable and the balance of the money (if any) shall be paid out to the applicant.

(3) For this purpose the amount of the fees and expenses properly payable is the amount the applicant is liable to pay under any agreement relating to the payment of the arbitrators.

(4) No application to the Court may be made where there is any available arbitral process for appeal or review of the amount of the fees and expenses demanded.

(5) References in this section to arbitrators include an arbitrator who has ceased to act and an oversman who has not replaced the other arbitrators.

(6) The above provisions of this section also apply in relation to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the award.

As they so apply, the references to the fees and expenses of the arbitrators shall be construed as including the fees and expenses of that institution or person.

(7) The leave of the Court is required for any appeal from a decision of the Court under this section.

### **Expenses**

**54. ?** (1) The tribunal shall in its award and subject to any agreement between the parties, fix the expenses of the arbitration and apportion them between the parties as it considers reasonable in the whole circumstances.

(2) For the purposes of sub-section (1) above expenses include ?

(a) The fees and expenses of the tribunal.

(b) The expenses of any assistance required by the tribunal in the course of the arbitration process including the fees and expenses of its experts.

(c) The expenses of meeting and hearing facilities.

(d) Any other expenses incurred by the tribunal in the conduct of the arbitration.

(3) The tribunal shall also have power, unless the parties otherwise agree, to -

(a) Order in its award that all or part of the legal or other expenses incurred by a party in the course of the proceedings shall be paid by another party.

(b) Determine and fix the amount of such expenses on such reasonable basis it thinks fit or to order taxation by the Auditor of the Court of Session or by the Auditor of an appropriate Sheriff Court.

(c) Make an award of expenses from time to time in the course of the proceedings.

(4) The tribunal shall have power in the course of the proceedings and from time to time to order the parties to make payments in advance in respect of the expenses mentioned in sub-section (1) above in such sums as to the tribunal appears reasonable.

(5) Unless the parties otherwise agree, the tribunal shall award expenses on the general principle that expenses should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the expenses.

### **Recoverable fees and expenses of arbitrators**

**55. ?** (1) Each arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an arbitrator, and shall be reimbursed for time (including travelling time) spent so serving and for expenses reasonably incurred in the course of the arbitration.

(2) Provided there is agreement in writing in advance from the parties the arbitrator's fees may include a charge for time reserved but not used as a result of late postponement or cancellation.

(3) In the event of failure to agree at the time of appointment on an arbitrator's fees, they shall be fixed upon the application of a party or the tribunal by the Auditor of the Court of Session, Scotland or by the Auditor of an appropriate Sheriff Court.

(4) Where the tribunal has appointed a clerk, the fees and expenses of the clerk, if not agreed, shall be fixed by the Auditor of the Court of Session or by the Auditor of an appropriate Sheriff Court upon the application of a party or of the tribunal.

### **Application of this part of the Act**

**56. ?** (1) This Act applies to arbitration agreements whenever entered into.

(2) Subsection (1) is subject to section 40.

## **Part II Other Provisions relating to Arbitration**

### *Statutory Arbitrations*

#### **Application of this Act to Statutory Arbitrations**

#### **Statutory arbitrations**

**57. ?** (1) Where, under any enactment, a dispute or difference in relation to a particular matter falls to be determined by arbitration (a "statutory arbitration"), this Act applies to any arbitration under that enactment as it applies to arbitration pursuant to an arbitration agreement, except in so far as the enactment in question or any other enactment makes specific provision wholly inconsistent with, or repugnant to, this Act.

(2) This section does not apply in relation to any statutory arbitration which commences before this section comes into force.

### *Consumer arbitration agreements*

#### **Application of unfair terms regulations to consumer arbitration agreement**

**58. ?** (1) The following sections extend the application of the Unfair Terms in Consumer Contracts Regulations 1994 in relation to a term which constitutes an arbitration agreement. For this purpose "arbitration agreement" means an agreement to submit to arbitration present or future disputes or differences (whether or not contractual).

(2) In those sections "the Regulations" means those regulations and includes any regulations amending or replacing those regulations.

(3) Those sections apply whatever the law applicable to the arbitration agreement.

### **The Regulations apply where the consumer is a legal person**

59. The Regulations apply where the consumer is a legal person as they apply where the consumer is a natural person.

### **Arbitration agreement unfair where modest amount sought**

**60. ?** (1) A term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order for the purposes of this section.

(2) Orders under this section may make different provision for different cases and for different purposes.

(3) The power to make orders under this section is exercisable by the Scottish Ministers.

(4) Any such order shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the Scottish Ministers.

### *Appointment of judges as arbitrators*

### **Appointment of judges as arbitrators**

**61. ?** (1) A Senator of the College of Justice may, in all the circumstances they think fit, accept appointment as arbitrator or as oversman by or by virtue of an arbitration agreement.

(2) The fees payable for the services of a Senator of the College of Justice as arbitrator or oversman shall be determined by statutory instrument.

(3) In this section?

"arbitration agreement" has the same meaning as in Part I.

(4) The provisions of Part I of this Act apply to arbitration before a person appointed under this section with the modifications specified in Schedule [1].

## **Part III International Arbitrations**

### **UNCITRAL Model Law on International Commercial Arbitration**

**62. ?** (1) In this Act, "the Model Law" means the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United National Commission on International Trade Law on 21st June 1985.

(2) The Model Law continues to have the force of law in Scotland in the form set out in Schedule 5 (which contains the Model Law with certain modifications to adapt it for application in Scotland).

(3) The documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the Model Law may be considered in ascertaining the meaning or effect of any provision of the Model Law as set out in Schedule 5.

(4) The parties to an arbitration agreement may, notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of article 1 of the Model Law as set out in Schedule 5, agree that the Model Law as so set out is to apply, and in such case the Model Law as so set out applies to that arbitration.

(5) Subject to subsection (6), where the Model Law as set out in Schedule 5 applies to an arbitration (whether or not by virtue of subsection (4))?

- (a) the arbitration law of Scotland also applies to the arbitration in so far as it makes provision with respect to matters not provided for by the Model Law as so set out, and
- (b) the arbitration law of Scotland does not apply to the arbitration in so far as it makes provision with respect to matters also provided for by the Model Law as so set out unless, and if so only to the extent that, any enactment (whether or not in this Act) expressly provides.

(6) Sections 43, 45 and 46 do not apply to an arbitration to which the Model Law as set out in Schedule 5 applies (whether or not by virtue of subsection (4)).

(7) Subject to subsections (8) and (9), this section applies in relation to an arbitration agreement whenever entered into.

(8) This section does not apply in relation to any arbitration on 1<sup>st</sup> January 1991 which had been commenced but had not been concluded.

(9) The parties to an arbitration agreement entered into before that date may agree that the foregoing provisions of this section are not to apply to that arbitration agreement.

## **Part IV**

### **Recognition and Enforcement of Certain Foreign Awards**

#### *Enforcement of Geneva Convention awards*

#### **Continuation of Part II of the Arbitration Act 1950**

**63.** Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards.

#### **New York Convention awards**

**64.?** (1) In this Part a “New York Convention award” means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards?

- (a) “arbitration agreement” means an arbitration agreement in writing, and
- (b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.

In this subsection “agreement in writing” and “seat of the arbitration” have the same meaning as in Part 1.

(3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.

(4) In this section “the New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

#### **Recognition and enforcement of awards**

**65. ?** (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. As to the meaning of “the court”, see section 68.

(3) Where leave is so given, judgment may be entered in terms of the award.

### **Evidence to be produced by party seeking recognition or enforcement**

**66.?** (1) A party seeking the recognition or enforcement of a New York Convention award must produce?

- (a) a duly authenticated original award or a duly certified copy of it, and
- (b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

### **Refusal of recognition or enforcement**

**67.?** (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –

- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity.
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.
- (c) that a party to the arbitration procedure was not given proper notice of the appointment of the tribunal or of the arbitration procedure or was otherwise unable to present their case;
- (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
- (e) that the composition of the tribunal or the arbitration procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
- (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision or the recognition or enforcement of the award. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

### **Saving for other bases of recognition or enforcement**

68. Nothing in the preceding provisions of this Act affects any right to rely upon or enforce a New York Convention award at common law.

## **Part V General Provisions**

### *Supplementary*

**69.?** (1) In this Act, unless the context otherwise requires?

“application” means?

- (a) in relation to the Court of Session, a petition, and

(b) in relation to the sheriff, a summary application,  
“writing” means any form, including without limitation a data message, that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference.

“data message” means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

“tribunal” means an arbitrator or a panel of arbitrators and includes an oversman.

“award” includes an interim provisional or part award,

“conclusion of the arbitration” means the expiry of the period mentioned in section 26(3) (or, where there is more than one such period, the period relating to the last award),

“court” means a judge of the Commercial Court of the Court of Session in Edinburgh, or, if agreed by the parties to the arbitration the Sheriff Principal of any Sheriffdom in Scotland or where the arbitrator or oversman is, or the parties agree that he must be, a Senator of the College of Justice, the Inner House of the Court of Session. (For the purposes of sections 45 and 46, “court” only means the Commercial Court of the Court of Session..

“enactment” includes an enactment in subordinate legislation,

“the Model Law” has the meaning given by section 62, and

“party” means a party to the arbitration agreement in question.

“public holiday” means Christmas day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday in Scotland and shall be excluded.

(2) Where any provision of this Act refers to the agreement of the parties on any matter, such agreement, in the absence of express provision to the contrary -

- (a) may be oral or in writing,
- (b) may be reached at any time. and
- (c) need not be in the arbitration agreement.

## **Crown application**

**70. This Act binds the Crown.**

## **Consequential amendments and repeals**

**71. ?** (1) The enactments specified in Schedule 2 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act.

(2) The enactments specified in Schedule 3 are repealed to the extent specified.

**(3) Unless the parties otherwise agree, the provisions of the Scottish Arbitration Code in the form set out in schedule 5, shall apply to any arbitration taking place under this Act, except insofar as this Act or any other enactment makes provision inconsistent with or repugnant to those contained in the Scottish Arbitration Code.**

## **Extent**

**72. ?** (1) The provisions of this Act extend to Scotland.

(2) The repeal of the Arbitration Act 1975 extends only to Scotland.

## **Commencement**

**73. (1)** This Act comes into force at the end of the period of two months beginning with the date of Royal Assent.

## **Power to make further provision by regulations**

**74. ?** (1) The Scottish Ministers may make provision by regulations for adapting or excluding any provision of Part II in relation to statutory arbitrations in general or statutory arbitrations of any particular description.

(2) The power is exercisable whether the enactment concerned is passed or made before or after the commencement of this Act.

(3) Regulations under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

**Short title**

**75.** This Act may be cited as the Arbitration (Scotland) Act 2003.

**LIST OF SCHEDULES** – provisional only

**Schedule 1**

Modification of Part I in relation to Judge – Arbitrator

**Schedule 2**

Consequential Amendments

**Schedule 3**

Repeals

**Schedule 4**

The Scottish Arbitration Code 1999

**Schedule 5**

UNCITRAL Model Law

**Schedule 1**

**Modification of Part I in relation to Judge-Arbitrators**

**Schedule 2**  
**Consequential Amendments**

### Schedule 3

#### Repeals

Chapter	Short Title	Extent of repeal
1695	Articles of Regulation	The whole Act.
1894 c.13.	Arbitration (Scotland) Act 1894.	The whole Act.
1972 c.59.	Administration of Justice (Scotland) Act 1972	Section 3.
1973 c.65.	Local Government (Scotland) Act 1973.	In section 25(3) the words from “but” to the end.
1980 c.55.	Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.	
1982 c.46.	Employment Act 1982.	In Schedule 3, paragraph 11.
1989 c.29.	Electricity Act 1989.	Section 64(2).
1990 c.40.	Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.	Section 66. Schedule 7.

## Schedule 4

### The Scottish Arbitration Code 1999

#### Commencement of Arbitration

1.7 (1) The party commencing arbitration (the Claimant) shall give to the other party (the Respondent) a Notice of Arbitration.

(2) Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Respondent.

(3) The Notice of Arbitration shall include the following:

- (a) The full names and addresses of the parties (including telephone, facsimile, telex numbers and e-mail addresses if known).
- (b) A reference to the arbitration clause or the separate arbitration agreement that is involved.
- (c) A short statement of the Claimant's claim, including the nature of the claim, the sum or sums claimed, and the Respondent's defence if known to the Claimant.
- (d) The relief or remedy sought.
- (e) A demand that the matter be referred to arbitration.
- (f) If the arbitration agreement calls for each party to appoint an Arbitrator, the name and address (and telephone, facsimile, telex number and e-mail address if known) of the Arbitrator nominated by the Claimant.
- (g) If the arbitration agreement does not call for each party to appoint an Arbitrator, a proposal by the Claimant of the name of an Arbitrator with his full name and address (and his telephone, facsimile, telex number and e-mail address if known).
- (h) Within thirty days after receipt of the Notice of Arbitration the Respondent shall deliver to the Claimant a Notice of Defence. Failure to deliver a Notice of Defence shall not delay the arbitration. If there is such a failure all claims set forth in the Notice of Arbitration shall be deemed to be denied.

(4) The Notice of Defence shall include:-

- (a) Any comment on article 1.3(a) (b) or (e) that the Respondent considers appropriate.
- (b) A short statement of the Respondent's defence.
- (c) If the arbitration agreement calls for each party to appoint an Arbitrator the name and address (and telephone, facsimile, telex and e-mail address if known) of the Arbitrator nominated by the Respondent.
- (d) If the arbitration agreement does not call for each party to appoint an Arbitrator, then the Respondent shall intimate whether he accepts the Arbitrator nominated by the Claimant and, if he does not accept him, the names and addresses of the candidates whom the Respondent proposes.

(5) The Respondent may include in the Notice of Defence any counterclaim within the scope of the arbitration clause. If so, the counterclaim in the Notice of Defence shall include those matters in Article 1.3. (b)(c)(d) and (e).

(6) If a counterclaim is asserted in the Notice of Defence, within 30 days after its receipt, the Claimant shall deliver to the Respondent a reply to the counterclaim which shall include the same matters as provided for in the Notice of Defence in Article 1.4.

(7) Failure by the Respondent to include a counterclaim in the Notice of Defence shall not preclude the Respondent from making a counterclaim at a later stage of the proceedings, if the arbitral tribunal in its absolute discretion is prepared to permit it. Any such counterclaim shall include those matters in Article 1.3. (b)(c)(d) and (e).

(8) If any party has been served with a Notice of Arbitration he may, at any time before the arbitral tribunal has been appointed, give Notice of Arbitration in respect of any other disputes which fall under the same arbitration agreement. All disputes identified in such Notice of Arbitration shall be consolidated within the same arbitral proceedings.

(9) After an arbitral tribunal has been appointed, either party may give a further Notice of Arbitration to the other, and to the arbitral tribunal, referring any additional dispute which falls under the same arbitration agreement to the arbitral tribunal proceedings and, whether or not the other party consents to that other dispute being referred to the proceedings, the arbitral tribunal may in its absolute discretion order that the additional dispute should be referred to and consolidated within those same proceedings or that it should not be so referred and consolidated.

(10) Where the same arbitral tribunal is appointed in two or more arbitral proceedings relating to the same project, each of which involves some common issue whether or not involving the same parties, the arbitral tribunal may if it considers it appropriate order the concurrent hearing of any such proceedings, or of any claim or issue arising in such proceedings upon such term or terms as it considers appropriate in all the circumstances.

## **Notices and Communications**

**2. ?** (1) All notices or other communications between the parties and the arbitral tribunal shall be in writing and may be delivered by courier or by registered/recorded post, or transmitted by facsimile, telex, e-mail or any other means of telecommunication which provides a record of its transmission.

(2) A party's last known residence or place of business during the arbitration shall be a valid address for the purposes of any notices or other communications in the absence of any notification of a change of address by that party to the other party and to the arbitral tribunal.

(3) For the purpose of determining the date of the commencement of a time limit, a notice or other communication shall be treated as having been received on the day it is delivered, or in the case of a telecommunication, transmitted in accordance with Article 2.1.

(4) For the purpose of determining compliance with a time limit, a notice or other communication shall be treated as having been sent made or transmitted if it is dispatched in accordance with Article 2.1 and 2.2 prior to or on the date of expiration of the time limit.

(5) All correspondence with, and other documents sent to the arbitral tribunal by one party shall at the same time be communicated to the other party.

## **Constitution of the Arbitral tribunal Number of Arbitrators and Procedure for Appointment**

**3. ?** (1) The expression "the Arbitral tribunal" in this Code includes a sole Arbitrator or a Arbitrators where more than one. All references to an Arbitrator shall include the masculine and the feminine, and Arbitrator shall include Arbitrer.

(2) The parties are free to agree on the number of Arbitrators. If they have not agreed, a single Arbitrator shall be appointed.

(3) If the parties have agreed that there shall be more than one Arbitrator and the Claimant has nominated an Arbitrator in accordance with Article 1.3(f) but the Respondent fails within thirty days of receipt of the Notice of Arbitration either to deliver a Notice of Defence at all, or to include in the Notice of Defence the name and address of another Arbitrator, the parties shall be deemed to have agreed on a single Arbitrator and the Arbitrator nominated by the Claimant shall be appointed as the sole Arbitrator.

(4) If the parties have agreed that there shall be a single Arbitrator and the Claimant has proposed an Arbitrator under Article 1.3(g), and the Respondent does not intimate non- acceptance of that Arbitrator within thirty days of the Notice of Arbitration, then the Arbitrator proposed by the Claimant shall be appointed as the sole Arbitrator.

(5) Where the parties have agreed a single Arbitrator be appointed and each has nominated an Arbitrator, they shall endeavour to agree on the single Arbitrator within thirty days of delivery of the Notice of Defence. If they cannot agree within that period either party may apply, in the case of a domestic dispute to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch), and in the case of an international dispute to the Chairman of the Scottish Council for International Arbitration, to appoint the Arbitrator.

(6) Where parties have agreed on an arbitral tribunal of three and each has appointed an Arbitrator then unless the parties have agreed on another method of appointment the party-appointed Arbitrators shall endeavour within thirty days of the delivery of the Notice of Defence to agree upon a third Arbitrator who shall be the chairman of the arbitral tribunal, or if the parties have so agreed shall act as oversman. If the party- appointed Arbitrators do not reach agreement within that time either party may apply in the case of a domestic dispute to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) and in the case of an international dispute to the Chairman of the Scottish Council for International Arbitration, to appoint that third Arbitrator or oversman.

(7) Where application has been made to the Chairman of the appropriate body to appoint an Arbitrator and that Chairman refuses or fails to make an appointment within thirty days of the application, either party may apply to the Court of Session, Scotland to appoint the Arbitrator.

(8) Where the Chairman of the appropriate body is unavailable or unable to act, a Vice-Chairman may act in his place.

(9) For the purposes of this Article the parties prorogate the exclusive jurisdiction of the Court of Session, Scotland.

### **Qualifications of Arbitrators**

**4. ?** (1) Any natural person of whatever nationality who is of full age and capacity may be an Arbitrator.

(2) Each Arbitrator shall be and remain at all times independent and impartial.

(3) Before nominating or proposing an Arbitrator the party seeking to nominate or propose that Arbitrator shall ascertain that that person is willing and able to accept appointment.

(4) On being approached to act as Arbitrator, the prospective Arbitrator shall disclose in writing to the parties any circumstances likely to give rise to justifiable doubts as to the Arbitrator's impartiality or independence or confirm in writing that no such circumstances exist. If at any stage in the arbitration circumstances arise that may give rise to such doubts, the Arbitrator shall promptly disclose those circumstances to the parties. Such circumstances include but are not limited to bias, interest in the result of the arbitration and past or present relationships with a party.

(5) By accepting appointment the Arbitrator shall be deemed to have undertaken to make available sufficient time to enable the arbitration to be conducted and completed expeditiously.

(6) Where parties are of different nationality a sole Arbitrator (or chairman or oversman) shall not have the same nationality as any of the parties unless they agree otherwise in writing. The nationality of a party shall be understood to include that of controlling shareholders or interests. Citizens of the European Union shall be treated for this purpose as nationals of the different Member States and shall not be treated as having the same nationality.

(7) Article 4.6 shall not apply in the case of an Arbitrator appointed as sole Arbitrator under Article 3.3.

(8) By accepting appointment the Arbitrator shall be deemed to be bound by this Code.

### **Challenge of Arbitrators**

**5. ?** (1) A party may challenge an Arbitrator if circumstances exist or arise giving rise to justifiable doubts as to the Arbitrator's impartiality or independence.

(2) Such challenge may only be made within fifteen days after the party challenging became aware of the circumstances it considers give rise to justifiable doubt as to an Arbitrator's impartiality or independence.

(3) The challenge shall be in writing and shall be delivered to the other party and to the arbitral tribunal.

(4) The other party may agree to the challenge (in which case the Arbitrator shall withdraw from the arbitration) or the challenged Arbitrator may decide to withdraw. In neither case does the withdrawal imply acceptance by the Arbitrator of the validity of the grounds stated for the challenge.

(5) If the challenged Arbitrator does not withdraw, the arbitral tribunal shall in the first instance decide upon the challenge. In the event that it rejects the challenge the party making the challenge shall have the right to apply to an arbitral tribunal of three persons to be selected by the Chairman of the Scottish Council for International Arbitration and the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) acting jointly to decide the challenge, and the decision of that arbitral tribunal shall be final.

(6) If the challenge is upheld by either the arbitral tribunal or the tribunal referred to in Article 5.5 the challenged Arbitrator shall be deemed to have resigned upon the date of the decision upholding the challenge.

(7) Pending the decision of such an arbitral tribunal the arbitral tribunal may in its discretion continue with the arbitration.

## **Replacement of Arbitrators**

6. ? (1) An Arbitrator shall not be entitled to resign or withdraw (except under Article 5) without the consent in writing of the parties, except upon the provision of a certificate from a registered doctor justifying resignation upon grounds of health.

(2) When an Arbitrator has died, withdrawn, resigned or been removed from office the position left vacant shall be filled, unless the parties otherwise agree, by appointment by the Chairman of the body designated in Article 3.5.

(3) When a replacement Arbitrator is appointed in the course of an arbitration, it shall be for the arbitral tribunal to determine in its discretion whether any hearings held previously shall be repeated.

(4) If in the view of a party an Arbitrator becomes incapacitated or unable to perform the duties of his office the procedure in respect of Challenge of Arbitrators set out in Article 5 shall apply.

(5) Pending replacement of an Arbitrator, the arbitral proceedings shall be suspended unless otherwise agreed by the parties.

## **Truncated Tribunal**

7. ? (1) If an Arbitrator in a three person tribunal, although duly notified fails without good cause to participate in the work of the tribunal, the two other Arbitrators shall have the power in their sole discretion to continue the arbitration and to make any award, order or other decision despite the failure of the third Arbitrator to participate. In making this decision the two other Arbitrators shall have regard to all matters they consider appropriate in the circumstances of the case. The two Arbitrators shall notify the parties and the third Arbitrator that the arbitral tribunal has become a tribunal of two and that the arbitration shall continue to its conclusion.

(2) If the two other Arbitrators determine that the arbitration should not proceed without the participation of a third Arbitrator, they shall declare in writing that the office of the third Arbitrator has been vacated, and the procedure for replacing that Arbitrator shall be carried through as if he had resigned in accordance with Article 6.2.

(3) Upon the appointment of a replacement Arbitrator in the circumstances of Article 7.2 the provision of Article 6.3 shall apply in relation to the repetition of previous proceedings.

## **Fees and Expenses**

8. ? (1) Each Arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an Arbitrator, and shall be reimbursed for his time, travelling and other expenses incurred in the course of the arbitration.

(2) Provided there is agreement in writing in advance by the parties the Arbitrator's fees may include a charge for time reserved but not used as a result of late postponement or cancellation.

(3) In the event of failure to agree at the time of appointment on an arbitrator's fees, they shall be fixed upon the application of a party or the Arbitrator by the Auditor of the Court of Session, Scotland.

(4) Where the arbitral tribunal has appointed a clerk, the fees and expenses of the clerk, if not agreed, shall be fixed by the Auditor of the Court of Session upon the application of a party or the arbitral tribunal.

## **Communications between Parties and Arbitrators**

9. ? Except as otherwise provided in these Articles or permitted by the arbitral tribunal no party or anyone acting on its behalf shall have any *ex parte* communications with any Arbitrator with regard to any matter of substance relating to the proceedings.

## **Exclusion of Liability**

10. No Arbitrator, clerk or nominating body shall be liable to any party for any act or omission in connection with any arbitration conducted under these Articles, except that he may be liable for the consequences of conscious and deliberate wrongdoing.

## **Preliminary Issues**

11. ? (1) The Tribunal shall have the power to hear and determine challenges to its own jurisdiction, including any objections with regard to the existence or validity of the arbitration clause or of the separate arbitration agreement.

(2) The Tribunal shall have the power to determine the existence, validity and scope of the contract of which an arbitration clause forms part. For the purposes of this Article an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the arbitration clause is null and void shall not for that reason alone render the arbitration clause invalid.

(3) Any challenge to the jurisdiction of the tribunal or as to the arbitrability of a claim or counterclaim must be made to the tribunal not later than the date of issue of the Notice of Defence or reply to the counterclaim as the case may be, provided that if a claim or counterclaim is later amended such a challenge may be made in relation to the amended matter not later than the date of reply to such amended claims or counterclaim. If no such challenge is made then the right to make it shall be treated as having been irrevocably waived.

## **Seat of Arbitration**

12. Unless the parties have agreed upon the seat of the arbitration the tribunal shall fix the seat of arbitration. Any award by the tribunal shall be deemed made at such place. Notwithstanding the above the tribunal may hold hearings whenever it deems appropriate. In addition it may hold meetings with or without the parties being present wherever it deems appropriate.

## **Language of Arbitration**

13. ? (1) In the absence of an agreement by the parties the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances including the language of the contract.

(2) If any document is expressed in a language other than the language(s) of the arbitration and no translation is provided by the party seeking to rely upon the document the tribunal may order that party to submit a translation in the language of the arbitration.

## **Substantive Law Applicable**

14. ? (1) The tribunal shall apply the substantive law agreed by the parties as applicable to the dispute. Failing such agreement, the tribunal shall apply such law or laws as it determines to be appropriate.

(2) In all cases the tribunal shall take account of the provisions of the contract and usage of the trade applicable to the contract.

(3) The tribunal shall not decide as *amiable compositeur* nor *ex bono et aequo* unless the parties have expressly authorised it to do so.

## **Conduct of Proceedings Generally**

15. ? (1) Subject to this Code, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party is given a fair opportunity to present its case.

(2) Unless the parties have agreed otherwise the tribunal shall determine to what extent, if any, written pleadings are to be provided by the parties in addition to those contained in the Notice of Arbitration and Notice of Defence, and shall set out the timetable according to which such pleadings shall be prepared and lodged with the tribunal.

(3) The tribunal in the exercise of the widest discretion shall conduct the proceedings with a view to the fair, speedy, and efficient resolution of the dispute. It may conduct preliminary conference(s) with the parties for the purpose of organising, scheduling and agreeing procedures to expedite the subsequent proceedings.

(4) The tribunal may in its discretion direct the order of proof, split proceedings, exclude cumulative or irrelevant witness testimony or other evidence and direct parties to focus their presentation on issues the decision of which may dispose of all or part of the case.

(5) In the case of a three member tribunal the chairman may after consulting the other members make procedural rulings which need only be signed by the chairman.

### **Additional Powers of Arbitrators**

**16. ?** (1) In addition to the powers conferred generally or specifically on Arbitrators elsewhere in this Code, the Arbitrator shall have the following powers (unless the parties otherwise agree):-

(2) power to make interim or partial awards;

(3) power to award damages;

(4) power to rectify the terms of any contract to the extent permitted by the law applicable to that contract;

(5) power to order that simple or compound interest shall be paid by any party on any sum awarded at such rate or rates as the Arbitrator determines to be appropriate without being bound by legal rates of interest imposed by any state, court or any agreement between the parties in respect of any period which the Arbitrator determines to be appropriate including a date prior to the appointment of the Arbitrator and ending not later than the date upon which the award is complied with;

(6) power to vary time limits whether imposed by the Arbitrator or this Code or the parties whenever it seems appropriate to so do;

(7) power in the event that a party is unduly dilatory in presenting its claim, counterclaim or defence to the prejudice of the other party to dismiss the claim or counterclaim or exclude the defences as the case may be;

(8) power to appoint a clerk, whose fees, outlays and expenses shall be included in the expenses of the arbitration

### **Evidence, Hearings and Pleadings**

**17. ?** (1) The tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise agreed by the parties or determined by the tribunal under Article 15, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following matters:

(a) A statement of facts.

(b) A statement of each claim being asserted.

(c) A statement of the applicable law on which the party relies.

(d) A statement of the relief requested, including the basis for any damages claimed and;

(e) An outline of the evidence to be presented including the name, capacity and subject of testimony of any witness proposed to be called, the language in which the witness will testify and an estimate of the amount of time required for that witness's direct testimony if it were to be given orally.

(2) In order to define the issues to be heard and determined the tribunal may make pre-hearing orders in relation to the arbitration and instruct parties within such time limits as it thinks fit to file more detailed statements of claim and defence and pre-hearing memoranda.

(3) The tribunal may impose such time limits as it considers reasonable for each stage of the proceedings including the time allocated to each party for presentation of its case or for rebuttal.

(4) At any time during the arbitration the tribunal may at the request of a party or of its own motion order a party to deliver to the tribunal and to the other party such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the tribunal (or to an expert appointed by it) or to the other party or its expert any property in its control for inspection or testing.

(5) Any party which expresses a desire to that effect in reasonable time shall be heard orally before the tribunal unless the parties have agreed in writing on a documents only arbitration.

(6) The tribunal shall fix the date, times and place of any meetings and hearings in the arbitration and shall give the parties reasonable notice thereof.

(7) The tribunal may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention.

(8) If any of the parties although duly notified in accordance with Article 16.6 fails to appear at a meeting or hearing without valid excuse the tribunal shall have the power to proceed with the hearing in its absence.

(9) At any hearing each party shall be entitled to be present. All meetings and hearings shall be in private unless the tribunal decides otherwise. Except with the approval of the tribunal and the parties, persons not involved in the proceedings shall not be admitted. The tribunal may require the retirement of any witness during the testimony of other witnesses.

(10) The parties may appear in person or through duly authorised representatives. In addition they may be assisted by advisers.

## **Evidence of Witnesses**

**18. ?** (1) The tribunal is not required to apply rules of evidence used in judicial proceedings. It shall determine the applicability of any privilege or immunity, and the admissibility, relevance, materiality and weight of the evidence offered.

(2) Before any hearing the tribunal may require any party to give notice of the identity of each witness that party wishes to call as well as the subject matter of that witness' testimony, its contents and relevance to the issues in the arbitration.

(3) The tribunal may also determine the times, manner and form in which such material should be exchanged between parties and presented to the tribunal. It has discretion to allow refuse or limit the appearances of witnesses.

(4) If the tribunal so determines, the evidence of witnesses may be presented in the form of witness statements signed by them.

(5) Any party may request that a witness on whose witness testimony another party seeks to rely should attend for oral questioning at a hearing before the tribunal. If the tribunal orders this other party to produce the witness, and the witness fails to attend the hearing without good cause, the tribunal may place such weight on the witness testimony (or exclude it altogether) as it considers appropriate in the circumstances of the case.

## **Experts**

**19. ?** (1) The tribunal may appoint one or more experts to report to it in writing on specific issues to be determined by the tribunal. A copy of the expert's draft terms of reference shall be communicated to the parties and they be given a period of time to comment thereon before the terms of the reference are finally established by the tribunal, and copied to the parties.

(2) The parties shall give the expert any relevant information or produce for inspection any property that the expert may require. In the event of disputes between the expert and a party as to the material to be produced or inspected the tribunal shall determine the issue.

(3) Upon receipt of the expert's report the tribunal shall communicate a copy to the parties who shall be entitled to express in writing their opinion on that report. A party shall be entitled to examine any material upon which the expert has relied in the report.

(4) Upon receipt of the expert's report a party may request a hearing thereon which the tribunal shall be bound to grant. At such a hearing the expert shall be present and may be questioned on his report on behalf of a party, and expert witnesses may testify on behalf of a party on the points at issue.

(5) The fees and expenses of such tribunal appointed experts shall be part of the costs and expenses of the arbitration.

## **Interim Measures**

**20. ?** (1) At the request of a party the tribunal may take such *interim* measures as it deems necessary:-

- (a) To order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute in such manner and upon such terms as it considers appropriate. Such terms may include the provision by the party claiming security of a cross indemnity itself secured in whichever manner the tribunal considers appropriate for any expenses or losses incurred by the party ordered to provide security in doing so. The

amount of such expenses or losses may be determined by the tribunal in one or more awards

- (b) To order the preservation, storage, sale or other disposal of any property or thing under the control of a party and relating to the subject matter of the arbitration.
- (c) To order, on a provisional basis, subject to final determination in an award any relief which the tribunal would have power to grant in an award including interdicts and provisional orders for the payment of money or the disposition of property as between any parties.

(2) The tribunal shall have power at the request of a party to order any other party to provide security for the expenses of that party in such manner and on such terms and for such amount as the tribunal considers appropriate.

(3) In the event that a party does not comply with an interim measure ordered by the tribunal under Article 20.1 or 20.2 within a time limit fixed by the tribunal, the tribunal may sist or dismiss any claim or counterclaim made by that party, or refuse to allow it to present a defence as may seem appropriate.

(3) The power of the tribunal under Article 20.1 shall not prejudice any party's right to apply to any state Court for interim or Conservatory measures either before or after the tribunal has been constituted.

### **Closure of Proceedings**

**21.** ? (1) The tribunal shall declare the proceedings closed when it is satisfied that the parties have had adequate opportunity to present their cases. Once it has done So the parties may not present any further material to the tribunal.

(2) The tribunal may in its discretion on its own motion or on the application of a party re-open the hearing at any time before the award is made.

(3) The arbitral tribunal shall use its best endeavours to make its award within forty-five days of the closure of the proceedings or such other period as the parties and the arbitral tribunal shall agree.

### **Awards**

**22.** (1) The tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the tribunal.

(2) Where there are three Arbitrators and the tribunal fails to agree on any issue, the Arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the chairman of the tribunal shall decide that issue.

(3) If any Arbitrator refuses or fails to sign the award, the signatures of the majority shall be sufficient provided that the reason for the omitted signature is stated in the award. In a case falling under Article 7.1, the signature of the chairman alone shall suffice.

(4) The tribunal shall make its award in writing and unless the parties agree otherwise shall state the reasons upon which its award is based. The award shall also state the date when the award was made and the seat of the arbitration and shall be signed by the Arbitrators (or the majority of them assenting to it).

(5) The sole Arbitrator or the Chairman shall be responsible for delivering copies of the award to the parties. The tribunal shall be entitled to withhold the delivering of the award until the fees and expenses due to the tribunal have been met in full.

(6) An award may be expressed in any currency.

(7) Any award interim or final shall be binding on the parties from the date on which it is made, subject to Article 2.3. By agreeing to arbitration under the Code, the parties undertake to carry out any award immediately and without delay subject to Article 23 and the parties irrevocably waive their right to any form of appeal review or recourse to any state court or other judicial authority.

### **Correction of Awards and Additional Awards**

**23.** ? (1) Within 30 days of receipt of any award a party may, with notice to the other party, request the tribunal in writing to correct in an award any errors in computation, clerical or typographical errors or any errors of a similar nature or make an additional award as to claims

presented but omitted from the award. If the tribunal considers the request justified it shall make the corrections or addition within 30 days of receipt of the request. Any addition or correction shall take the form of a separate memorandum dated and signed by the tribunal (or by the majority assenting to it) and shall become part of the award for all purposes.

(2) The tribunal may likewise on its own initiative within 30 days of the date of the award correct any error of the nature described in Article 23.1 in the same manner and to the same effect.

## **Expenses**

**24.** (1) The tribunal shall in its award and subject to any agreement between the parties, fix the costs of the arbitration and apportion them between the parties as it considers reasonable in the whole circumstances.

(2) For the purposes of Article 24.1 costs include:-

(a) The fees and expenses of the arbitral tribunal.

(b) The costs of any assistance required by the tribunal in the course of the arbitration process including the fees and expenses of its experts.

(c) The costs of meeting and hearing facilities.

(d) Any other costs incurred by the arbitral tribunal in the conduct of the arbitration.

(3) The tribunal shall also have power, unless the parties otherwise agree, to order in its award that all or part of the legal or other expenses incurred by a party in the course of the proceedings shall be paid by another party. The tribunal shall have power to determine and fix the amount of such expenses on such reasonable basis it thinks fit or to order taxation by the Auditor of the Court of Session. It may also make an award of expenses from time to time in the course of the proceedings.

(4) If the arbitration is abandoned, suspended or concluded by agreement or otherwise before the final award is made, the parties shall remain jointly and severally liable to pay to the tribunal the costs of the arbitration as fixed by the tribunal under Article 24.1.

(5) The Tribunal shall have power in the course of the proceedings and from time to time to order the parties to make payments in advance in respect of the costs mentioned in Article 24.1 in such sums as to the tribunal appears reasonable.

## **Settlement**

**25. ?** (1) In the event of a settlement of the parties' dispute the tribunal may render an award recording the settlement if the parties so request in writing, provided that such an award (which need not contain reasons) expressly states that it is an award made by the parties' consent.

(2) If a settlement is reached and the parties do not require an award, then on written confirmation to the tribunal that a settlement has been reached, the tribunal shall be discharged and the arbitration proceedings concluded subject to payment by the parties of any outstanding costs of the arbitration under Article 24.

**Schedule 5**  
**UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION**  
**CHAPTER 1**  
**GENERAL PROVISIONS**

*Article 1*

*Scope of application*

[ ] ? (1) This Law applies to international commercial arbitration, subject to any agreement in force between the United Kingdom and any other State or States which applies in Scotland.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only of the place of arbitration is in Scotland.

(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
  - (i) the place of arbitration is determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected.

(4) For the purposes of paragraph (3) of this article:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This law shall not affect any other enactment or rule of law in force in Scotland by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

*Article 2*

*Definitions and rules of interpretation*

[ ] ? (1) For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means an arbitrator or a panel of arbitrators;
- (c) "arbitrator" includes an arbiter;
- (d) "commercial", in relation to an arbitration, includes matters arising from all relationships of a commercial nature, whether contractual or not;
- (e) "country" includes Scotland;
- (f) "court" means a body or organ of the judicial system of a State;
- (g) "relationships of a commercial nature" include, but are not limited to, the following transactions, namely any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investments; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road;
- (h) "State", except in article 1(1), includes Scotland;
- (i) where a provision of this Law, except article 2u, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination;

- (j) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (k) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to such counterclaim.
- (l) article headings are for reference purposes only and are not to be used for purposes of interpretation.

*Article 3*  
*Receipt of written communications*

- [ ]. ? (1) Unless otherwise agreed by the parties;
- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempts to deliver it.
  - (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.

*Article 4*  
*Waiver of right to object*

[ ]. ? A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objections to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

*Article 5*  
*Extent of court intervention*

[ ]. ? In matters governed by this Law, no court shall intervene except where so provided in this Law.

*Article 6*  
*Court for certain functions of arbitration assistance, supervision and enforcement*

[ ]. ? The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3), 34(2), 35 and 36 shall be performed by:

- (a) the Court of Session, or
- (b) where it has jurisdiction, the sheriff court.

## CHAPTER II

### ARBITRATION AGREEMENT

#### Article 7

##### *Definition and form of arbitration agreement*

[ ]. ? (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing within the meaning of sections 5 and 69 of the Act.

#### Article 8

##### *Arbitration agreement and substantive claim before court*

[ ]. ? (1) A court before which an action is brought is a matter which is the subject of an arbitration agreement shall, if a party so requests at any time before the pleadings in the action are finalised, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

#### Article 9

##### *Arbitration agreement and interim measures by court*

[ ]. ? (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

(2) In paragraph (1) of this article "interim measure of protection" includes, but is not limited to, the following:

- (a) arrestment or inhibition to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by another party;
- (b) interim interdict or other interim order.

(3) Where:

- (a) a party applies to a court for an interim interdict or other interim order; and
- (b) an arbitral tribunal has already ruled on the matter,

the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

## CHAPTER III

### COMPOSITION OF ARBITRATION TRIBUNAL

#### *Article 10 Number of arbitrators*

- [ ] ? (1) The parties are free to determine the number of arbitrators.  
(2) Failing such determination, there shall be a single arbitrator.

#### *Article 11 Appointment of arbitrators*

- [ ] ? (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.  
(2) The parties are free to agree on a procure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.  
(3) Failing such agreement,  
(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on a third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court specified in article 6;  
(b) in an arbitration with a single arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court specified in article 6.  
(4) Where, under an appointment procedure agreed upon by the parties;  
(a) a party fails to act as required under such procedure, or  
(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or  
(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure

any party may request the court specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court specified in article 6 shall be subject to no appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case or sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### *Article 12 Grounds for challenge*

[ ] ? (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

*Article 13*  
*Challenge procedure*

[ ]. ? (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If the challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, request the court specified in article 6 to decide on the challenge, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

*Article 14*  
*Failure or impossibility to act*

[ ]. ? (1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

*Article 15*  
*Appointment of substitute arbitrator*

[ ]. ? Where the mandate of an arbitrator terminates under article 13 or 14 because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

## CHAPTER IV

### JURISDICTION OF ARBITRAL TRIBUNAL

#### *Article 15*

#### *Competence of arbitral tribunal to rule on its jurisdiction*

[ ]. ? (1) The arbitral tribunal may rule its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may, within thirty days after having received notice of that ruling, request the court specified in article 6 to decide the matter, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### *Article 17*

#### *Power of arbitral tribunal to order interim measures*

[ ]. ? (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) An order under paragraph (1) of this article shall take the form of an award and articles 31, 35 and 36 shall apply accordingly.

**CHAPTER V**  
**CONDUCT OF ARBITRAL PROCEEDINGS**

*Article 18*  
*Equal treatment of parties*

[ ]. ? The parties shall be treated with equality and each party shall be given a full opportunity of presenting its case.

*Article 19*  
*Determination of rules of procedure*

[ ]. ? (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

*Article 20*  
*Place of arbitration*

[ ]. ? (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

*Article 21*  
*Commencement of arbitral proceedings*

[ ]. ? Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which the request for that dispute to be referred to arbitration is received by the respondents.

*Article 22*  
*Language*

[ ]. ? (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

*Article 23*  
*Statements of claim and defence*

[ ]. ? (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the party have otherwise agreed as to the required elements of such statements. The parties may submit with

their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

*Article 24*  
*Hearing and written proceedings*

[ ] ? (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

*Article 25*  
*Default of a party*

- [ ] ? Unless otherwise agreed by the parties, if, without showing sufficient cause -
- (a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
  - (b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
  - (c) any party fails to appear at a hearing or to produce the documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

*Article 26*  
*Expert appointed by arbitral tribunal*

[ ] ? (1) Unless otherwise agreed by the parties, the arbitral tribunal:

- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- (b) may provide a party to give the expert any relevant information or to provide access to any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

*Article 27*  
*Court assistance in taking evidence*

[ ] ? The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the Court of Session or the sheriff court assistance in taking evidence and recovering documents. The court may execute the request within its competence and according to its rules on taking evidence and recovery of documents.

## CHAPTER VI

### MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

#### *Article 28*

##### *Rules applicable to substance of dispute*

[ ]. ? (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of law rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade application to the transaction.

#### *Article 29*

##### *Decision making by panel of arbitrators*

[ ]. ? In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

#### *Article 30*

##### *Settlement*

[ ]. ? If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if so requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

#### *Article 31*

##### *Form and contents of award*

[ ]. ? (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

#### *Article 32*

##### *Termination of proceedings*

[ ]. ? (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when?
- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute.
  - (b) the parties agree on the termination of the proceedings;
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

#### *Article 33*

#### *Correction and interpretation of award and making of additional award*

[ ] ? (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties?

- (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computations, any clerical or typographical errors or any errors of similar nature;
- (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph 1(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may, within thirty days of receipt of the award, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction or interpretation under paragraph (1) of this article.

(5) The provisions of article 31 shall apply to a correction of interpretation of the award or to an additional award.

## CHAPTER VII

### RECOURSE AGAINST AWARD

#### *Article 34*

#### *Application for setting aside as exclusive recourse against arbitral award*

[ ] ? (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if?

- (a) the party making the application furnishes proof that?
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Scotland; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (v) the award was procured by fraud, bribery or corruption; or
- (b) the court finds that?
  - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Scotland; or
  - (ii) the award is in conflict with public policy.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## **CHAPTER VIII RECOGNITION AND ENFORCEMENT OF AWARDS**

### *Article 35 Recognition and enforcement*

[ ] ? (1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in English, the party shall supply a duly certified translation thereof into English.

### *Article 36 Grounds for refusing recognition or enforcement*

[ ] ? (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only?

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that?
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

- (b) if the court finds that?
  - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Scotland; or
  - (ii) the recognition or enforcement of the award would be contrary to public policy.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decisions and also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

## ARBITRATION (SCOTLAND) BILL

### ARRANGEMENT OF CLAUSES

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- 57. Statutory arbitrations

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- 61. Appointment of judges as arbitrators

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