

ARBITRATION IN SCOTLAND

By Rob Wilson and Valerie Allan, CMS

Table of Contents

1.	Historical background	689
2.	Scope of application and general provisions of the Scottish Arbitration Act	690
2.1	Subject matter	690
2.2	Structure of the law	690
2.3	General principles	692
2.4	Limitation	693
3.	The arbitration agreement	693
3.1	Definitions	693
3.2	Formal requirements	693
3.3	Special tests and requirements of the jurisdiction	693
3.4	Separability	694
3.5	Legal consequences of a binding arbitration agreement	695
4.	Composition of the arbitral tribunal	695
4.1	Constitution of the arbitral tribunal	695
4.2	Procedure for challenging and substituting arbitrators	696
4.3	Responsibilities of an arbitrator	698
4.4	Arbitration fees and expenses	698
4.5	Arbitrator immunity	699
5.	Jurisdiction of the arbitral tribunal	700
5.1	Competence to rule on jurisdiction	700
5.2	Power to order interim measures	701
6.	Conduct of proceedings	701
6.1	Commencing an arbitration	701
6.2	General procedural principles	701
6.3	Place and language of the arbitration	702
6.4	Multi-party issues	702
6.5	Oral hearings and written proceedings	702
6.6	Default by one of the parties	703
6.7	Taking of evidence	704
6.8	Appointment of experts	704

6.9	Confidentiality	704
6.10	Court assistance in taking evidence	705
7.	Making of the award and termination of proceedings	706
7.1	Choice of law	706
7.2	Timing, form and notification of an award	706
7.3	Settlement	706
7.4	Power to award interest and costs	706
7.5	Termination of the proceedings	707
7.6	Effect of an award	708
7.7	Correction, clarification and issue of a supplemental award	708
8.	Role of the courts	708
8.1	Jurisdiction of the courts	708
8.2	Stay of court proceedings	709
8.3	Interim protective measures	709
9.	Challenging and appealing an award through the courts	711
9.1	Jurisdiction of the courts	711
9.2	Appeals	711
9.3	Applications to set aside an award	712
10.	Recognition and enforcement of awards	713
10.1	Domestic awards	713
10.2	Foreign awards	714
11.	Conclusion	715
12.	Contacts	716

1. Historical background

- 1.1.1 Private arbitration in Scotland can be traced back to the 12th century. However, despite this extensive history, Scotland did not have a clear and codified arbitration regime until the introduction of the Arbitration (Scotland) Act 2010 (**Scottish Arbitration Act**).
- 1.1.2 Prior to the introduction of the Scottish Arbitration Act, the Scots law of arbitration was governed by old case law, piecemeal legislation and out-dated rules, all of which led to the development of an uncertain and unclear regime. Reform was proposed by way of a draft Arbitration Bill during the 1990s which, despite being circulated in January 1997 by the Scottish Courts Administration (following recommendations made by the Dervaird Committee), was not progressed. In 1999 the Scottish Council for International Arbitration (**SCIA**) and the Chartered Institute of Arbitrators (Scottish Branch) (**CI Arb (SB)**) produced the Scottish Arbitration Code (**Code**). The Code attempted to set out the general framework of arbitration and the rules under which arbitration in Scotland should be conducted. While the Code was widely welcomed, it was not mandatory and its adoption required the agreement of all parties to an arbitration.
- 1.1.3 A second draft of the proposed arbitration bill was produced in December 2002 by the Arbitration (Scotland) Bill Working Group, in association with the SCIA and CI Arb (SB). The bill once again sought to provide a comprehensive statutory framework for arbitration with an emphasis on the expediency of arbitral proceedings. However, the bill was not progressed.
- 1.1.4 Following a shift in political climate, in May 2007 the new Scottish Government adopted a manifesto goal of encouraging arbitration in Scotland. As a result, the Scottish Government prepared a further draft bill, drawing on the Model Law 1985, the Arbitration Act 1996 (**English Arbitration Act**) and the earlier draft bill of 2002. The new draft bill was put out for consultation in June 2008 with its stated objectives being to:
- clarify and consolidate Scottish arbitration law (filling in any gaps);
 - provide a statutory framework for arbitrations where none is agreed between the parties;
 - ensure fairness and impartiality in the arbitral process; and
 - minimise expense and ensure that the arbitral process is efficient.
- 1.1.5 This time the draft bill was progressed. The Scottish Arbitration Act received royal assent on 5 January 2010 and came into full force and effect as from 7 June 2010.

- 1.1.6 The Scottish Arbitration Act radically overhauls the Scots law of arbitration and provides the first complete statutory framework for arbitration in Scotland. That framework seeks to adopt “best practice” from around the world. The drafters’ approach was to create a comprehensive, uniformly drafted Act. Therefore, the decision was taken to repeal the Model Law 1985, which was introduced into Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Nevertheless, the principles that underpin the Model Law 1985 are still to be found in the Scottish Arbitration Act.¹

2. Scope of application and general provisions of the Scottish Arbitration Act

2.1 Subject matter

- 2.1.1 The Scottish Arbitration Act applies to all arbitrations that are “seated in Scotland”. An arbitration is defined as being “seated in Scotland” if:

- Scotland is designated as the juridical seat by the parties, by a third party with designated power to decide the juridical seat or by the arbitral tribunal (where parties fail to designate a third party); or
- in the absence of any such designation the court determines Scotland to be the juridical seat.²

- 2.1.2 However, if two Scottish parties arbitrate in Scotland but specifically choose a different jurisdiction as the juridical seat, the provisions of the Scottish Arbitration Act will generally not apply. Exceptions to this general rule include the following situations:

- the sisting of legal proceedings by a court (equivalent to a stay of proceedings in England) on the application by one of the parties where a valid arbitration agreement exists;³ and
- the enforcement of awards.⁴

2.2 Structure of the law

- 2.2.1 The Scottish Arbitration Act consists of 37 primary sections and two schedules. The first of these schedules contains the Scottish Arbitration Rules (**SAR**).⁵ The

¹ *Greens Annotated Acts – Arbitration (Scotland) Act 2010*, p 2.

² Scottish Arbitration Act, s 3.

³ *Ibid*, s 10.

⁴ *Ibid*, s 12.

⁵ *Ibid*, schedule 1.

second schedule lists the extent to which previous legislation has been repealed.⁶ In addition, explanatory notes (prepared by the Scottish Government) are annexed to the Scottish Arbitration Act.

- 2.2.2 The SAR provide an easy point of reference to the rules that govern arbitration seated in Scotland. The SAR are intended to be user friendly and are categorised into mandatory and default rules. The status of each rule is denoted in Schedule 1 to the Scottish Arbitration Act by the letter “M” for mandatory rules and the letter “D” for default rules.

Mandatory rules

- 2.2.3 The mandatory rules apply to all arbitrations seated in Scotland, irrespective of which law the parties may choose to apply. These rules cannot be modified or disapplied by agreement between the parties or by any other means.⁷ They are intended to establish minimum standards to ensure fairness and impartiality.

Default rules

- 2.2.4 The majority of the SAR consists of default rules which apply where the arbitration agreement is silent or the parties have not agreed to modify or disapply them (in whole or in part).⁸ The default rules set out in detail elements of the procedural framework. The intention is that they will enable the maximum autonomy and flexibility for the parties. The default rules provide a fall back or “ready made” position if the parties are unable to agree on specific rules.

- 2.2.5 In addition to any express agreement by the parties to modify or disapply the default rules, the parties will be treated as having agreed to modify or disapply a default rule if the:

- rule is inconsistent with or disappplied by the arbitration agreement;
- rule is inconsistent with or disappplied by any arbitration rules or other document (for example, the UNCITRAL Rules (2010) or institutional rules) which the parties agree are to govern the arbitration;
- rule is inconsistent with or disappplied by anything done with the agreement of the parties; or
- parties choose a law other than Scots law as the applicable law in respect of the rule’s subject matter.⁹

⁶ *Ibid*, schedule 2.

⁷ *Ibid*, s 8.

⁸ *Ibid*, s 9.

⁹ *Ibid*, s 9(4)(a)–(b).

2.3 General principles

- 2.3.1 The Scottish Arbitration Act is to be interpreted and applied in accordance with the three founding principles of fairness, autonomy of the parties and non intervention by the courts.¹⁰ The inspiration behind these principles is taken from the “general principles” of the English Arbitration Act.

Fairness

- 2.3.2 The object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense.¹¹ The wording “without delay or expense” comes from the English Arbitration Act and it has been commented that this will hopefully give confidence to arbitral tribunals to deal with matters in an expeditious manner without fear of criticism by the parties for doing so.¹² This principle also underpins all of the SAR.

Autonomy

- 2.3.3 Parties are free to agree how to resolve their disputes subject only to such safeguards as are thought to be necessary and in the public interest.¹³ Party autonomy is at the root of all modern arbitration law including the Model Law 1985. The principle of party autonomy is reinforced by the proportion of rules within the SAR that are default rules rather than mandatory and so may be varied or excluded by the parties. Parties are therefore encouraged to consider matters in advance and to exclude those rules that they do not wish to apply.

Limited court intervention

- 2.3.4 The court should not intervene in arbitration except as provided for by the Scottish Arbitration Act.¹⁴ This principle, as expressed in Article 5 of the Model Law 1985, was included in the Scottish Arbitration Act to assist in dissuading the courts from intervening in arbitral matters. It remains to be seen to what extent the courts decide to intervene notwithstanding this “principle” and the apparent absence of a binding rule in this regard, although the court appears to have accepted the limitation in an early decision under the Scottish Arbitration Act.¹⁵ Case law in England in relation to the English Arbitration Act has interpreted the use of the words “should not intervene” (as used in the English Arbitration Act rather than

¹⁰ *Ibid*, s 1.

¹¹ *Ibid*, s 1(a).

¹² *Greens Annotated Acts – Arbitration (Scotland) Act 2010*, p 12.

¹³ Scottish Arbitration Act, s 1(b).

¹⁴ *Ibid*, s 1(c).

¹⁵ Arbitration Application No 3 of 2011 [2011] CSOH 164, para 3.

“shall” as used by Article 5 of the Model Law 1985) to mean that court intervention is not entirely precluded.¹⁶

2.4 Limitation

- 2.4.1 The Scottish Arbitration Act amends the Prescription and Limitation (Scotland) Act 1973 (**1973 Act**) to allow the 1973 Act to apply to arbitrations in Scotland.¹⁷

3. The arbitration agreement

3.1 Definitions

- 3.1.1 An “arbitration agreement” is defined as an agreement to submit a present or future dispute to arbitration (including any agreement which provides for arbitration in accordance with provisions contained in a separate document).¹⁸
- 3.1.2 Anyone who has legal capacity to bind himself to a contract can enter into an arbitration agreement in Scotland. The purpose of an arbitration agreement is to exclude the courts from the resolution of the dispute.

3.2 Formal requirements

- 3.2.1 The Scottish Arbitration Act does not prescribe (unlike the English Arbitration Act or the Model Law 1985) that arbitration agreements must be in writing. Arguably, the Scottish Arbitration Act will therefore recognise agreements which are concluded orally.
- 3.2.2 The Scottish Arbitration Act makes clear that an arbitration agreement can relate to an ad hoc submission of an existing (present) dispute or an agreement between parties to submit all future disputes to arbitration (typically found in an arbitration clause within a wider contract).
- 3.2.3 The Requirements of Writing (Scotland) Act 1995 will continue to apply to the situations to which it refers including rights relating to land, where agreements, including arbitration agreements, must be in writing to be valid in Scotland.

3.3 Special tests and requirements of the jurisdiction

- 3.3.1 In principle, if a matter can be litigated before the civil courts, then it can also be arbitrated if the parties have so agreed.

¹⁶ *Vale do Rio Doce Navegacos SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 All E.R. (Comm) 70.

¹⁷ Scottish Arbitration Act, s 23.

¹⁸ *Ibid*, s 4.

- 3.3.2 Some arbitration laws identify a list of subjects which cannot be arbitrated. The Scottish Arbitration Act has not done so perhaps because at the heart of arbitrability in Scotland is the Scots common law of contract, the codification of which was not the intended purpose of the Scottish Arbitration Act. The Scottish Arbitration Act does not therefore of itself render any dispute capable of being arbitrated which would not have been otherwise capable of being arbitrated absent the Scottish Arbitration Act.¹⁹
- 3.3.3 Generally speaking, the following matters may not be arbitrated under Scots law:
- criminal matters;²⁰
 - winding up of companies;
 - creation of property rights (although the question of whether property rights have been infringed is in principle arbitrable);
 - matters pertaining to public interest and status; and
 - matters that are required to be determined according to specific regulatory regimes.

3.4 Separability

- 3.4.1 The principle of separability, which has long applied in Scotland, is expressly set out in the Scottish Arbitration Act. Section 5(1) provides that an arbitration agreement which forms (or which was intended to form) part of a contract is to be treated separately from the remainder of that contract.
- 3.4.2 If the contract is terminated, for example, by a material breach or frustration, the arbitration clause is likely to subsist unless the tribunal (or the court upon review of the tribunal's decision) takes the view that the factors resulting in the termination of the contract should also nullify the arbitration clause.²¹
- 3.4.3 Where a dispute otherwise arises regarding the validity of a contract, the dispute can still be arbitrated²² in accordance with the arbitration clause or agreement notwithstanding the validity of the remainder of the contract, on the basis that the arbitration agreement can be severed from the remainder of the agreement which has its validity in dispute.

¹⁹ *Ibid*, s 30.

²⁰ *Soleimany v Soleimany* [1999] Q.B. 785, 797.

²¹ Scottish Arbitration Act, s 5(2).

²² *Ibid*, s 5(3).

3.5 Legal consequences of a binding arbitration agreement

- 3.5.1 The Scottish Arbitration Act states that an award will be final and binding.²³ Although this was the situation prior to implementation of the Scottish Arbitration Act, it is hoped that the express statement will avoid any issues arising in this regard. It should also assist in facilitating the enforcement of awards outside Scotland given that the non-binding nature of an award is a ground for refusing enforcement under Art V(1)(e) of the New York Convention.²⁴
- 3.5.2 In addition, any provisional award dealing with a particular issue will be final and binding except to the extent specified in the award or until it is superseded by a subsequent award.²⁵ This allows a degree of flexibility for the tribunal, permitting it to make interim awards or even a series of provisional awards on the same issue without such awards being final and binding.
- 3.5.3 It is a fundamental principle of arbitration that it can only bind the rights of the parties to the arbitration agreement. The Scottish Arbitration Act appears to go a stage further by stipulating²⁶ that the award of a tribunal cannot bind any third party (acting in good faith) and that an award ordering the rectification or reduction of a deed or other document is not effective in so far as it would adversely affect the interest of any third party acting in good faith. It is currently unclear what effect this provision will have in practice as there is no comparable provision under the English Arbitration Act.

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

- 4.1.1 Part 1 of the SAR addresses the constitution of the arbitral tribunal. The parties are provided with a degree of flexibility due to the mandatory and default rules contained in the SAR. Rule 2 (a default rule) provides that an arbitration agreement need not address the appointment of the tribunal, but, if it does so, parties may specify who is to form the tribunal, require the parties (or any other person) to appoint the tribunal, or provide for the tribunal to be appointed in any other way.²⁷

²³ *Ibid*, s 11(1).

²⁴ For the full text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.

²⁵ Scottish Arbitration Act, s 11(4).

²⁶ *Ibid*, s 11(2).

²⁷ SAR, rule 2 (default rule).

- 4.1.2 The parties can agree to choose one or more arbitrators and, if they wish, they may also specify the identities of the arbitrators within the arbitration agreement. However, the arbitrator must be an individual (as opposed to, for example, a corporate body).²⁸ The arbitrator must be over the age of 16 and must not be an incapable adult under the Adults with Incapacity (Scotland) Act 2000.²⁹
- 4.1.3 The default rules provide that if the parties fail to agree on the number of arbitrators the tribunal will consist of a sole arbitrator³⁰ who should be jointly appointed by the parties.³¹ The appointment of a sole arbitrator has tended to be the usual position in domestic arbitrations (usually for reasons of cost) but parties are free to agree on an alternative number of arbitrators, such as three, which is the norm in international arbitrations. There is no requirement to choose an odd number of arbitrators.
- 4.1.4 If the parties fail to appoint an arbitrator, the appointment may be referred to an arbitral appointments referee.³² The arbitral appointments referee will make the appointment of the arbitrator (subject to certain procedural requirements). If parties seek to challenge this appointment, an application can be made to the court to make the final decision on appointment.
- 4.1.5 A judge is only entitled to act as an arbitrator where the dispute appears to be of a commercial character and the Lord President (the leading civil judge in Scotland) has authorised the judge to so act.³³

4.2 Procedure for challenging and substituting arbitrators

The challenge of arbitrators

- 4.2.1 A party may object to the tribunal about the appointment of an arbitrator.³⁴ This should be distinguished from a right to remove. An objection can only be made in relation to:
- the impartiality or independence of the arbitrator;
 - fair treatment of the parties; or
 - the arbitrator not being qualified to the level agreed necessary by the parties.

²⁸ *Ibid.*, rule 3 (mandatory rule).

²⁹ *Ibid.*, rule 4 (mandatory rule).

³⁰ *Ibid.*, rule 5 (default rule).

³¹ *Ibid.*, rule 6 (mandatory rule).

³² *Ibid.*, rule 7(2) (mandatory rule).

³³ Scottish Arbitration Act, s 25.

³⁴ SAR, rule 10 (default rule).

4.2.2 This list is exhaustive and there are no other grounds for objection available. The default rule in the SAR provides that a party must make any objection to the tribunal within 14 days of becoming aware of the facts upon which the grounds for objection are based. This differs from the practice under the English Arbitration Act which provides for objections to be made to the court. This is a further example of the attempt to minimise the court's involvement in arbitration matters.

Procedure

4.2.3 Any objection should be made directly to the tribunal. Notice must also be given by the party objecting to the other party to the arbitration.³⁵ On receipt of a competent objection, the tribunal should decide to either confirm or revoke the appointment.³⁶ If they fail to do so within 14 days of a competent objection being made then the appointment of the challenged arbitrator is automatically revoked.³⁷

4.2.4 The effect of the rule is that where there is only one arbitrator he/she is being asked to adjudicate on the challenge to their own appointment. However, there is an additional mandatory rule which allows any party to apply to the Outer House of the Court of Session in Edinburgh to remove the arbitrator³⁸ if they are unsatisfied with the decision of the tribunal, subject to satisfying the criteria detailed in the rule. The grounds for such an application are the same as the three grounds for objecting to the tribunal (set out above at paragraph 4.2.1) with two additions:

- that the arbitrator is not capable of being an arbitrator;³⁹ or
- that a “substantial injustice” has been or will be caused if the arbitrator fails to conduct the arbitration in line with the arbitration agreement, the rules or any other agreement of the parties.⁴⁰

Use of the term “substantial injustice” would suggest that this will not extend to minor procedural breaches. This list is also exhaustive so any objection must be based on one of the five combined grounds.

The appointment of substitute arbitrators

4.2.5 It may be necessary to appoint a substitute arbitrator should an arbitrator decline the appointment or be unable to act.⁴¹ An arbitrator may only resign if:

³⁵ *Ibid.*, rule 10(2) (mandatory rule).

³⁶ *Ibid.*, rule 10(3) (default rule).

³⁷ *Ibid.*, rule 10(4) (default rule).

³⁸ *Ibid.*, rule 12 (mandatory rule).

³⁹ *Ibid.*, rule 12(c) (mandatory rule).

⁴⁰ *Ibid.*, rule 12(e) (mandatory rule).

⁴¹ *Ibid.*, rule 15 (mandatory rule).

- the parties consent to the arbitrator’s resignation;
- the arbitrator has a contractual right to resign;
- a party has successfully challenged the arbitrator’s appointment;
- the parties choose to disapply Rule 34 (1) of the SRA, or
- a successful application has been made to the court.⁴²

4.2.6 However, an arbitrator may also apply to resign, by way of petition to the Outer House of the Court of Session, irrespective of the parties’ position.⁴³

4.2.7 The appointment of substitute arbitrators is an issue upon which the parties may agree. If they fail to do so, then such appointment will be dealt with under the rules discussed at section 4.1 above.

4.3 Responsibilities of an arbitrator

4.3.1 The Scottish Arbitration Act sets out the general duties that are incumbent upon the tribunal. These include that the tribunal must be impartial and independent, treat the parties fairly and conduct the arbitration without unnecessary delay or expense.⁴⁴ These duties reflect the founding principles of the Scottish Arbitration Act and the laws of natural justice. They are mandatory duties and cannot be disapplied by the parties. The duty of treating the parties fairly is specifically extended to include giving each party a reasonable opportunity to put its case forward and address the other party’s case.⁴⁵

4.3.2 The parties are also free to agree within the arbitration agreement or otherwise, any other duty or responsibility they wish to put upon the arbitrator or tribunal including, for example, the default rules on confidentiality.⁴⁶

4.3.3 In contrast, the responsibilities or duties incumbent upon the parties are simply to conduct the arbitration without unnecessary delay or expense.⁴⁷

4.4 Arbitration fees and expenses

4.4.1 Part 7 of the SAR concerns arbitration fees and expenses. The parties’ obligation to pay an arbitrator’s fee is “several” rather than “joint and several” (which was the previous position under the common law). This means that the arbitrator can

⁴² *Ibid*, rule 15(1)(a)–(e) (mandatory rule).

⁴³ *Ibid*, rule 15(2) (mandatory rule).

⁴⁴ *Ibid*, rule 24(1)(a)–(c) (mandatory rule).

⁴⁵ *Ibid*, rule 24(2) (mandatory rule).

⁴⁶ *Ibid*, rule 26 (default rule).

⁴⁷ *Ibid*, rule 25 (mandatory rule).

claim the fee from either one of the parties and the paying party has no right of relief against the other party until such time as an award is made in which the other party is made partly liable for the arbitrator's fee. However, matters are made more complicated by a further rule (albeit a default rule, meaning it can be excluded by agreement) which states that the parties will each be liable for an equal share of the recoverable arbitral expenses until such time as an award is made, although it is stated that this should not affect the parties' several liability.⁴⁸

- 4.4.2 The position is the same in relation to any expenses incurred by the arbitrator personally and any fees incurred by the tribunal (e.g. employing a clerk or experts). The arbitrator is entitled to a reasonable fee, which should ideally be stipulated by the arbitrator upon the acceptance of office.
- 4.4.3 Failing agreement between the parties and the arbitrators as to the amount of the arbitrators' fees and expenses the matter will be remitted to the Auditor of the Court of Session who will decide the amount to be paid based on a reasonable commercial rate of charge.⁴⁹ It should be noted that if the parties fail to agree, the Auditor of the Court of Session will also be responsible for determining the payment terms.

4.5 Arbitrator immunity

- 4.5.1 Part 9 of the SAR addresses arbitrator immunity. When drafting the Scottish Arbitration Act it was decided to retain the existing common law position. The SAR therefore provides that neither the tribunal nor any arbitrator will be liable for anything done or omitted to be done in the performance of its functions.⁵⁰ This extends to any breach of either its express or implied terms or any delictual wrong committed in the course of the tribunal's functions.
- 4.5.2 Immunity extends to all of the tribunal's functions, covering not only those functions under the Scottish Arbitration Act but also any supplementary contractual provisions agreed between the parties. There are two exceptions to the operation of immunity:
- if the act or omission is shown to have been in bad faith, or
 - any liability arising from an arbitrator's resignation.
- 4.5.3 The purpose of the immunity is to ensure that capable arbitrators are not discouraged from taking up a position due to a risk that they may be sued for damages following a possible error or mistake.

⁴⁸ *Ibid.*, rule 62 (default rule).

⁴⁹ *Ibid.*, rule 60(4) (mandatory rule).

⁵⁰ *Ibid.*, rule 73 (mandatory rule).

- 4.5.4 Immunity also extends to any expert, witness or legal representative that may have participated in the arbitration. This mirrors the position in civil proceedings before the Scottish Courts.⁵¹

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

- 5.1.1 An arbitral tribunal in Scotland has the power to rule on its own jurisdiction. This position is consistent with many modern arbitration systems. The tribunal can rule on questions relating to the validity of the arbitration agreement, whether the tribunal is properly constituted⁵² and whether a particular dispute falls within the terms of an arbitration agreement.⁵³ As might be expected the relevant rule is mandatory and cannot be amended or disapplied.
- 5.1.2 A party may object to the tribunal's jurisdiction on the grounds that it does not have jurisdiction in relation to a particular matter or that it has exceeded its jurisdiction. Any objection must be made before, or as soon as reasonably practicable after, the matter to which it relates is raised in the arbitration. The exception to this timing requirement is where the tribunal considers the circumstances to justify a later objection.⁵⁴ However, any objection must be made prior to the tribunal making its final award.
- 5.1.3 If the tribunal upholds the objection then it must end the arbitration (in so far as it relates to matters over which it does not have jurisdiction) and set aside any relevant provisional or partial award that has been made previously.
- 5.1.4 The tribunal may either rule on the objection separately from the subject matter of the dispute or delay its ruling until it makes its award on the merits of the dispute. However, where the parties are in agreement as to which course of action should be taken, the tribunal should proceed accordingly.
- 5.1.5 If a party seeks to appeal a decision of the tribunal on an objection to jurisdiction, it can rely upon a further mandatory rule which allows parties the right to appeal to the Outer House of the Court of Session until 14 days after the decision. Pending

⁵¹ *Ibid*, rule 75 (mandatory rule).

⁵² *Ibid*, rule 19(a) and (b) (mandatory rule).

⁵³ *Ibid*, rule 19(c) (mandatory rule).

⁵⁴ *Ibid*, rule 20(2)(b) (mandatory rule).

such an appeal the tribunal may continue with the arbitration thereby avoiding any vexatious objections that might otherwise be designed to stall the process.⁵⁵

5.2 Power to order interim measures

5.2.1 The tribunal has limited powers under a default rule in relation to protecting property which is the subject of the arbitration.⁵⁶ In particular, the tribunal can direct a party to allow an expert or a third party to inspect, photograph, preserve or take custody of any property which that party either owns or possesses which is the subject of the arbitration. The tribunal can also direct a party to take samples, carry out experiments or preserve any document or other evidence which any party controls. These are similar to the powers available to the courts in civil proceedings.

5.2.2 The courts otherwise have the same power to order interim measures in relation to arbitration as they have in relation to civil court proceedings. However, the courts only have such powers if they are asked to take such action by a party to the arbitration either with the consent of the tribunal if the arbitration has begun or if the court is satisfied as to the urgency of the circumstances.⁵⁷

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 Arbitral proceedings begin when notice is given by one party to the other party (or parties) that they wish to submit the dispute to arbitration.⁵⁸ The Scottish Arbitration Act contains no formal requirement as to the content or form of the notice, although the arbitration agreement may contain formal requirements that must be observed to ensure that such a notice is valid.

6.2 General procedural principles

6.2.1 The tribunal may determine the procedure to be followed in the arbitration.⁵⁹ However, this rule can be disapplied by the agreement of the parties, reflecting the principle that the parties should be able to agree the form and method of resolution of their dispute.

⁵⁵ *Ibid.*, rule 21 (mandatory rule).

⁵⁶ *Ibid.*, rule 35 (default rule).

⁵⁷ *Ibid.*, rule 46 (default rule).

⁵⁸ *Ibid.*, rule 1 (default rule).

⁵⁹ *Ibid.*, rule 28 (default rule).

6.2.2 The tribunal may also give such directions to the parties as it consider appropriate for the conduct of the arbitration and the parties are required to comply with such directions within such period as the tribunal may specify.⁶⁰

6.3 Place and language of the arbitration

6.3.1 Subject to any agreement between the parties to the contrary, the tribunal may conduct the arbitration in any location that it sees fit.⁶¹ This can be in Scotland or elsewhere.

6.3.2 There is no requirement under the SAR for the arbitration to be conducted in English. Instead, in terms of a default rule, the tribunal can determine the language in which the arbitration will be conducted.⁶²

6.4 Multi-party issues

6.4.1 Parties may agree to consolidate their arbitration with other arbitral proceedings (involving the same or different parties) or to hold concurrent hearings. However, the tribunal cannot do this on its own initiative.⁶³ There are special provisions regarding consolidation of statutory arbitral proceedings⁶⁴ but these have not yet been brought into force.

6.5 Oral hearings and written proceedings

6.5.1 The Scottish Arbitration Act provides flexibility for a tribunal to approach the resolution of a dispute in whatever way is most suited to the particular circumstances of that dispute. The tribunal can determine whether and to what extent the arbitration will proceed by way of hearings and written or oral argument.⁶⁵ It may make orders regarding the presentation, disclosure and submission of documents or other evidence.⁶⁶

6.5.2 A party may be represented in arbitration by a lawyer or by any other person.⁶⁷ No particular qualifications are required although notice of the party's representative

⁶⁰ *Ibid*, rule 31 (default rule).

⁶¹ *Ibid*, rule 29 (default rule).

⁶² *Ibid*, rule 28(g) (default rule).

⁶³ *Ibid*, rule 40 (default rule).

⁶⁴ Scottish Arbitration Act, s 16.

⁶⁵ Although note that in Arbitration Application No 3 of 2011 [2011] CSOH 164 the court granted leave to make a legal error appeal in respect of a tribunal's decision as to the legal onus or burden of proof between the parties, but refused to grant leave for a legal error appeal relating to the arbitrator's decision as to the relevance of certain written pleadings.

⁶⁶ SAR, rule 28 (default rule).

⁶⁷ *Ibid*, rule 33 (default rule).

must be given to the tribunal and to the other party before representation begins. If the tribunal hears evidence, then it may direct that a party or witness is examined on oath or affirmation.⁶⁸

6.6 Default by one of the parties

Failure to submit a claim or defence in good time

- 6.6.1 Where a party fails to submit a claim or defence in a timely manner or there is an unnecessary delay without good reason, and the delay creates a substantial risk that the tribunal will not be able to resolve the issues fairly or the delay is likely to cause serious prejudice to the other party, the tribunal is required to end the arbitration in so far as it relates to the subject matter of the claim. The tribunal may also make any award it sees fit against the defaulting party, including an award of expenses.⁶⁹

Failure to attend a hearing or produce evidence

- 6.6.2 Where a party fails (without good reason) to attend a hearing which it was requested to attend on reasonable notice or fails to produce any document or other evidence requested by the tribunal, the tribunal can proceed with the arbitration and make an award on the basis of the evidence (if any) before it.⁷⁰

Failure to comply with a tribunal direction or arbitration agreement

- 6.6.3 A party will also be in default if it fails to comply with a tribunal direction or the arbitration agreement. As a consequence of this default, the tribunal can make an order requiring the party to comply with any directions or obligations arising from the tribunal or the arbitration agreement.⁷¹ If a party continues to be in default by failing to comply with the tribunal's order, the tribunal may:
- direct that the party is not entitled to rely on any allegation or material that is the subject matter of the order;
 - draw adverse inferences from the party's non-compliance;
 - proceed with the arbitration and make its award; or
 - make a provisional award (including an award on expenses) in consequence of the party's non-compliance.

⁶⁸ *Ibid.*, rule 36 (default rule).

⁶⁹ *Ibid.*, rule 37 (default rule).

⁷⁰ *Ibid.*, rule 38 (default rule).

⁷¹ *Ibid.*, rule 39 (default rule).

6.7 Taking of evidence

6.7.1 The tribunal will determine the admissibility, relevance, materiality and weight of any evidence.⁷² The tribunal will also determine the form in which evidence is to be given and whether or not it should be pro-active in determining the facts and law relative to the dispute. It may determine what documents and evidence should be disclosed to or by either party and how this should be done. Witness evidence may be heard on oath or affirmation.

6.8 Appointment of experts

6.8.1 The tribunal may instruct an expert to provide an opinion on areas outside the arbitrators' knowledge.⁷³ The expert's role is to advise the tribunal and not to determine the issues personally. The cost of such instruction will be met by the parties, who must consent to any such instruction if significant expense is likely to be incurred.⁷⁴ If such an appointment is made, the parties must be given a reasonable opportunity either to make representations about any written expert opinion or to hear any oral expert opinion and to question the expert.

6.8.2 Separately, parties are entitled to instruct their own experts to assist them in their case. It will be a question for the tribunal as to whether or not it is prepared to hear such an expert's evidence or allow their report to be relied upon and, if so, what weight is given to that evidence.

6.8.3 Experts have the same immunity as they do under civil proceedings in Scotland.⁷⁵ A recent Supreme Court decision has removed immunity from suit from English expert witnesses.⁷⁶ It remains to be seen what approach is taken by the Scottish courts or the Scottish Parliament in response to that decision.

6.9 Confidentiality

6.9.1 "Confidential information" is defined as being any information that is not in the public domain relating to the dispute, arbitration, award or to any civil proceedings relating to the arbitration in respect of which an order has been made under section 15 of the Scottish Arbitration Act (which provides a mechanism for protecting the identity of a party to legal proceedings connected with an arbitration).⁷⁷

⁷² *Ibid.*, rule 28 (default rule).

⁷³ *Ibid.*, rule 34 (default rule).

⁷⁴ *Ibid.*, rule 32 (default rule).

⁷⁵ *Ibid.*, rule 75 (mandatory rule).

⁷⁶ *Jones v Kaney* [2011] UKSC 13.

⁷⁷ SAR, rule 26(4) (default rule).

- 6.9.2 Any disclosure of confidential information by the arbitrator(s) or parties is actionable as a breach of an obligation of confidence.⁷⁸ Disclosure is not expressly prohibited but instead the Scottish Arbitration Act relies on the possible sanctions which might be obtained by way of an action for breach of confidence such as damages or interdict. It does not specify who has the right to bring an action for breach of confidence. The parties and the tribunal are, however, required to take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the arbitration⁷⁹ and the tribunal must inform the parties of these confidentiality obligations at the outset of the arbitration.⁸⁰
- 6.9.3 Disclosure is permitted without sanction in certain circumstances where it is:
- authorised expressly or impliedly by the parties;
 - required by the tribunal, or made to assist or enable the tribunal to conduct the arbitration;
 - required by a rule of law, for the proper function of the disclosing party's public functions or to enable any public body or office holder to perform their public functions properly;
 - reasonably considered to be necessary to protect a party's lawful interests;
 - in the public interest;
 - necessary in the interests of justice; or
 - made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.⁸¹

6.10 Court assistance in taking evidence

- 6.10.1 On application by the tribunal or any party, the court may order any person to attend a hearing to give evidence or disclose documents or other evidence to the tribunal. The court cannot, however, order a person to give evidence which that person would be entitled not to give in civil court proceedings.⁸²

⁷⁸ *Ibid.*, rule 26(1) (default rule).

⁷⁹ *Ibid.*, rule 26(2) (default rule).

⁸⁰ *Ibid.*, rule 26(3) (default rule).

⁸¹ *Ibid.*, rule 26(1)(a)–(g) (default rule).

⁸² *Ibid.*, rule 45 (mandatory rule).

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 Where the parties agree that the arbitration is to be seated in Scotland but do not specify which law is to govern it then Scots law will govern the arbitration agreement, unless the parties agree otherwise.⁸³

7.2 Timing, form and notification of an award

7.2.1 An award must be in writing and signed by all arbitrators or all of those assenting to the award.⁸⁴ It must state the seat of arbitration, when the award is made and when it takes effect, the tribunal's reasoning and whether any previous provisional or partial award has been made.⁸⁵ An award is validly notified if it meets the criteria for formal notification or as otherwise agreed between the parties.⁸⁶

7.3 Settlement

7.3.1 Parties can end the arbitration by notifying the tribunal that they have settled the dispute.⁸⁷ If the parties request it, the tribunal may make an award reflecting the terms of the settlement.⁸⁸

7.4 Power to award interest and costs

Interest

7.4.1 The tribunal has detailed powers to award interest on all or part of an award, if it chooses to do so.⁸⁹ It is not open to the parties to remove by agreement the tribunal's ability to award interest on all or part of the award, although the parties are permitted to agree the manner in which interest is to be calculated if it is awarded. Interest may be awarded by the tribunal on all or part of the amount of the award in respect of both the pre- and post- award periods. The tribunal may specify the interest rate and the period for which it is payable, and may make different determinations on interest in respect of different parts of the award.

⁸³ Scottish Arbitration Act, s 6.

⁸⁴ SAR, rule 51 (default rule).

⁸⁵ *Ibid*, rule 51(2) (default rule).

⁸⁶ *Ibid*, rule 83 (default rule).

⁸⁷ *Ibid*, rule 57(3) (default rule).

⁸⁸ *Ibid*, rule 57(4) (default rule).

⁸⁹ *Ibid*, rule 50 (mandatory rule).

Expenses and costs

- 7.4.2 “Arbitration expenses” are defined as being the:
- arbitrator’s fees and expenses;
 - expenses incurred by the tribunal in conducting the arbitration;
 - parties’ legal and other expenses; and
 - fees and expenses of any arbitral appointments referee and any third party to whom the parties gave powers in relation to the arbitration.⁹⁰
- 7.4.3 As mentioned at section 4.4 above, the parties are each separately liable for the arbitrator’s fees and expenses.⁹¹ The tribunal may make an award allocating liability between the parties for the recoverable expenses of the arbitration.⁹²
- 7.4.4 The parties are not permitted to agree between themselves the allocation of all or any arbitration costs before the dispute being arbitrated has arisen.⁹³
- 7.4.5 The tribunal is entitled to order either party to provide security for recoverable arbitral expenses as a condition of proceeding with that party’s claims.⁹⁴ No conditions are laid down as to when such an order may be granted (although it may not be granted solely on the basis that the party in question is not a UK resident or company). It is likely that a similar test will be applied to that which must be met by a similar application in civil court proceedings.

7.5 Termination of the proceedings

- 7.5.1 Arbitral proceedings end when the last award in the arbitration is made and no claim is outstanding.⁹⁵ The tribunal must, however, end the arbitration (or part of it) before then in two specific circumstances:
- (i) if the tribunal upholds an objection to its jurisdiction;⁹⁶ or
 - (ii) where a party delays without good reason in submitting or pursuing a claim and the tribunal is satisfied that the delay gives or is likely to give rise to unfairness in resolving those issues or has caused or may cause serious prejudice to the other party (subject to agreement between the parties to disapply this provision).⁹⁷

⁹⁰ *Ibid.*, rule 59 (default rule).

⁹¹ *Ibid.*, rule 60 (mandatory rule).

⁹² *Ibid.*, rule 62 (default rule).

⁹³ *Ibid.*, rule 63 (mandatory rule).

⁹⁴ *Ibid.*, rule 64 (default rule).

⁹⁵ *Ibid.*, rule 57(1) (default rule).

⁹⁶ *Ibid.*, rule 20(3) (mandatory rule).

⁹⁷ *Ibid.*, rule 37(1) (default rule).

7.6 Effect of an award

7.6.1 Section 11 of the Scottish Arbitration Act provides that an award is to be final and binding on the parties or any persons claiming under or through them, although it does not directly bind any third party. Parties can only challenge the award by any available arbitral process of appeal or review or by application to the court in the specific circumstances set out in Part 8 of the SAR. Provisional awards are not final or binding,⁹⁸ only to the extent specified in the provisional award or until they are superseded by a subsequent award.⁹⁹

7.7 Correction, clarification and issue of a supplemental award

7.7.1 Arbitrators have authority to deal with accidental errors or omissions, or any ambiguity in any final award they make.¹⁰⁰ This also applies to partial and provisional awards. The tribunal can make the correction on its own initiative or on the application of a party. Applications by a party must be intimated to the other party at the time the application is made, and must be made within 28 days of the award (unless that time limit is extended by application to court).¹⁰¹

7.7.2 Before deciding whether to correct an award, the tribunal must give the other party or parties a reasonable opportunity to make representations about the proposed award. Corrections proposed by the tribunal must be made within 28 days of the award. Corrections proposed by a party must be made within 28 days of the application to correct the award being made.

7.7.3 If an award is corrected, it is treated as if it was made in the corrected form on the day it came into force. There is provision for the tribunal to make consequential corrections to other awards that are affected by any correction to a particular award.

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 It has long been considered to be a strength of arbitration in Scotland that an arbitration agreement effectively and conclusively replaces the jurisdiction of the court. As mentioned above, non-intervention by the courts is one of the three founding principles of the Scottish Arbitration Act.

⁹⁸ *Ibid*, rule 53 (default rule).

⁹⁹ Scottish Arbitration Act, s 11(4).

¹⁰⁰ SAR, rule 58 (default rule).

¹⁰¹ *Ibid*, rule 58(4) (default rule).

- 8.1.2 Therefore, court interventions are limited to the specific circumstances set out in the Scottish Arbitration Act, some of which may be disapplied by agreement between the parties. These are dealt with in more detail elsewhere in this chapter, but in summary the court has jurisdiction to:
- enforce an arbitral tribunal’s award;¹⁰²
 - deal with questions regarding the validity of the arbitration agreement, the constitution of the tribunal or the matters submitted to the arbitration;¹⁰³
 - determine a point of law on the application of any party;¹⁰⁴ and
 - vary any time limit relating to the arbitration which is imposed by the arbitration agreement or by any other agreement between the parties.¹⁰⁵

8.2 Stay of court proceedings

- 8.2.1 Section 10 of the Scottish Arbitration Act provides for a mandatory *sist* (stay) of court proceedings if the following criteria are met:
- there is an arbitration agreement which provides that a dispute on the matter with which the court proceedings are concerned is to be resolved by arbitration;
 - the party seeking the *sist* is a party to the arbitration agreement, or is making its claim through or under a party to the arbitration agreement;
 - notice of the application to *sist* the court proceedings has been given to the other parties in the court action;
 - the person applying to *sist* the court proceedings has not taken any steps in the court proceedings to answer any substantive claim against him in that action or otherwise acted in a way which suggests a desire to have the dispute resolved in court rather than by way of arbitration; and
 - there is nothing to indicate that the arbitration agreement is void, inoperative or incapable of being performed.

- 8.2.2 It is not necessary that the arbitration in question has its seat in Scotland. The obligation on the Scottish court is to *sist* proceedings (subject to the conditions listed above) to give effect to any valid arbitration agreement.

8.3 Interim protective measures

- 8.3.1 Arbitration is largely a private matter in Scotland. In recognition of this, Section 15 of the Scottish Arbitration Act provides for the court to prohibit the disclosure of the identity of a party to the arbitration in any reporting of civil proceedings related

¹⁰² Scottish Arbitration Act, s 12.

¹⁰³ *Ibid*, s 14; see also *ibid*, schedule 1, part 8 – Challenging Awards.

¹⁰⁴ SAR, rule 41 (default rule).

¹⁰⁵ *Ibid*, rule 43 (default rule).

to the arbitration.¹⁰⁶ The court must grant such a request unless disclosure is in the public interest or necessary in the interests of justice, or is required to protect a party's lawful interests or to enable the proper performance of public functions. As a result of this requirement, the court has confirmed that it will not identify on court lists or through access to court papers any parties to an application to court under the Scottish Arbitration Act until after the procedural stage by which an application for anonymity must be made, and will not usually publish decisions on the grant or refusal of leave to appeal on the judicial website unless they raise issues of law or practice.¹⁰⁷

8.3.2 Unless the parties agree otherwise, the court also has the power to make various other orders in the same way that it could in ordinary civil proceedings.¹⁰⁸ These include:

- appointing a person to safeguard the interests of any party lacking capacity;
- ordering the sale of any property in dispute in the arbitration;
- making an order securing any amount in dispute in the arbitration;
- making an order for the inspection, photographing, preservation, custody or detention of documents or any other property (including land), which are relevant to the arbitral proceedings (in terms of Section 1 of the Administration of Justice (Scotland) Act 1972);
- granting warrant for arrestment or inhibition (these are freezing orders over respectively moveable property and real estate, to secure the sum claimed in the arbitration); or
- granting interdict or interim interdict (“interdict” is the Scottish equivalent of an injunction in England).

8.3.3 Applications in relation to the above matters can only be granted by the court on application by a party to the arbitration¹⁰⁹ and (if the arbitration has commenced) only with the consent of the tribunal or where the court is satisfied that there is urgency. Applications may also be brought before arbitration has commenced, if the court is satisfied that a dispute has arisen or might arise and that, if it does arise, the dispute is one to which an arbitration agreement applies.

¹⁰⁶ In terms of RC 100.5(5) this application must be made prior to the hearing of the motion for further procedure.

¹⁰⁷ See Arbitration Application No 3 of 2011 [2011] CSOH 164, para 18.

¹⁰⁸ SAR, rule 46 (default rule).

¹⁰⁹ For the procedure to be followed for such applications see RCS 100 of the Rules of the Court of Session.

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

9.1.1 Courts in Scotland have limited jurisdiction to review arbitral decisions. The tribunal's award is not subject to review or appeal in any legal proceedings except as set out in Part 8 of the SAR (see below). Part 8 does not apply where parties have asked the tribunal to make an award reflecting the terms of a settlement between them.¹¹⁰

9.2 Appeals

9.2.1 Under Part 8 of the SAR, only three types of appeal to the court are permissible:

- (i) jurisdictional appeal, which is a complaint that the tribunal did not have jurisdiction to make the award;¹¹¹
- (ii) serious irregularity appeal, which is a complaint that the tribunal failed to conduct the arbitration in accordance with the arbitration agreement, the Scottish Arbitration Act or the SAR or any other agreement between the parties concerning the conduct of the arbitration;¹¹² and
- (iii) legal error appeal, which is a complaint that the tribunal erred on a point of Scots law.¹¹³

9.2.2 In each case, supplementary provisions regarding the process of making an appeal are contained in Rule 71, which is mandatory. Appeals against provisional awards are not permitted, although they are permitted against partial awards. If an appeal is brought against a partial award, the tribunal may continue with the arbitration in respect of the remaining matters while the appeal is being determined. Notice of an appeal must be given to the other party to the arbitration and to the tribunal. The court may order the tribunal to state its reasons for the award to enable the court to deal with the appeal properly and may make any order it sees fit in relation to any additional expenses arising from that order.

9.2.3 An appeal must be brought within 28 days of the date of the award or the date of determination of a correction process or a review or appeal process by the tribunal, whichever is later.¹¹⁴ A legal error appeal can only be brought with the agreement

¹¹⁰ *Ibid*, rule 57(4) (default rule).

¹¹¹ *Ibid*, rule 67 (mandatory rule).

¹¹² *Ibid*, rule 68 (mandatory rule).

¹¹³ *Ibid*, rule 69 (default rule).

¹¹⁴ *Ibid*, rule 71(4) (mandatory rule).

of the parties or the leave of the court¹¹⁵ and so for the purpose of complying with this time limit, a legal error appeal is treated as having been made when leave is sought to make the appeal.

9.2.4 In each case, appeal is initially to the Outer House of the Court of Session.¹¹⁶ The Outer House's decision may be appealed to the Inner House, but only with the leave of the Outer House. Leave may only be granted by the Outer House where it considers that the proposed appeal raises an important point of principle or practice or where there is another compelling reason for the Inner House to consider the appeal. An application for leave must be made within 28 days of the Outer House's decision, and if leave is granted, the appeal must be brought within seven days of leave being granted.¹¹⁷ The Outer House's decision on whether to grant leave, and the Inner House's decision on such an appeal, are final. Appeal in each case is only competent where the appellant has exhausted any available arbitral process of appeal or review. This would include where appropriate the provisions in Rule 19, allowing an arbitrator to rule on his or her own jurisdiction, and Rule 58, which provides for the correction of an award.

9.2.5 The court may order an appellant, or a party applying for leave to appeal, to provide security for costs for the expenses of the appeal or the application and may dismiss the appeal or application if such security is not provided. It may not, however, make an order for security only on the grounds that the appellant is based outside the UK.¹¹⁸

9.2.6 The court may also order that any sum which is due under an award being appealed (or any associated provisional award) is paid into court or otherwise secured pending a decision on the appeal. As with security for costs, if the order is not complied with then the court may dismiss the appeal.¹¹⁹

9.3 Applications to set aside an award

9.3.1 Awards may be set aside on the basis of appeals brought under any of the three categories mentioned above if the court considers reconsideration of the award to

¹¹⁵ SAR, rule 70, which also sets out the criteria the court must apply in making this determination.

¹¹⁶ *Ibid*, rules 67(1) and 68(1) (mandatory rules); see also rule 69(1) (default rule). The procedure for making such an appeal is governed by RCS 100. See also Arbitration Application No 3 of 2011 [2011] CSOH 164, which sets out in detail how the procedure is intended to be applied in practice.

¹¹⁷ *Ibid*, rule 71(5) (mandatory rule).

¹¹⁸ *Ibid*, rule 71(10) and (11) (mandatory rule).

¹¹⁹ *Ibid*, rule 71(12) (mandatory rule).

be inappropriate.¹²⁰ If the court orders that an award or part of an award is to be set aside, it may also order that any provision in the arbitration agreement which prevents the bringing of legal proceedings in relation to the subject-matter of the award is void.¹²¹

- 9.3.2 If, in respect of a serious irregularity appeal or a legal error appeal, the court orders the tribunal to reconsider part of or the entire award, then the tribunal must make a new award (or confirm its original award) within three months of the Outer House or Inner House decision unless the court orders otherwise.¹²²
- 9.3.3 It is permissible to appeal against a new award and the rules apply equally in relation to such appeals as to appeals against the original award.¹²³

10. Recognition and enforcement of awards

10.1 Domestic awards

- 10.1.1 Any party to an arbitration seated in Scotland may apply to the court for an order to enforce an arbitral tribunal's award. The court has authority to make an order that the award may be enforced as if it were a final court award.¹²⁴
- 10.1.2 The court may not make such an order if the:
- award is currently under appeal, either to the court under Part 8 of the SAR, or under an arbitral process of appeal or review, or is subject to a process of correction under Rule 58 of the SAR;¹²⁵ or
 - court is satisfied that the tribunal did not have jurisdiction.¹²⁶

The onus of proof is on a party disputing a request for an enforcement order to show that the tribunal did not have jurisdiction, rather than on the applicant to prove that it did. The question of whether or not the tribunal had jurisdiction cannot be raised by a party if it has already lost the right to raise that objection under Rule 76 of the SAR. This may happen if the applicant has participated in the

¹²⁰ *Ibid*, rules 67(2), 68(3) and 70(8) (all mandatory rules).

¹²¹ *Ibid*, rule 71(9) (mandatory rule).

¹²² *Ibid*, rule 72 (mandatory rule).

¹²³ *Ibid*, rule 72(2) (mandatory rule).

¹²⁴ Scottish Arbitration Act, s 12(1).

¹²⁵ *Ibid*, s 12(2).

¹²⁶ *Ibid*, s 12(3).

arbitration and not disputed the jurisdiction of the tribunal as soon as reasonably practicable. If the court is satisfied that the tribunal only had jurisdiction to make part of the award, the court may restrict the order accordingly.

- 10.1.3 If the court makes an order to enforce a tribunal's award, the award is registered in the court records in the same way as a court decree (judgment) is registered.¹²⁷ Steps can then be taken to enforce the award in the same way as a court decree would be enforced.
- 10.1.4 As an alternative, where the arbitration agreement so provides, awards may also be registered for execution in the Books of Council and Session or Sheriff Court books, thus allowing such awards to be enforced directly without further application to the court. This is only possible if the arbitration agreement contains consent to registration for execution, and if the agreement is itself registered.

10.2 Foreign awards

- 10.2.1 Section 12(6) of the Scottish Arbitration Act provides that awards where the arbitration concerned was seated outside Scotland may be enforced in the same way as domestic awards, subject to the same requirements as set out above.
- 10.2.2 The Scottish Arbitration Act contains specific provisions in relation to awards made in pursuance of a written arbitration agreement in the territory of a party to the New York Convention.¹²⁸ These are recognised as binding on the parties between whom they were made and can therefore be relied on by those parties in any legal proceedings in Scotland. The court may order the enforcement of such an award as if it were an award of the Scottish court. In order to enforce a New York Convention award, the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or a duly certified copy of it and, where these are not in English, a certified translation must be produced.¹²⁹
- 10.2.3 The court may only refuse to make such an order in respect of a New York Convention award where:
- a party to it was under some incapacity under the law applicable to the party;
 - the arbitration agreement was invalid under the law the parties agreed should govern it (or, failing agreement, the law of the country where the award was made);

¹²⁷ *Ibid*, s 12(5).

¹²⁸ *Ibid*, s 18–22.

¹²⁹ *Ibid*, s 21.

- the applicant was not given proper notice of the arbitral process or of the appointment of the tribunal or was otherwise unable to present his or her case;
- the tribunal was constituted or the arbitration was conducted otherwise than in accordance with the parties' agreement or the law of the country where the arbitration took place;
- if the party against whom the award is invoked proves that the award deals with a dispute not contemplated by or within the submission to the arbitration, goes beyond the scope of the submission to the arbitration, is not yet binding or has been set aside or suspended; or
- the award is contrary to public policy.¹³⁰

10.2.4 If the award only partly exceeds the matters submitted to arbitration, then it can be enforced in respect of the competent part provided that the relevant decisions can be separated from those matters that should not have been included.¹³¹ There is also provision for the application to enforce to be sisted (stayed) or for security to be provided if an application to set aside or suspend the decision is made while the enforcement action is current.

11. Conclusion

11.1.1 The Scottish Arbitration Act provides Scotland with a firm foundation upon which it may continue to develop the law of arbitration in Scotland. It has radically overhauled the Scots law of arbitration and provides the first complete statutory framework for arbitration in Scotland. As that framework seeks to adopt "best practice" from around the globe it is hoped and expected that arbitration will once again become popular in Scotland as a means of dispute resolution. The Scottish Government's aim is that in due course Scotland will become a jurisdiction of choice in relation to not only domestic but also international arbitration.

¹³⁰ *Ibid*, s 20(2).

¹³¹ *Ibid*, s 20(5).

12. Contacts

CMS Cameron McKenna LLP

2nd Floor
7 Castle Street
Edinburgh EH2 3AH
Scotland

Rob Wilson

Head of the CMS Dispute Resolution Practice in Scotland

T +44 131 220 7672

E rob.wilson@cms-cmck.com

CMS Cameron McKenna LLP

6 Queens Road
Aberdeen AB15 4ZT
Scotland

Valerie Allan

T +44 1224 6220 02

E valerie.allan@cms-cmck.com