

Arbitration (Scotland) Bill
[CONSULTATION DRAFT]
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Arbitration (Scotland) Bill
[CONSULTATION DRAFT]

An Act of the Scottish Parliament to make provision about arbitration.

Introductory

1 Founding principles

The founding principles of this Act are—

- (a) that the object of arbitration is to resolve disputes fairly, impartially, quickly and without incurring unnecessary expense,
- (b) that parties should be free to agree how to resolve disputes (subject only to such safeguards as are necessary in the public interest),
- (c) that the court should not intervene in an arbitration except as provided by the Scottish Arbitration Rules.

Anyone construing this Act is to have regard to the founding principles when doing so.

2 Principal terms

(1) In this Act, unless the contrary intention appears—

- “arbitration” includes domestic and international arbitration,
- “dispute” means any difference (whether contractual or not),
- “party” means a party to an arbitration,
- “rules” means the Scottish Arbitration Rules (see section 6), and
- “tribunal” means an arbitrator or panel of arbitrators.

(2) References to “an arbitration”, “the arbitration” or “arbitrations” are references to a particular arbitration process or, as the case may be, to particular arbitration processes.

(3) References to a tribunal conducting an arbitration are references to the tribunal doing anything in relation to the arbitration, including—

- (a) making a decision about procedure or evidence, and
- (b) making an award.

(4) The words and other expressions listed in the index are defined or otherwise explained for the purposes of this Act by the provisions indicated in the index.

3 Juridical seat of arbitration

An arbitration is “seated in Scotland” if the parties have agreed, or where it is otherwise determined, that the arbitral process is to be governed by Scots law.

The fact that an arbitration is seated in Scotland does not affect the substantive law to be used to decide the dispute.

Arbitration agreements

4 Arbitration agreements

An “arbitration agreement” is—

- (a) an agreement to submit a present or future dispute to arbitration, or
- (b) in the case of statutory arbitration, the enactment which provides for a dispute to be submitted to arbitration

5 Separability

(1) An arbitration agreement which forms (or was intended to form) part only of an agreement is to be treated as a distinct agreement.

(2) **In particular**, an arbitration agreement is not void, voidable or otherwise ineffective only because the agreement of which it forms part is void, voidable or otherwise ineffective.

(3) **For example**, a dispute about the validity of an agreement which includes an arbitration agreement may be arbitrated in accordance with that arbitration agreement.

Comment 3: do we need to reflect the HoL decision in Fiona Trust ?

5A See rule 38 and the comment thereon

Scottish Arbitration Rules

6 Scottish Arbitration Rules

(1) Every arbitration seated in Scotland is to be governed by the rules set out in schedule 1 (the “Scottish Arbitration Rules”).

(2) The following rules also apply to arbitrations seated outwith Scotland or where no place of arbitration has been determined—

rule 38 (suspension of legal proceedings),

rule 52 (enforcement of award).

7 Mandatory rules

(1) The following rules, called the “mandatory rules”, cannot be disapplied by an arbitration agreement, by any other agreement between parties or by any other means—

rule 3 (eligibility as tribunal member)

rule 7 (tribunal members’ duty to disclose)

rule 8 (tribunal member’s tenure)

rule 11 (challenge to appointment of tribunal member)

rules 12 to 14 (court’s power to remove tribunal member or dismiss tribunal)

rules 17 to 20 (tribunal functions)

rule 20 and 21 (tribunal jurisdiction and objections thereto)

rule 24-25 (parties’ duties)

rule 32(4) (agreement not to have experts invalid if entered into after arbitration begins)

rule 38 (suspension of legal proceedings)

rule 39(1) (attendance of witnesses and disclosure of evidence)

rule 41 (form of award)

rule 44 (power to make interim awards)

rule 48 (power to withhold award if fees or expenses not paid)

rule 52 (enforcement)

rules 54 to 55 (challenging award)

rules 57 to 59 (challenging award)

rule 60(6) (prohibition on disapplying rule on arbitration expenses)

rule 62 (tribunal members’ fees and expenses)

rules 63 to 65 (immunity)

rule 67 (loss of right to object)

Comment 2: Rules 7 and 11 are essential inclusions

Comment 3: Rules 20/21 are essential inclusions, inter alia for consistency with Rule 54

Comment 4: Rule 24-25 are essential inclusions; see s.40/Sch.1 of AA96

Comment 5: Rule 56 cannot be mandatory; parties must have the right to opt out; as drafted we effectively reject all ICC and LCIA Arbitrations which is suicidal

~~~~~**TO BE REVISITED**~~~~~

## **8 Default rules**

(1) The rules which are not mandatory rules are called the “default rules”.

(2) **Unlike mandatory rules**, parties may agree to **adapt modify** or disapply a default rule.

**Comment: adapt/modify – suggested to avoid potential misreading as “adopt”**

(3) Parties may so agree—

(a) in the arbitration agreement, or

**(b) by agreeing to adopt an identified set of institutional or other rules published by any body**

(c) by any other means at any time before or after the arbitration begins.

**Comment 1: superfluous language, better removed**

**Comment 2: express recognition of such rules (e.g. including Scottish Arbitration Code 2007) is required to avoid any doubt or query; see s.4(3) AA96**

(4) Parties are to be treated as having agreed to disapply a default rule—

(a) if or to the extent that the rule is disappplied by or inconsistent with—

(i) the arbitration agreement, or

(ii) anything done with the agreement of the parties, or

(b) if they choose a law other than Scots law as the applicable law in respect of the rule’s subject-matter.

**Comment: s.4(b) was effectively overruled by the HoL in Lesotho Highlands (s.4(5) AA96 refers)**

This subsection does not affect the generality of subsections (2) and (3).

*Statutory arbitration*

## **9 Statutory arbitration: special provisions**

(1) “Statutory arbitration” is arbitration pursuant to an enactment which provides for a dispute to be submitted to arbitration.

(2) None of the Scottish Arbitration Rules (or other provisions of this Act) apply to a statutory arbitration if or to the extent that they are excluded by, or are inconsistent with, any provision made by virtue of any other enactment relating to the arbitration.

(3) Every statutory arbitration is to be taken to be seated in Scotland.

(4) None of the following rules apply in relation to statutory arbitration—

rule 36 (variation of time limits)

rule 38(3) (restriction on arbitration agreement preventing legal proceedings)

rule 57(8) (power to declare provision of arbitration agreement void)

rule 69 (death of party)

(5) Despite rule 37, parties to a statutory arbitration may not agree to—

(a) consolidate the arbitration with another arbitration,

(b) hold concurrent hearings, or

(c) authorise the tribunal to order such consolidation or the holding of concurrent hearings,

unless the arbitrations or hearings are to be conducted under the same enactment.

***Comment 2: note that compulsory statutory arbitration appears to fall foul of Art.6 ECHR so I suggest that appropriate redrafting of the section may preserve something rather than risk the entire section being struck out.***

## **10 Power to adapt enactments providing for statutory arbitration**

Ministers may by order—

(a) modify any of the Scottish Arbitration Rules, or any other provisions of this Act, in so far as they apply to statutory arbitrations (or to particular statutory arbitrations),

(b) make such modifications of enactments which provide for disputes to be submitted to arbitration as they consider appropriate in consequence of, or in order to give full effect to, any of the Scottish Arbitration Rules (or any other provisions of this Act).

*Recognition and enforcement of New York Convention awards*

## **11 New York Convention awards**

(1) A “Convention award” is an award made in pursuance of a written arbitration agreement in the territory of a state (other than the United Kingdom) which is a party to 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.

(2) An award is to be treated for the purposes of this section as having been made where the arbitration was seated.

(3) A declaration by Her Majesty by Order in Council that a state is a party to the Convention (or is a party in respect of any territory) is to be conclusive evidence of that fact.

## **12 Recognition and enforcement of New York Convention awards**

(1) A Convention award is to be recognised as binding on the persons as between whom it was made (and may accordingly be relied on by those persons in any legal proceedings in Scotland).

(2) The court may order that a Convention award is to be enforced as if it were an extract registered decree bearing a warrant for execution granted by the court.

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

(1) Recognition or enforcement of a Convention award may be refused only in accordance with this section.

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

(a) that a party was under some incapacity under the law applicable to the party,

(b) that the arbitration agreement was invalid under the law which the parties agreed should govern it (or, if the parties fail to so agree, under the law of the place where the agreement was made),

(c) that the person—

(i) was not given proper notice of the arbitral process or of the appointment of the tribunal, or

(ii) was unable to present the person's case,

(d) that the tribunal was constituted, or the arbitration was conducted, otherwise than in accordance with the agreement of the parties (or, failing such agreement, the law of the place where the arbitration is taking place).

(3) Recognition or enforcement of a Convention award (or any part of it) may be refused if the person against whom it is invoked proves that the award (or that part of it)—

(a) deals with a dispute not contemplated by or not falling within the submission to arbitration, or

(b) contains decisions on matters beyond the scope of that submission,

(c) is not yet binding on the person, or

(d) has been set aside or suspended by a competent authority.

(4) Recognition or enforcement of a Convention award (or any part of it) may be refused if—

(a) the award or that part of it relates to a matter which is not capable of being settled by arbitration, or

(b) to do so would be contrary to public policy.

(5) The court before which a Convention award is sought to be relied on may, if an application for the setting aside or suspension of the award is made to a competent authority—

(a) adjourn the decision on recognition or enforcement of the award,

(b) on the application of the party claiming recognition or enforcement, order the other party to provide suitable security.

(6) In this section "competent authority" means a person who has authority to set aside or suspend the Convention award concerned in the country in which (or under the law of which) the Convention award concerned was made.

## 14 Evidence to be produced when seeking recognition or enforcement

(1) A person seeking recognition or enforcement of a Convention award must produce—

- (a) the 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) Such a person must also produce a translation of any award or agreement which is in a language other than English (certified by an official or sworn translator or by a diplomatic or consular agent).

## 15 Saving for other bases of recognition or enforcement

Nothing in sections 11 to 14 affects any other right to rely on or enforce a Convention award at common law or in pursuance of any other enactment.

### *Supplementary*

## 16 Prescription and limitation

(1) The Prescription and Limitation (Scotland) Act 1973 (c.52) is amended as follows.

(2) In section 4 (positive prescription: interruption)—

(a) in subsection (3)(a), for the words from “and” to “served” substitute “, the date when the arbitration **commences**”,

(b) for subsection (4) substitute—

“(4) An arbitration **commences** for the purposes of this section—

**(a) when the parties to the arbitration agree it begins, or**

**(b) in the absence of such agreement,** in accordance with rule 1 of the Scottish Arbitration Rules (see section 6 of, and schedule 1 to, the Arbitration (Scotland) Act 2008 (asp 00)).”.

(3) In section 9 (negative prescription: interruption)—

(a) in subsection (3), for the words from “and” to “served” substitute “the date when the arbitration **commences**”,

(b) in subsection (4), for “preliminary notice” substitute “the date when the arbitration **commences**”.

(4) After section 19C, insert—

### **“19D Interruption of limitation period: arbitration**

(1) Any period during which an arbitration is ongoing in relation to a matter is to be disregarded in any computation of the period specified in section 17(2), 18(2), 18A(1) or 18B(2) of this Act in relation to that matter.

(2) In this section, “arbitration” means—

(a) any arbitration in Scotland,

(b) any arbitration in a country other than Scotland, being an arbitration an award in which would be enforceable in Scotland.”.

(5) In section 22A(4), for the words from “and” to “served” substitute “the date when the arbitration **commences** (within the meaning of section 4(4) of this Act)”.

(6) After section 22C, insert—

**“22CA Interruption of limitation period for 1987 Act actions: arbitration**

(1) Any period during which an arbitration is ongoing in relation to a matter is to be disregarded in any computation of the period specified in section 22B(2) or 22C(2) of this Act in relation to that matter.

(2) In this section, “arbitration” means—

(a) any arbitration in Scotland,

(b) any arbitration in a country other than Scotland, being an arbitration an award in which would be enforceable in Scotland.”.

**17 Amendment of Conveyancing (Scotland) Act 1924**

In section 46 (extract decree of reduction to be recorded) of the Conveyancing (Scotland) Act 1924 (c.27), after subsection (2) insert—

“(2A) For the purposes of this section, an award made by a tribunal in accordance with the Arbitration (Scotland) Act 2008 (asp 00) which orders reduction of a deed, decree or instrument is to be treated as if it were an extract of a decree of reduction of the deed, decree or instrument.”.

***Comment: we are not sure that an arbitral tribunal should, by award, be able to set aside, reduce or quash a court decree.***

**18 Arbitral appointments referee**

Ministers may by order specify persons or types of persons who may act as an arbitral appointments referee for the purposes of the Scottish Arbitration Rules.

***Comment 1: see comments on Rule 18’s procedural implications***

***Comment 2: what will define the process and the criteria by which AARs are to be specified by Ministers ? New Regulations ?***

***Comment 3: who will supervise/monitor/etc AARs ?***

***Comment 4: while one might envisage CIArb/RICS/ICE/LawSoc/Faculty being AARs, is it envisaged that that will be all ? In comparable circumstances, the PCA in The Hague has 3 individuals who serve as the equivalent of an AAR***

**19 Arbitrability of disputes**

Nothing in this Act makes any dispute capable of resolution by arbitration if it would not otherwise be capable of being so resolved.

*Final provisions*

**20 Transitional provision**

This Act does not apply to—

~~(a) arbitrations in pursuance of arbitration agreements (other than those comprised in enactments) made before the day on which section 6 comes into force,~~

~~(b) statutory arbitrations begun before that day.~~

**(1) This Act does not apply to *arbitral proceedings commenced before the date on which it comes into force.***

**[then as per AA96, s.84 (2) and (3)]**

~~(b) statutory arbitrations begun before that day.~~

***Comment 1: with respect, this is wrong in two significant regards***

***(a) as drafted, there will be “old-style” arbitrations likely to crop up for as long as 30 years from now e.g. consider a 2008-dated PFI contract with a 30-year term but***

**where the arbitration agreement predates the Bill becoming law. It is ESSENTIAL to apply the 1996 Act's approach (ss.84);**

**(b) parties who started their arbitration before D-Day should be permitted to transfer those arbitrations from the old law to the new Act, but only if they so wish**

**Comment 2: we need to "exterminate" the old law as soon as possible**

**84(1) The provisions of this Part do not apply to arbitral proceedings commenced before the date on which this Part comes into force.**

**84(2) They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.**

**84(3) The above provisions have effect subject to any transitional provision made by an order under section 109(2) (power to include transitional provisions in commencement order).**

## **21 More definitions**

In this Act, unless the contrary intention appears—

**"appropriate sheriff court means" [???**

"auditor of court" means the Auditor of the Court of Session or the Auditor of an appropriate sheriff court,

"claim" includes counterclaim,

"court" means the **Court of Session** ~~Outer House~~ or the sheriff (except in sections 1 and 6 ~~rule 38~~, where it means any court),

~~Outer House~~ **Court of Session** means the Outer House of the Court of Session,

"Ministers" means the Scottish Ministers.

**Comment 1: define "investment treaty arbitration" here (s.4 above refers) ?**

**Comment 2: define "appropriate sheriff court" here – it's relevant in relation to taxation of an arbitrator's fees and expenses where these are not agreed**

## **22 Ancillary provision**

(1) Ministers may by order make any supplementary, incidental, consequential, transitional, transitory or saving provision which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of this Act.

(2) Such an order may modify any enactment, instrument or document.

**Comment: we must put ourselves in at least as good a position as the Singapore legislature which, faced with an "eccentric" and very unfortunate interpretation of the International Arbitration Act (i.e. the Model Law) by an inexperienced judge, pushed through a clarificatory amendment to the statute in only 42 calendar days, thereby (a) removing a threat to the world's perception of arbitrating in Singapore and (b) showing the world that Singapore means business.**

## **23 Orders**

(1) Any Ministerial power under this Act to make orders is exercisable by statutory instrument.

(2) Any such power includes power to make—

(a) any supplementary, incidental, consequential, transitional, transitory or saving provision which Ministers consider appropriate,

(b) different provision for different purposes.

(3) A statutory instrument containing such an order (or an Order in Council made under section 11) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

This subsection does not apply—

- (a) to orders made under section 26(2) (commencement orders), or
- (b) where subsection (4) makes contrary provision.

(4) An order under section 10 or 22(1) which adds to, replaces or omits any text in this or any other Act may be made only if a draft of the statutory instrument containing the order has been laid before, and approved by resolution of, the Scottish Parliament.

#### **24 Crown application**

This Act binds the Crown.

#### **25 Repeals**

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

#### **26 Commencement**

(1) The following provisions come into force on Royal Assent—

- section 2 (and the index)
- sections 21 to 24
- this section
- section 27

(2) Other provisions come into force on the day Ministers by order appoint.

#### **27 Short title**

This Act is called the Arbitration (Scotland) Act 2008.

**SCHEDULE 1**  
*(introduced by section 6)*  
**SCOTTISH ARBITRATION RULES**

**PART 1**  
**COMMENCEMENT AND CONSTITUTION OF TRIBUNAL ETC.**

*Rule 1 Commencement of arbitration*

1 An arbitration **commences** when a party to an arbitration agreement gives the other party notice of arbitration in accordance with the agreement.

*Rule 2 Appointment of tribunal*

2 An arbitration agreement need not appoint (or provide for appointment of) the tribunal, but if it does so provide it may—

- (a) specify who is to form the tribunal,
- (b) require the parties to appoint the tribunal,
- (c) permit another person to appoint the tribunal, or
- (d) provide for the tribunal to be appointed in any other way.

*Rule 3 Eligibility [**Capacity**] to act as tribunal member*

3 (1) Every individual, of whatever nationality, is eligible to act as a tribunal member provided that he or she—

- (a) is aged 16 or over,
- (b) is not an incapable adult (within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)), and
- (c) does not fall within paragraph (2).

(2) An individual falls within this paragraph if—

- (a) the individual is an undischarged bankrupt,
- (b) a party considers the individual unsuitable to act as an arbitrator in the arbitration because of that status, and
- (c) the party objects accordingly (to the other party and, if constituted, the tribunal).

“undischarged bankrupt” means an individual—

- (a) whose estate has been sequestrated and who has not been discharged (or against whom a bankruptcy order has been made and is still in force),
- (b) who has granted a trust deed for, or made a composition or arrangement with, creditors (and has not been discharged in respect of it),

(c) who is the subject of—

(i) a bankruptcy restrictions order, or an interim bankruptcy restrictions order, made under the Bankruptcy (Scotland) Act 1985 (c.66) or the Insolvency Act 1986 (c.45), or

(ii) a bankruptcy restrictions undertaking entered into under either of those Acts, or

(d) who has been adjudged bankrupt (and has not been discharged), or is subject to any other kind of order, arrangement or undertaking analogous to those described above, anywhere in the world.

#### *Rule 4 Number of tribunal members*

4 Where there is no agreement as to the number of tribunal members, the tribunal is to consist of a sole tribunal member.

***Comment 1: “sole tribunal member” seems clumsy; “sole arbitrator” is worldwide standard language and should be used throughout. Parties, particularly foreign ones, might waste time speculating why we are using different language.***

***Comment 2: I suggest that we need to try to get away from 2-man tribunals; see AA96 15(2) Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal.***

#### *Rule 5 Method of appointment*

5 The tribunal is to be appointed as follows—

(a) where there is to be a sole tribunal member, the parties are to appoint an eligible individual jointly (and must do so within 28 days of either party requesting the other to do so),

(b) where there are to be two tribunal members, each party is to appoint an eligible individual (and must do so within 28 days of the other party requesting it to do so),

(c) where there are to be three or more tribunal members—

(i) each party is to appoint an eligible individual (and must do so within 28 days of the other party requesting it to do so), and

(ii) those two tribunal members are to appoint eligible individuals as the remaining tribunal members.

***(d) In any other case (including where there are more than two parties) rule 6 will apply as if there had been a failure of the agreed appointment procedure.***

***Comment 2: see AA96 s.17***

#### *Rule 6 Failure of appointment procedure*

6 (1) Where the tribunal is not appointed in accordance with—

(a) any appointment procedure set out in the arbitration agreement (or otherwise agreed between the parties), or

(b) rule 5,

either party may refer the matter to an arbitral appointments referee **apply to the arbitral appointments referee to exercise its powers under this rule.**

**Comment: what happens if they do not ? Does the arbitration die on its feet ?**

~~(2) The arbitral appointments referee may determine the matter by directing the parties to appoint such eligible individuals as the referee considers appropriate to be the tribunal (and the arbitration agreement is to have effect as if it required the parties to appoint those individuals).~~

(2) Those powers are –

(a) to make any necessary appointments itself;

(b) to revoke any appointments already made;

(c) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have already been made;

**Comment 1: what if the AAR fails/refuses/declines to act ? Where do the parties go next ? What sanction is there on the AAR ?**

**Comment 2: what if the AAR “directs” but the parties ignore that direction ? The mechanism as drafted seems rather cumbersome; surely the better approach is that the AAR actually make the appointment (as the President CI Arb does), not merely to tell someone else to make it and then rely on enforcing the implied term in the arbitration agreement.**

(3) The arbitral appointments referee must, when determining such **an application**, have regard to—

(a) the nature and subject-matter of the dispute, and

(b) the skills, qualifications, knowledge and experience which would make an individual suitable to determine such a dispute.

**(4) If the arbitral appointments referee refuses or fails to make an appointment within 14 days of the application to it, either party may apply to the Court of Session to exercise the powers specified in paragraph (2) of this rule.**

**(5) In considering how to exercise its powers under paragraph (2) of this rule the Court of Session shall have regard to the matters specified in paragraph (3) of this rule.**

**(6) An appointment made by the arbitral appointments referee or by the Court of Session under this rule has effect as if made with the agreement of the parties.**

**(7) A decision of the Court of Session under this rule may be appealed only with the leave of that court.**

Rule 7 Tribunal members’ duty to disclose circumstances relating to impartiality **and independence**

7(1) A tribunal member must, without delay, disclose to the parties anything likely to give rise to justifiable doubts as to the member’s impartiality **and/or independence**.

In this rule, “tribunal member” includes any individual who has been asked to be a tribunal member but who has not yet been appointed.

**7(2) The obligation in paragraph (1) shall continue in force throughout the arbitral proceedings.**

**7(3) Where an appointment is to be made by an arbitration appointments referee or any other person, such referee or personal shall oblige the appointee to deliver a statement of impartiality and independence prior to confirming the appointment**

**Comment 1:** HRD considers that we need to address independence, inter alia because of ECHR Art.6(1); see also ML Art.12(1). FD disagrees. Both LCIA and ICC insist on independence.

**Comment 2:** 7(2) is self-explanatory.

**Comment 3:** 7(3) reflects ICC and LCIA (and other) practice.

**Rule 7A Neutrality of Tribunal Members**

**[Tribunal Members][Arbitrators] shall act in a neutral manner at all times during arbitration proceedings notwithstanding that they may have been appointed by one party pursuant to rule 5(b) or otherwise.**

**Comment 1:** self-explanatory; while this may well be implied whether by rule XX or otherwise, we lose nothing, and achieve certainty, by stating it

**Comment 2:** we should consider where we need to address the role of the party-appointed arbitrator (PAA) in the process of selection of the Chairman pursuant to rule 5(b), 5(c)(ii) or otherwise.

*Rule 8 Tribunal member's tenure*

8 A tribunal member's tenure ends if—

- (a) the member becomes ineligible to act as a tribunal member (see rule 3),
- (b) the member resigns (see rule 10),
- (c) the member is removed by the parties, a third party or the Outer House (see rules 9 and 12),
- (d) the tribunal revokes the member's appointment (see rule 11),
- (e) the Outer House dismisses the tribunal containing the member (see rule 13), or
- (f) the member dies.

*Rule 9 ~~Removal of tribunal member~~ **Revocation of arbitrator's appointment***

9 (1) ~~A tribunal member may be removed~~ **The appointment of an arbitrator may be revoked by—**

- (a) by the parties acting jointly, or
- (b) by any third party to whom the parties have given power to remove a tribunal member.

(2) A removal is effected by **servicing notice on the tribunal member in accordance with rule 70.**

**Comment 1:** it is preferable to distinguish between revocation of an arbitrator's authority (an act of the parties) and removal of the arbitrator by the court i.e. that different words apply to the different scenarios.

**Comment 2:** where do we deal with fees and expenses of a TM removed by the parties ?

*Rule 10 Resignation of tribunal member*

10 (1) A tribunal member may resign (by giving notice of resignation to the parties and any other tribunal members) only if—

- (a) the parties consent to the resignation,
- (b) the member's appointment is challenged under rule 11 or 12, or:
- (c) the Outer House has authorised the resignation.

(2) The Outer House may authorise a resignation only if satisfied, on an application by the tribunal member, that it is reasonable for the member to resign.

(3) The Outer House may, on granting such an authorisation~~(or otherwise on the application of an individual who has resigned in accordance with this rule)~~ **or on a separate application of an arbitrator who has resigned in accordance with this rule:**

- (a) grant the resigned member relief from any liability incurred by virtue of acting as a tribunal member,
- (b) make such order as it thinks fit about—
  - (i) the resigned member's entitlement (if any) to fees and expenses, or
  - (ii) the repayment of fees or expenses already paid to the resigned member.

~~(4) Where a tribunal member resigns otherwise than in accordance with this rule, the Outer House may (on the application of a party) make such order as it thinks fit about—~~

- ~~(a) the resigned member's liability in respect of acting as a tribunal member,~~
- ~~(b) the resigned member's entitlement (if any) to fees and expenses, or~~
- ~~(c) the repayment of fees or expenses already paid to the resigned member.~~

**Comment 1: this assumes a wider entitlement of the TM to resign i.e. other than as expressly provided for; we do not believe that this is correct.**

**Comment 2: note that there is no provision in AA96 or in the ML for a TM to resign.**

*Rule 11 Challenge to appointment of tribunal member*

**Comment: this should precede rule 9**

11 (1) A party may object to the tribunal about the appointment of a tribunal member.

(2) An objection may be made only on the ground—

(a) that the appointee is **either** not impartial (or that there are justifiable doubts about the appointee's impartiality) **or not independent**, or

(b) that the appointee does not have a qualification which the parties agreed (before the appointment) that the appointee must have.

**Comment: if the parties made the appointment in the clear knowledge of the absent qualification they must be deemed to have waived that requirement**

(3) An objection is competent only if it—

- (a) states the facts on which it is based,

(b) is made within 14 days of the objector becoming aware of those facts, and

(c) is notified to the other party **or parties** and the individual whose appointment is being objected to **and the other tribunal members**.

**Comment: self-explanatory, notwithstanding rule 11(1).**

(4) The tribunal may deal with an objection by confirming or revoking the appointment (and it is to be treated as having confirmed the appointment if it fails to make a decision within 14 days of receiving the objection).

**Comment 1: as drafted (“confirmed”), this must be wrong because we cannot allow the situation that the tribunal’s failure to act automatically causes the objection to be dismissed.**

**Comment 2: even redrafting “confirmed” to “revoked” is still wrong since failure to make a decision cannot be the trigger for a substantive event.**

**(4) The tribunal may deal with an objection by confirming or revoking the appointment and it shall make its decision within 14 days, or such longer period as the parties may agree, of receiving the objection.**

**(5) In the event that the tribunal fails to reach a decision under paragraph (4) above within the time provided, in any case where rule 2(c) or 6(1)(b) above applied, the party which raised the objection may apply to said person or said arbitration appointments referee (as applicable) for a decision provided such application is made within [14] days of the expiry of the period provided for in paragraph (4) above**

**(6) In the event that:**

**(a) neither rule 2(c) nor rule 6(1)(b) applied and the tribunal fails to reach a decision under paragraph (4) above; or**

**(b)(i) either rule 2(c) or rule 6(1)(b) applied; and**

**(ii) the tribunal fails to reach a decision under paragraph (4) above; and**

**(iii) the person or arbitration appointments referee (as applicable) fails to reach a decision under paragraph (5) above;**

**within the time provided, the party which raised the objection may apply to the Outer House pursuant to rule 12 provided such application is made within [14] days of the expiry of the period provided for in paragraphs (4) or (5) (as applicable) above**

**Comment 1: self-explanatory: first you go to the tribunal, then to the appointing person/body and only after that can you go to Court.**

**Comment 2: cutting out the AP/B has been suggested to simplify the process**

Rule 12 Removal of tribunal members by Outer House

**Comment: it has been suggested that rules 12/13 should follow rule 9**

**12(1)** The Outer House may remove a tribunal member if satisfied on the application by a party—

(a) that the member is not impartial (or that there are justifiable doubts about the member’s impartiality),

(b) that the member is incapable of acting as an arbitrator in the arbitration (or that there are justifiable doubts about the member’s ability to so act), or

(c) that the member does not have a qualification which the parties agreed (before the appointment) that the member must have.

**(2) No application under rule 12(1) may be made until the applicant has exhausted its rights to object provided in rule 11.**

Comment 1: there should, here and elsewhere, be no direct access to the Court prior to exhaustion of remedies available within the arbitral proceedings. This is already given by rule 14(1) but would be better placed here.

Comment 2 on rules 12/13: there should be one rule. It is not clear why there have to be two rules one using the word "removal" and the other "dismissal". The only indication appears to be that where there is a tribunal of more than one arbitrator, all of the arbitrators or the tribunal as a whole must fail in its principal duties etc before any one of them can be removed.

Comment 3: This is more restrictive without any good reason than the English s. 24. Individual arbitrators should not be allowed to escape responsibility for compliance with rules 17 and 18 merely because as a whole the tribunal was not complying with rules 17 and 18. It should not be a case of all out or none out in such a situation.

**(3) The Court of Session shall remove an arbitrator if satisfied on the application of a party –**

**(a) that the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;**

**(b) that he has suffered or will suffer substantial injustice because the arbitrator has –**

**(i) refused or failed to comply with his duty under rule 17 (general duty of tribunal);**

**(ii) exceeded his powers (otherwise than by exceeding his substantive jurisdiction); or**

**(iii) failed to conduct the proceedings in accordance with the procedure agreed by the parties.**

**(4) No application under paragraphs (1) or (3) of this rule may be made unless the applicant has exhausted any available recourse to a third party whom the parties have agreed has power to remove an arbitrator.**

**(5) The Court of Session may, when removing an arbitrator make such order as it thinks fit about –**

**(a) the arbitrator's entitlement (if any) to fees and expenses; or**

**(b) the repayment by the arbitrator of any fees and expenses already paid to him.**

**(6) The Court of Session shall not make any order of removal under this rule without the arbitrator having been given notice of his entitlement to lodge answers to any application under this rule.**

**(7) A decision of the Court of Session under this rule may only be appealed with the leave of the court.**

**(8) The tribunal may continue the arbitration pending the outcome of an application under this rule.**

13 The Outer House may dismiss the tribunal if satisfied on the application by a party that substantial injustice has been or will be caused to that party because the tribunal has refused or failed—

(a) to comply with its principal duties (see rule 17) or its duty under rule 18, or

(b) to otherwise conduct the arbitration properly.

**Comment 2: what does “conduct the arbitration properly” mean ? It is essential that we define this, and in a restrictive manner, following the model of s.68(2) AA96. Note that, when we do so, we will need to frame the definition to remove reference to an award. See Benaim (UK) Ltd v. Davies Middleton & Davies (No. 2) [2005] EWHC 1370 § 23. Arbitrators should not be removed except for very good and clear reasons.**

**Comment 3: it is fundamental that the s.68(2) list is exhaustive; see comment on rule 55(3)**

**Comment 4: “may dismiss” leaves open the possibility that despite serious problems the Court might not dismiss the tribunal; If the court finds the circumstances are as set out it should not have any discretion. The requirement of “substantial injustice” in relation to the arbitrator’s failures gives the court sufficient measure of discretion to ignore trivial failures.**

**Comment 5: it is fundamental that the s.68(2) AA96 list is exhaustive; see comment on rule 55(3)**

**Comment 6: it is essential that an arbitrator be able to appear before the court not only in relation to his continuing appointment but especially in relation to his fees and expenses.**

*Rule 14 Removal and dismissal by court: supplementary*

**Comment: we suggest that this could usefully be amalgamated with rules 12/13**

14 (1) The Outer House may remove a tribunal member, or dismiss the tribunal, only if satisfied—

(a) that any recourse available under rule 11 has been exhausted, and

(b) that any available recourse to a third party who the parties have agreed is to have power to remove a tribunal member (or dismiss the tribunal) has been exhausted.

(2) The Outer House may, when removing a tribunal member or dismissing the tribunal, make such order as it thinks fit about—

(a) the tribunal member’s entitlement (if any) to fees and expenses, or

(b) repaying fees or expenses already paid.

**(3) The Outer House shall not make any order under paragraph 2 above without the tribunal member or members (as applicable) having been heard or having been offered the right to be heard and having declined, or failed to take up, such offer**

**Comment 1: essential e.g. (inter alia) ECHR Art 6 applies**

**Comment 2: the arbitrator must have a right of appeal**

**(4)** The Outer House’s decision under rule 12 or 13 is final.

**(5)** The tribunal may continue the arbitration pending the Outer House’s decision under rule 12 or 13.

*Rule 15 Reconstitution of tribunal*

15 (1) Where a tribunal member’s tenure ends, the tribunal is to be reconstituted—

(a) in accordance with the procedure used to constitute the original tribunal, or

(b) where that procedure fails, in accordance with rules 5 and 6.

(2) It is for the reconstituted tribunal to decide the extent, if any, to which previous proceedings (including any award made, appointment by or other act done by the previous tribunal) should stand.

The reconstituted tribunal's decision does not affect a party's right to object or appeal on any ground which arose before the tribunal made its decision.

**Comment: note that this allows the new tribunal to set aside any previous awards.**

#### *Rule 16 Tribunal members nominated in arbitration agreements*

16 Any provision in an arbitration agreement which nominates who is to be a tribunal member ceases to have effect when the nominated individual's tenure as a tribunal member ends (see rule 8).

## **PART 2**

### **TRIBUNAL FUNCTIONS**

#### *Rule 17 Principal duties*

**Comment: we greatly prefer the s.33 AA96 formulation which has stood the test of time and is fully explored in the jurisprudence**

#### **(1) The tribunal shall –**

**(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his 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, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.**

~~17 (1) When conducting an arbitration, a tribunal must comply with its principal duties.~~

~~(2) Its principal duties are—~~

~~(a) to be (and appear to be) impartial as between the parties, and~~

~~(b) to treat the parties fairly.~~

~~(3) Treating the parties fairly includes giving each party a reasonable opportunity—~~

~~(a) to put its case, and~~

~~(b) to deal with the other party's case.~~

**(4) A tribunal need not comply with any other duty imposed on it by these rules if doing so would make compliance with its principal duties impractical.**

**Comment: this will give rise to potential issues over whether conducting an arbitration “as quickly as reasonably practicable” and “without unnecessary expense” is “impractical” if parties are to be treated impartially and fairly. Such a provision will threaten to undermine the whole spirit of the new act and approach. It will encourage arbitrators to downgrade the importance of the duties in rule 18 for fear of being accused of seeking the impractical. Rule 17(4) should be omitted.**

*Rule 18 Further duties*

18 A tribunal must do its best to conduct an arbitration—

- ~~(a) in accordance with the parties' wishes,~~
- ~~(b) as quickly as is reasonably practicable, and~~
- ~~(c) without incurring unnecessary expense.~~

**Comment 1: see above**

**Comment 2: both rules 17 and 18 should be put together in one rule since to have two separate rules will threaten to undermine the whole spirit of the new regime. Separation of the rules and the downgrading of the duty to act expeditiously may encourage arbitrators to downgrade the importance of the quick resolution. The extensive English experience shows that the duties can be reconciled**

**Comment 3: the exhortation in R18 to “do its best” will give rise to questions as to what is “its best” and is, we suggest, weaker than the obligation in R17. In the new arbitration era the duties in R18 should not be ranked below those in ER17.**

**Comment 4: the arbitrator cannot disobey the parties' wishes given that arbitration is based on contract. However if there is a difficulty in that if both parties' wishes are inconsistent with the duty under rule 17, there may be scope for resignation on the part of the arbitrator on the ground that the parties' wishes do not allow him to fulfil his duty under rule 17.**

*Rule 19 Tribunal to rule on own jurisdiction*

19 A tribunal may rule on—

- (a) whether there is a valid arbitration agreement (or, in the case of a statutory arbitration, whether the enactment providing for arbitration applies to the dispute),
- (b) whether the tribunal is properly constituted, and
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

This is known as the tribunal ruling on its own jurisdiction.

**Comment 2: we need the equivalent of s.31(4) AA96**

*Rule 20 Objections to a tribunal's jurisdiction*

**Comment: the formulation in s.31 AA96 is to be preferred**

20 (1) If a party considers that the tribunal does not have jurisdiction, **that** party may object **provided that the objection is timeous in accordance with rule 67.**

**The tribunal may admit a late objection if it considers the delay justified. But in any case an objection may not be made after the arbitration has ended (see rule 51)..**

~~(2) An objection must be made before, or as soon as is reasonably practicable after, the matter to which the objection relates is first raised in the arbitration.~~

~~(3) The tribunal may admit a late objection if it considers the delay justified.~~

~~(4) But in any case an objection may not be made after the arbitration has ended (see rule 51).~~

**(3) Where an objection under paragraph (1) is duly taken, and the tribunal has power to rule on its own jurisdiction, it may –**

**(a) rule on the objection in an award as to jurisdiction; or**

**(b) rule on the objection in its award on the merits.**

**Comment 1: new para (3) seeks to point out to the tribunal that it may decide the objection now or later, a discretion which it will exercise (if the power to rule on jurisdiction has not been excluded) according to its duty to carry out the arbitration expeditiously. It also lays the foundation for the distinct appeal procedures in R21 and R54. See AA96, s. 31 (4)**

(4) If the tribunal upholds an objection it must—

(a) end the arbitration insofar as it relates to a matter **over** which the tribunal has ruled it does not have jurisdiction, and

(b) set aside any interim or partial award already made insofar as the award relates to such a matter.

**(5) notwithstanding any other provision of these rules, the tribunal is empowered to set aside any interim or partial award as envisaged in paragraph (4)(b) above.**

**Comment: It is unclear whether a tribunal has, otherwise, the power to set its own awards aside; once made an award is final as to the matters decided in it and the tribunal is functus officio i.r.o. those matters so it is powerless to act in response to a jurisdictional objection**

*Rule 21 Appeal against tribunal's ruling on objection*

21 (1) A party may, no later than 14 days after the tribunal's ~~decision on an objection~~ **award as to jurisdiction**, appeal the decision to the ~~Outer House~~ **Court of Session**.

(2) The tribunal may continue the arbitration pending determination of the appeal.

(3) The Outer House's decision on the appeal is final.

**Comment: the issue we need to discuss is the extent of court involvement at this juncture i.e. whether to follow the "English model" (see s.32 AA96 and Azov Shipping) of a full court hearing de novo (which will often address some or all of the merits) or the "French model" where the court does no more than satisfy itself that there is prima facie evidence of the existence of an arbitration agreement and leaves the rest to the tribunal to determine. Most countries sit somewhere in the middle. At present, Scots common law would appear to be following the English model.**

*Rule 22 Tribunal decisions*

22 (1) Where the tribunal **of more than one member** is unable to make a decision unanimously (including any decision on an award), a decision made by the majority of the tribunal members is sufficient.

(2) Where there is neither unanimity nor a majority, the decision is to be made by the tribunal member who the parties have nominated to chair the tribunal.

**Comment: this sits uncomfortably with rule 41(a) and I suggest that s.52(3) AA96 provides a more effective solution**

*Rule 23 Oversmen*

23 (1) Where a decision cannot be made under rule 22(2) because no person has been nominated, the decision is to be made by a third party (an "oversman") appointed—

(a) by the tribunal, or

(b) where the tribunal fails to make an appointment within 28 days of being requested to do so by either party or any tribunal member, by an arbitral appointments referee (at the request of a party or tribunal member).

**Comment 1: 28 days or 14 ? Rule 11 is based on 14 days so why vary ?**

**Comment 2: see redraft of rule 11**

(2) The following rules apply in relation to oversmen as they apply in relation to tribunal members or, as the case may be, tribunals—

rule 3

rule 7

rules 11 to 14

rules 17 and 18

rule 55

rules 62

rule 63

rules 67 and 68

**Comment 1: rules 3, 12-14, 17-18, 55, 62, 63 and 67 are already mandatory so why do we repeat them here ?**

**Comment 2: rules 7 and 68 are not (presently) mandatory so**

**~~~~~TO BE REVISITED~~~~~**

### **PART 3**

#### **PARTIES' DUTIES**

##### *Rule 24 Duties relating to conduct of arbitration*

24(1) A party ~~must do its best~~ **shall do all things necessary** to ensure that the arbitration is conducted—

(a) as quickly as is reasonably practicable, and

(b) without incurring unnecessary expense.

(2) Accordingly, a party ~~must comply~~ **This includes compliance** with any determination, direction, order or other requirement of the tribunal without ~~unnecessary~~ delay.

##### *Rule 25 Powers relating to default by a party*

~~25 (1) This rule applies where a party fails to—~~

~~(a) comply with rule 24(2);~~

~~(b) attend a hearing or a meeting which the tribunal requires the party to attend,~~

~~(c) produce evidence requested by the tribunal, or~~

~~(d) comply with a term of the arbitration agreement relating to the conduct of the arbitration.~~

~~(2) The tribunal may proceed with the arbitration on the basis of the evidence (if any) before it unless—~~

~~(a) the tribunal considers the party to have a reasonable excuse for the failure, or~~

~~(b) the parties agree that the tribunal should not proceed in that manner.~~

Comment: s.41(3) to (7) AA96 is, I suggest, much clearer and fuller here so:

**(1) If the tribunal is satisfied that the claimant has without reasonable excuse failed to comply with rule 17, and –**  
**(a) the failure gives rise or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in the claim, or**  
**(b) the failure has caused or is likely to cause, serious prejudice to the respondent,**  
**the tribunal may make an award dismissing the claim.**

**(2) If without showing reasonable excuse a party –**  
**(a) fails to attend or be represented at a hearing or meeting of which due notice was given, or**  
**(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions**

**the tribunal may proceed with the arbitration in the absence of that party, or as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence (if any) before it.**

**(3) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal the tribunal may make a peremptory order to the same effect, prescribing such time for compliance as the tribunal considers appropriate.**

**(4) Subject to rule if a party fails to comply with any peremptory order, then the tribunal may do any of the following –**

**(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;**  
**(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;**  
**(c) proceed to an award on the basis of such materials as have been properly provided to it;**  
**(d) make such order as it thinks fit as to the payment of the expenses of the arbitration incurred in consequence of the non-compliance.**

## **25A Confidentiality and Privacy**

Comment 1: this is a non-mandatory rule so it is available to the parties to vary it;

Comment 2: the jurisprudence shows that there is a distinction between privacy and confidentiality which we must maintain;

Comment 3: the Privy Council in AEGIS v European Re [2003] 1 All ER 253 has effectively stopped the attempt to list specific/individual exceptions;

Comment 4: the leading (and probably definitive) English case is Emmott v Michael Wilson Partnership [2008] EWCA 184, in particular Lawrence Collins LJ at §60-107, including the statement of principle (at §79) that “documents disclosed or generated in arbitration can only be used for the purposes of the arbitration”. In particular see §105 and 107.

Comment 5:

- (i) we fully appreciate that enforcement of this rule may be not be effective and that it may be difficult to impose sanctions; while interdict might be available, it will sometimes be too late (e.g. today’s newspaper headlines); while damages might be available, it will sometimes be difficult/impossible to prove loss or to quantify it;
- (ii) these limitations are, we argue, not our concern in the present circumstances; we are giving the affected party as much support as we can and it is for that party, not for us, to take the next step(s);

- (iii) **Emmott states that the list of exceptions is open-ended; again, that is not our concern;**
- (iv) **A significant driving factor here is that we must assume that the great majority of businesspeople are honest and of “good moral standing”; it follows that, faced with a clear and explicit rule, most parties will comply with it - of course, a few will not but that (again) is not our concern;**
- (v) **The oil industry exists on the basis of data exchanges under confidentiality agreements; these are generally complied with but “naming and shaming” defaulters has proved a useful weapon;**
- (vi) **In practice, some of the leakage appears to be from the advising law firms; faced with breach of this Rule 25A by a law firm, how would the Law Society respond to a formal complaint of professional misconduct;**
- (vii) **Imagine an arbitration AAA vs BBB, both household names; AAA breaches the confidentiality obligation e.g. by leaking information to the media; the latter contact the M/D of BBB**

**Q Mr X, do you have any comment to make about today’s reports that .....**

**A Yes; given the fact that there exists a confidentiality agreement between AAA and BBB covering these matters, it is most regrettable that AAA has chosen to breach contract and go public.**

**Q Why would they do that ?**

**A You’ll have to ask the M/D of AAA; I will not speculate on why such a well-known company should so flagrantly breach its contractual obligations in pursuit of headlines; that is not the way BBB does business and I am sure that the overwhelming majority of your readers/viewers would not do so either. There is an old saying “My Word is my Bond” and we conduct our business on that basis even if others do not**

**Etc etc**

**(1) It is a fundamental general principle of arbitration that it is both confidential and private.**

**(2) The parties shall keep confidential all matters connected with the arbitration including:**

**(a) the existence, nature and scope of the arbitration;**

**(b) the identity of the parties, their advisors, experts and witnesses;**

**(c) all materials of whatsoever nature created in, or for the purpose of, the arbitration;**

**(d) all documents produced by any other party in the proceedings;**

**(e) procedural and any other orders;**

**(f) awards, whether provisional, partial or final;**

**(g) any application to any court, to the extent permitted by applicable rules of court; and**

**(h) any other issue or matter connected with or derived from the arbitration.**

**(3) The obligation in paragraph (2) shall not apply where:**

**(a) a party is obliged by law or regulation to disclose any matter concerning the arbitration;**

**(b) the parties consent, expressly or impliedly, to disclosure;**

**(c) a competent court orders, or grants leave for, disclosure;**

**(d) disclosure is reasonably necessary for the protection of the legitimate interests of a party to the arbitration;**

**(e) the interests of justice require disclosure;**

**(f) the public interest requires disclosure.**

**Comment: this captures the law as stated by Lawrence Collins LJ in Emmott at §107.**

**(4) The obligations set out in paragraph (2) above shall apply to all participants in the arbitration including (but not limited to):**

**(a) the parties' employees, advisers, agents, consultants, experts and witnesses;**

**(b) the tribunal members and their employees, advisers, agents, consultants and experts; and the parties and tribunal members (as applicable) shall take all reasonable steps to protect and comply with said obligations, whether by obtaining appropriate confidentiality undertakings or otherwise**

**Comment 1: all those involved should be contractually bound;**

**Comment 2: the oil industry does this all the time; it is easy to set up and administer**

**(5) The deliberations of the tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration may be required.**

**(6) Arbitral proceedings shall be held in private and no person not involved in the arbitration shall be entitled to be present or otherwise participate**

**Comment: we need to address the CPR62.10 issue but this requires input from litigation specialists**

#### **PART 4**

#### **ARBITRAL PROCEEDINGS**

##### *Rule 26 Procedure and evidence*

**Comment: it has been suggested that the format of s.34 AA96 is preferable; a suggested modification is as follows**

**“(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.**

**(2) Procedural and evidential matters include—**

**(a) when and where any part of the proceedings is to be held, whether within or outwith Scotland;**

**Comment: section 8(3)(c) allows the parties to agree to remove this power as a general power but that is different from agreeing case-by-case where/when to meet for a hearing/other meeting.**

**(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;**

**(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;**

**(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;**

**(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;**

**(f) whether to apply the law of evidence of Scotland in whole or in part as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;**

**(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;**

**(h) whether and to what extent there should be oral or written evidence or submissions.**

**(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit, whether on its own initiative or at the request of a party, extend the time so fixed (whether or not it has expired).**

**(4) When considering the award of expenses under rule 60(2) below, the tribunal may, pursuant to its duty under rule 17, take into consideration the extent to which any part of the arbitration proceedings, including any hearing, had proved to be necessary.**

(4) A tribunal may require the parties to attend a meeting to inspect any document, goods or other property.

(5) The tribunal must give the parties at least 14 days' notice of any hearing or meeting.

(6) A tribunal may direct that a party or witness is to be examined on oath or affirmation. The tribunal may administer an oath or affirmation for that purpose.

**Comment: I am told that this is a criminal office in Switzerland**

**Comment 1: the holding of a hearing must be justifiable;**

**Comment 2: it is widely agreed that it is probably impossible, to deny a party a right to be heard, this being seen as a fundamental principle of natural justice; rule 17(3)(a) refers**

26(1) Insofar as not determined by these rules, it is for a tribunal to determine—

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

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

**Comment 1: this rule 26 also incorporates rule 34 which, we suggest, is too rigid in that it requires in every arbitration unless the parties agree, all documents to be copied, regardless of expense and difficulty. It seems preferable to leave it to the arbitrator to impose such a duty if it is appropriate to do so, as in many cases it will.**

**Comment 2: this rule incorporates the essence of all of the rules which it replaces. There is no need for an arbitration to have to have a hearing when it is not necessary merely because a party wishes it. Again it seems best to leave this to the discretion of an arbitrator. If a hearing is necessary to allow him to fulfil his duty to give each party an opportunity to put their case etc. he will do so as the risk is that if he does not his award may be appealed later for serious irregularity.**

Rule 28 Power to appoint clerk etc.

28(1) **Subject to the provisions of rule 18(c)**, a tribunal may appoint a clerk (and such other **advisers**, agents or employees as it thinks fit) to assist it in conducting the arbitration.

**But the parties' consent is required for any appointment in respect of which significant costs are likely to arise.**

**(2) The fees and expenses of such clerk and of all such advisers and agents shall be deemed expenses of the tribunal and shall be dealt with under rule 62(1)(b) below.**

**(3) The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such clerk, adviser or agent.**

**Comment 1:** *I suggest that the cross-reference to rule 18(c) is a helpful reminder of the need to have regard to costs*

**Comment 2:** *what is “significant” ? this cannot be defined. It seems better to give parties an opportunity to make representations which will not bind a tribunal but which may cause it to hesitate if the case for a clerk is not clear cut.*

**Comment 3:** *28(3) - we must avoid the Luzon v Transfield fiasco (Singapore)*

**Comment 4:** *employees cause some difficulty – do we mean persons legally employed by the tribunal ? Such seems impossibly unlikely, causing PAYE and other nightmares. Do we mean employees of individual tribunal members ? If so, such seems highly unlikely except where the tribunal member is a sole practitioner with his/her own employed staff*

*Rule 29 Statements of claim and defence*

**Comment:** *Dealt with in R26 above*

~~29 It is for a tribunal to determine—~~

~~(a) whether a party must submit a written statement of the party’s claim, **counterclaim or** defence,~~

~~(b) the form and content of any such statement,~~

~~(c) the extent to which any such statement may be amended, and~~

~~(d) the time limit for the submission of any such statement or amendment.~~

*Rule 30 Failure to submit claim, or defence timeously*

~~30 (1) Paragraphs (2) and (3) apply where a party fails to submit its statement of claim or defence to the tribunal before the expiry of the time limit for such submission.~~

~~(2) If the tribunal considers that there is a good reason for the failure, it must specify a new time limit for the submission of the statement.~~

~~(3) In the absence of reason, the tribunal must—~~

~~(a) in the case of failure to submit a statement of claim, end the arbitration insofar as it relates to the subject matter of claim, and~~

~~(b) in the case of failure to submit a statement of defence, proceed with the arbitration (but the failure is not, in itself, to be treated as an admission of anything).~~

~~(4) Where a party unnecessarily delays in submitting its statement of claim or defence to the tribunal (and there is no time limit for that submission), the tribunal must—~~

**Comment:** *this (underlined) should NEVER occur since the concept of a tribunal issuing directions without deadlines is wholly unthinkable.*

~~(a) in the case of a delay in submitting a statement of claim, end the arbitration in so far as it relates to the subject matter of the claim, and~~

~~(b) in the case of a delay in submitting a statement of defence, proceed with the arbitration (but the delay is not, in itself, to be treated as an admission of anything).~~

**Comment 1:** *dealt with in R25 above*

**Comment 2:** *The English authorities (see Merkin at 16.25 and see TAG Wealth Management v West [2008] EWHC 1466 (Comm)) establish that s.41(3) cannot be applied within the prescription/limitation period.*

**Comment 3: the blunt dismissal seems to me to be unduly harsh and the formulation of s.41(3) AA96 is to be preferred – see amended R25 above**

*Rule 31 Hearings and examinations*

31 (1) It is for ~~the~~ tribunal to determine the extent to which an arbitration is to proceed by way of—

(a) ~~hearings for the presentation of evidence or for oral argument, or~~

(b) ~~the submission of documents or other materials.~~

(2) ~~A tribunal must hold a hearing if requested to do so by a party.~~

(3) ~~A tribunal may require the parties to attend a meeting to inspect any document, goods or other property.~~

(4) ~~The tribunal must give the parties at least 14 days' notice of any hearing or meeting.~~

(5) ~~A tribunal may direct that a party or witness is to be examined on oath or affirmation. The tribunal may administer an oath or affirmation for that purpose.~~

*Rule 32 Use of experts*

32 (1) A tribunal may obtain the **advice or** opinion of, **or may obtain information from**, an expert on any matter arising in the arbitration.

(2) If the **advice**, opinion **or information** is given in writing—

(a) the tribunal must send a copy of it to the parties as soon as is reasonably practicable, and

(b) ~~the parties must be given at least 14 days from the date the opinion is sent to make representations.~~

**(b) the parties shall be given a reasonable opportunity, not being less than 14 days, to comment on it.**

**Comment: this is essential to avoid falling into the Luzon v Transfield trap**

(3) If the **advice**, opinion **or information** is to be given in person, it must be given at a hearing (see rule 31) at which the parties may ask the expert questions **and cross-examine him/her**.

**Comment: I (HRD) am not convinced that “asking questions” is sufficient but maybe one of the litigators can deal with that**

(4) Any agreement between the parties to disapply this rule (or any part of it) has no effect if entered into after the arbitration begins.

*Rule 33 Powers relating to property*

33 (1) A tribunal may direct a party to allow the tribunal, an expert or another party—

(a) to inspect, photograph, preserve or take custody of any relevant property, or

(b) to take samples from, or conduct an experiment on any relevant property.

“relevant property” means any property which a party owns or possesses—

- (a) which is the subject of the arbitration, or
- (b) as to which any question arises in the arbitration.

(2) A tribunal may direct a party to preserve any evidence which the party possesses or controls.

*Rule 34 Duty to give copies of documents*

**Comment:** *consider adding to rule 24 so that all the parties' duties are in one place*

34 If a party discloses a document to the tribunal, the party must give a copy of the information contained in the document to the other party.

"document" **shall be understood in the widest sense and** includes—

- (a) a map, plan, graph or drawing,
- (b) a photograph **in whatever format**, and
- (c) any disc, tape or other **medium** in which images, sounds or other data are recorded.

*Rule 35 Representation of parties*

35 A party may be represented in the arbitration by any lawyer or other person.

**Comment:** *see discussion in Merkin at §14.26*

*Rule 36 Variation of time limits*

**Comment:** *dealt with above*

36 (1) A tribunal may, ~~on its own initiative or on the application of a party,~~ vary any time limit **imposed by itself** relating to the arbitration if it considers it appropriate to do so.

~~(2) **A** sheriff may, on the application of the tribunal or a party, vary such a time limit if satisfied that—~~

- ~~(a) **a party** would suffer a substantial injustice if no variation was made, and~~
- ~~(b) any available arbitral process for varying the time limit has been exhausted.~~

~~(3) If the sheriff varies a time limit, it is for the sheriff to determine the extent of the variation.~~

*Rule 37 Consolidation of proceedings*

37 Parties may agree to—

- (a) consolidate the arbitration with another arbitration, or
- (b) to hold concurrent hearings.

**on such terms as may be agreed** but the tribunal may not order such consolidation, or the holding of concurrent hearings, on its own initiative.

**Comment:** *see s.35 AA96*

*Rule 38 **Suspension Sisting** of legal proceedings*

**Comment: this should be in the main body of the Act and not in the Rules as it applies whether or not an arbitration has actually commenced. We suggest that it be after the provision on separability of arbitration agreements.**

38 (1) The court must, on an application by a party to an arbitration agreement, sist legal proceedings on a dispute if the arbitration agreement provides that the dispute is to be resolved by arbitration (immediately or after the exhaustion of other dispute resolution procedures).

But the court need not sist the legal proceedings if satisfied that the arbitration agreement concerned is void, inoperative or incapable of being performed.

(2) **No** application to sist legal proceedings **may be made unless** the applicant—

(a) has given notice of the application to the parties to the legal proceedings,

(b) has taken any appropriate procedural step to acknowledge those proceedings, and

(c) has not taken any step in those proceedings to answer the substantive claim.

(3) Any provision in an arbitration agreement which prevents the bringing of the legal proceedings is void in relation to any proceedings which the court refuses to sist.

#### *Rule 39 Court's powers in relation to arbitration*

39 (1) The court may, on an application by the tribunal or a party, order a person to—

(a) attend a hearing or meeting for the purposes of giving evidence to the tribunal, or

(b) disclose documents or other material evidence to the tribunal.

But the court may not order a person to give any evidence, or to disclose anything, which the person would be entitled to refuse to give or disclose in civil proceedings.

~~(2) The court has the same power in relation to an arbitration as it has in relation to civil proceedings to—~~

~~(a) make an order under section 1 of the Administration of Justice (Scotland) Act 1972 (c.59),~~

~~(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) grant warrant for arrestment or inhibition,~~

~~(e) grant interdict (or interim interdict), or~~

~~(f) grant any other interim or permanent order.~~

~~But the court may take such action only—~~

~~(a) on the application of a party, and~~

~~(b) if the arbitration has begun, with the consent of the tribunal.~~

**Comment 1: we suggest that Rule 39 (2) should read:**

***“(2) The court has the same power for the purposes of and in relation to an arbitration as it has in***

*relation to proceedings depending before it to –*

- (a) make an order under section 1 of the Administration of Justice (Scotland) Act 1972,*
- (b) order the sale of any property in dispute in the arbitration,*
- (c) grant warrant for arrestment or inhibition on the dependence,*
- (d) grant interim interdict,*
- (e) appoint a curator ad litem to a party.*

*But the court may take such action only –*

- (a) on the application of a party, and*
- (b) if the arbitration has begun, with the consent of the tribunal, unless the case is one of urgency.”*

*Comment 2: The purpose of this rule is to provide ancillary support to the tribunal as it would make to support parties during depending proceedings before it.*

*Comment 3: We are unaware of any power of the court to make an order securing any amount in dispute in a litigation which is not by means of arrestment or inhibition or interdict. Equally the interdict would be an interim one and not a permanent one given that its future is dependent on the outcome of the arbitration.*

*Comment 4: Paras (c) and (f) fall out entirely and para (d) and (e) are altered accordingly.*

*Comment 5: Para (e) is to cater for a child or an incapax being represented if there is a conflict of interest between his guardian and him.*

*Comment 6: There should be provision for urgency as there is in the English section 44.*

(3) This rule applies in relation to—

(a) ongoing arbitrations, and

~~(b) arbitrations which are likely to begin.~~

(b) any circumstance where the court is satisfied both

**(i) that a dispute exists or might arise in relation to a matter; and**

**(ii) that dispute is prima facie covered by an arbitration agreement**

*Comment: “likely” seems imprecise; in Cetelem v Roust Cooke J granted an interim measure given only the existence of an arbitration agreement and a (prima facie) relevant dispute; this was upheld by the CoA [2005] EWCA Civ 618*

(4) This rule does not affect—

(a) any other powers which the court has under any enactment or rule of law in relation to arbitrations, or

(b) the tribunal's powers.

## **PART 5**

### **AWARDS**

*Rule 40 Rules applicable to the substance of the dispute*

40 (1) The tribunal is to decide the dispute in accordance with the law applicable to the substance of the dispute and, when doing so, must have regard to—

(a) the provisions of any contract relating to the substance of the dispute,

(b) the normal commercial or trade usage of any undefined terms used in the provisions of any such contract **but not defined therein**, and

(c) any established commercial or trade customs or practices relevant to the substance of the dispute.

(2) It is for the tribunal to determine the law which is applicable to the substance of the dispute.

~~(3) The tribunal may not decide the dispute on the basis of general considerations of justice, fairness or equity unless they form part of the law applicable to the substance of the dispute.~~

**Comment:** we prefer the formulation of s.46 AA96 with (a)(b)(c) above added

**46(1) The arbitral tribunal shall decide the dispute-**

- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
- (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

**46(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.**

**46(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.**

*Rule 41 Form of award*

41 A tribunal's award must—

(a) be signed by at least the majority of the tribunal members (and state why any tribunal member has not signed),

**Comment:** s.52(3) AA96 seems a better solution.

(b) state where the arbitration is seated,

(a) state **its date and** the date on which the award takes effect (see rule 43),

(d) contain details of any previous partial, interim or **provisional** award,

(e) specify the extent to which any previous **provisional** award is superseded, and

(f) be sent to the parties as soon as is reasonably practicable.

*Rule 42 Award to contain statement of reasons*

42 A tribunal's award must state the reasons for the award.

*Rule 43 Day award takes effect*

43 An award takes effect on the day it is made **notwithstanding the provisions of rule 70.**

*Rule 44 Power to make **provisional** awards*

44 (1) A tribunal may make a **provisional** award granting any relief on a temporary basis which it has the power to grant permanently.

**Comment 1:** use of the term “interim award” is wrong here since the terminology “interim” or “partial award” by definition refers to an award which is final as to the matters decided therein

**Comment 2:** While in Scotland it has been used to mean a reversible provisional/temporary award, the use of the “interim” adjective can lead to confusion and should be replaced by “provisional”.

**Comment 3:** the sidebar to s.39 AA96 is well-known to be a confusing misnomer

(2) For example, a **provisional** award may order a party to—

- (a) pay a sum of money to another party,
- (b) transfer property to another party, or
- (c) make an interim payment on account of the arbitration expenses.

**(3) A provisional award may, at some later date, be  
(a) superseded in whole or in part by a further provisional award; or  
(b) confirmed or vacated in whole or in part in a partial or final award  
in each case by the tribunal.**

*Rule 45 Power to make partial awards*

45 (1) A tribunal may make more than one award at different times **on different aspects of the matters to be decided in the** arbitration.

(2) An award which ~~deals with~~ **decides** some (but not all) of the matters which the tribunal is to decide in the arbitration is to be known as a “partial award”.

***Comment 1: this is the generally accepted/preferred terminology so we should stick to it***

***Comment 2: do we wish to expressly exclude use of the term “interim award” ?***

**(3) A partial award shall be final as to the matters decided therein.**

*Rule 46 Power to produce draft awards*

46 Before making an award, a tribunal—

- (a) **may** send a draft of its proposed award to the parties, and
- (b) **shall** consider any representations from the parties about the draft.

*Rule 47 General powers in relation to awards*

***Comment: we suggest “Remedies” following s.48 AA96***

~~47 (1) An award may order the payment of a sum of money (including a sum in respect of damages).  
The award may specify the sum in any currency.~~

~~(2) An award requiring payment of a sum of money may specify that interest is to be paid on that sum.  
The award may, in particular, specify—~~

- ~~(a) the rate of interest,~~
- ~~(b) the manner in which interest is to be calculated (for example: whether it is simple or compound interest);~~

***Comment: as stated above, better not to give examples***

~~(c) the period for which interest is payable (including any rests if the tribunal considers that appropriate).~~

**Comment: this is incomplete; the formulation in s.49 AA96 is to be preferred, both because it is more comprehensive but also because we have the benefit of the HoL's views thereon (Lesotho)**

~~(3) An award may—~~

~~(a) be of a declaratory nature;~~

~~(b) rectify the terms of a contract to the extent permitted by the law applicable to the contract;~~

~~(c) order a party to do or refrain from doing something (including ordering the performance of a contractual obligation);~~

~~(d) order the reduction of a deed or other document.;~~

**Comment: this was queried at the meeting on 20<sup>th</sup> August; in my view the tribunal should, in general, have the same powers as the court**

~~But an award may not order anything which a court would be unable to order in the circumstances.~~

**“(1) An award may do one or more of the following—**

**(a) order the payment of a sum of money in any currency , including a sum in respect of damages;**

**(b) be of a declaratory nature;**

**(c) rectify the terms of a document to the extent permitted by the law applicable to the substance of the dispute;**

**(d) order a party to do or refrain from doing anything; or**

**(e) order the reduction of a document other than the decree of a court**

**but an award may not order anything that a court would be unable to order in the circumstances.**

**(2) An award ordering the payment of any sum of money may include an award of simple or compound interest on that sum at such rates and with any rests as the tribunal considers meets the justice of the case –**

**(a) on the whole or any part of the sum in respect of any period until the date of the award or until payment;**

**(b) on the whole or any part of any amount claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award was made, in respect of an period up to the date of payment;**

**(c) on the whole or any part of the sum plus interest accrued or awarded until the date of the award, from the date of the award until payment.”**

Rule 48 Power to withhold award on non-payment of fees or expenses

**Comment: I prefer the formulation of s.56 AA96; in particular the fees of any appointing body or AAR are not addressed here**

48 (1) A tribunal may refuse to ~~make an award~~ **send an award to the parties** if—

**Comment: s.56 AA96 preferable here; refusal to make an award is problematic. See also rule 41(f)**

(a) the fees and expenses of the tribunal members (see rule 62), or

(b) any expenses reasonably incurred by the tribunal when conducting the arbitration,

have not been paid in full

(2) Where a tribunal so refuses, the court may (on the application of a party) order—

(a) the tribunal to make the award on the applicant paying into the court an amount equal to the fees and expenses demanded (or such lesser amount as may be specified in the order),

(b) the amount paid into the court to be used to pay the fees and expenses which the court determines as being properly payable, and

(c) the balance (if any) of the amount paid into the court to be repaid to the applicant.

(3) The court may make such an order only if the applicant has exhausted any available arbitral process of appeal or review **of the fees and expenses demanded**.

(4) The court's decision may be appealed only with the leave of the court.

*Rule 49 Award to be final and binding on parties*

49 (1) An award, **whether termed as partial or final**, is final and binding on the parties and on any person claiming through or under them.

(2) But **a provisional** award under rule 44 is binding only—

(a) to the extent specified in the award, or

(b) until it is superseded, **confirmed or vacated** by a subsequent award.

(3) This does not affect the right of any person to challenge the award—

(a) under Part 6 of these rules, or

(b) by any available arbitral process of appeal or review.

*Rule 50 Award treated as made in Scotland*

50 An award is to be treated as having been made in Scotland even if it is signed outwith Scotland.

*Rule 51 Arbitration to end on last award or early settlement*

51 (1) An arbitration ends when the last award to be made in the arbitration takes effect.

This does not prevent the tribunal from ending the arbitration before then under rule 20(5) or 30(3) or (4).

(2) The parties may end the arbitration at any time by notifying the tribunal that they have settled the dispute.

(3) On the request of the parties, the tribunal may make an award reflecting the terms of the settlement.

These rules (except for rule 42) apply to such an award as they apply to any other award.

(4) The tribunal's functions expire when the arbitration ends (except for its functions under rules 53, 57(7), 59(2), 60 and 62(2)).

**(5) The ending of the arbitration shall in no way prejudice the right of the tribunal, any appointing institution or any arbitral appointments referee to receive its fees and expenses**

*Rule 52 Enforcement of award*

52 (1) The court may, on the application of a party, order that an award is to be enforced as if it were an extract registered decree bearing a warrant for execution granted by the **court**.

(2) No such order may be made if the court is satisfied that the tribunal which made the award lacked jurisdiction to do so (and the court may restrict the extent of the order if satisfied that the tribunal lacked jurisdiction to make a part of the award).

(3) But a party may not object on the ground that the tribunal lacked jurisdiction if the party has lost the right to raise that objection by virtue of—

(a) the arbitration agreement, or

(b) rule 67.

(4) An award may be registered for execution in the Books of Council and Session or the sheriff court books.

(5) This rule does not apply in relation to New York Convention awards (see section 12 of this Act).

*Rule 53 Correcting an award*

53 (1) A party may, no later than **28** days after an award takes effect, apply to the tribunal for the award to be corrected so as to—

(a) correct a clerical or typographical error in the award,

(b) correct an error arising by accident or omission, or

(c) clarify or remove any ambiguity in the award.

**Comment: we appear to have omitted s.57(3)(b)**

**57(3) The tribunal may on its own initiative or on the application of a party:**

**(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or**

**(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.**

**These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.**

(2) The party must, at the same time as the application is made, send a copy of it to the other party.

(3) The other party may, no later than **14** days after receiving a copy of the application, make written representations to the tribunal about the application.

(4) The tribunal may, no later than **56** days and no earlier than **28** days after the application is made, correct the award to the extent it considers necessary having regard to the application and any representations.

**Comment: it will be unnecessarily confusing to have slightly different time limits to AA96.**

(5) The tribunal may, on its own initiative and no later than **28** days after an award takes effect, correct a clerical or typographical error in the award.

**Comment: we need to address the lacuna discovered in Gannet v Eastrade [2002] 1 Lloyds Rep 713 so:**

**(5A) Where a tribunal corrects an award pursuant to this rule and such correction causes, in the judgement of the tribunal, a consequential effect on another part of the award, whether on some part of the substance of the dispute, or on expenses or interest, the tribunal may make such consequential correction.**

(6) The sheriff may, on the application of a party, make an order varying the time limit for making an application under this rule.

(7) A corrected award is to be treated as if it was made in its corrected form on the day the award took effect.

## **PART 6**

### **CHALLENGING AWARDS**

*Rule 54 Challenging the award: substantive jurisdiction*

54 (1) An award may be appealed to the Outer House ***of the Court of Session*** by a party on the ground that the tribunal did not have jurisdiction to make the award (a “jurisdictional appeal”).

**(2) A jurisdictional appeal is subject to the restrictions in rules 57(2) and (4).**

~~(2) The Outer House of the Court of Session may decide a jurisdictional appeal by —~~ **(3) Where the Outer House allows a jurisdictional appeal it may -**

~~(2) The Outer House may decide a jurisdictional appeal by —~~

~~(a) confirm the award,~~

**Comment: if the Court has allowed the appeal, it can hardly then confirm the award**

(b) **vary** the award (or part of it), or

(c) **set** aside the award (or part of it).

(3) Any variation by the Outer House has effect as part of the tribunal’s award.

**(4) There shall be no appeal from a decision of the Outer House under this rule without leave of that court.**

**Comment 1 – this provides a remedy against an award as to the merits in relation to the tribunal’s jurisdiction. Awards dealing solely with jurisdiction are dealt with by rule 20**

**Comment 2 – usually appeals (unlike applications) are to the Inner House. Therefore it seems prudent to specify for the avoidance of doubt that the appeal is to the Outer House.**

**Comment 3 – the practice of the Court of Session is to refuse an unfounded appeal from an outside body rather than confirm the decision being appealed to them. “Confirmation” of the**

**decision implies that the court gives its approval to the decision whereas all it is doing when not allowing the appeal is finding that the grounds for appeal before it are unfounded.**

**Comment 4 – where there is an appeal to the Outer House, it is implied that there is a further right of appeal without leave to the Inner House of the Court of Session (Rule of Court 41.45). Is this intended ? AA96 requires leave. If this is sought it should be specified.**

*Rule 55 Challenging the award: serious irregularity*

55 (1) An award may be appealed to the Outer House by a party on the ground of serious irregularity (an “irregularity appeal”).

(2) “Serious irregularity” means an irregularity which has caused, or will cause, substantial injustice to the appellant.

(3) **Any one or more of the following shall constitute an “irregularity” may, for example, include—**

**Comment: it is ESSENTIAL that this list be exhaustive; the existing drafting fails to do this and opens the door, wholly unnecessarily, to other grounds of challenge;**

(a) a refusal or failure by the tribunal—

(i) to comply with its principal duties (see rule 17) or its duty under rule 17,

**(ii) to conduct the arbitration in accordance with the procedure agreed by the parties;**

(iii) to deal with any issues put to it,

(iv) to comply with the requirements as to the form of the award, or

(iv) to otherwise conduct the arbitration properly,

**Comment: definition of “properly” ?**

(b) the tribunal or any third party to whom the parties give powers in relation to the arbitration acting outwith **its** powers,

(c) the award being—

(i) contrary to public policy, or

(ii) obtained by fraud or in a way which is contrary to public policy,

**(iii) uncertain or ambiguous in its effect,**

(d) a tribunal member having not been impartial (or there being justifiable doubts about a tribunal member’s impartiality),

(e) a tribunal member having been incapable of acting as an arbitrator in the arbitration (or there being justifiable doubts about a tribunal member’s ability to so act), or

(f) a tribunal member not having a qualification which the parties agreed (before the appointment) that the member must have, or

(g) any other irregularity committed by the tribunal, or by any third party to whom the parties give powers in relation to the arbitration, **and admitted as such by the tribunal or third party (as applicable).**

**Comment: as drafted, ABSOLUTELY NO !! This would be a recipe for a free-for-all and would be wholly counter to the objective**

**(4) An irregularity appeal is subject to the restrictions in rule 57 (2) and (4).**

(5) The Outer House may decide an irregularity appeal by—

- (a) confirming the award,
- (b) requiring the tribunal to reconsider the award (or part of it), or
- (c) if it considers reconsideration inappropriate, setting aside the award (or part of it).

***(6) There shall be no appeal from a decision of the Outer House under this rule without leave of that court.***

*Rule 56 Challenging the award: legal error*

56 (1) An award may be appealed to the Outer House **of the Court of Session in accordance with this rule** by a party on the ground that the tribunal erred on a point of law (a “legal error appeal”).

(2) A **legal error appeal shall not be brought except –**

**(a) with the permission of the Outer House; or**

**(b) with the agreement of all of the other parties to the arbitration.**

**(3) A legal error appeal is subject to the restrictions in rule 57(2) and (4).**

(4) ~~A legal error appeal may proceed only if the Outer House~~ **The Outer House shall grant permission for a legal error appeal to proceed only if it** is satisfied—

- (a) that deciding the point will substantially affect a party’s rights,
- (b) that the tribunal was asked to decide the point,
- (c) that the tribunal’s decision on the point—
  - (i) was obviously wrong, or
  - (ii) where the court considers the point to be of general ***public*** importance, is open to serious doubt, and
- (d) that it is just and proper for the court to decide the point despite the parties’ agreement to resolve the dispute by arbitration.

**(4) An application for permission to appeal shall be valid only if** ~~application for a legal error appeal is valid only if—~~

**(a) it** identifies the point of law concerned,

**(b) the point of law is evident on the face of the award**

(c) **it** states why the applicant considers that the appeal should proceed.

(5) It is for the Outer House to decide whether a hearing is needed for the purposes of deciding whether a legal error appeal should proceed.

(6) The Outer House may decide a legal error appeal which proceeds by—

(a) confirming the award,

(b) requiring the tribunal to reconsider the award (or part of it), or

(c) if it considers reconsideration inappropriate, setting aside the award (or part of it).

**(7) There shall be no appeal from a decision of the Outer House under this rule without leave of that court.**

*Rule 57 Challenging the award: supplementary*

57 (1) This rule (and rules 58 and 59) apply to jurisdictional appeals, irregularity appeals and legal error appeals (and references to “appeal” are to be construed accordingly).

(2) An appeal is competent only if the appellant has exhausted—

(a) any available arbitral process of appeal or review, and

(b) any recourse available under rule 53 (corrections).

(3) No appeal may be made against an interim award.

(4) An appeal must be made within 28 days of—

(a) the date on which the award being challenged takes effect,

(b) if the award is corrected (or an application for correction is refused), the date of the correction or refusal,

(c) if there has been an arbitral process of appeal or review, the date on which the appellant was notified of the result of that process.

(5) An appellant must give notice of an appeal to the other party and the tribunal.

(6) The tribunal may continue the arbitration pending determination of an appeal.

(7) The Outer House may—

(a) order the tribunal to state its reasons for the award being appealed in sufficient detail to enable the Outer House to deal with the appeal properly, and

(b) make any other order it thinks fit with respect to any additional costs arising from that order.

(8) The Outer House, when deciding an appeal by setting aside the award (or any part of it), may also order that any provision in an arbitration agreement which prevents the bringing of the legal proceedings in relation to the subject-matter of the award (or that part of it) is void.

(9) The identities of the parties to an appeal must not be disclosed—

(a) by the Outer House, or

(b) in any report of the Outer House’s decision.

Any disclosure in such a report is to be treated as a breach of an obligation of confidence.

**Comment 2: see CPR 62.10**

*Rule 58 Appeal costs*

58 (1) The Outer House may require any amount due under an award being appealed (or any associated interim award) to be paid into court or otherwise secured pending its decision on the appeal.

(2) The Outer House may require the appellant to provide security for the costs of the appeal.

But such a requirement may not be made ***solely*** because the appellant—

(a) is an individual who ordinarily resides outwith the United Kingdom, or

(b) is a body which is—

(i) incorporated or formed under the law of a country outwith the United Kingdom, or

(ii) managed or controlled from outwith the United Kingdom.

(3) The Outer House may dismiss an appeal if a requirement made under this rule is not complied with.

*Rule 59 Effect of Outer House's decision on appeal*

59 (1) The Outer House's decision on an appeal is final (as is any decision on whether to proceed with a legal error appeal).

(2) Where the Outer House requires the tribunal to reconsider its award (or any part of it), the tribunal must make a new award in respect of the matter concerned by no later than—

(a) the day falling 3 months after the Outer House makes the requirement, or

(b) such other day as the Outer House may direct.

These rules apply in relation to the new award as they apply in relation to the appealed award.

**PART 7**

**EXPENSES**

*Rule 60 Arbitration expenses*

**Comment 1: nowhere is there any concept of recoverable expenses – this is essential**

**Comment 2: we need to replicate s.60 AA96; this is also essential**

**60. An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.**

60(1) It is for the tribunal to—

(a) determine and fix the amount of the arbitration expenses (other than those agreed or fixed under rule 62), or

(b) arrange for those expenses to be taxed by the auditor of court.

(2) The tribunal may make an award allocating the parties' liability for the arbitration expenses (and, when doing so, must have regard to the principle that expenses should follow a decision made in favour of a party unless that is not appropriate in the circumstances).

**Comment: I prefer the formulation of s.61(2) AA96**

**61(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs 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 costs.**

(3) Such an award may cap a party's liability for the arbitration expenses at an amount specified in the award. But an award imposing such a cap must be made sufficiently in advance of the arbitration expenses to which the cap relates being incurred, or the taking of any steps in the arbitration which may be affected by the cap, for the parties to take account of it.

**Comment 1: this appears illogical/contradictory – how can the tribunal impose an up-front cap by an award, generally issued at the end of the proceedings .**

**Comment 2: I prefer the formulation of s.65 AA96**

65(1) Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

65(2) Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

(4) An award under this rule may be made together with or separately from the tribunal's award on the substance of the dispute (and these rules apply in relation to an award under this rule as they apply to an award on the substance of the dispute).

(5) "Arbitration expenses" means—

(a) the fees and expenses of the tribunal members (see rule 62),

(b) any expenses reasonably incurred by the tribunal when conducting the arbitration, including—

(i) fees and expenses of any oversman,

(ii) fees and expenses of any clerk, agents or employees appointed by the tribunal,

(iii) fees and expenses of any **adviser or expert** used by the tribunal (see rule 32),

(iv) reasonable expenses in respect of meeting and hearing facilities,

**Comment: the "reasonable" principle must apply across the board**

(c) the legal and other expenses of the parties, and

(d) the fees and expenses of any third party to whom the parties give powers in relation to the arbitration.

**(6) Reference to "fees" shall include such fees in such form as may be agreed between the tribunal and the parties including any or all of the following**

**(a) fees calculated by way of hourly or daily or other time-based rates;**

**(b) fees calculated on a lump sum or other unit-based basis;**

**(c) booking fees whether reflecting the tribunal's accepting appointment, reserving time or otherwise;**

**(d) cancellation fees for time reserved but not utilised;**

**(e) any other method of fee charging in general professional use .**

**(7)** Any agreement between the parties to disapply this rule (or any part of it) has no effect if entered into after the arbitration begins.

**Comment: logical enough in all cases except the parties' own legal and other expenses**

*Rule 61 Security for expenses*

61 A tribunal may order a party making a claim to provide security for the arbitration expenses or any part of those expenses.

But such an order may not be made ***solely*** because the party—

- (a) is an individual who ordinarily resides outwith the United Kingdom, or
- (b) is a body which is—
  - (i) incorporated or formed under the law of a country outwith the United Kingdom, or
  - (ii) managed or controlled from outwith the United Kingdom.

*Rule 62 Fees and expenses of tribunal members*

62 (1) The parties are severally liable to pay to tribunal members—

- (a) a fee for conducting the arbitration, and
- (b) any expenses the tribunal members incur in relation to the arbitration,

but, as between themselves, are liable for those fees and expenses in the proportions which they agree (or, failing such agreement, in the proportions determined by the tribunal in an award under rule 60(2)).

***Comment: s.60 AA96 must apply here***

(2) The amount of fees and expenses so payable and the payment terms are—

- (a) to be agreed by the parties and the tribunal members, or
- (b) failing such agreement, to be fixed by the auditor of court (on the application of the tribunal or a party) on the basis of a reasonable commercial rate of charge.

(3) The auditor of court may, when fixing the amount of fees and expenses, order the repayment of any fees or expenses already paid which the auditor considers excessive.

Such an order has effect as if it was made by the sheriff.

(4) This rule does not affect the Outer House's power to make an order under rules 10 or 14 (orders relating ***to*** expenses in cases of resignation or removal).

**(5) This rule is subject to any order of the court under rule ?? (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator)**

**(6) Nothing in this rule affects any liability of any party to any other party to pay all or any of the arbitration expenses or any contractual right of an arbitrator to payment of his fees and expenses.**

**PART 8**

**MISCELLANEOUS**

*Rule 63 Immunity of tribunal etc.*

63 (1) Neither the tribunal nor any tribunal member is liable for anything done or omitted in the performance, or purported performance, of the tribunal's functions.

**Comment: "is" ?**

(2) This rule does not apply—

(a) if the act or omission is shown to have been in bad faith, or

(b) to any liability arising from the resignation of a tribunal member.

**Comment: should not this be limited to liability in respect of fees and expenses (i.e. repayment) ?**

(3) This rule applies to any clerk, agent or employee of the tribunal as it applies to the tribunal.

*Rule 64 Immunity of appointing arbitral institution etc.*

64 (1) A third party who the parties ask to appoint or nominate a tribunal member is not liable for anything done or omitted in the performance, or purported performance, of that function (unless the act or omission is shown to have been in bad faith).

(2) Such a third party is not liable for the acts or omissions of—

(a) any tribunal member who it nominates or appoints, or

(b) the tribunal of which such a tribunal member forms part (or any clerk, **adviser**, agent or employee of that tribunal).

(3) This rule applies to a third party's agents and employees as it applies to a third party.

*Rule 65 Immunity of experts, **advisers**, witnesses and legal representatives*

65 Every person who participates in an arbitration as an expert, **adviser**, witness or legal representative is to enjoy the same immunity in respect of acts or omissions as the person would enjoy if the arbitration were civil proceedings.

*Rule 66 Raising the question of the tribunal's jurisdiction with the court*

66 A party may not raise the question of the tribunal's jurisdiction with the court other than—

(a) by an appeal under rule 21 or 54, or

(b) in objecting to an order being made under rule 52.

*Rule 67 Loss of right to object*

67 (1) A party who participates in an arbitration without making a timeous objection on any of the **grounds set out below** may not raise the objection later—

(a) before the tribunal or on appeal to the Outer House, or

(b) for the purposes of rule 3(1)(c).

(2) **Paragraph (1) of** ~~This~~ rule does not apply where the party shows that it did not object timeously because it—

- (a) did not know of the ground for objection, and
- (b) could not with reasonable diligence have discovered that ground.

(2) The grounds are—

- (a) that the tribunal member is ineligible to act as a tribunal member,
- (b) that a tribunal member is not impartial (or that there are justifiable doubts about a tribunal member's impartiality),
- (c) that the tribunal does not have jurisdiction,
- (d) that the arbitration has been conducted improperly,

***Comment: we need to define “improper” – see earlier***

(e) that there has been a failure to comply with the arbitration agreement or **these rules or such other rules as are agreed between the parties**, and

(f) that the arbitration has been affected by any other irregularity.

***Comment: we need to define “irregularity” – see earlier***

(3) An objection is timeous if it is made—

- (a) as soon as reasonably practicable after the circumstances giving rise to the ground for objection first arose, or
- (b) by such later date as may be allowed by the arbitration agreement, the arbitration rules or the tribunal.

(4) This rule does not allow a party to raise an objection which it is barred from raising for any reason other than failure to object timeously.

*Rule 68 Consideration where tribunal member adjudged not to be impartial*

68 (1) This rule applies where—

(a) a tribunal member is removed by the Outer House under rule 12 on the ground that the member is not impartial **or not independent** (or that there are justifiable doubts about the member's impartiality **or independence**),

(b) a tribunal is dismissed by the Outer House under rule 13 on the ground that it has failed to comply with its duty to be (and appear to be) impartial as between the parties, or

(c) a tribunal's award (or any part of it) is returned to the tribunal for reconsideration or set aside on either of those grounds (see rule 55).

***Comment: what is meant by “either” ? If it means (a) and (b) above, then this does not work i.r.o. (b) since the Court cannot return an award to a tribunal which has been dismissed***

(2) Where this rule applies, the Outer House must have particular regard to whether a tribunal member has complied with rule 7 when it is considering whether to make an order about—

(a) the tribunal member's entitlement (if any) to fees or expenses,

(b) repaying fees or expenses already paid.

*Rule 69 Death of party*

69 An arbitration agreement is not discharged by the death of a party and may be enforced by or against the executor or other representative of that party.

This rule does not affect the operation of any law by virtue of which a substantive right or obligation is extinguished by death.

*Rule 70 Formal communications*

70 (1) A “formal communication” means any application, award, consent, designation, direction, notice, objection, order, request or requirement made or given or any document served—

(a) in pursuance of an arbitration agreement,

(b) for the purposes of these rules, or

(c) otherwise in relation to an arbitration.

(2) A formal communication must be in writing.

(3) A formal communication is made, given or served if it is—

(a) hand delivered to the person concerned,

(b) sent to the person concerned by first class post in a properly addressed envelope or package—

(i) in the case of an individual, to the individual’s principal place of business or usual or last known abode,

(ii) in the case of a body corporate, to the body’s registered or principal office, or

(iii) in either case, to any postal address designated for the purpose by the intended recipient (such designation to be made by giving notice to the person giving or serving the formal communication), or

(c) sent to the person concerned in some other way (including by email, fax or other electronic means) which the sender reasonably considers likely to cause it to be delivered on the same or next day.

(4) A formal communication which is sent by email, fax or other electronic means is to be treated as being in writing only if it is legible and capable of being used for subsequent reference.

(5) A formal communication is, unless the contrary is proved, to be treated as having been made, given or served—

(a) where hand delivered, on the day of delivery,

(b) where posted, on the day on which it would be delivered in the ordinary course of post, or

(c) where given in any other way described in rule 70(3)(c), on the day after it is sent.

(6) The tribunal may determine that a formal communication—

(a) is to be delivered in such manner as it may direct, or

(b) need not be delivered.

But it may do so only if satisfied that it is not reasonably practicable for the formal communication to be made, given or served in accordance with these rules (or, as the case may be, with any contrary agreement between the parties).

(7) This rule does not apply in relation to any application, order, notice, document or other thing which is made, given or served in or for the purposes of legal proceedings.

*Rule 71 Periods of time*

71 Periods of time are to be calculated for the purposes of an arbitration as follows—

(a) where any act requires to be done within a specified period after or from a specified date, the period begins immediately after that date, and

(b) where the period is a period of 7 days or less, the following days are to be ignored—

(i) Saturdays and Sundays, and

(ii) any public holidays in the place where the act concerned is to be done.

**SCHEDULE 2**  
**(introduced by section 25)**  
**REPEALS**

| <i>Enactment</i>                                                 | <i>Extent of repeal</i>  |
|------------------------------------------------------------------|--------------------------|
| Articles of Regulation 1695                                      | 25th Act                 |
| Arbitration (Scotland) Act 1894 (c.13)                           | The whole Act            |
| Arbitration Act 1950 (c.27)                                      | The whole Act            |
| Administration of Justice (Scotland) Act 1972 (c.59)             | Section 3                |
| Arbitration Act 1975 (c.3)                                       | The whole Act            |
| Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55) | Section 17               |
| Electricity Act 1989 (c.29)                                      | Section 64(2)            |
| Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) | Section 66<br>Schedule 7 |
| Trade Union and Labour Relations (Consolidation) Act 1992 (c.52) | Section 217              |

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