

THE SCOTTISH CONSTRUCTION

# ARBITRATION CODE VERSION 1.0

FOR USE IN DOMESTIC AND INTERNATIONAL ARBITRATION

PREPARED BY THE CHARTERED INSTITUTE OF ARBITRATORS (SCOTTISH BRANCH)

## Foreword

A small group of individuals has worked with great enthusiasm over the past twenty four months to produce the Scottish Construction Arbitration Code, which, I believe, will offer parties in Scotland in dispute a fast, efficient and cost effective Arbitration process as an alternative to Adjudication.

This work, coupled with an excellent level of input from the leading construction litigation firms in Scotland, has created the basis for parties to have their disputes resolved expeditiously, but below the frantic activity level of the current Adjudication process. After wide consultation, the proposals have been warmly received by users and construction litigators alike.

I firmly believe this Code offers a genuine way forward to resolve construction disputes in Scotland and I commend its use.

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Chairman  
Chartered Institute of Arbitrators (Scottish Branch)

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## Commencement of Arbitration

## article 1

- 1.1 The party commencing arbitration (the Claimant) shall give to the other party (the Respondent) a Notice of Arbitration.
- 1.2 Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Respondent.
- 1.3 The Notice of Arbitration shall include the following:
  - (a) The full names and addresses of the parties (including telephone and facsimile numbers and e-mail addresses if known).
  - (b) A reference to the arbitration clause or the separate arbitration agreement that is involved.
  - (c) A full statement of the Claimant's claim, including the nature of the claim, a statement of the relevant facts and of the applicable law on which the Claimant relies and a statement of the relief or remedy sought including details of the sum or sums claimed and how they are made up. The claim shall be accompanied by copies of, or relevant extracts from, the contract and such other documents (including a full copy of any expert report(s)) as the Claimant intends to rely upon and shall detail the relevant parts of the contract, and the relevant parts of any such other documents, as are particularly relied upon by the Claimant.
  - (d) [Not used.]
  - (e) A demand that the matter be referred to arbitration.
  - (f) If the arbitration clause or agreement calls for each party to appoint an Arbitrator, the name and address (and telephone and facsimile numbers and e-mail address if known) of the Arbitrator nominated by the Claimant. The Respondent shall thereafter, within seven days after receipt of the Notice of Arbitration, intimate the name and address (and telephone, facsimile number and email address if known) of the Arbitrator nominated by the Respondent.
  - (g) If the arbitration clause or agreement does not call for each party to appoint an Arbitrator, a proposal by the Claimant of the name of an Arbitrator with his full name and address (and his telephone and facsimile numbers and e-mail address if known). The Respondent shall, within seven days after receipt of the Notice of Arbitration, intimate whether or not he accepts the Arbitrator nominated by the Claimant and, if he does not accept him, the name and address (and telephone, facsimile number and email address if known) of the Arbitrator whom the Respondent proposes.
- 1.3.1 Within twenty one days after receipt of the Notice of Arbitration (and

irrespective of whether or not an Arbitrator has by then been appointed in accordance with Article 3) the Respondent shall deliver to the Claimant a Notice of Defence. Failure to deliver a Notice of Defence shall not delay the arbitration. If there is such a failure all claims set forth in the Notice of Arbitration shall be deemed to be denied.

1.4 The Notice of Defence shall include: -

- (a) Any comment on article 1.3(a) (b) or (e) that the Respondent considers appropriate.
- (b) A full statement of the Respondent's defence, including a statement of the relevant facts and of the applicable law (if any) on which the Respondent relies in its defence and a statement of the relief requested. The defence shall be accompanied by copies of, or relevant extracts from, the contract and such other documents (including a full copy of any expert report(s)) as the Respondent intends to rely upon, except where such copies or extracts have already been provided by the Claimant under Article 1.3(c), in which event the Respondent shall state its position regarding the terms of such copies or extracts.

1.5 [Not used.]

1.6 The Respondent may include in the Notice of Defence any counterclaim within the scope of the arbitration clause or agreement and such counterclaim shall become part of the arbitration. If so, the counterclaim in the Notice of Defence shall include those matters in Article 1.3. (b), (c) and (e).

1.7 If a counterclaim is asserted in the Notice of Defence, within twenty one days after its receipt, the Claimant shall deliver to the Respondent a reply to the counterclaim which shall include the same matters as provided for in the Notice of Defence in Article 1.4 with the addition of a statement of the remedy requested, instead of the relief requested, if considered appropriate by the Respondent.

1.8 Failure by the Respondent to include a counterclaim in the Notice of Defence shall not preclude the Respondent from making a counterclaim, within the scope of the arbitration clause or agreement, no later than seven days after the later of the Notice of Defence or the appointment of the arbitral tribunal (in terms of Article 3) if, on cause shown, the arbitral tribunal in its absolute discretion is prepared to permit it, in which event it shall become part of the arbitration.

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

Arbitration shall be consolidated within the same arbitral proceedings.

- 1.10 After an arbitral tribunal has been appointed, either party may give a further Notice of Arbitration to the other, and to the arbitral tribunal, referring any additional dispute which falls under the same arbitration agreement to the arbitral tribunal proceedings and, whether or not the other party consents to that other dispute being referred to the proceedings, the arbitral tribunal may in its absolute discretion order that the additional dispute should be referred to and consolidated within those same proceedings or that it should not be so referred and consolidated.
- 1.11 [Not used.]
- 1.12 Immediately following the appointment of an arbitral tribunal (in terms of Article 3) the Claimant shall send to the arbitral tribunal a copy of all Notices of Arbitration in the arbitration and a copy of all replies to any counterclaims in any Notices of Defence in the arbitration. The Respondent shall send to the arbitral tribunal a copy of all Notices of Defence (including any counterclaims contained therein) in the arbitration. At the same time each party shall send to the arbitral tribunal copies of, or relevant extracts from, the contract and such other documents as the party intends to rely upon (except in so far as such action is made unnecessary for the Respondent by Article 1.4(b)).

## Notices and Communications

## article 2

- 2.1 All notices or other communications between the parties and the arbitral tribunal shall be in writing and may be delivered by courier or by registered/recorded post, or transmitted by facsimile, e-mail or any other means of telecommunication which provides a record of its transmission.
- 2.2 A party's last known residence or place of business during the arbitration shall be a valid address for the purposes of any notices or other communications in the absence of any notification of a change of address by that party to the other party and to the arbitral tribunal.
- 2.3 For the purpose of determining the date of the commencement of a time limit, a notice or other communication shall be treated as having been received on the day it is delivered, or in the case of a telecommunication, transmitted in accordance with Article 2.1.
- 2.4 For the purpose of determining compliance with a time limit, a notice or other communication shall be treated as having been sent made or transmitted if it is dispatched in accordance with Article 2.1 and 2.2 prior to or on the date of expiration of the time limit.

- 2.5 All communications with, and other documents sent to, the arbitral tribunal by one party shall at the same time be communicated to the other party.

### Constitution of the Arbitral Tribunal, Number of Arbitrators and Procedure for Appointment [article 3](#)

- 3.1 The expression “the arbitral tribunal” in this Code includes a sole Arbitrator or all Arbitrators where more than one. All references to an Arbitrator shall include the masculine and the feminine, and Arbitrator shall include Arbitrer.
- 3.2 The parties are free to agree on the number of Arbitrators. If they have not agreed, a single Arbitrator shall be appointed.
- 3.3 If the parties have agreed that there shall be more than one Arbitrator and the Claimant has nominated an Arbitrator in accordance with Article 1.3(f) but the Respondent fails within seven days after receipt of the Notice of Arbitration to intimate the name and address of another Arbitrator in accordance with Article 1.3(f), the parties shall be deemed to have agreed on a single Arbitrator and the Arbitrator nominated by the Claimant shall be deemed appointed as the sole Arbitrator upon the expiry of the foregoing seven day period.
- 3.4 If the parties have agreed that there shall be a single Arbitrator and the Claimant has proposed an Arbitrator under Article 1.3(g), and the Respondent does not intimate non-acceptance of that Arbitrator within seven days after receipt of the Notice of Arbitration, then the Arbitrator proposed by the Claimant shall be deemed appointed as the sole Arbitrator upon the expiry of the foregoing seven day period.
- 3.5 Where the parties have agreed a single Arbitrator be appointed and the Claimant has failed to propose an Arbitrator in accordance with Article 1.3(g) or each party has nominated an Arbitrator, they shall endeavour to agree on the single Arbitrator within seven days of intimation of the name of the Respondent’s proposed Arbitrator under clause 1.3(g). If they do so agree then the Arbitrator shall be deemed appointed on the date of such agreement being reached. If they cannot agree within that period either party may apply to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) to appoint the Arbitrator within seven days of the application and the Arbitrator shall be deemed appointed on the date of his or her appointment by the relevant officer of the Chartered Institute of Arbitrators (Scottish Branch).
- 3.6 Where parties have agreed on an arbitral tribunal of three and each has appointed an Arbitrator then unless the parties have agreed on

another method of appointment the party-appointed Arbitrators shall endeavour within seven days of the appointment of the later of the two party-appointed arbitrators to be appointed to agree upon a third Arbitrator who shall be the chairman of the arbitral tribunal, or if the parties have so agreed shall act as oversman. If agreement upon the identity of a third Arbitrator is so reached then the arbitral tribunal shall be deemed appointed on the date of such agreement being reached. If the party-appointed Arbitrators do not reach agreement within that time either party may apply to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) to appoint that third Arbitrator or oversman within seven days of the application and the arbitral tribunal shall be deemed appointed on the date of the third Arbitrator's appointment by the relevant officer of the Chartered Institute of Arbitrators (Scottish Branch).

- 3.7 Where application has been made to the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) to appoint an Arbitrator and the relevant officer of the Chartered Institute of Arbitrators (Scottish Branch) refuses or fails to make an appointment within seven days of the application, either party may apply to the Court of Session, Scotland to appoint the Arbitrator. In the event of appointment of the arbitral tribunal by the Court of Session it shall be deemed appointed on the date of appointment by the Court of Session.
- 3.8 Where the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) is unavailable or unable to act, a Vice-Chairman or the Secretary may act in his place.
- 3.9 For the purposes of this Article the parties prorogate the exclusive jurisdiction of the Court of Session, Scotland.

## Qualifications of Arbitrators

## article 4

- 4.1 Any natural person of whatever nationality who is of full age and capacity may be an Arbitrator.
- 4.2 Each Arbitrator shall be and remain at all times independent and impartial.
- 4.3 Before nominating or proposing an Arbitrator the party seeking to nominate or propose that Arbitrator shall ascertain that that person is willing and able to accept appointment.
- 4.4 On being approached to act as Arbitrator, the prospective Arbitrator shall disclose in writing to the party or parties making the approach any circumstances likely to give rise to justifiable doubts as to the Arbitrator's impartiality or independence or confirm in writing that no such circumstances exist. If at any stage in the arbitration circumstances arise that may give rise to such doubts, the Arbitrator

shall promptly disclose those circumstances to the parties. Such circumstances include but are not limited to bias, interest in the result of the arbitration and past or present relationships with a party.

- 4.5 By accepting appointment the Arbitrator shall be deemed to have undertaken to make available sufficient time to enable the arbitration to be conducted and completed expeditiously. Prior to accepting appointment the Arbitrator shall confirm in writing to the parties (or, if applicable, to the relevant officer of the relevant appointing body, in which event the arbitrator shall immediately after appointment copy such written confirmation to the parties) that he will make available sufficient time to conduct, and will conduct, the arbitration so as to conclude the arbitration within the timescales provided in Articles 15.6, 15.7, 15.8, 15.9, 22.5 and 23.
- 4.6 Where parties are of different nationality a sole Arbitrator (or chairman or oversman) shall not have the same nationality as any of the parties unless they agree otherwise in writing. The nationality of a party shall be understood to include that of controlling shareholders or interests. Citizens of the European Union shall be treated for this purpose as nationals of the different Member States and shall not be treated as having the same nationality.
- 4.7 Article 4.6 shall not apply in the case of an Arbitrator appointed as sole Arbitrator under Article 3.3.
- 4.8 By accepting appointment the Arbitrator shall be deemed to be bound by this Code.

## Challenge of Arbitrators

## article 5

- 5.1 A party may challenge an Arbitrator if circumstances exist or arise giving rise to justifiable doubts as to the Arbitrator's impartiality or independence.
- 5.2 Such challenge may only be made within fifteen days after the party challenging became aware of the circumstances it considers give rise to justifiable doubt as to an Arbitrator's impartiality or independence.
- 5.3 The challenge shall be in writing and shall be delivered to the other party and to the arbitral tribunal.
- 5.4 The other party may agree to the challenge (in which case the Arbitrator shall withdraw from the arbitration) or the challenged Arbitrator may decide to withdraw. In neither case does the withdrawal imply acceptance by the Arbitrator of the validity of the grounds stated for the challenge.
- 5.5 If the challenged Arbitrator does not withdraw, the arbitral tribunal

shall in the first instance decide upon the challenge. In the event that it rejects the challenge the party making the challenge shall have the right to apply to a tribunal of three persons to be selected (subject always to the provisions of Article 3.8) by the Chairman of the Chartered Institute of Arbitrators (Scottish Branch) to decide the challenge, and the decision of that tribunal shall be final.

- 5.6 If the challenge is upheld by either the arbitral tribunal or the tribunal referred to in Article 5.5 the challenged Arbitrator shall be deemed to have resigned upon the date of the decision upholding the challenge.
- 5.7 Pending the decision of such a tribunal the arbitral tribunal may in its discretion continue with the arbitration.

## Replacement of Arbitrators

## article 6

- 6.1 An Arbitrator shall not be entitled to resign or withdraw (except under Article 5) without the consent in writing of the parties, except upon the provision of a certificate from a registered doctor justifying resignation upon grounds of health.
- 6.2 When an Arbitrator has died, withdrawn, resigned or been removed from office the position left vacant shall be filled, unless the parties otherwise agree, by appointment by the Chairman of the body designated in Article 3.5.
- 6.3 When a replacement Arbitrator is appointed in the course of an arbitration, it shall be for the arbitral tribunal to determine in its discretion whether any hearings held previously shall be repeated.
- 6.4 If in the view of a party an Arbitrator becomes incapacitated or unable to perform the duties of his office the procedure in respect of Challenge of Arbitrators set out in Article 5 shall apply.
- 6.5 Pending replacement of an Arbitrator, the arbitral proceedings shall be suspended unless otherwise agreed by the parties. Any period of suspension shall be added to the period within which a final award must be issued in terms of Articles 15.6 and 15.7. If a period of suspension only commences after an extension has been agreed under Article 15.8, or has arisen by operation of Article 15.9, the period of suspension shall be added to the date agreed in terms of Article 15.8, or which applies by operation of Article 15.9.

## Truncated Tribunal

## article 7

- 7.1 If an Arbitrator in a three person tribunal, although duly notified fails without good cause to participate in the work of the tribunal, the two other Arbitrators shall have the power in their sole discretion to

continue the arbitration and to make any award, order or other decision despite the failure of the third Arbitrator to participate. In making this decision the two other Arbitrators shall have regard to all matters they consider appropriate in the circumstances of the case. The two Arbitrators shall notify the parties and the third Arbitrator that the arbitral tribunal has become a tribunal of two and that the arbitration shall continue to its conclusion.

- 7.2 If the two other Arbitrators determine that the arbitration should not proceed without the participation of a third Arbitrator, they shall declare in writing that the office of the third Arbitrator has been vacated, and the procedure for replacing that Arbitrator shall be carried through as if he had resigned in accordance with Article 6.2.
- 7.3 Upon the appointment of a replacement Arbitrator in the circumstances of Article 7.2 the provision of Article 6.3 shall apply in relation to the repetition of previous proceedings.

## Fees and Expenses

## article 8

- 8.1 Each Arbitrator shall be compensated on a reasonable basis determined at the time of appointment for serving as an Arbitrator, and shall be reimbursed for his time, travelling and other expenses incurred in the course of the arbitration.
- 8.2 Provided there is agreement in writing in advance by the parties the Arbitrator's fees may include a charge for time reserved but not used as a result of late postponement or cancellation.
- 8.3 In the event of failure to agree at the time of appointment, or subsequently, on an arbitrator's fees, they shall be fixed upon the application of a party or the Arbitrator by the Auditor of the Court of Session, Scotland.
- 8.4 Where the arbitral tribunal has appointed a legal adviser, the fees and expenses of the legal adviser, if not agreed, shall be fixed by the Auditor of the Court of Session upon the application of a party or the arbitral tribunal.
- 8.5 Where the Auditor of the Court of Session is to fix fees and/or expenses under Articles 8.3 and/or 8.4 he shall do so in accordance with any basis of charge agreed between the Arbitrator and the parties.

## Communications between Parties and Arbitrators

article 9

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

## Exclusion of Liability

article 10

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

## Preliminary Issues

article 11

- 11.1 The Tribunal shall have the power to hear and determine challenges to its own jurisdiction, including any objections with regard to the existence or validity of the arbitration clause or of the separate arbitration agreement.
- 11.2 The Tribunal shall have the power to determine the existence, validity and scope of the contract of which an arbitration clause forms part. For the purposes of this Article an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the arbitration clause is null and void shall not for that reason alone render the arbitration clause invalid.
- 11.3 Except as provided for in this Article 11.3 and in Articles 11.4 and 11.5, any challenge to the jurisdiction of the tribunal must be made to the tribunal not later than the date by which the Notice of Defence or reply to the counterclaim, as the case may be, is required to be delivered or made in order to comply with Article 1 provided that (1) if the tribunal has not at that time been appointed such a challenge must instead be made within seven days of the appointment of the tribunal and, separately, (2) if a claim or counterclaim is later amended such a challenge may be made in relation to the amended matter not later than the date of reply to such amended claim or counterclaim. If no such challenge is made then the right to make it shall be treated as having been irrevocably waived.
- 11.4 Article 11.3 shall not apply to a challenge which could not with reasonable diligence have been known (to the party claimed to have a right to make such a challenge) prior to the expiry of the timescales in Article 11.3. Except as provided for in Article 11.5, in the event of

Article 11.3 being disapplied by this Article 11.4 the right to make a challenge to the jurisdiction of the tribunal shall be treated as having been irrevocably waived if the challenge is not made within fourteen days of the date upon which the right to challenge could, with reasonable diligence, have been known to the party claimed to have a right to make such a challenge.

- 11.5 Articles 11.3 and 11.4 shall not apply to a challenge which could not with reasonable diligence have been known (to the party claimed to have a right to make such a challenge) prior to the making of the tribunal's final award.

## Seat of Arbitration

## article 12

- 12.1 Unless the parties have agreed upon the seat of the arbitration the tribunal shall fix the seat of arbitration. Any award by the tribunal shall be deemed made at such place. Notwithstanding the above the tribunal may hold hearings wherever it deems appropriate. In addition, where the tribunal is made up of more than one arbitrator it may hold meetings of those arbitrators with or without the parties being present wherever it deems appropriate.

## Language of Arbitration

## article 13

- 13.1 In the absence of an agreement by the parties the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances including the language of the contract.
- 13.2 If any document is expressed in a language other than the language(s) of the arbitration and no translation is provided by the party seeking to rely upon the document the tribunal may order that party to submit a translation in the language of the arbitration.

## Substantive Law Applicable

## article 14

- 14.1 The tribunal shall apply the substantive law agreed by the parties as applicable to the dispute. Failing such agreement, the tribunal shall apply such law or laws as it determines to be appropriate.
- 14.2 In all cases the tribunal shall take account of the provisions of the contract and usage of the trade applicable to the contract.
- 14.3 The tribunal shall not decide, or act as, a mediator between the parties nor reach a decision on a basis other than one founded in the law which applies by virtue of Article 14.1, unless the parties have

expressly authorised it to do so.

## Conduct of Proceedings Generally

## article 15

- 15.1 Subject to this Code, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party is given a fair opportunity to present its case. The parties shall comply with the directions of the tribunal as to the conduct of the arbitration.
- 15.2 Without prejudice to the terms of Article 15.1, written pleadings in the normal form used in ordinary cases in the Scottish courts are not necessary unless the tribunal so orders, having been shown good cause for their use by one or more of the parties.
- 15.3 The tribunal in the exercise of the widest discretion shall conduct the proceedings with a view to the fair, speedy, and efficient resolution of the dispute. It may conduct preliminary conference(s) with the parties for the purpose of organising, scheduling and agreeing procedures to expedite the subsequent proceedings.
- 15.4 The tribunal may in its discretion direct the order of any hearings of evidence, split proceedings, exclude cumulative or irrelevant witness testimony or other evidence and direct parties to focus their presentation on issues the decision of which may dispose of all or part of the case.
- 15.5 In the case of a three member tribunal the chairman may after consulting the other members make procedural rulings which need only be signed by the chairman.
- 15.6 Subject to the provisions of Articles 6.5, 15.7, 15.8, 15.9, 22.5 and 23, the tribunal must make and issue its final award no later than six months from the date of the appointment of the tribunal in terms of Article 3. For the purpose of achieving the foregoing maximum time period (including when extended under Articles 15.7, 15.8 and 15.9), the parties agree to co-operate and take every opportunity to save time where possible. For the same purpose, the tribunal has the power to order and impose time limits on the parties and the parties are bound by those time limits unless the tribunal varies them under its powers under Article 16.6. The date by which the final award must be made and issued is in all cases a long stop and the tribunal should at all times endeavour to complete the arbitration as quickly as reasonably possible.
- 15.7 Notwithstanding the provisions of Article 15.6, and subject to Articles 6.5, 15.8, 15.9, 22.5 and 23, in cases which the tribunal, in its sole discretion, determines to be complex the tribunal may grant itself an extension to the maximum period referred to in Article 15.6 of a

period of up to a further two months. In such an event the tribunal must make and issue its final award no later than two months after the date which would otherwise have applied by virtue of Article 15.6.

- 15.8 Notwithstanding the provisions of Articles 15.6 and 15.7, and subject to this Article 15.8 and to Articles 6.5, 15.9, 22.5 and 23, the parties can agree with the tribunal an extension to the maximum time period provided for in Articles 15.6, 15.7 and this Article 15.8. In such an event, and subject to Articles 15.9, 22.5 and 23, the tribunal must make and issue its final award no later than the date agreed with the parties.
- 15.9 If the parties have not made payment of the tribunal's fees and expenses provided for under Article 21.4, and subject to Article 6.5, the tribunal shall have the power unilaterally to extend the date for issue of its final award until the day following the making of payment of such fees and expenses.

## Additional Powers of Arbitrators

## article 16

- 16.1 In addition to the powers conferred generally or specifically on Arbitrators elsewhere in this Code, the Arbitrator shall have the following powers (unless the parties otherwise agree):-
- 16.2 power to make interim or partial awards;
- 16.3 power to award damages;
- 16.4 power to rectify the terms of any contract to the extent permitted by the law applicable to that contract;
- 16.5 power to order that simple or compound interest shall be paid by any party on any sum awarded at such rate or rates as the Arbitrator determines to be appropriate without being bound by legal rates of interest imposed by any state or court in respect of any period which the Arbitrator determines to be appropriate including a date prior to the appointment of the Arbitrator and ending not later than the date upon which the award is complied with;
- 16.6 power to vary time limits whether imposed by the Arbitrator or this Code (other than those which apply by virtue of Articles 15.6, 15.7, 15.8 and 15.9 except to the extent that such variation is permitted by those Articles) whenever it seems appropriate to so do;
- 16.7 power in the event that a party is unduly dilatory in presenting its claim, counterclaim or defence to the prejudice of the other party to dismiss the claim or counterclaim or exclude the defences (in each case either in whole or in part) as the case may be;

- 16.8 power to appoint a legal adviser (who, for the purposes of Article 19 only, shall be deemed not to be an expert but whose legal advice shall be issued either in writing to the arbitrator, and copied by the arbitrator to the parties for comment, or orally at a meeting or hearing attended by the parties at which the parties shall also be given the opportunity to comment on the legal advice given orally), whose fees, outlays and expenses shall be included in the expenses of the arbitration;
- 16.9 power to decide whether and to what extent the Arbitrator should himself take the initiative in ascertaining the facts and the law;
- 16.10 power to decide whether and to what extent evidence should be given under oath or affirmation.

## Evidence, Hearings and Pleadings

## article 17

- 17.1 The tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise agreed by the parties or determined by the tribunal under Article 15, the presentation of a party's case shall include the advance submission (by a time to be determined by the tribunal) of an outline of the evidence to be presented including the name, capacity and subject of testimony of any witness proposed to be called, the language in which the witness will testify and an estimate of the amount of time required for that witness's direct testimony if it were to be given orally.
- 17.2 In order to define the issues to be heard and determined the tribunal may make pre-hearing orders in relation to the arbitration and instruct parties within such time limits as it thinks fit to file more detailed statements of claim and defence.
- 17.3 Subject always to the provisions of Articles 15.7, 15.8, 15.9, 22.5 and 23, the tribunal may impose such time limits as it considers reasonable for each stage of the proceedings including the time allocated to each party for presentation of its case or for rebuttal.
- 17.4 At any time during the arbitration the tribunal may at the request of a party or of its own motion order a party to deliver to the tribunal and to the other party such documents or other evidence as it considers necessary or appropriate to assist the tribunal in making its award and may order, if so necessary or appropriate, a party to make available to the tribunal (or to an expert appointed by it) or to the other party or its expert any property in its control for inspection or testing.
- 17.5 Any party which expresses a desire to that effect in reasonable time shall be heard orally before the tribunal unless the parties have agreed in writing on a documents only arbitration or unless the

tribunal deems such a hearing not to be necessary.

- 17.6 The tribunal shall fix the date, times and place of any meetings and hearings in the arbitration and shall give the parties reasonable notice thereof.
- 17.7 The tribunal may in advance of any meeting or hearing submit to the parties a list of questions which it wishes them to answer at the meeting or hearing.
- 17.8 If any of the parties although duly notified in accordance with Article 17.6 fails to appear at a meeting or hearing without valid excuse the tribunal shall have the power to proceed with the hearing in its absence.
- 17.9 At any meeting or hearing each party shall be entitled to be present. All meetings and hearings shall be in private unless the tribunal decides otherwise. Except with the approval of the tribunal and the parties, persons not involved in the proceedings shall not be admitted. The tribunal may require in advance that notice be given by each party of whom that party intends to have present (including representatives and advisers) at any meeting or hearing. The tribunal may require the retirement of any witness during the testimony of other witnesses.
- 17.10 The parties may appear in person or through duly authorised representatives. In addition they may be assisted by advisers.

## Evidence of Witnesses

## article 18

- 18.1 The rules of evidence used in judicial proceedings shall not apply to this arbitration unless the tribunal determines otherwise. The tribunal shall determine the applicability of any privilege or immunity, and the admissibility, relevance, materiality and weight of the evidence offered.
- 18.2 Before any hearing of evidence the tribunal shall require any party to give notice of the identity of each witness that party wishes to call as well as the subject matter of that witness' testimony, its contents and relevance to the issues in the arbitration.
- 18.3 The tribunal may also determine the times, manner and form in which such material should be exchanged between parties and presented to the tribunal. It has discretion to allow, refuse or limit the appearances of witnesses.
- 18.4 If the tribunal so determines, the evidence of witnesses may be presented in the form of witness statements signed by them.

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

## Experts

## article 19

- 19.1 The tribunal may appoint one or more experts to report to it in writing on specific issues to be determined by the tribunal. A copy of the expert's draft terms of reference shall be communicated to the parties and they be given a period of time to comment thereon before the terms of the reference are finally established by the tribunal, and copied to the parties.
- 19.2 The parties shall give the expert any relevant information or produce for inspection any property that the expert may require. In the event of disputes between the expert and a party as to the material to be produced or inspected the tribunal shall determine the issue.
- 19.3 Upon receipt of the expert's report the tribunal shall communicate a copy to the parties who shall be entitled to express in writing their opinion on that report. A party shall be entitled to examine any material upon which the expert has relied in the report.
- 19.4 Upon receipt of the expert's report a party may request a hearing thereon which the tribunal shall be bound to grant. At such a hearing the expert shall be present and may be questioned on his report on behalf of a party, and expert witnesses may testify on behalf of a party on the points at issue.
- 19.5 The fees and expenses of such tribunal appointed experts shall be part of the costs and expenses of the arbitration.

## Interim Measures

## article 20

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

security in doing so. The amount of such expenses or losses may be determined by the tribunal in one or more awards.

- (b) To order the preservation, storage, sale or other disposal of any property or thing under the control of a party and relating to the subject matter of the arbitration.
  - (c) To order, on a provisional basis, subject to final determination in an award any relief which the tribunal would have power to grant in an award including interdicts and provisional orders for the payment of money or the disposition of property as between any parties.
- 20.2 The tribunal shall have power at the request of a party to order any other party to provide security for the expenses of that party in such manner and on such terms and for such amount as the tribunal considers appropriate.
- 20.3 In the event that a party does not comply with an interim measure ordered by the tribunal under Article 20.1 or 20.2 within a time limit fixed by the tribunal, the tribunal may sist or dismiss any claim or counterclaim made by that party, or refuse to allow it to present a defence as may seem appropriate.
- 20.4 The power of the tribunal under Article 20.1 shall not prejudice any party's right to apply to any state court for interim or conservatory measures either before or after the tribunal has been constituted.

## Closure of Proceedings

## article 21

- 21.1 The tribunal shall declare the proceedings closed when it is satisfied that the parties have had adequate opportunity to present their cases. Once it has done so the parties may not present any further material to the tribunal.
- 21.2 The tribunal may in its discretion on its own motion or on the application of a party re-open the proceedings at any time before the award is made.
- 21.3 The arbitral tribunal shall use its best endeavours to make its award within forty-five days of the closure of the proceedings or such other period as the parties and the arbitral tribunal shall agree but always subject to the provisions of Articles 15.6, 15.7, 15.8 and 15.9.
- 21.4 Not later than eighteen days before the final award is due to be made, the tribunal shall send to the parties its reasonable estimate of the tribunal's total fees and expenses incurred and likely to be incurred up to the making of the final award (including VAT if applicable). Provided the parties have paid this sum to account to the tribunal (or to a third party acceptable to the tribunal to be held

to the order of the tribunal) the tribunal shall have no lien over the award and may not exercise its powers under Articles 15.9 and 22.5. Without prejudice to the obligation upon the tribunal in Article 24.1, a final account of the tribunal's fees and expenses shall be sent by the tribunal to the parties within twenty days after issuing the final award.

## The Award

## article 22

- 22.1 The tribunal may make separate awards on different issues at different times but always subject to the provisions of Articles 15.6, 15.7, 15.8 and 15.9. Such awards shall have the same status and effect as any other award made by the tribunal. The tribunal is not obliged to issue its awards in draft form.
- 22.2 Where there are three Arbitrators and the tribunal fails to agree on any issue, the Arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the chairman of the tribunal shall decide that issue.
- 22.3 If any Arbitrator refuses or fails to sign the award, the signatures of the majority shall be sufficient provided that the reason for the omitted signature is stated in the award. In a case falling under Article 7.1, the signature of the chairman alone shall suffice.
- 22.4 The tribunal shall make its award in writing and unless the parties agree otherwise shall state (at the time of making its award) the reasons upon which its award is based. The award shall also state the date when the award was made (being the date of signature by the Arbitrator or the last date of signature amongst the majority of Arbitrators assenting to it) and the seat of the arbitration and shall be signed by the Arbitrators (or the majority of them assenting to it) and each such signature shall be witnessed. The place and date where the award was signed shall, in each case, also be stated in the award.
- 22.5 The sole Arbitrator or the Chairman shall be responsible for delivering copies of the award to the parties. Subject always to Article 15.9 being operated, the tribunal shall be entitled to withhold the delivering of the award until the fees and expenses due to the tribunal in terms of Article 21.4 have been met in full.
- 22.6 An award may be expressed in any currency, provided it is a currency which has been requested by one or more of the parties. Where the parties agree on the currency in which the award should be expressed then the award shall be expressed in that currency.
- 22.7 Any award interim or final shall be binding on the parties from the date on which it is made, subject to Articles 11.3, 11.4, 11.5 and 23. By agreeing to arbitration under the Code, the parties undertake to

implement any award immediately and without delay subject to Articles 11.3, 11.4, 11.5 and 23 and the parties irrevocably waive their right to any form of appeal review or recourse to any state court or other judicial authority except in so far as such a right would arise or be preserved by the operation of Articles 11.3, 11.4 or 11.5.

- 22.8 Without prejudice to the foregoing generality all recourse to the Court of Session under Section 3 of the Administration of Justice (Scotland) Act 1972 is expressly excluded.
- 22.9 If the seat of the arbitration is in Scotland, the parties and the tribunal consent to the registration of the award (and of any addition or correction by way of a memorandum as provided for in Articles 23.1 and 23.2) for execution in the Books of Council and Session, provided always that (owing to the terms of Articles 23.1 and 23.2) such consent is only given (if no request is made under Article 23.1) for registration after the elapse of 14 days after the date of the award or (if a request is made under Article 23.1) such consent is only given for registration after the tribunal has made its corrections or additions under Article 23.1 or after the elapse of 14 days after the date of the award, whichever is the later.

## Correction of Awards and Additional Awards [article 23](#)

- 23.1 Within 14 days of receipt of any award a party may, with notice to the other party, request the tribunal in writing to correct in an award any errors in computation, clerical or typographical errors or any errors of a similar nature or make an additional award as to claims presented but omitted from the award. If the tribunal considers the request justified it shall make the corrections or addition within 14 days of receipt of the request. Any addition or correction shall take the form of a separate memorandum dated and signed by the tribunal (or by the majority assenting to it) in a manner identical to that provided for the signature of the award itself in Article 22.4 and shall become part of the award for all purposes.
- 23.2 The tribunal may likewise on its own initiative within 14 days of the date of the award correct any error of the nature described in Article 23.1 in the same manner and to the same effect.

## Expenses

## [article 24](#)

- 24.1 Subject always to the terms of Articles 15.6 to 15.9, the tribunal shall in its award and subject to the parties' joint and several liability to the tribunal and to any agreement between the parties, fix the costs of the arbitration and apportion them between the parties as it considers reasonable in the whole circumstances.

- 24.2 For the purposes of Article 24.1 costs include: -
- (a) The fees and expenses of the arbitral tribunal.
  - (b) The costs of any assistance required by the tribunal in the course of the arbitration process including the fees and expenses of its experts and of its legal adviser(s).
  - (c) The costs of meeting and hearing facilities.
  - (d) Any other costs incurred by the arbitral tribunal in the conduct of the arbitration.
- 24.3 The tribunal shall also have power, unless the parties otherwise agree, to order in its award that all or part of the legal or other expenses incurred by a party in the course of the proceedings shall be paid by another party. The tribunal shall have power to determine and fix the amount of such expenses on such reasonable basis it thinks fit or to order taxation by the Auditor of the Court of Session. It may also make an award of expenses from time to time in the course of the proceedings.
- 24.4 If the arbitration is abandoned, suspended or concluded by agreement or otherwise before the final award is made, the parties shall remain jointly and severally liable to pay to the tribunal the costs of the arbitration as fixed by the tribunal under Article 24.1.
- 24.5 The Tribunal shall have power in the course of the proceedings and from time to time to order the parties to make payments in advance in respect of the costs mentioned in Article 24.1 in such sums as to the tribunal appears reasonable.

## Settlement

## article 25

- 25.1 In the event of a settlement of the parties' dispute the tribunal may render an award recording the settlement if the parties so request in writing, provided that such an award (which need not contain reasons) expressly states that it is an award made by the parties' consent.
- 25.2 If a settlement is reached and the parties do not require an award, then on written confirmation to the tribunal that a settlement has been reached, the tribunal shall be discharged and the arbitration proceedings concluded subject to payment by the parties of any outstanding costs of the arbitration under Article 24.