

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Final provisions

Schedule 1 – Scottish Arbitration Rules

Part 9 – Miscellaneous

Rule 73 – Immunity of tribunal etc. *Mandatory*

238. Rule 73 is a mandatory rule which ensures that the role of arbitrators is not compromised by lack of immunity, and that actions for damages against arbitrators are not used as a way for a party to the arbitration to challenge or re-open the arbitration itself.
239. Rule 73(1) provides that an arbitrator is not to be liable in damages for anything done or omitted in the exercise or discharge of his or her functions as arbitrator, unless under rule 73(2)(a) that act or omission is shown to have been in bad faith. This means that immunity will extend to all the arbitrators functions, namely those under the Act and also those supplemented by contractual provisions of a separate arbitration agreement.
240. In relation to resignation, rule 73(2)(b) provides that the immunity does not affect any liability incurred by the arbitrator by reason of his resigning. Rule 16(1)(c) on the resignation of the arbitrator provides protection for a resigning arbitrator by allowing the court to grant relief from liability if it is satisfied that in all the circumstances it was reasonable for the arbitrator to resign.
241. Rule 73(3) extends immunity to any clerk, employee or agent of the arbitrator or any other person assisting the tribunal to perform its functions.

Rule 74 – Immunity of appointing arbitral institution etc. *Mandatory*

242. The principal difference between nominating and appointing bodies is that nominating bodies put forward the name of an arbitrator who is then appointed by the parties while appointing bodies themselves appoint the arbitrator.
243. In most cases the parties will agree on the identity of the arbitrator but there will be situations when this does not happen. Rule 7 provides for failure of the appointment procedure.
244. Rule 74 is a mandatory rule. Rule 74(1) provides that nominating or appointing bodies or individuals who appoint or nominate arbitrators are not to be liable for damages for anything done or omitted in the exercise or discharge of that function unless under rule 74(1)(a) that act or omission is shown to have been in bad faith.
245. Rule 74(1)(b) provides that nominating and appointing bodies will also not be liable for the acts or omissions of the arbitrator whom it nominates or appoints nor for the tribunal the arbitrator forms part of or any clerk agent or employee of the tribunal.

246. Rule 74(2) extends immunity to employees or agents of nominating or appointing bodies.

Rule 75 – Immunity of experts, witnesses and legal representatives *Mandatory*

247. As arbitration is a private version of judicial proceedings, the Act places experts, witnesses and legal representatives in no more vulnerable a position if they are taking part in arbitration proceedings than if they are taking part in civil court proceedings. Rule 75 therefore makes mandatory provision for this immunity for experts, witnesses and legal representatives in arbitration.

Rule 76 – Loss of right to object *Mandatory*

248. Rule 76 is a mandatory rule. As a matter of effective, fair and efficient dispute resolution, an arbitration should not proceed if circumstances exist which compromise the arbitrator or the process. Rule 76(1) provides a number of grounds on which a party may object. The right to object will be lost (as will the right to make a later appeal to the court) and the arbitration will continue if the objection is not made timeously (unless the delay is because the party did not know of the ground for objection and could not with reasonable diligence discover the information - rule 76(3)). Rule 76(2) explains what is meant by timeous. Rule 76(4) means that a party cannot raise a timely objection on a matter which it is not allowed to object to.

Rule 77 – Independence of arbitrator *Mandatory*

249. Rule 77 is mandatory and defines “independence” as meaning anything which gives rise to justifiable doubts as to the arbitrator’s impartiality.

Rule 78 – Consideration where arbitrator judged not to be impartial and independent *Default*

250. Rule 78 is a default rule which applies (subject to the agreement of the parties) where an arbitrator is adjudged not to be impartial or independent. Rule 78(2) provides that the court can consider whether an arbitrator has complied with rule 8 by disclosing, without delay, to the parties any circumstances likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence when considering whether to make an order about the arbitrator’s fees and expenses.

Rule 79 – Death of arbitrator *Mandatory*

251. Rule 79 is a mandatory rule providing that the arbitrator’s authority ceases on death.

Rule 80 – Death of party *Default*

252. Rule 80 is a default rule that subject to agreement of the parties, an arbitration agreement is not discharged by the death of a party.

Rule 81 – Unfair treatment *Default*

253. Rule 81 ensures for the avoidance of doubt that only one of the parties need have been treated unfairly for the purposes of the rules. Evidence in relation to other parties does not necessarily have to be shown by comparison in order to make out a case for unfairness.

Rule 82 – Rules applicable to umpires *Mandatory*

254. Rule 82 is a mandatory rule. Rule 82(1) clarifies the application of certain specific Scottish Arbitration Rules to umpires. Rule 82(2) clarifies that the parties cannot choose to disapply mandatory rules in relation to umpires, but can modify or disapply the default rules.

Rule 83 – Formal communications *Default*

255. Rule 83 provides default rules for the means of intimating certain formal notices or documents under the arbitration agreement or in the course of arbitral proceedings, in the event that this is not already agreed between the parties. References in the Act to “notifying” things are caught by rule 83 as it applies to “notice” having to be given. Rule 83(2) provides that the “formal communication” as defined in rule 83(1) must be in writing. Rule 83(3) makes provision for the delivery of a formal communication and rule 83(4) provides that any electronic communication will be treated as being in writing only if it gets to its destination in a readable state and can be used as a record. Rule 83(5) provides for where formal communication is to be deemed to have been made, given or served.
256. Rule 83(6) provides that where it is not reasonably practicable for formal communication to be made, given or served, the arbitrator will have the power to determine that another means of intimation is used or for dispensing with intimation. This will allow the arbitrator to move the arbitral process along and will also reduce court involvement. Specific provision for review by the court on this matter has not been made but in some cases the general provisions in Part 8 on challenging the decision of an arbitrator might be relevant.
257. Rule 83(7) means that the rule only applies to documents which are being intimated under the arbitration agreement or as part of the arbitration proceedings. If the documents relate to proceedings of the court, then the rules of court in relation to delivery and service of documents will apply.

Rule 84 – Periods of time *Default*

258. Rule 84 provides default provisions for calculating time periods in the absence of agreement between the parties.