

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT

6. The Act has drawn from the UNCITRAL Model Law (adopted on 21 June 1985), the [UK Arbitration Act 1996 \(c.23\)](#), from the work done in a draft Bill for Scotland developed by a working group chaired by Lord Dervaird in 2002 and from consultation comments by parties interested in the promotion of arbitration in Scotland. The Scottish Law Commission 1984 Report on Breach of Confidence (Scot. Law. Comm. No. 90) was also drawn from in drafting the confidentiality provisions in Scottish Arbitration Rule 26 in schedule 1 to the Act.
7. The approach in the Act is broadly consistent with the UNCITRAL Model Law and the regime for the rest of the UK in the Arbitration Act 1996 where appropriate. It establishes a statutory regime for arbitration in Scotland. Schedule 1 to the Act lays out a standard set or code of clauses (“the Scottish Arbitration Rules”) that form a regime for parties who voluntarily agree to go to arbitration, where that arbitration is ultimately governed by the law of Scotland.
8. Which law ultimately governs any arbitration is governed by the “seat” of the arbitration, also known as the “juridical seat” or “place” of the arbitration. This concept is important because arbitrations are often between parties in different countries and so cross jurisdictional borders. The concept of the “seat” describes the country where the arbitration is based and which legal system, including the rules of Scots law enshrined in the Act, therefore governs any arbitration. The governing legal system can be different from the law which applies to the substance of the dispute, or (in some jurisdictions) from the rules regulating particular aspects of arbitration procedure. Where an arbitration is seated may depend on the choice of the parties as to which law applies, and the conflict of law rules in the different legal systems which may become involved.
9. The regime in the Act will also apply to a greater or lesser degree to arbitration under specific statutes, so far as not inconsistent with those statutes, and as applied under the Act.
10. The Act and the Scottish Arbitration Rules contain a number of “mandatory” rules which cannot be departed from even by agreement of the parties, if they have agreed to go to arbitration at all under Scots law. However, the majority of the Scottish Arbitration Rules are “default” rules – parties are free to make their own arrangements, by agreement, on the matters covered by the default rules. Where the parties agree on different rules, or agree to disapply the default rules, either before or after the dispute arises between the parties, the default rule or rules will not apply (section 9 of the Act). For instance, default rules will not apply if they are inconsistent with the parties’ agreement to arbitrate or anything done with the parties’ agreement, or if the parties choose another law to apply instead. The code in the Scottish Arbitration Rules can also be adopted wholesale by parties and used by their arbitrator.
11. Although the Scottish Arbitration Rules set out in schedule 1 – both mandatory and default rules – may affect the operation of parties’ arbitration agreements, they remain

statutory rules. In particular, default rules do not lose their statutory nature because they appear in a schedule to the Act or apply only in certain circumstances, for example in the absence of contrary agreement by the parties.

12. The Act applies the same rules to domestic, cross-border (with other parts of the UK) and international arbitrations, where the Scottish courts have jurisdiction over an arbitration whose seat is in Scotland. Accordingly, the separate treatment in Scotland of international commercial arbitrations under the UNCITRAL Model Law will be replaced by a single code informed by the UNCITRAL Model Law principles. The Act also provides for the enforcement of arbitral awards, foreign and domestic (section 12), and consolidates a separate procedure for the enforcement of foreign arbitral awards to which the New York Convention applies (sections 18 to 22).

Terminology – “arbitrator”

13. In Scots common law there is a technical difference between the term “arbitrator”, more commonly used, and the term “arbitrator”, where an arbitrator decides in accordance with the law while an arbitrator can decide in terms of general equitable considerations (known as “*ex aequo et bono*”). The Act dispenses with this distinction and the term “arbitrator” is employed throughout the regime established by the Act following modern international arbitral practice.

Statutory arbitrations

14. A wide range of statutes, for example, employment legislation, use arbitration to resolve disputes which arise under those statutes. The Act includes provision to apply, to the extent that they are not inconsistent with the statutory provision, the general rules of arbitration in the Act to such arbitrations and a power for the Scottish Ministers, with the approval of the Scottish Parliament, to vary by order how those rules apply (sections 16 and 17).

Consumer arbitrations

15. Certain other statutory provisions apply to arbitration in Scotland. Sections 89 to 91 of the UK Arbitration Act 1996 apply to Scotland. Together with the [Unfair Arbitration Agreements \(Specified Amount\) Order 1996 \(S.I. 1996/3211\)](#) and the [Unfair Terms in Consumer Contracts Regulations 1999 \(S.I. 1999/2083\)](#), those provisions provide protections for those who might inadvertently agree to unfair low-value consumer arbitration clauses.

Commencement and implementation

16. The Act was brought into force on 7th June 2010 for non-statutory arbitrations. The commencement of the provisions of the Act and its implementation is described below as it stood at the date of publication of these Notes. The commencement and transitional arrangements are set out in sections 33, 35 and 36 of the Act and in the [Arbitration \(Scotland\) Act 2010 \(Commencement No. 1 and Transitional Provisions\) Order 2010 \(S.S.I. 2010/195\)](#), with the transitional arrangements described below in relation to section 36.
17. The Rules of the Court of Session as they apply to arbitration have been updated with the addition of a new Chapter 100 (arbitration) of those Rules and the substitution of Part IX of Chapter 62 (recognition and enforcement foreign arbitral awards—formerly under the UNCITRAL Model Law and now for awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and other foreign awards). The rules changes were made by paragraph 10 of Act of [Sederunt \(Rules of the Court of Session Amendment No. 4\) \(Miscellaneous\) 2010 \(S.S.I. 2010/205\)](#).