

ARBITRATION (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Arbitration agreements

Section 4 – Arbitration agreement

25. The agreement to go to arbitration can be in a past agreement between the parties or in a submission to the arbitrator when the dispute arises. It can include arbitration clauses in separate agreements incorporated in the arbitration agreement.
26. Arbitration agreements are recognised by the Act whether they are concluded orally or in writing. Accordingly, all arbitrations in Scotland may in principle be subject to the Act. However, other specific laws may require arbitration agreements to be in writing, for instance the [Requirements of Writing \(Scotland\) Act 1995 \(c.7\)](#) in relation to heritable property. A written arbitration agreement may also be necessary for the resulting arbitral award to be enforceable, either in Scotland by summary diligence following registration for execution in the Books of Council and Session, or in foreign countries under the New York Convention.
27. As noted above, there are also other specific legal protections for consumers who might be inadvertently caught by low-value arbitration clauses.

Section 5 – Separability

28. [Section 5\(1\)](#) provides that an arbitration agreement which is part of another agreement is to be treated as separate from the principal contract. Accordingly, [section 5\(2\)](#) means that where it is alleged that the principal contract is void or non-existent, voidable or otherwise unenforceable, the arbitrator will not lack jurisdiction over the dispute in question only as a result of that fact. [Section 5\(3\)](#) means that a tribunal can rule on whether an agreement that includes an arbitration agreement is valid in accordance with that arbitration agreement.

Section 6 – Law governing arbitration agreement

29. [Section 6](#) establishes a presumption that where Scotland is designated by the parties as the “seat” of the arbitration (see paragraphs 8 and 23 above), and the Scots arbitration law in the Act therefore governs the arbitration, Scots law will also govern the arbitration agreement, unless the parties explicitly state that another law should govern that agreement. The arbitration agreement itself is considered separately from any wider contract of which it may form part (under [section 5](#) of the Act). The significance of the law that governs the arbitration agreement is that it governs its formal validity, scope, and related matters.