



Arbitration Guide
IBA Arbitration Committee

SCOTLAND

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TABLE OF CONTENTS

	PAGE
I. Background	3
II. Arbitration Laws.....	5
III. Arbitration Agreements	6
IV. Arbitrability and Jurisdiction	8
V. Selection of Arbitrators.....	9
VI. Interim Measures	11
VII. Disclosure/Discovery.....	12
VIII. Confidentiality.....	13
IX. Evidence and Hearings	13
X. Awards	15
XI. Costs	17
XII. Challenges to Awards	18
XIII. Recognition and Enforcement of Awards.....	20
XIV. Sovereign Immunity	21
XV. Investment Treaty Arbitration.....	21
XVI. Resources	21
XVII. Trends and Developments.....	22

I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Prior to the passing of the Arbitration (Scotland) Act 2010, arbitration in Scotland had largely fallen out of use, except in respect of disputes arising out of leases (rent review and dilapidation disputes), partnership disputes and, to a lesser extent, construction disputes. Construction disputes had traditionally been dealt with using arbitration, but this had diminished due to dissatisfaction with the system, and the introduction of statutory adjudication for construction disputes in 1998. Scottish arbitration law prior to 2010 was spread over numerous cases and statutes with some of the applicable provisions dating back to 1695. It contained numerous lacunae. Largely based on the 1996 Act applicable in England and Wales, but with a number of refinements and innovations, the 2010 Act codified the law of arbitration in Scotland, and arbitration is once again gaining currency as a method of commercial dispute resolution in Scotland. Research indicates that the use of arbitration is growing at a rapid rate.

The principal advantages of arbitration under the 2010 Act are confidentiality (which has a statutory basis in Scotland), restricted grounds of appeal or challenge, flexibility in procedure, and the ability to choose the decision maker.

The perceived disadvantages are the potential for delay and expense caused by abuse of the arbitration process. This perception is largely a result of the previous system which allowed 'stated case referrals' (in terms of which the arbitrator at the request of one or both parties set out questions of law for determination by the court) to the Inner House (the Scottish appeal court). The potential for delay and expense as compared with litigation has been removed by the 2010 Act, and given the restrictions on the right of appeal or challenge, arbitration in Scotland has the potential to be considerably more cost effective than litigation.

(ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

Most arbitration in taking place in Scotland at present is ad hoc domestic arbitration under the Scottish Arbitration Rules. The Scottish Arbitration Centre is increasingly named as an appointing body for ad hoc arbitration. The International Centre for Energy Arbitration was established in 2013 as joint research project of the Scottish Arbitration Centre and the Centre for Energy Petroleum Mineral Law and Policy at the University of Dundee. Neither body administers institutional arbitration.

Since the coming into the force of the 2010 Act, it is becoming increasingly common to specify ICC arbitration in larger scale contracts with Scotland as the seat of arbitration.

Accordingly, it is reasonable to expect that there will be an increase in institutional arbitration in the coming years.

In the meantime, arbitrations tend to be conducted on an ad hoc basis in accordance with the Scottish Arbitration Rules, which form Schedule 1 to the Arbitration (Scotland) Act 2010.

The Scottish Branch of the Chartered Institute of Arbitrators has produced short form rules for use with smaller scale disputes.

The Arbitration (Scotland) Act 2010 and its incorporated rules are compatible with the institutional rules of the main arbitral institutions.

(iii) What types of disputes are typically arbitrated?

Historically, most arbitration has taken place in the sphere of real estate, in respect of construction contracts, development agreements and commercial leases.

Arbitration in respect of construction disputes gained a reputation for expense and delay due to abuse of process and excess formality in the 1980s and 90s and suffered a decline in use. The advent of statutory adjudication for construction disputes in 1998 accelerated this trend and saw arbitration fall out of use in construction disputes more or less completely, but that trend has been reversed.

Arbitration remains a dispute resolution method of choice (together with expert determination) in respect of commercial leases. Rent review disputes are dealt with in this way.

Arbitration is making a comeback in construction contracts, and is gaining currency in renewable energy contracts.

Arbitration is also popular in partnership disputes because of its privacy and confidentiality.

Questions of personal status are not arbitrated. However, certain aspects of family law can be arbitrated, such as the financial implications of divorce, and some issues regarding the care of children, such as schooling and medical treatment. Family Law Arbitration Group Scotland (FLAGS) has been set up to promote its use in those areas. The Faculty of Advocates, Scotland's Bar, has also launched an initiative to use arbitration in personal injury cases. Criminal matters are not capable of arbitration in Scotland.

(iv) How long do arbitral proceedings usually last in your country?

Arbitration in Scotland can be dealt with very swiftly if the matter in dispute is focused. It is possible to dispose of a matter in months or even weeks with sufficient cooperation of the parties.

It is possible for parties to limit the duration of the arbitration by agreement, and a provision limiting procedure to six months has been used for some time.

A more complex arbitration may take one to two years.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are no restrictions on foreign nationals acting as counsel in arbitration proceedings or as arbitrators.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The Arbitration (Scotland) Act 2010 governs all domestic and international arbitrations seated in Scotland.

As with the Arbitration Act 1996, applicable to England and Wales, the 2010 Act is influenced by the UNCITRAL Model Law, but does not incorporate it.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

No, the 2010 Act applies equally to domestic and international arbitration. There is an indirect distinction in that there is an optional legal error appeal process that applies if the tribunal can be said to have made an error on a point of Scots law. For this rule to apply, Scots law must be the law of the contract. Scots law is not widely used as the substantive law of the contract outside of domestic contracts, and there is therefore a distinction of sorts between domestic and international arbitrations, in that most international arbitrations concern contracts which do not have Scots law as the law of the contract.

At the enforcement stage, there is a procedural distinction between New York Convention awards, and non New York Convention awards.

- (iii) **What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

Although Scotland has its own arbitration act, and is a separate jurisdiction with its own legislature and courts, it is a constituent part of the United Kingdom, and cannot independently adopt treaties. The UK has ratified the New York Convention, the Washington Convention and the Geneva Convention, and the Scottish Government and courts are bound to these treaties.

- (iv) **Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

There are several such rules: The fact that the arbitration is seated in Scotland does not affect the substantive law to be used to decide the dispute. The tribunal must decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or if no such choice is made, in accordance with the law determined by the conflict of law rules which the tribunal considers applicable. The rules allow the parties to agree that the dispute is to be governed in accordance with principles or rules which do not form part of a national law, or in accordance with the principles of justice, equity and fairness.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

There is no requirement that an arbitration agreement must be in writing. Accordingly an oral agreement to arbitrate is likely to be enforceable. However, certain types of contract (for example those relating to land) must be in writing, and an arbitration clause in respect of such a contract would also need to be recorded in writing. If the award is to be enforced in another jurisdiction, the agreement must be in writing so as to comply with the New York Convention.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

In terms of the 2010 Act, the court is obliged to sist (suspend) proceedings if the matter in dispute is subject to a valid and operable arbitration agreement on application of a party, so long as that party has not taken a step to respond to the substance of the dispute within the proceedings. It is therefore important that the

arbitration agreement is brought to the attention of the court immediately if a party wishes to rely upon it.

An agreement to arbitrate will not be enforced if it is 'pathological' or if the dispute is not an arbitrable dispute.

- (iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses are relatively common. An agreement to negotiate may be valid in certain narrow circumstances, but the consequence of breaching such an obligation would be nominal damages only. If clear words are used, it is possible to contract that certain procedural steps or time limits are to be observed before commencing arbitration. This would not, however, affect the jurisdiction of the arbitrator or the arbitrability of the dispute. The arbitrator might take a failure to comply with pre-arbitration procedures into account at the stage of awarding expenses.

Some standard contracts try to prevent early arbitration proceedings by attempting to limit the circumstances in which a 'dispute' can be said to have arisen. The 2010 Act provides a broad definition of the term 'dispute' and accordingly such provisions are unlikely to be enforced.

- (iv) What are the requirements for a valid multi-party arbitration agreement?**

All parties must agree to arbitrate. Otherwise, the requirements are the same as for a two party arbitration.

- (v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

Yes. If one party agrees that the other party to a contract may initiate arbitration, but the first party may not (and can only litigate), that is enforceable if it is sufficiently clear.

- (vi) May arbitration agreements bind non-signatories? If so, under what circumstances?**

A third party such as an assignee deriving right through a contract signed by another may be bound by an agreement to arbitrate.

On 21 September 2017, the Scottish Parliament passed the Contract (Third Party Rights) (Scotland) Act, which provides that a third party with rights under a

contract which contains an arbitration clause is regarded as being bound by that arbitration clause. The provisions of the Act will come into force on 26 February 2018.

Otherwise, an agreement to arbitrate does not bind non-signatories.

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Generally, matters of public right cannot be arbitrated. Accordingly questions of criminal law, and matters of status are not capable of arbitration. While divorce and custody disputes cannot be arbitrated, the financial consequences of divorce can be. There is a general rule in Scotland that for a dispute to be capable of arbitration it must give rise to a practical consequence sounding in money or obligation; thus purely academic questions cannot be arbitrated.

A lack of arbitrability is a question of jurisdiction, and a party may object to the tribunal on jurisdictional grounds. There is a right of appeal to the court in respect of the tribunal's ruling. A party also has the right to make a direct application to the court on a jurisdictional point if the parties agree, or the tribunal consents and the court is satisfied that it should be dealt with by the court.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

The procedure is to apply to the court in question for a sist (a stay) of the proceedings. No time limit is specified, and the court must grant the sist so long as notice has been given to the other parties involved in the proceedings, and the applicant has not taken any step in the legal proceedings to answer the substantive claim, and had not otherwise acted in a way indicating a desire to have the dispute resolved by legal proceedings rather than arbitration. The right to arbitrate is therefore waived by participating in court proceedings other than to seek an application to sist the proceedings.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

The tribunal is empowered to rule on its own jurisdiction. The tribunal may rule on whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement. Parties may object to the tribunal on the ground that it does not have, or has exceeded its jurisdiction in relation to any matter. A challenge to the tribunal's jurisdiction should be made as soon as is reasonably practicable after the matter become apparent. Parties may appeal against the tribunal's ruling on a jurisdictional challenge no later than 14 days after the ruling.

Alternatively, parties may make a direct application to the court on a jurisdictional point, if the parties agree or the tribunal consents and the court is satisfied that it should be dealt with by the court.

V. Selection of Arbitrators

- (i) **How are arbitrators selected? Do courts play a role?**

Parties are free to agree the identity of a sole arbitrator or tribunal. In the absence of agreement, the arbitration agreement will normally provide the mechanism for the appointment of the arbitrators, which may include nomination of individuals or reference to a professional body or arbitral institution. If institutional rules are used, the arbitrators will be appointed in accordance with those rules. In the event that no provision is made, or the provisions of the contract fail in respect of the appointment of one or more of the arbitrators to be appointed, either party may approach an Arbitral Appointment Referee (AAR) to make the necessary appointment. The current AARs are Agricultural Industries Confederation Limited, Chartered Institute of Arbitrators, Dean of the Faculty of Advocates, Institution of Civil Engineers, Law Society of Scotland, Royal Incorporation of Architects in Scotland, Royal Institution of Chartered Surveyors and Scottish Agricultural Arbiters and Valuers Association. If the other party objects to the AAR selected by the applicant making the appointment, or the AAR fails to make the necessary appointment within 21 days (or if the parties agree not to use an AAR), the Court may on application of any party make the necessary appointment.

- (ii) **What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?**

Any arbitrator or person asked to be an arbitrator who has not yet been appointed must, without delay, disclose to the parties or any relevant appointing body any

circumstances known to the individual (or which becomes known before the end of the arbitration) which might reasonably be considered relevant when considering whether the individual is impartial and independent.

A party may challenge the appointment of an arbitrator on certain limited grounds, namely that the arbitrator is not impartial and independent, has not treated the parties fairly or does not have a qualification required by agreement of the parties prior to the appointment. A challenge must be made within 14 days of the facts becoming known to the objector and must be dealt with by the tribunal within 14 days or the challenge is successful and the appointment of the arbitrator is revoked.

The court may remove an arbitrator if satisfied on the application by any party: (a) that the arbitrator is not impartial and independent, (b) that the arbitrator has not treated the parties fairly, (c) that the arbitrator is incapable of acting as an arbitrator in the arbitration (or that there are justifiable doubts about the arbitrator's ability to so act), (d) that the arbitrator does not have a qualification which the parties agreed (before the arbitrator's appointment) that the arbitrator must have or (e) that substantial injustice has been or will be caused to that party because the arbitrator has failed to conduct the arbitration in accordance with the arbitration agreement, the Scottish Arbitration Rules, so far as they apply, and any other applicable rules or agreements between the parties governing conduct of the arbitration.

The court may also dismiss the entire tribunal if there is a risk of substantial injustice due to a failure by the tribunal to conduct the arbitration in accordance with the arbitration agreement, and other applicable provisions.

The court can only intervene after application has been made to the tribunal, and to any third party (such as an arbitral institution) that has power to remove an arbitrator or dismiss the tribunal.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

The only limitations on who may serve as an arbitrator is that the arbitrator must be a natural person and must have legal capacity. Parties may impose further restrictions, such as required technical qualifications and experience.

Arbitrators are obliged by the 2010 Act to be impartial and independent, and to treat the parties fairly. The 2010 Act does not otherwise impose ethical guidelines.

In practice, the vast majority of arbitrators belong to professional bodies (such as the Law Society of Scotland, the Chartered Institute of Arbitrators, etc) and are accordingly subject to ethical codes or codes of conduct.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

There is no definition of a conflict of interest built in to the 2010 Act, but regard is commonly had to documents such as the IBA Guidelines on Conflicts of Interest in International Arbitration, and the Chartered Institute of Arbitrators Code of Ethics.

Solicitors and advocates are bound by standards of conduct when acting as an arbitrator, as are members of other professional bodies such as the Royal Institution of Chartered Surveyors (RICS), and the Chartered Institute of Arbitrators.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

The tribunal is empowered to issue interim measures in the form of provisional awards. Provisional awards can be made in respect of all or part of the subject matter of the arbitration. The tribunal may make a provisional award granting any relief on a provisional basis which it has the power to grant permanently. The tribunal has power to make an order for security of costs, and may make directions for the inspection and preservation of property, documents and other evidence.

The tribunal has power to issue final partial awards.

Awards must be in writing and signed by all arbitrators or all of those assenting to the award.

Interim measures issued by the tribunal are enforceable in the courts.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

The court has power to grant provisional relief in support of arbitrations. If the tribunal has been constituted, it may do so only with the consent of the tribunal or if the court is satisfied that the case is one of urgency. The court can restrict the duration of any such order, and may provide that the tribunal may alter it when constituted (or at a later stage if already constituted).

- (iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

The court may, on an application by the tribunal or any party, order any person to attend a hearing for the purposes of giving evidence to the tribunal, or to disclose documents or other material evidence to the tribunal. 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. The tribunal's consent is not required, but in practice, the court expects the parties to apply to the tribunal for the disclosure of documents or other materials before applying to the court. In terms of the rules, it is for the tribunal to determine the admissibility, relevance, materiality and weight of any evidence, and the court will wish to know the view of the tribunal before making any order. The court's decision on whether to make an order is final.

VII. Disclosure/Discovery

- (i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

Procedure is entirely a matter for the tribunal, subject to any specific procedure that the parties may have agreed. The degree of disclosure or discovery permitted is therefore generally a matter for the tribunal.

That said, the procedural culture in Scottish courts is that full disclosure or discovery is not ordered. Instead, only the relevant documents are produced. The tribunal will order production of documents, or classes of documents if persuaded that they have a material bearing on the case.

- (ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**

General open-ended discovery is not permitted in the Scottish courts and that tends to be the practice followed in arbitration.

The tribunal does not have power to order production of a document in the hands of a third party. The assistance of the court is required for such an order.

- (iii) Are there special rules for handling electronically stored information?**

No.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Yes, arbitrations are confidential. There are detailed provisions regarding confidentiality and the related question of anonymity in the Act and the related court rules. In terms of a default rule (which can be altered by agreement) all parties to the arbitration have a duty to maintain confidentiality in respect of confidential information (as defined in the Act)

The tribunal is required to outline the duty of confidentiality to the parties at the outset of the arbitration. A breach of confidentiality is 'actionable' meaning that it is a civil wrong, and can be prevented by 'interdict' (injunction) if caught in time. The other consequence of this rule is that if a breach of confidentiality can be shown to have caused loss, that loss can be recovered through the courts.

If there is an application to the court in respect of arbitral proceedings, parties names are anonymised, the case does not appear on the rolls of court, and all hearings are held in private. In cases arising under the Act to date, the court has endeavoured to uphold the spirit as well as the letter of the confidentiality provisions of the Act. Accordingly in published decisions, details of the case likely to give away the identity of the parties have been redacted. In addition, the court has allowed parties to see opinions in draft, so that the parties may make a submission to the court as to whether further detail needs to be omitted prior to publication, or indeed whether or not the decision should be published at all.

The confidentiality rules are subject to certain exceptions, mostly relating to the public interest. The exceptions are set out in the Act.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no such specific powers, but parties are subject to the general rules on confidentiality. The tribunal has power to determine which documents are to be disclosed.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The tribunal will typically apply the usual rules of legal professional privilege. The 2010 Act provides that the court will not order disclosure or production of any document or information unless such an order would be made in equivalent civil proceedings.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration

proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

The tribunal has discretion whether to apply rules of evidence used in legal proceedings or any other rules of evidence. The IBA Rules have no official status under the Act, but may be adopted.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The tribunal must have regard to its duty to act fairly, impartially and without unnecessary delay and expense, but otherwise the tribunal has complete discretion, unless the parties have agreed on a procedure by incorporating a set of rules requiring such a procedure.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

This is a matter for the tribunal. The Scottish courts have a tradition of oral examination and cross examination, but there is no requirement to replicate this in arbitration. Tribunals are flexible and the use of witness statements is increasingly common. This may be combined with cross examination where appropriate. Some arbitrators question witnesses, and some take the view that it is not their role to do so.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no rules as to who can or cannot appear as a witness. There are no mandatory rules on oath or affirmation, but the tribunal may direct that a party or witness is to be examined on oath or affirmation.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

No. There are no specific rules. A connection with one of the parties would be something taken into account by the tribunal when weighing up the evidence.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Commonly expert evidence is presented by way of a report. It is not uncommon for there to be an evidentiary hearing at which the expert is questioned by representatives of the parties, or the arbitrator.

There are no formal requirements that an expert is independent or impartial, but such lack of independence or partiality would be taken into account by the tribunal when weighing the evidence.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

It is not common for the tribunal to appoint its own expert. It is more typical that parties provide their own experts. The 2010 Act provides as a default rule, that the tribunal may obtain an expert opinion on any matter arising in the arbitration subject to the parties' right to make representations on any report or evidence given by such an expert.

There is no requirement that experts are selected from a particular list.

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Witness conferencing is used in Scotland to a limited extent. There are no set rules as to how witness conferencing is handled, and like other procedural matters, it is a question for the tribunal.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

The arbitrator has power to employ a clerk or arbitral secretary. However if that is likely to lead to significant cost, the tribunal must obtain the consent of the parties. The use of arbitral secretaries is more common in larger disputes.

X. Awards

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

It is open to parties to agree on formal requirements of the award. The default provision in the 2010 Act is that the Award must be signed by all arbitrators (or all those assenting to the award), and that it specifies the seat of the arbitration, when the award is made and when it takes effect, the tribunal's reasons for the award, and whether any provisional or partial award have been made, and the extent to which any previous provisional award is superseded or confirmed. There are no limitations on the type of permissible relief. The award may order payment, and unless otherwise agreed by the parties may be of a declaratory nature, order a party to do or refrain from doing something, or order the

rectification or reduction of any deed or other document (other than a decree of court) to the extent permitted by the law governing the deed or document.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

In Scotland, punitive damages are regarded as being contrary to public policy. There is no rule specified in the 2010 Act regarding punitive or exemplary damages. The tribunal might award punitive damages if the applicable substantive law allows such an award. If the applicable law does not allow punitive or exemplary damages, the parties might still confer that power on the tribunal, but careful drafting would be required, and it is quite likely that a Scottish court would refuse to enforce such an award as contrary to public policy, although this has not been tested to date.

The tribunal has power to award interest. The award of interest may specify the interest rate and the period for which interest is payable. An award may provide for different interest rates in respect of different amounts. Interest is to be calculated in the manner agreed by the parties, or failing such agreement, in such manner as the tribunal determines. Interest can be awarded on a simple or compound basis.

(iii) Are interim or partial awards enforceable?

Yes, interim and partial awards are enforceable. An interim (provisional) award is enforceable to the extent specified in the award, or until superseded by a subsequent award.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

The 2010 Act provides that where the tribunal is unable to make a decision unanimously (including any decision on an award), a decision made by the majority of arbitrators is sufficient. Arbitrators are allowed to issue dissenting opinions and there are no rules as to their content or form.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

There is provision for an award to be made reflecting the terms of a settlement. The parties may end the arbitration at any time by notifying the tribunal that they have settled the dispute.

The tribunal also has the power to end the arbitration if it finds that it does not have jurisdiction. The tribunal may also end the arbitration in circumstances

where the claimant has delayed unnecessarily in submitting or otherwise pursuing a claim.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The tribunal may correct an award to remove a clerical, typographical or other error in the award arising by virtue of accident or omission, or to clarify or remove any ambiguity in the award. The tribunal may make such a correction either on its own initiative, or on an application by any party. Before deciding whether to correct an award, the tribunal must give a reasonable opportunity to the parties to make representations about the proposed correction. A corrected award is to be treated as if it was made in its corrected form on the day the award was made.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Costs generally follow the event, except where this would be inappropriate in the circumstances. The general principle is that the party who has caused the expense of the arbitration should pay for it. So for example where the unsuccessful party has made an offer to the successful party which has not been bettered by the ultimate award the successful party may be deemed to have caused the expense incurred after the offer by refusing to accept it.

This is the default position, and parties may agree how costs are to be borne.

(ii) What are the elements of costs that are typically awarded?

Elements of costs typically awarded include the arbitrators' fees and expenses, any expenses incurred by the tribunal when conducting the arbitration including the fees of any clerk, agent or expert, and facility costs, the parties' legal and other expenses and the fees and expenses of any arbitral appointments referee or any other third party to whom the parties give powers in relation to the arbitration.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The amount of fees and expenses payable are to be agreed by the parties and the arbitrators or the appointing body if appropriate (which agreement can take place at the outset of the arbitration). If agreement cannot be reached, the amount will be determined by the Auditor of the Court of Session (an officer of the court concerned with accounts).

- (iv) **Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

The tribunal has discretion to make an award allocating the parties' liability for the recoverable arbitration expenses (or any part of those expenses). Costs follow success unless that is inappropriate in the circumstances.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

The court may review the tribunal's decision on costs if such a decision can be said to constitute an error of Scots law or a serious irregularity.

XII. Challenges to Awards

- (i) **How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

It is difficult to challenge an arbitral award in Scotland, but there are three possible grounds for such a challenge: (a) jurisdiction, (b) serious irregularity and (c) error of (Scots) law.

(a) Jurisdiction

An award can be challenged on the grounds that the tribunal lacked substantive jurisdiction. That may be because there is no valid arbitration agreement, the tribunal has not been properly constituted or the tribunal has dealt with matters that have not been referred to arbitration.

(b) Serious irregularity

An award can be challenged on the ground that an irregularity of the kind specified in the 2010 Act has caused or will cause 'substantial injustice' to the appellant. This ground covers a failure to act fairly and impartially and a number of other technical and procedural failures.

(c) Error of Law

This is a default rule, and parties may exclude challenges under this ground. The rule only applies where the error is one of Scots law, and will not therefore apply where another law is the law of the contract. Such a challenge can only be brought with the agreement of the parties or with leave of the court. The court will only grant leave if the point will substantially affect a party's rights, the tribunal was asked to decide the point and the tribunal's decision on the points was obviously

wrong, or where the point is one of general importance and is open to serious doubt.

Challenges generally

A challenge must be brought within 28 days, and can only be brought if all other remedies have been exhausted.

Challenges are dealt with by way of a summary procedure and are generally disposed of within weeks.

The court may not enforce an award if it is subject to a challenge under the 2010 Act until such time as the challenge is disposed of.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

The parties cannot waive the right to challenge on the grounds of lack of jurisdiction or serious irregularity, although the right will be waived if not exercised within the 28 day time limit.

The right to challenge on legal error grounds can be waived by agreement and will be impliedly waived if rules excluding such appeals are incorporated or if the parties dispense with the requirement that the tribunal provides reasons in the award.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

The grounds for challenge are set out above. There are two levels of appeal. The initial appeal is to the Outer House of the Court of Session (a single judge of the higher court). There are generally three or four nominated Arbitration Judges designated to deal with such appeals. An appeal from the Outer House may be made with leave of the Outer House judge to the Inner House (appeal court). The decision of the Inner House is final, and no appeal lies to the UK Supreme Court.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

The court does not have power to remand an award to the tribunal in respect of a jurisdictional challenge. Awards that have been challenged on non-jurisdictional grounds can be remitted to the tribunal to reconsider all or part of the award. The tribunal must make the new award no later than three months after the decision by the court, or within such other period as the court specifies.

XIII. Recognition and Enforcement of Awards

- (i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

An application may be made to the Sheriff Court (lower court) or the Court of Session (higher court) for an order enforcing an arbitral award. The effect is that where a court grants an order, the tribunal's award may be enforced in the same way as a court decree may be enforced (without a further warrant). Enforcement of an award made in Scotland may be opposed by challenging the award on the grounds set out previously (see the responses to Section XII above).

- (ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

A foreign arbitral award can be enforced through the court in the normal way. It is possible to challenge such an award on the usual grounds under the New York Convention, but assuming that the award is recognised, it can be enforced by way of 'arrestment' freezing money or assets in the hands of a third party, or by bringing bankruptcy or sequestration proceedings.

- (iii) Are conservatory measures available pending enforcement of the award?**

Yes, a party may apply for interim preservation orders, attaching money or property in the hands of third parties.

- (iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

The Scottish courts are very supportive of arbitration. It is not known whether the Scottish courts would enforce an award that had been set aside at the arbitral seat. Each case would need to be considered on its merits. There are no known examples of this at present.

- (v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

If there are no objections raised, then the expedited procedures applicable to arbitration mean that enforcement can be achieved within a matter of weeks. If there is a challenge to the award, this first stage will normally be disposed of within a few weeks up to a few months. If a further appeal is allowed, it may take several months to get before the Inner House. In contrast to the arbitration procedure in England and Wales, there is no appeal to the UK Supreme Court on

any matter arising out of the Arbitration (Scotland) Act 2010. The delays associated with that further stage of procedure are therefore avoided. An arbitral award is exempted from the short (5 year) prescriptive period, but is subject to the long (20 year) prescriptive period, and must be enforced within that time.

XIV. Sovereign Immunity

- (i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Sovereign states do enjoy immunity for general purposes, but a State which agrees to arbitrate is not immune from arbitral proceedings or from proceedings in the Scottish courts which relate to the arbitration.

- (ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?**

Whilst a sovereign state may be held to have submitted to arbitration, it may still be necessary to obtain consent to enforce a resulting arbitral award against the state's property. This consent to execution should be obtained in the underlying contract if possible. There are certain circumstances in which an award can be executed without such consent, but the safer course is to obtain consent within the contract.

XV. Investment Treaty Arbitration

- (i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Yes. Scotland is a party all treaties to which the UK is a party.

- (ii) Has your country entered into bilateral investment treaties with other countries?**

Scotland has no power to enter into treaties in its own right. However, Scotland by virtue of its status as part of the UK is party to all bilateral investment treaties to which the UK is a party.

XVI. Resources

- (i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The main texts on arbitration in Scotland are:

Hew Dundas & David Bartos, Dundas and Bartos on the Arbitration (Scotland) Act 2010, 2nd Ed.2014 (Edinburgh: W. Green, 2010) (part of the Greens Annotated Acts series)

Fraser Davidson, Arbitration, 2nd Ed. (Edinburgh: W. Green, 2012)

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Yes. Many organisations run arbitration events throughout the year. In particular, the Chartered Institute of Arbitrators has a very active Scottish Branch with a regular events programme.

In 2012, the Chartered Institute of Arbitrators held its World Congress in Edinburgh, Scotland, and a conference on international ADR took place to coincide with the congress.

The Scottish Arbitration Centre also runs regular events, and an annual training day for all Scottish arbitrators and arbitrators from elsewhere dealing with the Arbitration (Scotland) Act 2010.

The Royal Institution of Chartered Surveyors and the Faculty of Advocates also host arbitration and ADR conferences.

In 2020, the Scottish Arbitration Centre will host the 25th International Council for Commercial Arbitration Congress in Edinburgh.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes. There is no doubt that arbitration under the 2010 Act is firmly established as an alternative to court proceedings. From a relatively low starting point in 2010, arbitration continues to grow, and the use of arbitration for domestic and international disputes is growing.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

The use of mediation in Scotland is growing, albeit slowly. Whilst parties are encouraged to discuss mediation in advance of court proceedings, there is no penalty in expenses for a failure to mediate. The demand for mediation is therefore client, rather than court led.

Expert determination is also used for certain types of dispute, particularly those arising out of commercial leases.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

There have been recent concerted efforts to develop arbitration in new areas, such as family law and personal injury actions. These projects are at an early stage.

In the commercial sphere, whilst the record of arbitration in Scotland dates back to the 12th century, international commercial arbitration is underdeveloped. In that context, the fact that the 25th ICCA Congress is to be held in Edinburgh in May 2020 can be seen as a major milestone in the development of commercial arbitration in Scotland.

Scotland has a reasonably large economy in European terms with comparatively little international commercial arbitration. The development of arbitration in Scotland therefore presents an opportunity for Scottish practitioners, and the wider international arbitration community.