

# ARBITRATION (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Final provisions*

#### *Schedule 1 – Scottish Arbitration Rules*

#### **Part 3 – General duties**

#### **Rule 24 – General duty of the tribunal *Mandatory***

141. Rule 24 is a mandatory rule. Rule 24(1) provides that an arbitral tribunal (and any umpire) conducting an arbitration must comply with its general duty - to be impartial, independent and fair. Treating the parties fairly does not necessarily mean treating them in exactly the same way.
142. The general duty is also that the tribunal (and umpire) must conduct the arbitration without unnecessary delay and without incurring unnecessary expense. “Without unnecessary delay” recognises the possibility of delay for the purposes of the arbitration and unnecessary expense recognises that the tribunal can incur expense where necessary.
143. Under rule 24(2), the tribunal must allow parties a reasonable opportunity to put their case and respond to the other party’s case.

#### **Rule 25 – General duty of the parties *Mandatory***

144. Rule 25 imposes a general duty on the parties to ensure that the arbitration is conducted without unnecessary delay and without incurring unnecessary expense. “Without unnecessary delay” recognises the possibility of delay for the purposes of the arbitration and unnecessary expense recognises that the tribunal and the parties may need to incur expense where necessary.

#### **Rule 26 – Confidentiality *Default***

145. Rule 26 is a default rule which provides that the arbitrator(s) and the parties must not disclose confidential information as defined in rule 26(4) relating to the arbitration. There are various exceptions to this. The effect is that disclosure will be a breach of an obligation of confidence unless the parties agree otherwise.
146. The parties are placed under a duty of confidentiality towards each other and to the tribunal. The tribunal is likewise placed under a similar duty towards the parties. A breach of the obligation of confidence will be actionable by the party or parties to whom the duty was owed. The available remedy will depend on the circumstances, but might be interdict or damages. Breach of the duty of confidentiality will also for instance allow removal of an arbitrator under rule 12 where it leads to substantial injustice.

147. The exception allowing disclosure in paragraph (1)(a) covers disclosure of information, for example, to the tribunal, other parties, advisers, experts and witnesses authorised by the parties. In addition, paragraph (1)(b) allows any disclosure by the tribunal or for the conduct of the arbitration.
148. Paragraph (1)(c) covers disclosure required by enactment or rule of law (including compliance with court orders), for the fulfilment of any public duty or function and where public officials seek information in pursuance of regulatory functions.
149. Paragraph (1)(d) covers disclosure where this is needed to protect a person's lawful interests. In the Court of Appeal in the English law case of *Emmott v Michael Wilson & Partners Ltd.*, Lawrence Collins LJ, said "that disclosure was permissible when, and to the extent to which, it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by that third party. It would be this exception which would apply where insurers have to be informed about the details of arbitral proceeding"<sup>1</sup>.
150. Paragraph (1)(e) covers disclosure in the public interest and (1)(f) in the interests of justice. Paragraph (1)(g) permits disclosure in circumstances which would attract a defence of absolute privilege in a defamation action (for instance in Parliamentary proceedings).
151. The duty of confidentiality is not imposed on third parties, for example professional advisers and expert witnesses. However, it is expected that the parties or tribunal will enter into private arrangements with third parties under which an agreement or undertaking to keep matters confidential is obtained. Disclosure by third parties is not a breach of any duty of confidentiality imposed by rule 26.
152. Rule 26(2) imposes an express duty on the tribunal and the parties to take all reasonable steps to prevent unauthorised disclosure by third parties, for instance by informing them of the requirement of confidentiality or seeking confidentiality undertakings from them if appropriate. Rule 26(3) imposes a duty on the tribunal to inform the parties at the outset of the arbitration whether any proceedings they will be involved with are to be confidential.
153. If the tribunal breaches the duties in rules 26(2) and (3), this may be grounds for removal of the arbitrator under rules 12 and 13. If the parties are unhappy about a disclosure by an arbitrator, they could agree to remove under rules 11 or 12. If the parties breach the duty under rule 26(2), the tribunal can take this into account when allocating the parties' liability for expenses between themselves under rule 60. Failure by the tribunal to comply with any of the duties in rule 26 may also be a ground for a serious irregularity appeal where non-compliance causes substantial injustice.

### **Rule 27 – Tribunal deliberations *Default***

154. Rule 27 is a default rule which provides that the tribunal is not required to share its deliberations with the parties, except for the information in rule (2) – which they are required to share. Failure by an arbitrator to comply may attract the same consequences as noted in the preceding paragraph for rules 26(2) and (3).

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<sup>1</sup> [2008] EWCA Civ 184; WLR (D) 82 at paragraph 101.