

## INSIGHT

### Arbitration - how does it work in Scotland?

Arbitration is a longstanding method of dispute resolution whereby parties can agree to have their disputes determined in a private tribunal instead of by the courts

In Scotland the process of arbitration is overseen by the Arbitration (Scotland) Act 2010 ("the 2010 Act").

The 2010 Act presents a modern flexible framework for arbitration 'seated' in Scotland and seeks to adopt the 'best practice' from around the globe. The rules make arbitration an effective method of resolving both domestic and international disputes. Under the 2010 Act such agreements do not need to be in writing.

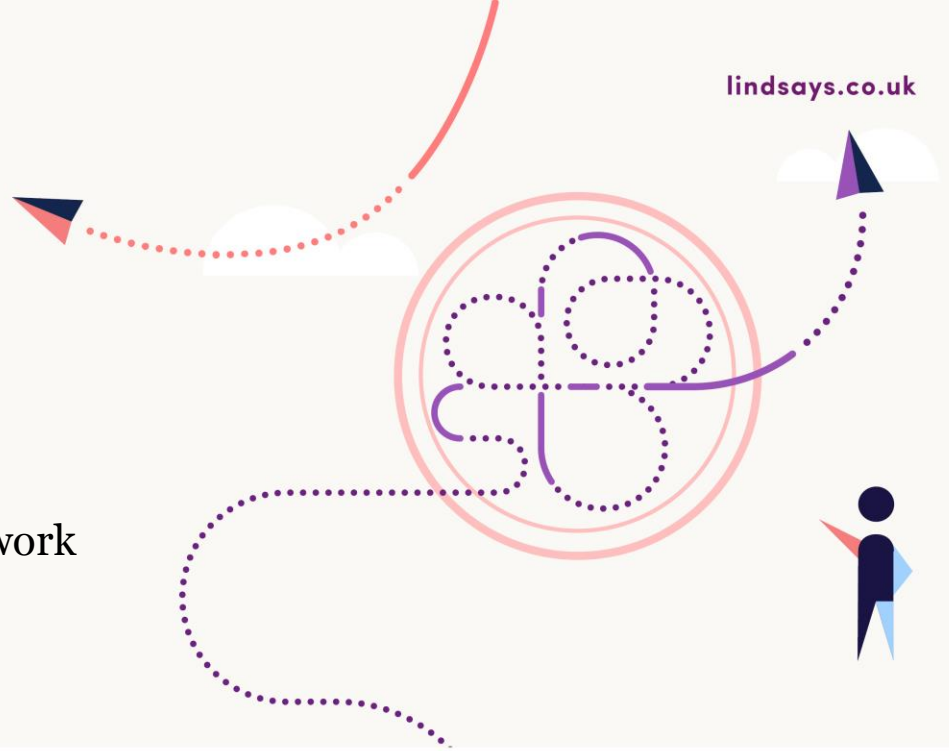
The 2010 Act regulates:

- the seat of the arbitration
- enforcement of arbitral awards
- interaction between arbitration and the courts.

Arbitration rules are divided between mandatory rules, which cannot be dis-applied and default rules which can be modified with the parties' agreement.

In principle such agreements exclude the jurisdiction of the courts if either party insists on arbitration. That said, to varying extents, courts will temper parties' rights to a private determination so that there is some access to the judicial system.

The courts' ability to interfere in an arbitration process varies from jurisdiction to jurisdiction.



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### General Principles

The founding principles of the 2010 Act mirror the opening section of the English Arbitration Act 1996 and set out these key elements:

- fairness and the efficient determination of the dispute
- the ability of the parties to influence the procedure in the course of the arbitration
- a limited role of the court in the arbitration.

The 2010 Act provides that an arbitration is seated in Scotland where the parties or the tribunal designate Scotland as the seat (the actual location of hearings being irrelevant).

Parties are free to choose the substantive law to be applied – thus disputes under international contracts may be arbitrated in Scotland under the provisions of the 2010 Act.

An arbitral award is final and binding on the parties and cannot be challenged except on the basis of:

- lack of jurisdiction
- breach of natural justice on the part of the Tribunal
- appeals on errors of law (if the default rules referred to above are applied).

Arbitral awards are enforceable as if a Decree of the court. To this end awards may be registered for preservation and execution in the Books of Council & Session provide that the Arbitration Agreement is itself registered this way (section 12 (5)). An arbitral award has equivalent effect to a court Decree for payment.

### Limited Court involvement

A court will only have limited powers to intervene in the Tribunal's jurisdiction and this is provided for in the arbitration rules.

### How does an Arbitration commence under the Act?

Arbitration commences by the giving of notice that a party intends to submit a dispute to arbitration in accordance with the Arbitration Agreement.

The Agreement will often set out the procedure for appointment, but if this is lacking a default rule provides for the joint appointment of an arbitrator within 28 days of either party requesting the other to do so. There is also scope for a court to appoint an arbitrator.

Once appointed, the Tribunal has the power to rule on its own jurisdiction with parties being entitled to raise objections. The arbitration rules provide for the Tribunal to determine the procedure to be followed in the arbitration and this power extends to the timing and the format of submission, together with the admissibility, relevance, materiality and weight of any evidence. The Tribunal is given wide powers to determine the format and the scope of any hearing.

### Confidentiality

The 2010 Act provides a mechanism to protect the identity of a party to legal proceedings connected with an arbitration. Any disclosure of confidential information by the arbitrator(s) or parties is an actionable breach of an obligation of confidence.

### Powers of the Court

The court may determine any point of Scots Law arising in arbitration, albeit the parties can agree not to grant this power to the court. This allows either party to effectively require the arbitrator to refer a question of law to the Court of Session (Scotland's superior court). In such a situation the court needs to be satisfied that there is a good reason as to why the question should be determined by it.

### Awards

Parties are severally liable for the arbitrator's fees and expenses.

The default rules allow the arbitrator to make an award allocating the parties liability between themselves for any



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recoverable arbitration expenses.

Awards may only be challenged on the basis of:

- a lack of substantive jurisdiction
- serious irregularity
- appeal on a point of law (if the default rules referred to above are applied).

### **The Scottish landscape for arbitration**

Scotland offers a cost effective forum for ADR and is an excellent neutral location much like Switzerland. A close knit legal community means that experienced dispute resolution lawyers can operate in a competent and efficient manner to achieve speedy determination to disputes without the application of London costs.

Parties have freedom to choose their arbitrator(s), can address privacy concerns and adopt a procedure that should be faster and more flexible than court.

Scottish advocates offer an appointment service - the Faculty of Advocates Arbitration (FOAA) which is overseen by retired judge, Lord Eassie. The arbitrators available for appointment includes within their ranks Sir David Edwards, former ECJ judge and Lord Hope, former Deputy President of the Supreme Court of the United Kingdom.

The Scottish Arbitration Centre, supported by the Scottish Government, offers both a centrally located venue for arbitration, mediation or other hearings and a arbitral appointments committee.

The 25<sup>th</sup> International Council for Commercial Arbitration (ICCA) Congress takes place in Edinburgh from 10-13 May 2020.

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