

# **Arbitration (Scotland) Act 2010**

**Ceasing the effect of transitional  
provision under section 36(3)**

**A Consultation Paper**

**August 2016**



**Scottish Government**  
Riaghaltas na h-Alba  
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## ARBITRATION (SCOTLAND) ACT 2010

### CEASING THE EFFECT OF TRANSITIONAL PROVISION UNDER SECTION 36(3)

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## **EXECUTIVE SUMMARY**

### **Background**

Arbitration is a procedure whereby parties with a dispute between them agree to submit that dispute to a third party who will act as a private tribunal to produce a final and binding determination of the dispute. Also known as a method of alternative dispute resolution, the agreement to arbitrate is often contained in a contract concluded between the parties possibly years before they come into dispute.

The advantage of arbitration is that the arbitrator's award is final and binding without further court hearings, and may be enforced like a court decree.

Arbitration is also private, which is another major advantage to commercial parties who may not wish the nature of their dispute or sensitive commercial information debated openly in the courts. The parties can choose their arbitrator, which is not possible in the courts. By way of example, if a technical expert is appointed as arbitrator, this may reduce the need to lead technical evidence so that arbitration may be quick, cost-effective and efficient. The process can provide flexible procedures (as it is privately funded and initiated) and because it is within the parties' control, the location, timing and other arrangements can be planned to suit their particular needs.

### **The 2010 Act**

The Arbitration (Scotland) Act 2010 ("the Act") provided Scotland with a modern and innovative arbitration regime, clarifying and consolidating the general Scots law of arbitration into a single statute. The purpose was also to provide a statutory default framework for arbitrations to operate in the absence of agreement to the contrary, ensuring a fair and impartial process, with the intention that anyone in Scotland, or seeking to do business in Scotland, should be able to access the principles and rules governing the law of arbitration in Scotland.

### **Scottish Government proposal**

Section 36(3) of the Act made transitional provision providing that the legislation does not apply to an arbitration arising under an arbitration agreement made before commencement of that section if the arbitrating parties agree not to use it. Essentially, this provision gave arbitrating parties the ability to opt to use the pre-existing arbitration law over the new law provided for in the 2010 Act. The pre-existing law was therefore saved for those pre-commencement agreements where the parties chose to contract out of the Act.

However, the Act further provides that Scottish Ministers may by order remove this opt-out ability after a suitable period, falling at least 5 years after commencement of section 36. This order is subject to affirmative procedure, as provided for by the Act.

As the Act is now over 5 years old, the Scottish Government is proposing to repeal all old arbitration law on 1 January 2017. The intention is to remove the ability of parties to contract out of using the new arbitration law.

This means that it will not be possible for parties to agree that the Act will not apply to an arbitration commenced after that date.

Before making an order, Scottish Ministers must consult those appearing to have an interest in the law of arbitration and will consider any representations made to them about it during consultation.

The draft Order will then be laid before the Scottish Parliament, and brought into force on 1 January 2017.

**Scottish Government**

Justice Directorate

August 2016

## **WHO ARE WE CONSULTING?**

This consultation is relevant to anyone who is either involved or interested in arbitration as provided for in the Arbitration (Scotland) Act 2010.

The Act states that before the Scottish Government can make an order repealing the use of old arbitration law, Ministers must consult those appearing to have an interest in the law of arbitration as they see fit. This may include, but is not limited to, the arbitration and legal service sectors as well as those with a consumer interest.

The purpose of the draft Order at Annex A is to remove the ability of parties under an arbitration agreement made prior to the commencement of section 36 of the Arbitration (Scotland) Act 2010 to contract out of using the new arbitration law provided for by the 2010 Act. The draft Order will not affect arbitrations under such agreements where the arbitration has commenced before the coming into force of the Order.

All responses to the consultation are due by **28 October 2016**.

## RESPONDING TO THE CONSULTATION PAPER

We are inviting responses to this consultation by **28 October 2016**.

Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You may view and respond to this consultation online at <https://consult.scotland.gov.uk/access-to-justice/ceasing-use-of-old-arbitration>

You can save and return your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date.

If you are unable to respond online, please complete the Respondent Information Form (see below) to:

Lee-Anne Barclay  
Scottish Government Justice Directorate  
GW14, St. Andrews House  
Edinburgh  
EH1 3DG

### Handling your response

If you respond using Citizen Space (<http://consult.scotland.gov.uk/>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### Comments and Complaints

If you have any comments about how this consultation exercise has been conducted, please send them to **Denise Swanson, Head of Access to Justice Unit, GW14, St. Andrews House, Edinburgh, EH1 3DG.**

## **NEXT STEPS IN THE PROCESS**

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

## SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise of a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>)

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

**DRAFT ORDER  
For Consultation**

*Draft Order laid before the Scottish Parliament under section 33(3)(c) of the Arbitration (Scotland) Act 2010, for approval by resolution of the Scottish Parliament.*

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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No.**

**ARBITRATION**

**The Arbitration (Scotland) Act 2010 (Transitional Provisions) Order  
2016**

<i>Made</i>	- - - -	***
<i>Coming into force</i>	- -	<i>1st January 2017</i>

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 33(1)(b) and 36(4) of the Arbitration (Scotland) Act 2010<sup>(1)</sup> and all other powers enabling them to do so.

In accordance with section 36(4) of that Act, the day specified in Article 2 falls more than 5 years after the day on which section 36 came into force.<sup>(2)</sup>

In accordance with section 36(5) of that Act, the Scottish Ministers have consulted such persons appearing to them to have an interest in the law of arbitration as they think fit.

In accordance with section 33(3) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

**Citation, commencement and interpretation**

**1.**—(1) This Order may be cited as the Arbitration (Scotland) Act 2010 (Transitional Provisions) Order 2016 and comes into force on 1st January 2017.

(2) In this Order, “the Act” means the Arbitration (Scotland) Act 2010.

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(1) 2010 asp 1.

(2) Section 36 was brought into force on 7<sup>th</sup> June 2010 by S.S.I. 2010/195 (except for the purposes of statutory arbitration).

### **Cessation of transitional provision**

2. Section 36(3) of the Act (agreement may disapply the Act in relation to an arbitration arising under an arbitration agreement made prior to commencement) is to cease to have effect on 1st January 2017.

### **Further transitional provision**

3. Despite article 2, section 36(3) of the Act continues to have effect in relation to an arbitration begun before the day on which this Order comes into force.

*Name*

Authorised to sign by the Scottish Ministers

St Andrew's House,  
Edinburgh  
Date

### **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order specifies 1<sup>st</sup> January 2017 as the date on which section 36(3) of the Arbitration (Scotland) Act 2010 ("the Act") is to cease to have effect.

Section 36(3) of the Act is a transitional provision which prevents the Act from applying to an arbitration arising under an arbitration agreement made before the commencement of the Act if the parties agree that the Act is not to apply to that Arbitration. The date of 1<sup>st</sup> January 2017, which is specified in article 2, falls more than 5 years after the commencement of section 36 of the Act (as required by section 36(4)).

Article 3 makes transitional provision for arbitrations begun prior to 1 January 2017.

## CONSULTATION QUESTIONNAIRE

The proposal means that the Arbitration (Scotland) Act 2010 (“the 2010 Act”) will apply to all arbitrations (other than statutory arbitrations) commenced after 1 January 2017. It will no longer be possible for parties to an arbitration taking place under an arbitration agreement made prior to 7 June 2010 (the day on which section 36 of the 2010 Act came into force) to agree that the 2010 Act will not apply. Arbitrations which have commenced prior to 1 January 2017 will be unaffected.

1. Do you agree with the proposal that it should no longer be possible, with effect from 1 January 2017, for parties to agree that the 2010 Act will not apply to an arbitration under an arbitration agreement made prior to 7 June 2010 ?
2. Do you have any concerns with the proposal?
3. Will the draft Order at Annex A have an adverse impact on your organisation?
4. Do you have any observations or further comments on the proposal outlined in this paper?

## Arbitration (Scotland) Act 2010

### Ceasing the effect of transitional provision under section 36(3)

#### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be returned with your response.

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response.  
Please indicate your publishing preference:

- Publish response with name  
 Publish response only (anonymous)  
 Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes  
 No



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