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ARBITRATION (SCOTLAND) ACT 2010

The Arbitration (Scotland) Act 2010 was passed by the Scottish Parliament on 18 November 2009, received Royal Assent on 5 January 2010 and is expected to come into force in March 2010.

It was said by the Enterprise, Energy & Tourism Minister, Jim Mather, that it "sets the scene for a renaissance of Scottish arbitration" so high expectations accompany it. Even more than that, it is hoped that it will make Scotland an attractive place for dispute resolution by providing a "modern, impartial and efficient arbitration regime". Whether that will prove to be the case remains to be seen. However, what it does do is to finally encapsulate, in one place, the Scottish law on arbitration thereby providing certainty as to the rules applicable.

The Act starts by setting out the "founding principles" namely:

- The object of arbitration is

to resolve disputes fairly, impartially and without unnecessary delay or expense.

- Parties should be free to agree how to resolve disputes.
- The court should not intervene in arbitration except as specifically provided.

The Act itself contains provisions related to suspension of any court action if there is an agreement in the contract to arbitrate, enforcement of arbitration awards by the court, court intervention in arbitrations, recognition and enforcement of foreign arbitration awards, authorisation of "arbitral appointments referees" or appointing bodies, judges acting as arbitrators and transitional provisions.

Importantly, it also incorporates a set of Scottish Arbitration Rules, some of which are mandatory and some of which

are non-mandatory (referred to as the "default rules"). These rules set out details of matters including appointment of arbitrators, the arbitrator's jurisdiction, duties of the arbitrator, procedural matters, powers of the court, arbitral awards, expenses and challenges to awards.

Addressing some of the criticisms levied at arbitration in the past - delay and expense - the new rules contain duties on both the arbitrator and the parties to the arbitration to conduct the arbitration without unnecessary delay and without incurring unnecessary expense. Operating this in practice will be key to persuading parties to reconsider arbitration as a form of dispute resolution.

After Arbitration's decline in recent years and the rise of the Commercial Courts and Adjudication, it will be a case of waiting to see whether this new Act is sufficient to increase Arbitration's popularity.

CONSTRUCTION ACT CHANGES RECEIVE ROYAL ASSENT

The Local Democracy, Economic Development and Construction Act 2009 (the "2009 Act") received Royal Assent on 12 November 2009, after a passage through Parliament marked at each stage by intensive lobbying by various interested industry groups on the proposed changes to the Housing Grants Construction and Regeneration Act 1996 (the "1996 Act"). The relevant changes are set out in Part 8 of the 2009 Act.

Whilst the changes will not be retrospective in effect, as the 2009 Act will apply only to those construction contracts entered into after it comes into force, they are far reaching, particularly in relation to the payment regime and will entail amendment to the UK standard forms and bespoke forms of contract and subcontract.

It currently remains unclear when these provisions will come into effect but it is unlikely to be before the end of the year, to allow time for the statutory Scheme to be updated to reflect the changes to the 1996 Act.

The principle changes to the 1996 Act are:

Oral Contracts: Where the 1996 Act only applied to construction contracts which were in writing, the 2009 Act in contrast applies to all construction contracts including where terms are partially or wholly oral. The only proviso to this is that the adjudication regime must remain in writing (or the Scheme adjudication provisions will apply).

Adjudication: The 2009 Act encourages the use of adjudication by outlawing clauses which require one party to an adjudication (usually the referring party) to pay all of the costs of the adjudication, win or lose, unless such terms are agreed in writing after

the decision to refer a dispute to adjudication.

There is also a provision, giving statutory effect to the English common law "slip" rule, allowing adjudicators to correct clerical or typographical errors in their decisions arising by accident or omission.

Payment Notices: Given the widespread criticism of the 1996 Act payment regime, the changes introduced by the 2009 Act are aimed at producing a more transparent, simplified scheme for payment. Whether it achieves this is open to debate as the amended provisions are extremely complex.



Essentially a payer or specified person must serve a payment notice every time a payment is to be made giving notification of the sum which he or she intends to pay (the "notified sum") even if the amount to be paid is zero. Importantly, if the payer or specified person fails to serve a notice, the payee may serve a notice specifying the sum due and the basis on which it was calculated and that sum shall, in the absence of a withholding notice (now called a 'pay less' notice), be the sum which the payer requires to pay.

Where the payee gives such a notice, the final date for payment of this sum is moved back by the same number of days as the notice was delayed, which some have argued is inequitable as

payment is thereby delayed as a result of a breach of the contract by the payer!

'Pay Less' Notices: The 'pay less' notice replaces what was formerly known as a withholding notice. As before, it is necessary to serve a 'pay less' notice a set number of days before the final date for payment if a deduction is to be made.

Conditional Payments: There is a ban on 'pay-when-entitled' and 'pay-when-certified' provisions. This provision in particular has given rise to criticism, particularly in relation to its effect on PPP/PFI projects as it cuts across the type of "equivalent project relief" clauses which are standard in PPP subcontracts and which funders usually view as essential.

However, there is some hope that, in response to lobbying, the government will exercise its exclusion powers to exclude PPP subcontracts from the ambit of the ban on "pay when certified" clauses.

Right to Suspend: The 2009 Act improves the provisions regarding suspension of work/services in

the event of non payment. It provides that the contractor can stop carrying out some, not simply all, of the work in such a case and the payer will be liable for any reasonable costs and expenses incurred by the payee as a result of the suspension.

It has been possible only to give a flavour of the changes to the 1996 Act which will take effect when the 2009 Act comes into force. The provisions are complex and will require to be reflected in updated contracts and subcontracts, both bespoke and standard form. It is worth starting to become familiar with the changes now in preparation for their coming into effect and considering whether you have in-house forms of contract which will need updating.

SCOTTISH FUTURES TRUST

The Scottish Futures Trust ("SFT") is up and running. It now has a full complement of staff, has issued a five year Corporate Plan and has held its first annual conference. So far so good. But what will it actually do? When will we see it deliver projects? And how will it achieve the much trumpeted £100-£150m yearly savings in infrastructure costs?

The SNP's initial idea was to create a body to replace, in their view, the 'costly PFI'. It would provide funding for infrastructure projects at low rates, by using public bonds, and hold the assets in trust for the benefit of the public. A laudable idea. That is, if the SNP had the power to create a body which could effectively borrow - which they did not.

After some two years of consultation the SFT was set up. Not as a funding body but, effectively, as a delivery vehicle.

It has five key roles:

- Aggregation and Collaboration - to find opportunities to improve co-operation and collaboration between public bodies.
- Centre of Expertise - to become a centre of expertise for infrastructure investment in Scotland, pursue new models and support operational projects.
- Delivery - to manage, co-ordinate and promote infrastructure projects and programmes.
- Funding and Financing - to advise on funding and financing approaches for projects.
- Validation - to review and advise on Key Stage Reviews, and value for money analysis.

The SFT is responsible for delivering the new £1.25bn schools investment programme and the £1bn hub community infrastructure initiative. It is becoming involved in the various waste projects coming to market, pursuing a low rental housing initiative and developing tax incremental financing proposals for regeneration projects. It is also reviewing various projects such as the Forth Replacement Crossing and the Borders Rail project. All to deliver value for money in infrastructure investment.

The SFT's development has not been without its difficulties and has been an easy target for political point scoring and media headlines. Not all of this has been the SFT's fault. It has stated that it operates at arm's length from the Government and so is free to adopt an economical approach to infrastructure investment. But, without the promise of providing funding for projects, can it persuade public bodies to adopt particular models, or the SNP to, say, relax its anti-PFI stance?

Time will tell if the two year wait for SFT has been worth it. These are difficult times for public bodies. There are capital and budget constraints, yet the demand for infrastructure is high and urgent. This statement would only be echoed by the construction industry. For now the jury is out. But if the SFT can promote and accelerate infrastructure investment, work with public bodies to bring projects to market and re-invigorate a stalled industry, then it will have served a purpose and should be welcomed.

NEW REVISION TO STANDARD FORMS ISSUED BY JCT & SBCC

JCT issued Revision 2 of the Standard Building Contract, the Design and Build Contract and the Minor Works contracts in May 2009. SBCC issued the Scottish updates in November 2009.

There are a number of changes:

- Interim payments after practical completion – rather than payments being made as and when further amounts are due, the new provision requires this at 2 monthly intervals.
- Where the Employer fails to issue a Certificate or issues it late, an entitlement for the Contractor to be paid interest from what would have been the final date for payment if a Certificate had been issued on time.
- New clause – "Retention Bond" which applies if a bond is being provided in lieu of retention being deducted. JCT have also suggested text for a Form of Retention Bond.
- Revisals to notice provisions and encouragement to parties to agree a communications protocol at the outset.
- Revisals to termination provisions so that an increased notice period is required before terminating.
- New Recitals Sixth and Seventh which refer to the contract being supplemented by a Framework Agreement and Supplemental Provisions.
- An obligation on parties to "give serious consideration" to any request to refer disputes to mediation.
- Optional provisions to adopt the principles of the Office of Government Commerce's "Achieving Excellence in Construction" related to:

- ▶ Acceleration Quotation to be submitted by the Contractor where the Employer wants to investigate the possibility of achieving practical completion early.
- ▶ Collaborative working.
- ▶ Obligations to endeavour to establish and maintain a culture and working environment in which health and safety is of paramount concern to all involved with the project. There are obligations to comply with codes of practice, provide training, provide access to advice and ensure consultation with personnel.
- ▶ In line with JCT's aim of including sustainability in every contract, the Contractor is encouraged to propose changes to designs or specifications which may benefit the Employer in terms of cost of works or life cycle cost.
- ▶ Contractor is encouraged to suggest economically viable amendments to the works which may result in an improvement in environmental performance.
- ▶ Monitoring of contractor's performance against KPI's stated in the contract.
- ▶ Provision for meetings between senior executives to negotiate in respect of any disputes.

"Revision 2009" Guides have been published which include a list of the Revision 2 changes and a User Checklist containing a checklist of the key information required to complete the Articles of Agreement. JCT are now working on Revision 3 which will reflect the changes made by the 2009 Act.

WHEN ARE LOSSES TOO REMOTE TO RECOVER?

It is well established that before a court will make an award of damages in relation to a breach of contract, it must be satisfied that the type of loss being claimed was considered a potential risk when the parties entered the contract. The courts are careful not to impose liability for losses that are simply too remote, not being within the reasonable contemplation of parties at the time of entering into the contract.

The issue of the remoteness of damages was considered in the recent case of *Donoghue v Greater Glasgow Health Board*.

In this case, the Health Board was being sued by an employee who had slipped on concrete steps due to loose stones from a gravel path being on the steps. The path and stairs were her normal route for deliveries in the course of her work and she used this route around 20 times per day.

Three years earlier, the University had contracted with a company to build and operate a multi storey car park for the Glasgow Royal Infirmary. The contractor had subcontracted some of the works to Laing O'Rourke Scotland Limited ("LORSL") who were responsible for constructing the gravel path in question. LORSL had granted the Health Board a warranty, agreeing to comply with the building subcontract. In terms of the subcontract, it was alleged that LORSL were obliged to construct the path using asphalt as opposed to gravel and that by failing to use asphalt, they had breached their contract.

When the Health Board were sued by Ms Donoghue, they sought to rely, in turn, on their warranty and pass on any losses to LORSL. In order to recover their losses from LORSL, the Health Board needed to convince the court that their losses were caused by the use of gravel rather than



asphalt and that they could have been reasonably contemplated as likely to occur when LORSL signed the warranty. In its defence to the action, LORSL argued that the court did not have enough evidence before it to decide whether the accident was caused by their breach of contract and, furthermore, that the Health Board's claim was too remote from any breach of contract to justify recovery.

In reaching its conclusion, the court relied on an earlier decision on remoteness of damages in the House of Lords case *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*.

In that case, the House of Lords held that damages should follow from the intention of the parties on the basis that parties took on liabilities under contracts on a voluntary basis. It was wrong to hold someone liable for risks that parties entering a contract in a particular market would not have considered they had undertaken. When entering into contracts, parties' views on responsibilities and risks taken on determined other contract terms, including the price. A party asked to assume a large, unpredictable risk would want some payment in return. If the law

made a party liable for a risk which that party thought was excluded, this would give the other party something for nothing.

Following on from that judgement, the court held that the loss the Health Board was claiming could not be categorised as a loss that was likely to arise from the alleged breach of contract or that would have been reasonably contemplated by the parties when they entered the contract. The Health Board had not pointed to any special knowledge on the part of LORSL which would bring this within their contemplation.

This case is interesting in the court's resistance to extending liability for breaches of contract and also as another example of a party being pursued under a collateral warranty. Where there is a particular risk to users of a building, in order to make a party liable for this, it would assist to give the fullest information available to allow the party to have "special knowledge", allowing the remoteness test to be overcome although it will, of course, still be necessary to first establish that the breach was the cause of the loss.

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