

Working North of the Border – Key Differences between JCT and SBCC Contracts

The aim of the Scottish Building Contract Committee (SBCC) in its standard form contracts is to create as much uniformity across the UK as possible, adopting the JCT forms wherever possible. However, it remains the case that because of the different legal system north of the border, there are certain key differences in approach.

The SBCC standard forms have made the changes required to the JCT forms to bring them in line with Scots law and terminology but they do not change the risk profile or make other substantive amendments. They follow the JCT colour coding, section headings and clause numbering and, as far as possible, follow the JCT names and dates.

The SBCC forms are now published in one amalgamated document so that it is no longer necessary (as was the case with the JCT 80 and 98 forms) to read a separate Scottish supplement into the JCT form. The consolidated approach is one that users will find easier to read.

Key differences are:

- **Arbitration** – Like the JCT form, the default dispute resolution method is Court as opposed to Arbitration. Where arbitration applies, the applicable legislation is the Arbitration (Scotland) Act 2010 which came into force on 7 June 2010. The Arbitration Act 1996 does not apply in Scotland. The Arbitration (Scotland) Act 2010 is relatively brief, consisting of 37 sections, but supplemented by 84 Rules contained in Schedule 1, the Scottish Arbitration Rules. It can apply equally to domestic, inter-UK or international arbitrations. The Scottish Arbitration Rules are stated to govern every arbitration seated in Scotland. Some of the Rules are mandatory meaning they cannot be modified or disapplied and some are non-mandatory (referred to as the "default rules"). The default rules apply unless the parties have agreed to modify or disapply them. It is possible to disapply a rule in whole or in part. The appointment of the arbitrator is dealt with by "Arbitral Appointments Referees" which are bodies authorised by the Scottish Ministers to act in this role.
- **Adjudication** – the Rules of the Scottish Scheme are applied.
- **Nominating bodies** – the Adjudicator nominating bodies are the Royal Incorporation of Architects in Scotland, The Royal Institution of Chartered Surveyors in Scotland, National Specialist Contractor's Council and Scottish Building Federation. The Arbitrator nominating bodies are the Chairman or Vice Chairman of the board of the Scottish Building Contract Committee Limited and the Chairman or Vice Chairman of the Chartered Institute of Arbitrators (Scottish Branch).
- **Off site materials and goods** – JCT clause 2.25 provides that where a payment is made under the contract of the value of the off-site materials, the

materials will become the property of the client notwithstanding that delivery has not been made. This is not contained in the SBCC contract because in Scotland, under a building or engineering contract, ownership of property can only pass when there is both an intention to transfer ownership and delivery. This can be achieved when the property is incorporated into the works. It may also be achieved when the materials are delivered to site and then paid for by the Employer by inclusion in an interim certificate. However, where the contract can be characterised as a contract of sale, it will be subject to the Sale of Goods Act 1979 and ownership of the property may pass, by agreement, on payment being made rather than on delivery. The way this is dealt with is for the client to enter into a separate contract for the purchase of the materials from the contractor or sub contractor so that the materials will no longer form part of their contract. This is provided for within SBCC clause 4.17. It is in quite different terms from the equivalent JCT clause and provides that the Employer may enter into a separate contract for the purchase of materials or goods prior to their delivery to site. If such a contract is entered into, the purchase of the materials or goods is excluded altogether from the building contract.

- **Trust** - A trust cannot be effectively created in Scotland unless the parties divest control of the relevant assets to the trustee. This means that most trust mechanisms in English standard form contracts, e.g. in respect of retention, will be ineffective under Scots law.
- **Signing** – In Scotland the law in relation to the formalities of the execution of contracts is contained in the Requirements of Writings (Scotland) Act 1995. To be validly executed a document requires to be properly subscribed by each of the parties on its last page. At least part of the written document must appear on the page which is signed, and that page requires to be signed by at least one of the parties. It is not appropriate for the parties to sign on a blank page that is merely attached to the document to be executed. The proper method of subscription depends on the nature of the party signing. A document may be executed in such a way as to make it self-proving. The 1995 Act also sets out rules for the incorporation of schedules and other attachments to a document. Schedules should be referred to in the document itself and each schedule should be identified on its face as being the schedule that is referred to in the contract. There is no need generally for a schedule to be signed unless it is a contract which “relates to land”. There is no Scottish equivalent to the English rule on counterparts or exchange of contract.
- **Registration for preservation and execution** - In Scotland the parties may agree to have the contract, and more particularly any arbitration clause, registered in the Books of Council and Session in Edinburgh. Registration for preservation means the document is kept safe in the Register so it does not get lost. Registration of the contract for execution together with any decree arbitral that may be subsequently issued means that any arbitral award under the contract can be enforced without the need to go to court for enforcement.
- **Third Party Rights** – the Contracts (Rights of Third Parties) Act 1999 does not apply in Scotland. The equivalent right in Scots law derives from the Scottish common law doctrine of *jus quaesitum tertio*. This allows a third party who is not party to the contract to obtain and enforce rights under the contract. It is necessary to identify the third party in the contract by name, as a member of a class or as answering to a particular description. It is also

necessary to show that the contracting parties intended to benefit the third party. The third party rights procedure is not commonly used. Collateral warranties remain the preferred option in Scotland.

- **Prescription & Limitation** - The law in Scotland on prescription and limitation of claims is to be found in the Prescription and Limitation (Scotland) Act 1973 and the case law regarding its interpretation and application. The short negative prescriptive period is five years. This period runs from the date any loss, injury or damage occurred as a result of an act, neglect or default. If the person who suffered the loss, injury or damage was not aware and could not, exercising reasonable diligence, have become aware of its occurrence at the time it occurred, then the period runs from the date the person became aware or could, exercising reasonable diligence, have become aware. The long negative prescription is twenty years which acts as a longstop. This runs from the date of the act, neglect or default rather than the date of discovery of the defect. Relevant proceedings (broadly court action or arbitration) need to be commenced prior to the deadline date otherwise the claim is extinguished.

In general terms, the similarities between the JCT and SBCC forms by far outweigh the differences but it is important to bear in mind the key differences above if contracting north of the border.

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