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The art of “kilting”: key differences between Scottish and English Law when drafting construction contracts

Following the 2014 referendum, we may officially be “better together” but the legal systems in England and Wales and Scotland have always been subject to some stark differences. When dealing with a contract that is subject to Scots Law, what are the key differences and where should legal advisors look to adjust terms and conditions or their advice accordingly?



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Kilting a contract

Converting an English law contract into a Scottish law equivalent will take more than adding a bit of tartan check to the front page and remembering that the two jurisdictions have different public holidays.



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Execution and signing of contracts

Firstly, there is no such concept of *documents being executed as deeds* in Scots Law. The *Requirements of Writing (Scotland) Act 1995* deals with execution requirements and how to incorporate schedules into contracts and to ensure a document is “self-proving”. Scots law contracts are usually *signed on the last page before the schedule* and there must be text from the final clause of the main body of the contract on the same page as the first signature line to meet the self-proving test.

There is no requirement for consideration under Scots Law and only recently has the concept of signing in counterpart been introduced into the Scottish legal system through the *Legal Writings (Counterpart and Deliver) (Scotland) Act 2015*. Time will tell if this becomes commonly used in practice.

Prescription and limitation

There is no link between the manner in which a Scots law contract is executed (such as there is with a deed) and the period of liability thereunder. The *Prescription and Limitation (Scotland) Act 1973* applies. Subject to some exceptions (such as personal injury claims where a three-year rule applies), the *prescriptive period* is 20 years from the date of the obligation, subject to a short negative period of five years. The five-year period runs from the date the claimant was aware (or ought to be aware) of the loss, injury or damage. Contracts can contain express provisions that shorten the 20-year period.

Until very recently, the commonly applied interpretation of when the five-year period began was when the claimant knew (or ought to have known) of the loss, injury or damage and that it had been caused by an act of neglect or default. However, following the Supreme Court’s judgment in *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd and others (Scotland)* (where the court held that a claimant does not need to be aware that the loss or damage was caused by the defender’s wrongful act), the Scottish Law Commission is currently examining the law of prescription with particular regard to *latent damage claims*. Watch out for a possible change in this area of the law.

Assignment and assignment

Aside from the different language used (*assignation* in Scotland rather than *assignment*), the *Law of Property Act 1925* does not apply in Scotland. Accordingly, there is no distinction between statutory and equitable assignments. Further, while assignments in Scotland need not be in writing (unless relating to land), they must be *intimated against*

the granter of the rights before they can be enforced.

Surprisingly, there is differing opinion as to whether obligations (as well as rights) can be assigned in Scots law. Case law and institutional writers suggest it may be possible where there is no *delectus personae* but in 2011, the Scottish Law Commission contented that Scots law is broadly the same as English law in the sphere of assignation and therefore obligations cannot be assigned regardless of *delectus personae*.

Regardless of, or perhaps because of the uncertainty in this area, many contracts contain express provisions on assignation that will "trump" the common law. The adopted practice, certainly in construction contracts, is to use *novation* when both the rights and obligations are to be transferred. The post-assignation "*no loss*" *defence* argument seems to have met with similar resistance in the Scottish courts as it has in the English courts.

Third party rights

Another English statutory provision that has no equivalent under Scots law is the *Contract (Rights of Third Parties) Act 1999*. Instead, the common law doctrine of *jus quaesitum tertio* applies. This doctrine is usually expressly dis-applied in construction contracts and the usual system of *collateral warranties* governs contractual rights granted to third parties.

Other considerations when dealing with Scots law construction contracts include treatment of off-site materials and retention, which are different due to the underlying rules on ownership of property and trust respectively. There are also Scottish versions of certain of the standard form contracts such as the JCT suite (but that's a story for another day).

Next time

Next time we will turn our attention to advising on a dispute that is governed by the Scottish courts, and will try to demystify some of the different terminology and rules.
