

# 'BUT WE'RE SCOTTISH!' AN EXCLUSIVE JURISDICTION CLAUSE IN FAVOUR OF THE ENGLISH COURTS BINDS SCOTTISH PARTIES AND STOPS ADJUDICATION ENFORCEMENT PROCEEDINGS IN THE SCOTTISH COURTS

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- ▶ An exclusive jurisdiction clause in favour of the English courts was held to govern proceedings to enforce an adjudicator's decision, even though both parties were domiciled in Scotland.
- ▶ A reference to standard terms in the subcontract order was sufficient consent to the exclusive jurisdiction clause contained in those terms.
- ▶ Disputes were intended to be governed by a one-stop shop and adjudication is not to be treated as a standalone class of disputes falling outside the jurisdiction clause.

## What's it about?

In the case of *BN Rendering Limited v Everwarm Ltd* [2018] CSOH 45 an action was brought in the Commercial Court in Edinburgh to enforce an adjudicator's award, pursuant to which the Pursuers were entitled to £141,598.20 in additional payment under a contract with the Defenders for labour provision at sites in Scotland.

The parties had agreed that the Defenders' subcontract terms formed the contract. These included express recourse to adjudication, and a right to take 'court proceedings' ensuring an adjudicator's decision would be given effect, and a jurisdiction clause: "the parties hereby submit to the exclusive jurisdiction of the English courts."

The Defenders entered a plea of no jurisdiction in the enforcement proceedings. The court found there was no jurisdiction for the Court of Session, concluding that the jurisdiction clause governed proceedings to enforce the adjudicator's award. The need for a one-stop shop was particularly apparent as the defencers had a right of set off against the award. In order to enforce the award an action must be brought in the English courts despite the parties being domiciled in Scotland.

## Why does it matter?

In a contract where both parties are based in Scotland and where performance takes place in Scotland, the normal forum would be the Scottish Courts. Any contrary intention would have to be clearly expressed and under EU law specific consent to jurisdiction being conferred on another court is required. The Pursuers' arguments that the relevant term had not received real consent as it was contained in terms referred to in the unsigned subcontract order did not find favour with the Court, which found that the important issue was the express reference to the terms and conditions in the order and that there was no requirement for the order to be signed by the parties.

The case confirms that an exclusive jurisdiction clause governs proceedings to enforce an adjudicator's decision. None of the Pursuers' arguments as to why this should not be the case (eg that adjudication was statutorily based and not covered by the clause) found favour with the court, which preferred the Defenders' submissions that the presumption should be for a 'one-stop shop' for disputes. It would be misguided to separate the statutory process of adjudication from the contract it arises from.

By raising in the wrong forum, the Pursuers incurred additional costs and further delayed the period before they were likely to receive any payment in regard to their successful adjudication (albeit subject to the set off). The case demonstrates that the

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Scottish courts will be reluctant to disregard an exclusive jurisdiction clause, regardless of the circumstances or location of the parties, works or adjudication procedure.

## Now what?

The case highlights the need for parties to check the jurisdiction clause (which may be in separate terms referred to in an order) at the time that the contract is negotiated to make sure that it reflects their wishes in terms of both the jurisdiction and the disputes to which it relates.

The clause should also be checked prior to commencing any proceedings.

It also is a reminder that standard terms and conditions not expressly set out in a subcontract order should be clearly referred to. Where jurisdiction is being conferred on a different court to that which would ordinarily have jurisdiction it would be prudent to clearly state this on the face of the contract.

## Who to contact?



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