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Guide to **resolving disputes in Scotland**

Navigating dispute resolution processes can be daunting for both domestic and international clients operating in the UK. We have developed this brief Guide to provide an overview of the options available to you, and an indication of how your dispute might progress.

"Sources praise the team for its 'very commercial' approach."

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Dispute Resolution options

What are the main dispute resolution methods used to settle commercial disputes?

Litigation

Raising court proceedings is the definitive method of resolving large commercial disputes between two parties who are unable to agree on an alternative method of settlement or resolution. All claims for payment of money with a value of £100,000 or less must be raised in the Sheriff Court. There are a number of Sheriff Courts in Scotland and while there are a number of mechanisms for determining jurisdiction, the default rule is that the claim should be raised in the court which is local to the Defender. Where the claim exceeds £100,000 the party raising the action (the Pursuer) may choose to raise it in the Sheriff Court or in the Court of Session (in Edinburgh). In each of the Sheriff Court and Court of Session a commercial action procedure is available. Commercial procedure is designed to be quicker and more flexible than "ordinary procedure".

Parties to a commercial action are expected to have made efforts to resolve matters before the action commences and a pre-action protocol applies. Court fees are relatively modest compared to England and Wales and are not fixed by reference to the value of a claim. For example, in the Court of Session, the fee for commencing proceedings is £300 in all cases.

Arbitration

Parties may agree to refer a dispute to arbitration and arbitrations most commonly arise through a provision in a contract between the parties. A tribunal consisting of one or more arbitrators assesses the legal and factual issues in dispute between the parties and decides the outcome. Where the arbitration is seated in Scotland, the Arbitration (Scotland) Act 2010 applies to the arbitration. An arbitration "seated" in Scotland can in fact take place anywhere and the dispute can be determined by a foreign law if appropriate. The tribunal's decision is binding and rights of appeal are restricted. The process is similar to court proceedings but generally more flexible. Proceedings are subject to strict confidentiality requirements which is often attractive to the parties in dispute. Arbitration may be less expensive and take less time than court proceedings if only because there is usually no appeal. The parties have the opportunity to choose an arbitrator with industry knowledge and specialist technical expertise. They can also tailor the arbitration process to their particular needs by agreeing to modify or disapply certain rules set down in the Arbitration (Scotland) Act. Arbitration is often most effectively used for international/cross-border disputes as it can overcome jurisdictional issues inherent in court proceedings. This can avoid one party having a "home" advantage and benefiting from a more extensive enforcement regime.

Negotiation

Given the expense, risk and time involved in court and arbitration proceedings, it is common for parties to attempt to resolve disputes through negotiation. Where court proceedings are raised under the commercial procedure, parties are expected to have fully set out their respective positions in correspondence and to have disclosed any relevant documents or expert reports before the commencement of proceedings. Otherwise there is no requirement to engage in pre-action correspondence. However, parties may attempt to negotiate a resolution on a without-prejudice basis at any point during court proceedings, without sharing details of any settlement offers or discussions with the court.

Additionally the court rules provide a mechanism for formal offers known as "Defender's tenders" or "Pursuer's

offers". There are strict requirements such an offer must meet but a valid and well-pitched offer can impose considerable pressure on an opponent (particularly a Defender) to settle, as a party who refuses the offer only to achieve a less advantageous result when the court makes a final determination may face sanctions in expenses.

Mediation

This is the most commonly used method of Alternative Dispute Resolution (ADR). It is used by parties who wish to achieve an agreed settlement but who cannot reach an agreement through negotiation.

The parties meet with an independent, trained mediator (usually an advocate, or former advocate or expert in a particular field) who liaises between the parties to identify issues and facilitate an agreed commercial settlement which is then recorded in writing. The mediator does not determine the underlying dispute and so any agreement reached as a result of mediation lacks precedent value. There are a number of specialist mediators offering this service in Scotland.

Expert Determination

An independent expert may be appointed by the parties to resolve the dispute. The parties' contract may make provision for expert determination but an ad hoc agreement to use this method may also be reached. Provided the parties agree, the expert's decision is legally binding. This is a quicker and more informal way of resolving a dispute than court proceedings. It is of assistance where the dispute centres on a technical issue (for example, defective products). It allows for the matter to be resolved by an expert who is familiar with the technical/specialist issues. It is unsuitable for disputes where there is a disagreement about the interpretation of a contract. It is also possible within the context of a formal court dispute to ask the court to remit the dispute to a "person of skill". This is akin to expert determination and if the remit is agreed by all parties the decision of the person of skill will ordinarily be given effect to by the court.

Adjudication

Parties to a construction contract have a statutory right to refer a dispute to adjudication at any time. The adjudicator's decision is temporarily binding on the parties until the dispute is finally determined by court proceedings or arbitration, though parties can choose to accept the adjudicator's decision. Adjudication is a quick and cost-effective way of resolving a dispute as there is a standard 28-day time period between referring the matter to an adjudicator and the adjudicator's decision (though the time period may be extended). It is specifically designed to sustain the flow of cash down the supply chain in the short term, and facilitate the continuation of construction works. The speed of the process means that the level of enquiry is not necessarily as thorough as court proceedings.

Litigation and the court system

What is the court structure? Are certain types of disputes allocated to particular divisions?

The main courts in Scotland are the Sheriff Court, the Sheriff Appeal Court and the Court of Session.

There are six Sheriffdoms in Scotland, each with a number of Sheriff Courts. The Sheriff Court has exclusive jurisdiction in relation to most commercial disputes with a value of £100,000 or less. A specific commercial procedure to deal with commercial disputes is available in most Sheriffdoms. Cases in the Sheriff Court are always heard by a single Sheriff. Appeals from the Sheriff Court are taken to the Sheriff Appeal Court which sits in Edinburgh.

The Court of Session is the highest civil court in Scotland and sits in Edinburgh. The Court of Session has exclusive jurisdiction in a number of areas, including judicial review and in relation to the insolvency of companies with a share capital exceeding £120,000.

Complex and high value commercial disputes will usually be raised in the Court of Session. All actions are heard at first instance before a single judge of the Outer House of the Court of Session (Outer House judges are known as "Lords Ordinary"). The Pursuer can elect to raise the action as a commercial action at the point the action is commenced. Alternatively an action raised as an ordinary action can be transferred to the commercial roll on the motion of either party. Any dispute "arising out of, or concerned with, any transaction or dispute of a commercial nature" is eligible to be dealt with on the commercial roll.

Each action on the commercial roll is allocated at the outset to a specific commercial judge in the Outer House. The allocated judge will oversee the action from commencement to conclusion and takes an active role in case management.

Appeals are taken to the Inner House of the Court of Session and are heard before a bench of three senior judges (the Inner House Judges are known as "Senators of the College of Justice"). The ultimate appeal court in respect of Scottish civil matters is the Supreme Court of the United Kingdom.

Typical proceedings

The main stages in large commercial cases proceeding under the Court of Session commercial procedure are:

- **Service of the Summons**
  The Pursuer prepares a Summons and lodges it with the court for signetting (which is the authority of the court to serve the Summons on the Defender). The Pursuer should elect at this stage to use the commercial procedure. The Summons must summarise the circumstances out of which the action arises and set out the orders sought and the legal basis for seeking those orders. A Schedule listing any documents founded upon by the Pursuer must be appended to the Summons. While the Summons should be in abbreviated form, it must give fair notice of the Pursuer's case to the Defender. Where the purpose of the action is to obtain a decision only on the construction of a document, a simplified form of Summons may be used. It is service of the Summons which constitutes commencement of the action and which stops the clock running in relation to time bar. Service must be effected within a year and a day of signetting, otherwise the action will cease to exist and cannot be resurrected. Following service of the Summons, the action becomes live when the Pursuer returns the Summons for calling. The Pursuer must return the Summons for calling no earlier than 21 days after service (and no later than a year and a day after service). The Pursuer is not required to give the Defender notice that the Summons has been returned for calling. However, the court publishes a roll of all actions that have been returned for calling. Once an action has been called, the Defender has three days to enter appearance by informing the clerk of court that the action is to be defended. Thereafter, the Defender must lodge written answers within seven days of the calling date. Again, the answers ought to be brief and contain a schedule of documents founded upon.

- **Case management**
  Following the lodging of answers, the court will allocate the case to a particular commercial judge who will fix a Preliminary Hearing. The same commercial judge will oversee all stages of procedure in the case and has flexibility to make such orders as he (or

she) thinks fit for the speedy determination of the action. At the Preliminary Hearing, the commercial judge will determine what further specification of the claim and/or defences is required and will fix a timetable for the adjustment of the pleadings. Parties are often ordered to lodge specific documents required to determine further procedure (such as expert reports and witness affidavits). Orders for the disclosure of documents are often made at the Preliminary Hearing stage. Following the preliminary stage, a Procedural Hearing is fixed.

- Parties are required to lodge a written statement of proposals for further procedure in advance of the Procedural Hearing. At the Procedural Hearing the commercial judge will appoint the case to a substantive hearing to determine the issues in dispute. The substantive hearing will take the form of a Debate (hearing on legal arguments only), a Proof (an evidential hearing) or a Proof Before Answer (a hearing combining legal and evidential issues).

- **Disclosure**
  There is no prescribed disclosure exercise as there is in England and Wales. It is always open to a party to an action to obtain an order for the disclosure of documents by way of a procedure commonly referred to as "Specification of Documents". In commercial actions, the judge may also require parties to disclose certain documents such as expert reports.

- **Witness statements of fact**
  Where witness evidence is required, parties are ordinarily required to exchange and lodge witness statements in advance of the Proof and there is usually an opportunity to lodge rebuttal statements.

- **Preparation for Substantive Hearings**
  Each party will require to prepare for the Substantive Hearing by: agreeing and lodging joint bundles of documents; preparing and exchanging witness statements; preparing written submissions and lodging Notes of Argument (as appropriate). An Advocate or Solicitor-Advocate is usually instructed to conduct Substantive Hearings. Following the Substantive Hearing, the judge issues a written judgment, and a court order known as a "Decree".

Limitation periods

Unless otherwise specified in a contract between the parties, the Prescription and Limitation (Scotland) Act 1973 sets out the periods for bringing a claim. If a claimant fails to raise and serve a claim within the relevant time period, the claim will, in principle, be time-barred. In Scotland, this time-frame is commonly referred to as "the prescriptive period".

Type of Claim	Statutory Limitation Period	What triggers a limitation period?
An obligation arising from a breach of contract	Five years	The date on which the act constituting the breach occurred
Negligence (i.e. breach of duty not contained within a contract) excluding personal injury and latent damage	Five years	The date on which the damage is suffered which is calculated by reference to the first point at which loss was suffered, even if the party suffering the loss was unaware that the loss arose from negligence
Damages for latent damage (i.e. damage which is not discoverable immediately)	Five years	The date on which the party suffering loss first became aware, or could with reasonable diligence have become aware of the damage
Liability arising from fraud	Five years	The date of the fraudulent act or, in certain circumstances, the date the party suffering the loss became aware, or could with reasonable diligence have become aware of the damage
Personal injury (excluding certain claims relating to childhood abuse)	Three years	The date of the injury
Defamation (equivalent of libel/slander)	Three years	The date on which the defamatory statement first came to the notice of the person defamed
Liability arising from the Consumer Protection Act 1987	Ten years	The date on which the product was supplied

Pre-action conduct

Before raising a commercial action in the Court of Session, parties are required to comply with the pre-action protocol set out in the court's practice direction which requires parties to engage in Pre-Action Communication. This requires a potential Pursuer to set out its claim in writing and in sufficient detail to enable the other party to understand and respond to it. The potential Defender is also expected to set out its defence in substantial terms. Parties are expected to exchange the documents which they intend to rely on as part of the pre-action protocol. Parties are also expected to obtain and disclose any expert report on which they intend to rely before the action commences.

The Practice Direction stipulates that unless there is real urgency and/or exceptional circumstances, cases should not be placed on the commercial roll unless and until the parties have had careful discussions as to whether the action is truly necessary.

Should a party fail to comply with the Pre-Action Practice Direction or an applicable Protocol, the court will take that conduct into account when awarding costs of the action. For example, a claimant who fails to send a letter explaining its claim may be penalised in terms of costs even if it is ultimately successful.

Confidentiality

Court hearings are public unless there is a good reason for them to be heard in private.

Details of all cases calling in the Court of Session, and most cases calling in the Sheriff Court, appear on the Rolls of Court which are displayed in court and published on the Scottish Courts and Tribunal Service's website. Judgments pronounced by the court are often published on the court website.

Arbitration proceedings subject to the Arbitration (Scotland) Act 2010 are subject to strict confidentiality requirements.

Class actions

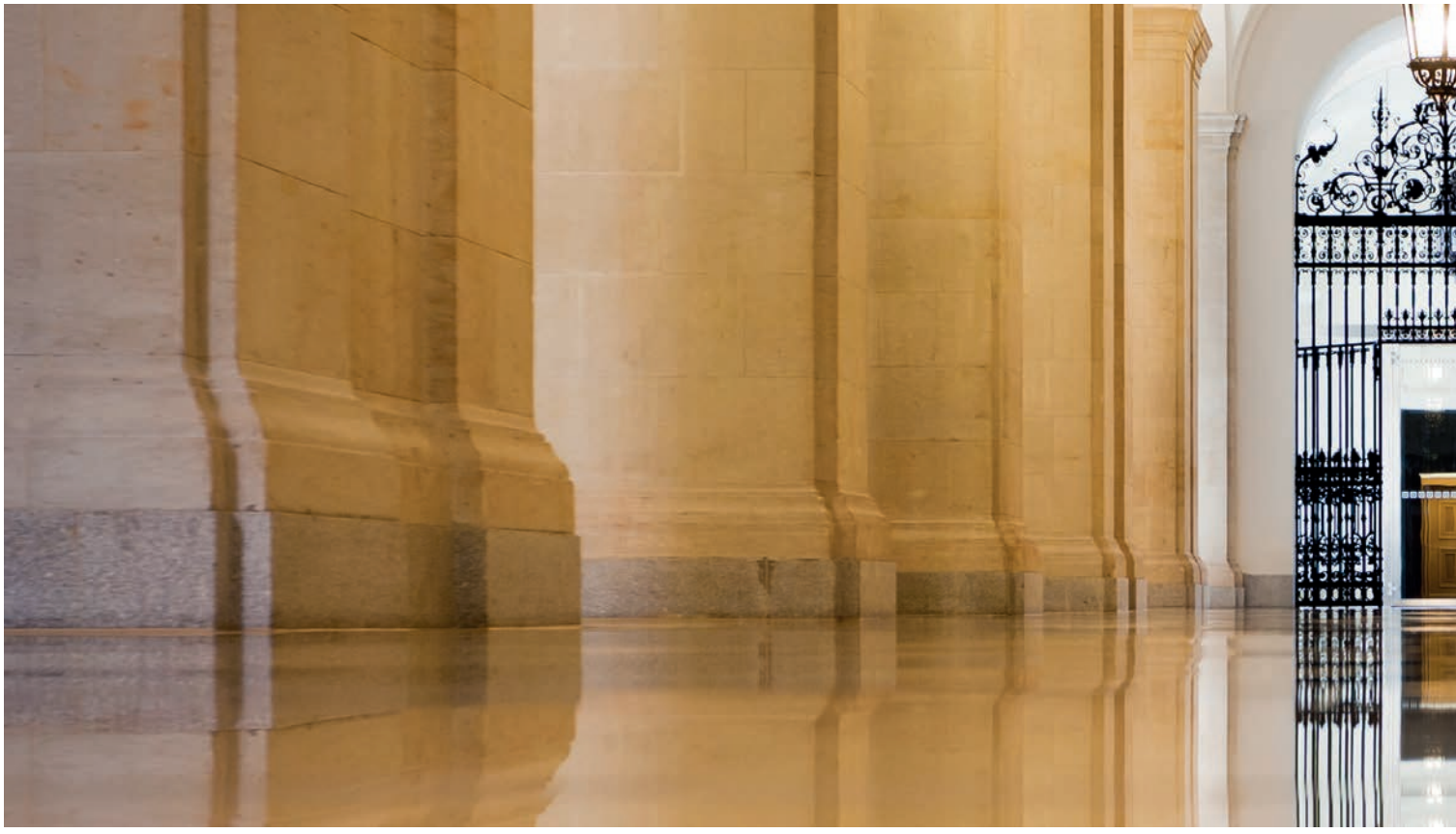
There are currently no procedures for the bringing of class actions in Scotland. However, the Civil Litigation (Expenses and Group Proceedings) Scotland Bill was introduced to the Scottish Parliament in June 2017. The Bill proposes the introduction of a class action procedure in terms of which parties (including individuals and third party groups such as consumer rights or environmental organisations) will be able to opt-in to actions brought in the Court of Session. The procedure is yet to be finalised.

Audience rights

Advocates (the Scottish equivalent of a barrister) have full rights of audience in all courts and tribunals in Scotland (and the Supreme Court in Scottish appeals) and typically conduct the advocacy in the Court of Session (where the solicitor has day-to-day conduct of the case generally). Solicitors with full practising certificates have full rights of audience in all Scottish tribunals, the Sheriff Courts and the Sheriff Appeal Court. Solicitors do not have rights of audience in the Court of Session unless they have achieved the status of "Solicitor Advocate" which requires specialist training.

European lawyers can be instructed in relation to cases before the Scottish courts provided they are instructed along with a solicitor or advocate who is entitled to practise before that court.

Non-EU lawyers have no rights of audience in Scotland and cannot conduct cases (or appear as advocates) in Scottish courts.



Evidence

How should evidence be presented?

Disclosure

There is no prescribed disclosure exercise in Scotland (as there is in England and Wales). However, it is always open to a party to an action to seek an order for the disclosure of documents:

- **Specification of Documents**
  A party to an existing action can seek an order for the disclosure of documents (including electronic documents) by way of a procedure commonly referred to as "Specification of Documents". This mechanism is commonly used to obtain disclosure from another party to the action or a third party. For a Specification of Documents to be granted it must be specific and relate to the case set out in the pleadings; it must not be used as a fishing exercise. Disclosure under a Specification of Documents is usually satisfied by way of a voluntary procedure in terms of which the disclosing party lodges a certificate and any applicable documents with the court. Mechanisms are in place to protect confidential and privileged documents. If documents are not disclosed voluntarily the court may appoint an officer, known as a Commissioner, to recover the documents.

- **Section 1 Orders**
  It is also possible to obtain an order under Section 1 of the Administration of Justice (Scotland) Act 1972. This Act applies both to existing civil proceedings and to proceedings which are likely to be brought. While a Specification of Documents order only applies to disclosure of "documents", a Section 1 Order applies to documents and other property (including land) and orders can be made for the production, inspection, detention, preservation or photographing of such property. Again, mechanisms are in place to protect confidential or privileged material.

In commercial actions, the judge may also require parties to disclose certain documents such as expert reports as part of the case management procedure.

Privileged documents

In both the Specification of Documents procedure and Section 1 orders, parties must disclose the existence of all documents covered by the order. However, a party can mark certain items as confidential or privileged. In that case, documents are usually placed in a sealed envelope and disclosed to the other party only if ordered by the court (or a Commissioner, where appointed).

The most common forms of privilege are:

- **Legal advice privilege:** applies to confidential information passed between solicitor and client for the purposes of providing legal advice;
- **Litigation privilege:** applies to communications when litigation has commenced or is in contemplation. As a general rule all material which is prepared or gathered by a party in preparation of its own case is privileged. Reports and records of accidents prepared by a party are usually always privileged even if prepared before litigation is in contemplation.
- **Privilege in aid of settlement negotiations:** documents created in a genuine attempt to settle an existing dispute are protected from disclosure. Note that the use of "without prejudice" wording is not of itself sufficient to render a document privileged.

Additionally, apologies made in accordance with the Apologies (Scotland) Act 2016 are not admissible in civil proceedings for the purposes of determining liability or in any manner which is prejudicial to the party who made the apology.

Privilege applies to both private practice and in-house solicitors (providing the in-house lawyer holds a current practising certificate). Note that the position of in-house lawyers is not protected in relation to EU competition law investigations.

Examination of witnesses

Where a proof is required, witnesses of fact are almost always required to give oral evidence. In commercial actions, common practice is to lodge written witness statements in advance. The witness would usually be required to adopt the witness statement as their evidence in chief and there will be limited scope to expand upon that in oral evidence.

Right to cross-examine

When a witness is called to give evidence it is always open to the opposing party to cross-examine. The party calling the witness then has an opportunity to re-examine but this is limited to clarifying matters raised in cross-examination.

Third party experts

Appointment procedure

Standard practice is for each party to instruct its own expert witness. The expert's duty is to the court. The role of the expert is to assist the court on matters within his expertise. This duty overrides any obligation to the party from whom the expert receives instructions and fees. The court does not supervise the appointment of expert witnesses, save that consideration to the suitability of an expert may be a factor in relation to an award of expenses.

As noted above, it is also possible in appropriate circumstances for the court to remit the determination of certain technical matters to an expert known as a "person of skill".

Role of experts

Opinion evidence from a witness with particular skills or expertise is admissible where it is necessary to assist the court to determine technical matters which are outwith the court's expertise. An expert must explain the basis of his or her evidence where it is not based upon personal observation. Where conflicting expert evidence is led it is for the court to determine which evidence it prefers.

Expert Fees

The person instructing an expert is liable for his or her fees, which usually include a day rate for appearing as a witness. The successful party can only recover the costs of instructing their expert if the court certifies the expert as a skilled witness. The court must be satisfied that the witness is a skilled person and that it was reasonable to employ the person for the purposes of the action.

Remedies

What remedies can be employed, and when?

Dismissal of a case before trial

- **Summary Decree**
  This is a mechanism whereby an action can be determined in a summary manner (i.e. without detailed examination of the facts and law). The availability of the remedy and the test is different in the Court of Session and the Sheriff Court. Summary Decree is not a substitute for a legal debate and is primarily intended for use where a party's case is fundamentally defective.

- **Summary Decree in the Court of Session**
  A Pursuer in a commercial action in the Court of Session may make a motion for Summary Decree. The court may grant the motion if there is no defence disclosed to the action or any part of it to which the motion relates. The procedure requires a hearing at which the court will consider the written pleadings and can also have reference to documentary or affidavit evidence. Summary Decree will not be granted unless the court is satisfied that the defence is bound to fail. As an alternative to granting the motion, the court may order any party (or a partner, director or other office-bearer of a party) to produce documents or lodge affidavits in support of any assertion of fact upon which it relies.

- **Summary Decree in the Sheriff Court**
  In a commercial action in the Sheriff Court either party may move for Summary Decree. The test is whether the opposing party's case (or any part of it) has no real prospects of success. The court must be satisfied that there is no compelling reason why Summary Decree should not be granted. As in the Court of Session, the court will have regard to the written pleadings and can also consider documentary or affidavit evidence. Where the motion is made by the Pursuer, the Sheriff may grant Summary Decree against the Defender in relation to all or part of the action. Where the action is brought by a Defender, the court may dismiss all or part of the Pursuer's claim. The Sheriff may also order any party (or a partner, director or other office-bearer of a party) to produce documents or lodge affidavits in support of any assertion of fact upon which it relies.

Security for costs

A court in Scotland can order a party to find "caution" (pronounced kay-shun) for expenses. The grounds for caution depend on whether an order is sought against a Pursuer or a Defender.

- **Orders for Caution against a Pursuer**
  Where a Pursuer is a UK limited company, an order may be made under section 762 of the Companies Act 1985. The Act provides that caution may be ordered where "it appears by credible testimony that the company will be unable to pay the Defender's expenses if successful in his defence". Relevant factors will include the publicly available accounts (or failure to lodge them with Companies House as required) and available statements regarding the solvency of the company (for example, statements from suppliers who have not been paid timeously).
  Where the Pursuer is an individual, a common law test applies and the threshold for obtaining an order for caution is much higher. It is not sufficient simply to show that the Pursuer may be unable to pay the Defender's expenses if successful and, as a general rule, caution will only be ordered against an individual Pursuer in exceptional circumstances. One instance where caution is more likely to be granted is where the Pursuer (whether an individual or a company) is not resident within the United Kingdom, particularly if resident in a jurisdiction where the enforcement of an award of expenses is likely to be difficult (however, caution will not be ordered on this ground alone in respect of a Pursuer resident within the European Union).

- **Orders for Caution against a Defender**
  The general rule is that caution should not be ordered against a Defender (whether the Defender is an individual or a company). The rationale behind this is that a person called to court is entitled in all cases to defend himself. Caution will only be awarded against a Defender in exceptional circumstances such as where there is a substantial counterclaim or abuse of process by the Defender.

An alternative to caution is the sisting of a "Mandatary". This is applicable where a party (either a Pursuer or Defender) is resident outwith Scotland. In such cases the court may order that party to introduce a party based in Scotland to be responsible for the proper conduct of the action and to be

liable for expenses. Again, such an order is more likely to be granted where the party is resident in a jurisdiction in which an award of expenses would be difficult to enforce. It would therefore by unlikely to be considered appropriate where a party is resident elsewhere in the United Kingdom or in the European Union.

Interim injunctions

Interim Interdict

A party can petition the court for interim interdict. Interdict is a Scottish remedy which is broadly comparable to the English injunction. However, interdict is available only as a negative order (i.e. it is an order of the court prohibiting a party from taking certain actions). Interdict is not available as a positive order (i.e. an order compelling a party to take particular actions). There are two essential tests which the petitioner must meet in order to obtain interim interdict:

- the petitioner must demonstrate that it has a prima facie case. Essentially the court must be satisfied that there is at least some prospect that the petitioner will ultimately be successful; and
- the balance of convenience must favour the making of the order. The court's aim is usually to maintain the status quo.

Specific Implement

A party to a contract can seek a positive order compelling the other party to perform its contractual obligations. It is competent to seek an interim order for specific implement. The test is similar to that for interim interdict.

Other interim remedies

In certain circumstances a Pursuer can take steps to ensure the Defender's assets are preserved pending determination of the action. This process is know in Scotland as interim diligence or diligence on the dependence. The Pursuer may apply for an interim order at any time including before the action is served on the Defender. There must be reasonable grounds for the granting of an interim order and the court must be satisfied:

- that the Pursuer has a prima facie case on the merits;
- that there is a real and substantial risk of the debtor becoming insolvent before any decree in the Pursuer's favour could be satisfied; or that there is a likelihood of the debtor removing, disposing of, burdening or concealing assets; and
- that it is reasonable in all the circumstances, including the effect on the debtor and any other party having an interest in the assets which would be caught by the order.

The following types of interim diligence are available:

- **Arrestment on the Dependence**
  This is essentially a freezing order which prevents third parties who hold money to the Defender's order from paying it to the Defender or any other party. Interim arrestments are commonly served on the main clearing banks and on any other party suspected of holding cash which is payable to the Defender. The sums which can be arrested are capped by reference to the value of the claim plus interest.
- **Inhibition on the Dependence**
  The effect of an interim inhibition once registered is that the debtor cannot sell heritable property without the consent of the Pursuer.
- **Interim Attachment**
  Interim Attachment provides a form of interim security over corporeal moveable property (i.e. any property other than land or intellectual property rights). There are a number of exceptions to the type and value of property which can be attached.

Caveats

It is possible for an individual or company to lodge a document known as a caveat with the Scottish courts. The effect of a caveat is that an interim order will not be granted before the Defender is given the opportunity to address the court. A caveat is therefore an extremely useful tool and parties in disputes, particularly if in financial difficulties, should consider lodging caveats to prevent interim orders being granted against them without notice. Note that caveats do not prevent orders for the inspection of documents or other property in terms of Section 1 of the Administration of Justice (Scotland) Act 1972.

Final remedies

The most common remedies sought in commercial actions are:

- **Damages.** The court may order the payment of damages and interest.
- **Specific Implement.** The court may order a party to a contract to perform its contractual obligations.

- **Interdict.** The court may order a party to refrain from committing certain acts, either for a specified period or indefinitely.
- **Declarator.** The court may make binding determinations, for example as to the correct interpretation of a contract or as to the ownership of certain property.

Damages under Scottish law are generally compensatory and rarely, if ever, punitive. Most civil claims involve claims for damages either as the principal claim or as an alternative (for example, an alternative to specific implement). In contract cases, the aim is to compensate the innocent party for the loss suffered as a result of the breach. The damages awarded should put the party in the position it would have enjoyed had the contract been performed. So a claim for breach of contract would ordinarily be limited to loss of profits (as opposed to turnover) and incidental costs arising from the breach. Contracts can provide for liquidated (or pre-ascertained) damages for specified breaches.

The court will generally enforce a straightforward liquidated damages clause when freely agreed by the parties, provided these are a genuine pre-estimate of loss. If the contract provides for a more complex remedy for breach (for example, disentitling the party in breach from deferred consideration), the court will enforce this if persuaded the claimant had a legitimate interest in performance of the relevant obligation and that the sanction for breach is not extravagant, exorbitant or disproportionate when compared with that interest. Otherwise, such a clause will be struck down as a penalty.

Fees, funding and costs

What should you expect, and budget for?

Legal fees

In dispute resolution matters, law firms often charge clients for the time spent on the claim on an hourly rate basis.

Other potential fee structures include:

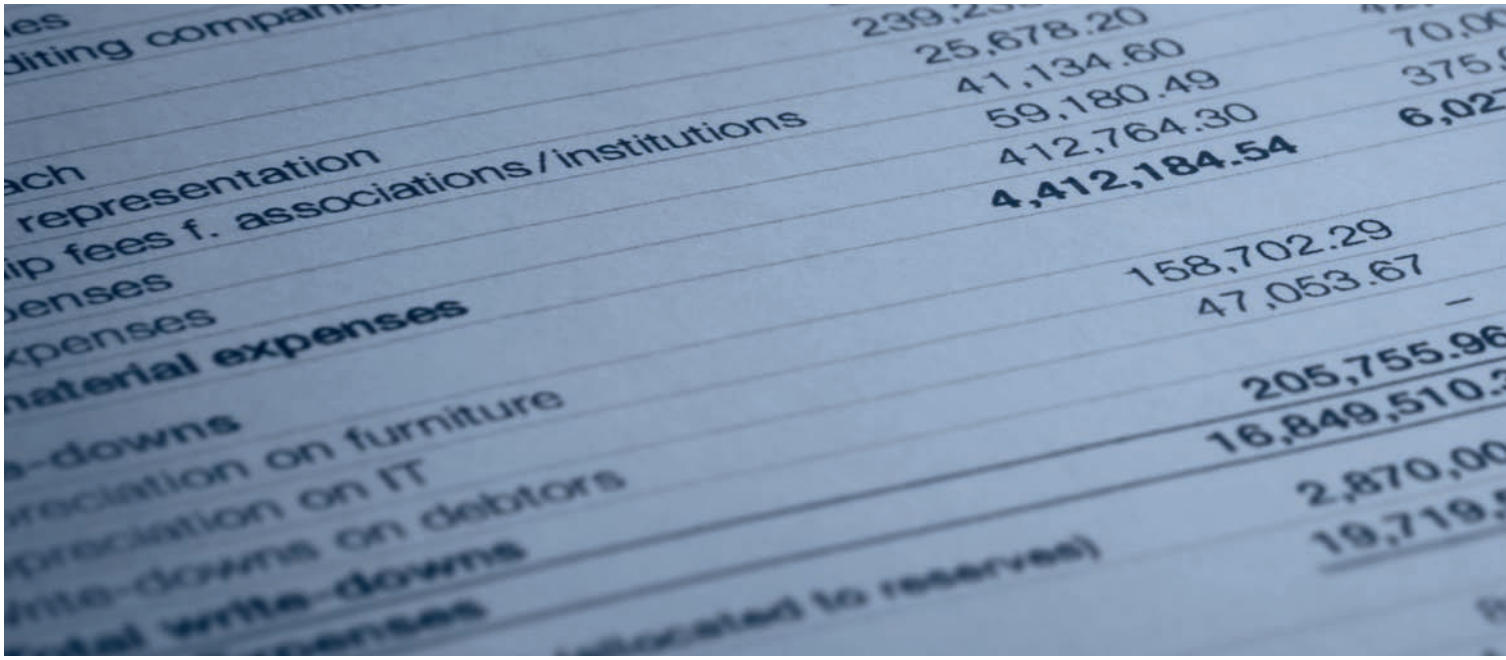
- **Success fee arrangements**
  These are arrangements in which the solicitor will not receive its fees (or may receive less than normal) if the client loses the case. The solicitor will often receive normal fees plus a "success fee" if the case is successful. The success fee is calculated as a percentage uplift of the agreed hourly rate or by reference to the fee element of a judicial award of expenses (with the success element capped at 100% of the fee element of the judicial award). Success fees are not recoverable against the losing party.
- **Damages-based agreements (DBAs)**
  A DBA is another type of contingency fee agreement where the fee paid to the solicitor is based on a percentage of the compensation received by the client (this is usually a settlement sum or damages from the other party). DBAs are currently not permitted in Scotland.

In June 2017, a bill seeking to reform the law relative to civil legal expenses was introduced to the Scottish Parliament which proposes, among other things, to cap success fees and to introduce DBAs. Its outcome is awaited.

Funding and insurance for costs

Litigation in Scotland is primarily funded privately. However, forms of litigation funding and insurance are becoming increasingly common.

- **After the event (ATE) insurance**
  This legal expenses insurance policy, obtained after the dispute has arisen, covers a party's potential liability in the event it loses its case. The policy usually covers the other side's legal costs and disbursements. As a result, it is often combined with another form of litigation funding in respect of the party's own costs. ATE insurance is becoming increasingly available for Scottish disputes.
- **Before the event (BTE) insurance**
  These are policies purchased prior to a dispute arising and usually cover legal fees and disbursements up to a specified limit. Examples include motor insurance and residential landlord cover.
- **Third party funding**
  This is an arrangement where a third party agrees to pay some or all of the claimant's legal fees



- and disbursements in return for a fee payable from the proceeds of the claim (whether following a judgment or settlement). If the case is unsuccessful, the funder is generally unable to recover any sum. While the market for third party funding is not as developed in Scotland as it is in England and Wales, third party funding is becoming increasingly available.

Cost award

The default position is that the successful party is entitled to recover its costs from the unsuccessful party.

As a general rule, the successful party usually recovers around 60% of its costs from the unsuccessful party. In certain circumstances, the court may order an additional fee. The factors to be taken into account when determining whether to award an additional fee include:

- the complexity/novelty of the issues in dispute;
- volume of documents involved;
- the place and circumstances of the case (for example, where evidence requires to be obtained from another jurisdiction);
- the importance of the case to the client;
- the value of the case;
- the steps taken in attempt to settle the case.

The court will also be told about any formal settlement offers made by the parties when determining costs. Either the Pursuer or Defender may make a formal offer known either as a "Pursuer's Offer" or a "Defender's Tender". These formal offers are made by intimating it to the other party and lodging it with the court. The clerk of court lodges the offer but does not advise the judge of its existence until it is either accepted or the action is determined. These formal offers can have a potentially significant impact on the expenses position.

It should be noted that the Scottish position is distinct to the English "Part 36 Offers" and careful consideration requires to be given to formal offers depending on the circumstances of each case.

Expenses are awarded "as taxed". Following an award of expenses, the party in whose favour the award is made must prepare an account of legal expenses and lodge these with the Auditor of Court (within four months of the date of the order). The Auditor fixes a "Diet of Taxation" at which the successful party's account and any objections lodged before the other side are considered. Following the taxation, the auditor determines the expenses and outlays payable to the successful party.

Cost interest

Generally, post-judgment interest on costs orders is awarded at a rate prescribed by regulation, calculated from the costs order's date. However, courts retain discretion to:

- disallow post-judgment interest;
- vary the rate of interest;
- allow interest for a shorter period where it is considered just to do so.

Appeals

How does this process evolve, and on what ground?

Which courts

Appeals to the Inner House. Decisions of commercial judges in the Court of Session are heard before a bench of three judges of the Inner House. The process of appealing to the Inner House is known as "reclaiming". Any judgment which constitutes a final disposal of the action, or part of the action, can be appealed without leave. Appeals must be lodged within 21 days (though, in some specified cases, a shorter period applies).

Appeals to the Supreme Court. Decisions of the Inner House may be appealed to the UK Supreme Court. Leave to appeal is always required and must be obtained either from the Inner House or from the Supreme Court itself. Applications for leave to appeal to the Supreme Court must be made within 28 days.

Grounds for appeal

Broadly speaking the available grounds of appeal are: that the first instance decision was based on an error of law or that the judge misdirected himself; or that the judge at first instance has not properly considered or assessed the evidence. It is also possible to bring an appeal on procedural grounds, for example if the first instance judge has not given adequate reasons for the decision.

Enforcement of judgment

What options are available?

If the Decree is not satisfied voluntarily, the creditor must apply for an "Extract Decree" (this is the official copy of the Decree which can be used for enforcement purposes). Usually an Extract Decree will be issued seven days after the judgment is pronounced. Once in possession of an Extract Decree, the judgment creditor can instruct court officers known as "Messengers at Arms" to serve a document known as a "Charge for Payment" which is an official demand for payment. The debtor has 21 days to make payment in accordance with the Charge for Payment, failing which further enforcement action can be taken:

- **Arrestment in execution**
  The creditor can serve a Schedule of Arrestment on any person holding property on behalf of the judgment debtor. Most commonly, arrestments are served upon the major clearing banks to arrest funds held in a bank account in the name of the debtor. The property will be automatically released to the creditor after 14 weeks unless the debtor signs a mandate authorising its release in advance of that date. It is also possible to arrest other types of property (for example, for fees payable by a third party to the debtor or shares held by the debtor).

- **Arrestment of earnings**
  The creditor may serve a Schedule of Arrestment on the debtor's employer (providing the employer is subject to the jurisdiction of the Scottish courts). The employer is required to pay a prescribed part of the debtor's salary to the creditor until the decree is satisfied.

- **Attachment of movable property**
  The creditor can in certain circumstances seize the debtor's moveable assets (for example vehicles, cash and goods). There are detailed rules governing attachment and a number of restrictions on the ability to attach goods.

- **Inhibition in Execution**
  A creditor can register an Inhibition in the Register of Inhibitions. The effect of a registered Inhibition is that the debtor cannot sell heritable property without the consent of the creditor.

- **Land Attachment**
  The Bankruptcy and Diligence etc (Scotland) Act 2007 introduced a new right of enforcement known as a "Land Attachment". As at 2017, the relevant provisions of the act have not been brought into force. When in force, the act will permit a creditor to register a Notice of Land Attachment in the Land Register. The creditor will ultimately be able to apply to the court for a warrant to sell the land and to apply the proceeds of sale to the outstanding debt.

- **Bankruptcy**
  Where the debtor is an individual, the creditor can ultimately petition the court for their bankruptcy (technically known as sequestration). If the petition is granted the court will appoint an insolvency practitioner, known as a trustee in sequestration, to manage the debtor's financial affairs. The debtor may be required to make a contribution from income for a period of up to four years. The trustee realises the debtor's assets and collects income contributions. After deduction of the costs of the sequestration, the trustee then distributes the sums realised proportionately among all creditors, including the petitioning creditor. Secured creditors are repaid from any secured assets before any ordinary creditors can be repaid. Once the insolvency is concluded the debtor is released from all pre-insolvency debts. Sequestration has a damaging effect on the debtor's credit rating and reputation. The threat of sequestration is therefore a powerful tool for persuading a debtor to satisfy the decree voluntarily. There is, however, a risk that the creditor will recover significantly less than the sum owed. There can also be a significant delay before any recovery is made.

- **Liquidation**
  Where the debtor is a company, the creditor can ultimately petition the court for it to be wound up. If the petition is granted the court will appoint an insolvency practitioner, known as a liquidator, to wind up the company's affairs and the company will ultimately be dissolved. The liquidator realises the company's assets and, after deduction of the costs of the liquidation, distributes the sums realised proportionately among all creditors, including the petitioning creditor. Secured creditors are repaid from any secured assets before any ordinary creditors can be repaid. As with sequestration, the threat of winding-up can be very effective in encouraging voluntary settlement. Equally, there is a risk that the full sum will not be recovered and that there will be significant delay before any funds are received.

Choice of law in a contract

The Scottish courts will respect the choice of governing law in a contract subject to limited exceptions relating to:

- Unfair Contract Terms Act 1977;
- Financial Services and Markets Act 2000;
- mandatory rules of law (or provisions that cannot be derogated from by agreement) including those relating to employment and consumer contracts;
- situations where applying the choice is manifestly incompatible with public policy; and
- the quantification of damages will usually be determined by Scottish Law.

Forum selection in a contract

The jurisdiction of the Scottish courts is governed by EU legislation and domestic law.

Where EU legislation, or the Lugano Convention, applies (for example, where a jurisdiction clause names a court in, or the defendant is domiciled in, the EU or within a country signed up to the Lugano Convention) the Scottish courts will generally respect choice of jurisdiction clauses. The main exceptions relate to:

- matters over which other courts have exclusive jurisdiction (for example, in relation to immoveable property, some questions as to company law, insolvency law, public registers, registered IP rights and enforcement of judgments);
- situations where a party submits to the jurisdiction of a court other than the one specified in any clause; and
- instances where there are special rules in relation to the types of contract, such as employment, consumer or insurance contracts.

In cases that fall within these exceptions, it is possible that the courts of Scotland may disregard an alternative choice of jurisdiction clause and claim jurisdiction for itself.

In relation to claims arising out of contracts that have a jurisdiction clause naming a jurisdiction outside the EU or Lugano Convention countries, the Scottish courts will respect the chosen jurisdiction in the contract unless the court considers that the "ends of justice" would be best served by applying a different jurisdiction.

Rights of service for foreign parties

The usual methods of service in Scotland include:

- personal service by court officers (Sheriff Officers or Messengers at Arms);
- service by first-class recorded delivery post (from within the UK).

It is not possible to serve proceedings using email or fax.

Scotland is a party to the EC Service Regulations and the Hague Service Convention. These treaties provide further procedures for overseas service into Scotland, which the Scottish courts recognise as valid.

Scotland is party to the EU Taking of Evidence Regulation and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. If a foreign court (from any territory) requests assistance with a witness, and makes an application, the Court of Session may make an order compelling a witness to submit to examination either orally or in writing.

Enforcement of a foreign judgment

General principles

Scotland, as part of the United Kingdom, has bilateral treaties for the reciprocal enforcement of judgments with numerous countries including:

- The EU;
- EFTA (European Free Trade Association) countries;
- Commonwealth countries; and
- Hague Convention countries.

The procedure for enforcing foreign judgments covered by these arrangements varies depending on the underlying treaty and the specific statutory rules applicable in Scotland. Generally, the party wishing to enforce the judgment lodges the paperwork specified by the relevant treaty and an affidavit that it is entitled to enforce the decree in Scotland. If this is in order, the Court of Session registers the foreign judgment and makes an order permitting enforcement.

Judgments which are subject to the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933 may be enforced provided they are final and conclusive and for a sum of money (but not for taxes, a fine, or other penalty).

Judgments issued by EU member states are treated as if they were an enforceable Scottish judgment and so the creditor can simply serve a Charge for Payment on the debtor (together with a certified translation of the original judgment and a certificate from the issuing court) without the need for a further order.

Judgments issued in other jurisdictions are more difficult to enforce and require the creditor to raise an action of "decree conform" in the Court of Session.

Enforcing Foreign Arbitration Awards

The Scottish courts will recognise an arbitration award made in accordance with the New York Convention. Convention awards can be directly enforced in Scotland without the requirement of any additional procedure.

Alternative (appropriate) Dispute Resolution

How can disputes be resolved out of court?

ADR procedures

ADR can be highly successful in settling commercial disputes either: (i) without commencing court proceedings; or (ii) after commencing proceedings but before a substantive hearing.

ADR methods are split between non-binding and binding processes:

- the non-binding processes include negotiation, mediation, conciliation and early neutral evaluation. Negotiation and mediation are by far the most popular;
- the binding processes include appointing an expert to determine a technical issue (expert deter-mination), adjudication and arbitration.

ADR does not form part of the court procedure in Scotland. While courts encourage parties to explore extra-judicial settlement (and are likely to allow parties time to engage in ADR, particularly mediation or settlement negotiations), the court will not order parties to engage in ADR (the only exception to this is in relation to the simple Procedure Rules introduced in 2016 for claims with a value of less than £5,000 in which the court can direct parties to attend mediation).

Evidence in ADR

Where parties voluntarily engage in ADR, it is usual for them to agree that the process will be confidential and that any documents produced or admissions made will be protected from disclosure in future proceedings.

- **Arbitration**
  The form of evidence can be agreed between the arbitrator and the parties, though it generally follows similar principles to court proceedings with (usually limited) disclosure of documents, witness statements and expert reports. Arbitrations (and the documents produced for the purpose of the arbitration) are recognised as confidential and hearings generally take place in private. The scope of the confidentiality obligation may differ depending on the circumstances of the case and the obligations can be modified by agreement. The arbitrator has flexibility as to where and how evidence is given (for example, witnesses may give evidence remotely by way of video-conferencing). Arbitration is governed by the Arbitration (Scotland) Act 2010 unless otherwise specified by the parties.
- **Adjudication**
  There is no express duty of confidentiality in adjudications under the Scheme for Construction Contracts (Scotland) Regulations 1998, but they are generally treated as confidential. The parties will lose confidentiality if required to enforce the adjudicator's decision at court. The parties can agree to use documents produced in the adjudication for the purpose of subsequent court proceedings.
- **Mediation**
  Confidentiality is integral to the mediation process, which is usually conducted on a without-prejudice basis. Mediation agreements will usually include express provisions regarding confidentiality (for example, that no party (including any third party who attends the mediation) may disclose any information arising out of or in connection with the mediation for any purpose, without the consent of the other party).
- **Negotiation**
  If negotiations are conducted on a without-prejudice basis, written correspondence and documents produced for the purpose of negotiation/settlement are usually prevented from being put before a court, provided the negotiation is a genuine attempt to settle the dispute. The court distinguishes between admitting without-prejudice communications as evidence (which is not allowed) and admitting that without-prejudice communications have taken place (which is allowed). Without-prejudice protection does not protect an admission of fact unless that is specifically agreed by the parties.

Costs in ADR

This depends on the type of ADR.

Arbitration

The arbitrator is under no obligation to order that one party pays another's costs, but often does so if the parties do not agree otherwise. If the arbitrator is to decide, this depends on the relative success or failure of the award.

Adjudication

The usual rule is that each party bears its own costs. The costs are not usually recoverable from the losing party and the adjudicator has no power to make costs orders. Costs will not be recoverable even if there is subsequent litigation between the parties on the same dispute. The adjudicator's fees are usually borne by the losing party, but are often split between the parties where there has been mixed success. The adjudicator decides who should be responsible for his costs but the parties are often jointly and severally liable.

Mediation or negotiation

Costs are a matter for commercial agreement between the parties. Parties often share the mediator's fees and agree to bear their own legal fees. Legal costs can, however, be used as a tool in negotiations. If a settlement is not reached, costs will usually become part of the costs of the litigation and will be dealt with by the court in the usual way after trial (i.e. loser pays the winner's costs subject to other factors such as conduct, albeit that the costs recovered in relation to a mediation will be substantially less than the actual costs incurred). However, it is always open to the parties to agree otherwise.

ADR organisations

- The Chartered Institute of Arbitrators;
- The Royal Institute of Chartered Surveyors;
- The Faculty of Advocates (Arbitration Service).

Additionally there are a number of private firms offering mediation services, including specialised commercial mediation.

ADR Reform

There are a number of proposed reforms before the Scottish Parliament's 2017/18 session. These include:

- the introduction of class actions;
- the reform of the law of prescription and limitation of actions; and
- the reform of the law on legal expenses in civil claims.

Additionally, the Scottish Law Commission is currently undertaking a review of the remedies for breach of contract which may result in substantial reform of the law.

Notes

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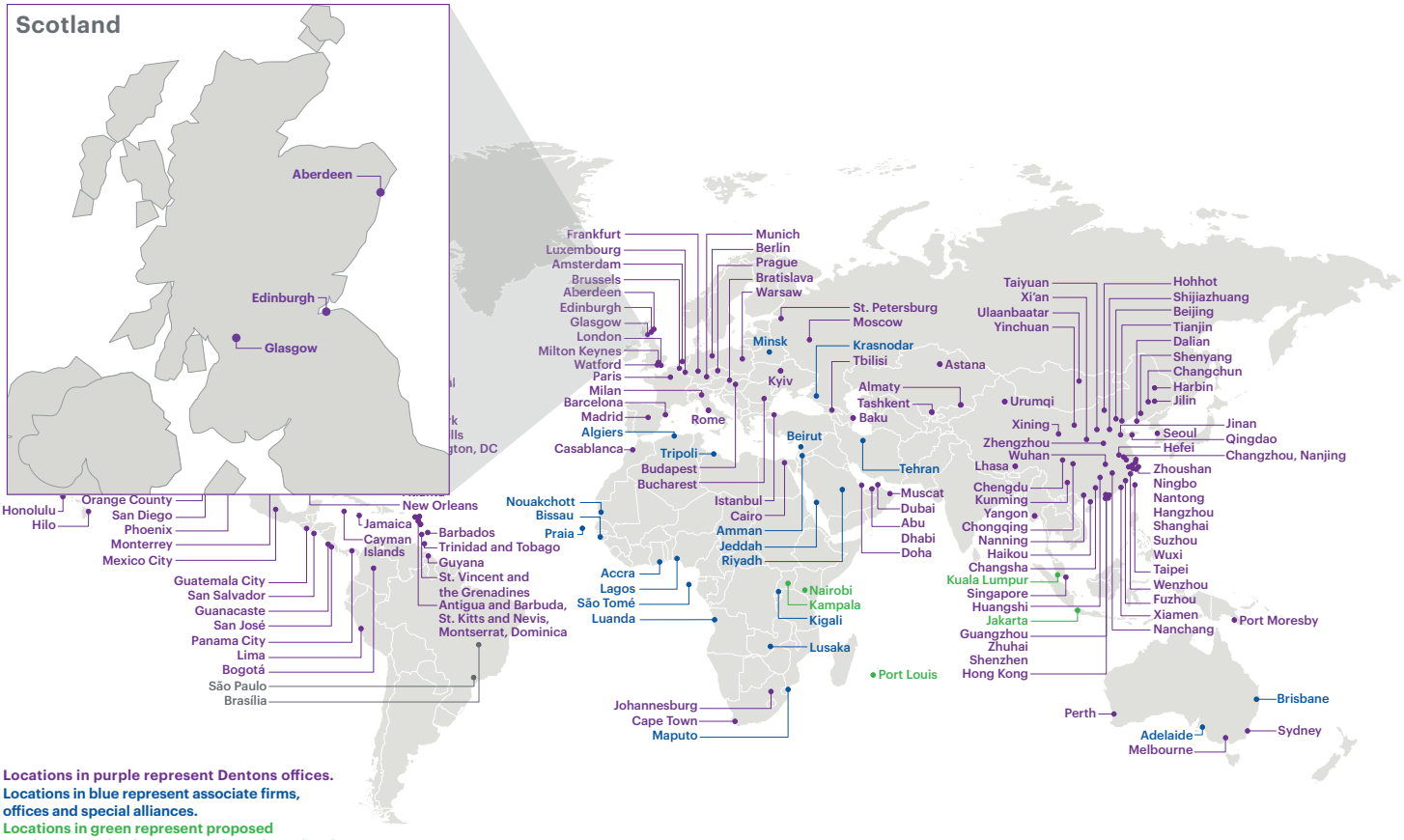

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