Contract (Formation and Remedies) (Scotland) Bill

[AS AMENDED AT STAGE 2]

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Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Contract (Formation and Remedies) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision in relation to formation of contract and remedies for breach of contract; and for connected purposes.

PART 1

FORMATION OF CONTRACT

Autonomy of parties

1 Autonomy of parties: application of sections 2 to 13

(1) Sections 2 to 13 apply in relation to the formation of a contract except in so far as—

(a) the offer, or any counter-offer, provides otherwise, or

(b) the parties to the contract have, before the contract is formed, come to an agreement which (whether in regard to the formation of that contract or to the formation of contracts which include that contract) provides otherwise.

(2) Such provision as is referred to in subsection (1)(a) and (b)—

(a) may be express or implied, and

(b) may be to the effect that the contract is to be formed—

(i) in a way other than in accordance with sections 2 to 13, or

(ii) in accordance with sections 2 to 13 but with such modifications to them as the parties may agree between themselves.

Requirements for the conclusion of a contract

2 Formation of contract: general

(1) A contract is formed on the parties coming to an agreement—

(a) which they intend to have legal effect, and

(b) which, taking any relevant enactment or rule of law into consideration, has both—

(i) the essential characteristics of a contract of the kind in question, and

(ii) sufficient content,

for it to be given legal effect as a contract of that kind.

(2) A contract is formed on the parties coming to an agreement on all but one matter or all but some matters, provided that the agreement is otherwise an agreement within the meaning of subsection (1).

(3) But where a party explicitly requires that, for a contract to be formed, there must be agreement on a specific matter there is no contract unless the parties come to an agreement on that matter.

(4) For the purposes of subsections (1) to (3), whether there is agreement or not may be determined from the statements and conduct of the parties (whether or not such statements and conduct consist of, or include, the acceptance of an offer).

3 Conclusion of contract by unnotified acts

(1) Subsection (2) applies, in relation to the formation of a contract, where—

(a) an offer provides expressly or impliedly,

(b) the parties to the prospective contract have established a practice between or among themselves to the effect, or

(c) there is a usage common to those parties to the effect,

that the performance of certain acts by the offeree forms the contract, even without notification of performance or of acceptance to the offeror.

(2) The contract is formed on the offeree's beginning to perform the acts in question.

(3) Subsections (1) and (2) are subject to section 11(1)(b).

Offers

4 What constitutes an offer

(1) For a proposal to constitute an "offer" in relation to the formation of a contract—

(a) the offeree must have reasonable grounds to suppose that the proposer intends the proposal to result in a contract if accepted, and

(b) the proposal must be one which, after taking any relevant enactment or rule of law into account, could be given legal effect as a contract if accepted.

(2) Any such offer may be addressed—

(a) to a specific person,

(b) to persons of a particular description,

(c) to persons in general, or

(d) to the public at large.

(3) Subsections (1) and (2) are without prejudice to the application of any relevant enactment, or rule of law, in relation to the constitution of a unilateral promise.

5 Revocation of offer

(1) An offer in relation to the formation of a contract may be revoked by the offeror but only if the revocation takes effect before—

(a) the offeree accepts the offer,

(b) from the statements or conduct of the offeree it may be determined that, as mentioned in section 2(4), agreement has been reached, or

(c) the offeree begins performance such as is referred to in section 3(2).

(2) Subsection (1) is subject to subsections (3) and (4).

(3) Where such an offer is addressed to persons in general, persons of a particular description or the public at large—

(a) revocation is, in a case—

(i) other than is mentioned in sub-paragraph (ii), to be effected by the same means as were used to make the offer, and

(ii) where the means of effecting revocation is specified in the offer, to be effected by the means so specified, and

(b) subsection (1) is to be construed, in determining whether revocation affects a particular person, as if for references in the subsection to the offeree there were substituted references to that person.

(4) Revocation under subsection (1) is ineffective if—

(a) it is manifest from the terms of the offer in question that it is intended to be irrevocable, or

(b) the offeror has, in a declaration which has taken effect, stated that it is irrevocable.

6 Lapsing of offer on fundamental change of circumstances

(1) An offer in relation to the formation of a contract lapses on a fundamental change of circumstances and having lapsed can no longer be accepted.

(2) Without prejudice to the generality of subsection (1), there is a fundamental change of circumstances if, after the offer is made but before a contract is formed, the offeror or offeree—

(a) dies, or

(b) becomes incapable of making any decision as to whether to form the contract.

(3) But an offer such as is mentioned in subsection (1) does not lapse where, after it is made but before a contract is formed, the offeror or offeree becomes insolvent.

(4) For the purposes of subsection (3)—

(a) an offeror or offeree who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent when—

(i) that person's estate is sequestrated,

(ii) that person grants a trust deed for creditors or makes a composition or arrangement with creditors,

(iii) a voluntary arrangement proposed by that person is approved,

(iv) that person's application for a debt payment programme is approved under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002, or

(v) that person becomes subject to any other order or arrangement analogous to those mentioned in sub-paragraphs (i) to (iv) anywhere in the world, and

(b) an offeror or offeree other than is mentioned in paragraph (a) becomes insolvent when—

(i) a decision approving a voluntary arrangement entered into by that person has effect under section 4A of the Insolvency Act 1986 ("the 1986 Act"),

(ii) that person is wound up under Part 4 or 5 of the 1986 Act or under section 367 of the Financial Services and Markets Act 2000,

(iii) a receiver is appointed, under section 51(1) or (2) of the 1986 Act, over all or part of the property of that person,

(iv) that person enters administration ("enters administration" being construed in accordance with paragraph 1(2) of schedule B1 of the 1986 Act), or

(v) that person becomes subject to any other order or arrangement analogous to those mentioned in sub-paragraphs (i) to (iv) anywhere in the world.

(5) Subsections (1) to (4) are without prejudice to the application of any relevant enactment, or rule of law, in relation to the transaction with regard to which the offer is made.

(6) The Scottish Ministers may, by regulations subject to the affirmative procedure—

(a) amend subsection (4)(a) or (b),

(b) specify further circumstances in which a person becomes insolvent for the purposes of subsection (3).

(7) In subsection (2)(b), "incapable" has the meaning given to that expression by section 1(6) of the Adults with Incapacity (Scotland) Act 2000.

7 Acceptance of offer

(1) In this Part, any reference to acceptance of an offer is to—

(a) a statement (in whatever form), or

(b) conduct (of whatever kind),

of the offeree which shows the unqualified assent of the offeree to the offer.

(2) But any such conduct as is mentioned in subsection (1)(b) must be conduct of which the offeror is, or ought to be, aware.

(3) Silence or inactivity is not in itself to be taken to show such assent.

(4) This section is without prejudice to section 2(2) and (3).

8 Qualified acceptance of offer

(1) Subsection (2) applies where, as regards an offer (in this section referred to as "the original offer") in relation to the formation of a contract, a qualified acceptance by the offeree provides for any or all of the following—

(a) terms additional to those of the original offer,

(b) terms different from those of the original offer,

(c) the omission of terms of the original offer.

(2) The qualified acceptance (however expressed) is taken to be both—

(a) a rejection of the original offer, and

(b) a counter-offer.

(3) Subsection (2) is without prejudice to section 2(2).

9 Rejection of offer

On the rejection of an offer (whether or not an irrevocable offer) in relation to the formation of a contract, the offer lapses.

Withdrawal of offer or acceptance

10 Withdrawal of offer or acceptance

In relation to the formation of a contract—

(a) an offer, whether or not an irrevocable offer, may be withdrawn by the offeror if notification of the withdrawal takes effect before, or at the same time as, notification of the offer takes effect, and

(b) an acceptance may be withdrawn by the offeree if notification of the withdrawal takes effect before, or at the same time as, notification of the acceptance takes effect.

Time limits

11 Time limits

(1) In relation to the formation of a contract, notification of acceptance of an offer is only effective if it occurs—

(a) before the expiry of any period of time specified in the offer, or

(b) if no period of time is specified in the offer, within a reasonable time after the notification of the offer has taken effect.

(2) Notification of acceptance of an offer occurs when—

(a) in the case of section 7(1)(a), the statement in question reaches the offeror,

(b) in the case of section 7(1)(b), the offeror is aware, or ought to be aware, of the conduct in question.

(3) Performance of an act as described in section 3(1) is effective only if it is begun before the expiry of any period of time mentioned in subsection (1).

(4) Sections 13(3) and (4) apply for the purposes of subsection (2)(a) as they apply for the purposes of section 13(1).

12 Commencement of a period of time within which a response to an offer is required

(1) Subsection (2) applies where, in relation to the formation of a contract, the terms of an offer—

(a) stipulate that the offeree must respond to the offer within a period of time, but

(b) do not make clear when the period is to begin.

(2) The period begins on the taking effect of the notification of the offer.

Notification

13 When notification takes effect

(1) In relation to the formation of a contract, a notification to a person of an offer, acceptance, counter-offer, withdrawal, rejection, revocation or declaration takes effect on reaching that person.

(2) Subsection (1) is subject to section 11(1).

(3) For the purposes of subsection (1), a notification reaches a person when it is made available to the person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay.

(4) Circumstances in which it may be reasonable to expect that a person is able to obtain access to a notification without undue delay include—

(a) when it is delivered to the person,

(b) when it is delivered to the person's place of business,

(c) in a case where either the person does not have a place of business or the notification does not relate to a business matter, when it is delivered to the person's habitual residence, or

(d) in the case of a notification transmitted by electronic means, when it becomes available to be accessed by the person.

14 Abolition of any rule of law as to when notification of postal acceptance takes effect

Any rule of law whereby, in relation to the formation of a contract, an acceptance sent by means of a postal service takes effect when posted is abolished.

General

15 Interpretation of Part 1

(1) In this Part (except where the context otherwise requires)—

"acceptance" is to be construed in accordance with section 7,

"counter-offer" is to be construed by reference to section 8(2),

"offer" is to be construed in accordance with section 4 (and includes a counter-offer),

"offeree" means a person to whom an offer is made, and

"offeror" means a person who makes an offer.

(2) In this Part (except where the context otherwise requires), a reference to a "postal service" is to be construed in accordance with the definition of "postal services" in section 27(1) of the Postal Services Act 2011.

(3) In this Part, any reference to the taking effect of a notification is to be construed in accordance with section 13.

PART 2

REMEDIES FOR BREACH OF CONTRACT

Autonomy of parties

16 Autonomy of parties: application of sections 17 to 21 and of the Law Reform (Contributory Negligence) Act 1945

(1) Sections 17 to 21 apply in relation to any breach of contract—

(a) except in so far as the parties to the contract have agreed otherwise, and

(b) except that if the contract includes any term which the parties intend should continue to have effect even after the contract is rescinded, those sections are without prejudice to that term.

(1A) Sections 21A to 21C apply in relation to any breach of contract, or anticipatory breach of contract, except in so far as the parties to the contract have agreed otherwise.

(2) The parties to a contract may agree that the Law Reform (Contributory Negligence) Act 1945 is to be disregarded in determining any question as to reducing, by virtue of a breach of the contract by a party, any damages recoverable from the other party.

(3) An agreement of the kind referred to in subsections (1) to (2) may be express or implied.

Mutuality of contract

17 Mutuality of contract

(1) Subsection (2) applies where any two parties to a contract (those parties being in this section referred to as "PA" and "PB") are each in breach of the contract.

(2) PA is entitled to exercise any right, or pursue any remedy, arising out of PB's breach provided PB's breach occurs before the contract is lawfully rescinded for PA's breach.

(3) But subsection (2) does not entitle PA to require PB to perform the contract in so far as—

(a) such performance falls due after the contract is so rescinded, or

(b) PB is (for PA's breach) lawfully withholding such performance.

Rescission for breach of contract

18 Rescission for breach of contract: return of benefits received

(1) On a contract being lawfully rescinded for breach of contract, this section and sections 19 to 21 apply if a party to the contract received any benefit from the performance by another party of an obligation under the contract.

(2) But this section and sections 19 to 21 do not apply in respect of any benefit which fully reciprocated the performance of such an obligation by the party which received the benefit.

(3) The party which received the benefit is in those sections referred to as "the recipient".

(4) The benefit must be returned to the other party provided that the other party concurrently returns any benefit it received from the performance by the recipient of an obligation under the contract.

(5) In so far as the performance was a payment of money, the amount received must be repaid.

(6) In so far as the benefit was not a payment of money but is transferable by the recipient, it must be transferred to the other party unless it would be unreasonable or impracticable to do so, in which case its return is to be by the payment to the other party of its value.

(7) In so far as the benefit was not a payment of money and is not transferable by the recipient, its return is to be by the payment to the other party of—

(a) its value, or

(b) if it has been disposed of for an amount greater than its value, that greater amount.

(8) The requirement to return a benefit includes a requirement to return the fruits of the benefit (whether natural or civil).

19 Value of benefit

(1) This section applies where the recipient is required, by section 18(6) or (7), to pay the value of a benefit.

(2) The payment is the value of the benefit as at the time of the performance by the other party.

(3) Where there was an agreed price, the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance.

(4) Where there was no agreed price, the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient would reasonably be taken to have agreed for the actual performance.

(5) But subsections (2) to (4) are subject to subsection (6).

(6) The recipient's liability to pay the value of a benefit is reduced to the extent that, as a result of the non-performance of an obligation owed by the other party to the recipient (being an obligation under the contract) the recipient is compelled, without compensation, either to dispose of the benefit or to sustain a disadvantage in order to preserve it.

20 Compensation for reduction in value of a returned benefit

(1) This section applies where the recipient is required, by section 18(6), to transfer a benefit.

(2) The recipient must pay compensation for any reduction in the value of the benefit as a result of a change in the condition of the benefit between the time of receipt and the time of transfer to the other party.

(3) But the recipient's liability to pay compensation under subsection (2) is reduced to the extent that the change in condition is a result of—

(a) the non-performance of an obligation owed by the other party to the recipient (being an obligation under the contract), or

(b) conduct of the recipient in the reasonable, but mistaken, belief that the other party's performance of an obligation so owed conformed with the contract.

21 Use and improvement

(1) The recipient must pay the other party a reasonable amount for any use which the recipient made of the benefit (except in so far as the recipient is liable to pay compensation to the other party under section 20(2) in respect of that use).

(2) If a recipient improved a benefit which the recipient is required by section 18(4) to return, the recipient has a right to payment for the value of the improvement (provided that the other party could readily obtain that value by dealing with the benefit) unless—

(a) the making of the improvement was in itself a breach of the contract, or

(b) the recipient made the improvement when the recipient knew, or ought to have known, that the benefit would require to be returned.

Contractual retention

21A Application of contractual retention

(1) A party to a contract ("PA") may temporarily withhold or suspend performance of an obligation that is due to be performed under the contract ("contractual retention")—

(a) following a breach of a counterpart obligation by the other party to the contract ("PB"),

(b) in anticipation of a breach of a counterpart obligation by PB (an "anticipatory breach"), or

(c) in relation to an obligation subsisting when the contract is ended by PA as a result of PB's breach or an anticipatory breach.

(2) For the purposes of subsection (1)—

(a) the contractual obligations of each party are presumed to be counterparts unless it can be shown that the parties do not intend the obligations to be counterparts,

(b) counterpart obligations may be contained in separate contracts as long as the contracts form part of the same transaction.

(3) The breach or anticipatory breach referred to in subsection (1)—

(a) must be a material breach in the case of an anticipatory breach,

(b) need not be a material breach in any other case.

(4) The effect of the contractual retention must not be clearly disproportionate to the effects of the breach or anticipatory breach referred to in subsection (1).

(5) PA may contractually retain part of an obligation in order that the contractual retention is not clearly disproportionate in terms of subsection (4).

(6) PA may exercise contractual retention until PB has performed the obligation referred to in subsection (1) or has paid damages in lieu of performance.

21B Notification of contractual retention for an anticipatory breach of contract

(1) Where PA exercises contractual retention for an anticipatory breach by PB in accordance with section 21A(1)(b), PA must notify PB of the contractual retention—

(a) before the contractual retention begins, or

(b) as soon as reasonably practicable after the start of the contractual retention.

(2) For the purposes of subsection (1), a notification must be written or oral.

21C Contractual retention in proceedings

(1) In proceedings disputing a contractual retention on the basis of section 21A(4), it is for the party disputing the contractual retention to show that the contractual retention is clearly disproportionate to the breach or anticipatory breach.

(2) In proceedings for breach of contract, it is a defence for a party to show that their failure to perform an obligation constitutes contractual retention.

21D Interaction of contractual retention with existing law

Sections 21A to 21C are without prejudice to—

(a) the application of any enactment, or rule of law, including in relation to—

(i) lien,

(ii) set off, netting, or close out,

(iii) compensation,

(iv) anticipatory breach of contract (except as specifically provided by this Act),

(v) the remedy known as equitable or special retention,

(vi) any other circumstances in which the right to retain or abate obligations is conferred, including in relation to retention for reasons other than contractual breach, and

(b) the power of a court to refuse the exercise of contractual retention where that retention is, or would be, inequitable.

Amendment of Law Reform (Contributory Negligence) Act 1945

22 Amendment of Law Reform (Contributory Negligence) Act 1945

In section 5 of the Law Reform (Contributory Negligence) Act 1945—

(a) in paragraph (a), after "; and" insert "subject to paragraph (aa)", and

(b) after paragraph (a) insert—

"(aa) without prejudice to the generality of section 1—

(i) in subsection (1) of that section the reference to a person's "own fault" includes a reference to that person's breach of a contract and the reference to "the fault of any other person or persons" includes a reference to a breach of a contract by that other person or those other persons; and

(ii) in each of subsections (2), (5) and (6) of that section, references to being "at fault" are to be construed accordingly;".

PART 3

GENERAL

23 Saving

The provisions of this Act are without prejudice to any enactment or rule of law which—

(a) regulates any question which relates to—

(i) the formation of a contract,

(ii) mutuality of contract, or

(iii) remedies for breach of contract,

but is not provided for by the provisions of this Act,

(b) requires writing for the formation of a contract,

(c) prescribes a form for a contract,

(d) regulates any question which relates to the essential validity of a contract,

(e) provides protection against unfair contract terms, or

(f) provides protection for a particular category of contracting person.

24 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it.

(2) Regulations under this section may—

(a) make different provision for different purposes,

(b) modify any enactment (including this Act).

(3) Regulations under this section—

(a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act, and

(b) are otherwise subject to the negative procedure.

25 Commencement

(1) This section and sections 15, 23, 24 and 26 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under this section—

(a) may include transitional, transitory or saving provision,

(b) make different provision for different purposes.

26 Short title

The short title of this Act is the Contract (Formation and Remedies) (Scotland) Act 2025.

Contract (Formation and Remedies) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision in relation to formation of contract and remedies for breach of contract; and for connected purposes.

Introduced by: Angela Constance
Supported by: Siobhian Brown
On: 2 October 2025
Bill type: Government Bill

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