Contract (Formation and Remedies) (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 26 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Siobhian Brown

1 In section 1, page 1, line 9, leave out <concluded> and insert <formed>

Section 2

Siobhian Brown

2 In section 2, page 1, line 20, leave out <concluded> and insert <formed>

Siobhian Brown

3 In section 2, page 2, leave out subsection (2) and insert —

<(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).>

Siobhian Brown

4 In section 2, page 2, line 7, after <party> insert <explicitly>

Siobhian Brown

5 In section 2, page 2, line 7, leave out <concluded> and insert <formed>

Section 3

Siobhian Brown

6 In section 3, page 2, line 19, leave out <is to conclude> and insert <forms>

Siobhian Brown

7 In section 3, page 2, line 21, leave out <concluded> and insert <formed>

Section 6

Siobhian Brown

8 In section 6, page 3, line 27, leave out <concluded> and insert <formed>

Siobhian Brown

9 In section 6, page 3, line 30, leave out <conclude> and insert <form>

Siobhian Brown

10 In section 6, page 3, line 32, leave out <concluded> and insert <formed>

Section 13

Siobhian Brown

11 In section 13, page 6, line 8, leave out <11(1)(a)> and insert <11(1)>

Section 16

Siobhian Brown

12 In section 16, page 7, line 10, at end insert—

<( ) Sections (*Application of contractual retention*) to (*Contractual retention in proceedings*) 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.>

Section 19

Siobhian Brown

13 In section 19, page 8, line 13, leave out <of the obligation>

After section 21

Siobhian Brown

14 After section 21, insert—

<*Contractual retention*

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.>

Siobhian Brown

15 After section 21, insert—

<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 (*Application of contractual retention*)(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.>

Siobhian Brown

16 After section 21, insert—

<Contractual retention in proceedings

(1) In proceedings disputing a contractual retention on the basis of section (*Application of contractual retention*)(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.>

Siobhian Brown

17 After section 21, insert—

<Interaction of contractual retention with existing law

Sections (*Application of contractual retention*) to (*Contractual retention in proceedings*) 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.>

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