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Contract (Formation and Remedies) (Scotland) Bill

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The Contract (Formation and Remedies) (Scotland) Bill ("the Bill") restates and reforms the law of formation of contract and certain aspects of the law of remedies for breach of contract. It follows recommendations made by the Scottish Law Commission in 2018.

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Contents

Summary

- The Bill was introduced in the Scottish Parliament on 2 October 2025.
- It follows recommendations made by the Scottish Law Commission ("SLC") in 2018 in its Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses ("SLC Report") which concluded that some parts of contract law are unclear, difficult to find and in need of modernisation. [1]
- The Bill restates and reforms aspects of the law of formation of contract by creating a statutory statement of the law.
- This includes abolition of the "postal acceptance rule" (a rule that a contract is formed when an acceptance of an offer is put in the post, as opposed to being received).
- In addition, the Bill also reforms certain aspects of the law of remedies for breach of contract (i.e. action the parties can take if there has been a breach of contract).
- The rules proposed are default rules. The Bill allows the parties to contract out of them. Any such alternative arrangement may be express or implied.
- In line with the SLC's recommendations, which reflect input which the SLC received during the consultation process, the Bill does not deal with various aspects of contract law including:
    - the "battle of the forms" (there is no direct reform in this area, although the SLC's view is that there is scope for the statutory statement of the law on formation of contract to address current issues)
    - the law on the interpretation of contracts
    - various aspects of the law on remedies for breach of contract
    - the law on penalty clauses.
- The Bill is not, therefore, a complete statutory codification of the Scots common law on contract (i.e. general principles, and precedents from court cases). Many aspects will still be governed by the common law rather than legislation.
- Further consultation by the Scottish Government in March 2025 suggested that the law of retention also needs modernising as a result of case law which followed the publication of the SLC's Report in 2018. The Scottish Government intends to introduce provisions on the law of retention by way of amendments to the Bill.
- It is worth noting that the SLC's work on contract law has a very long history. A proposal for a comprehensive review of contract law was part of the SLC's First Programme of Law Reform in 1965.
- A series of SLC reports in the 1990s also made proposals for reform of the law, including the abolition of the postal acceptance rule (a recommendation which dates back to 1977).
- Although there has been reform in other areas (notably in relation to third-party rights

in contract and execution in counterpart), the proposals by the SLC from the 1990s were never implemented. The SLC indicates in its 2018 Report that "the reasons for their non-implementation are not easy to discern. There does not seem to have been any significant opposition to the substance of the Reports at the time".

- Given the delay in implementing the proposed changes to the law, one question linked to the Bill is whether the implementation of SLC recommendations is working as effectively or as efficiently as it should.
- The Bill and this briefing refer to a number of technical legal terms. This briefing includes definitions in the text. A glossary of commonly used terms can also be found in the Bill's Policy Memorandum and in the SLC Report.

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What are contracts and contract law?

Contracts are agreements which are binding on the parties. A longer legal definition, quoted in Professor McBryde's "The Law of Contract in Scotland" (third edition, para 1.03), is as follows:

> “ A contract is the agreement of two or more parties which is intended to establish, regulate, alter or extinguish a legal relationship and which gives rise to obligations and has other effects, even in respect of one party only.”
>
> MacGregor, 2004[2]

Although often unseen, contracts are a key part of daily life covering matters such as:

- the sale and purchase of goods and services
- property sales
- employment arrangements
- rented housing
- financial services
- the supply of gas, water and electricity
- family law matters
- commercial agreements.

As a result, the legal rules governing contracts (contract law) are of importance for a wide range of policy areas, and the economy more generally. They also affect a wide number of individuals, businesses, government bodies, charities and third sector organisations.

Although not an exhaustive overview, the list below summarises some of the main, high level principles which apply to contract law in Scotland.

Common law is key

Over the years, various statutes have reformed and codified some of the principles underlying Scots contract law. In addition, legislation in other fields (for example, consumer law, employment law, competition law etc.) has had an impact on contracts in certain areas.

However, the majority of the rules governing contract law in Scotland are still based on the common law (i.e. general principles, and precedents from court cases). [3] Among other things, this includes the rules in relation to:

- how binding contracts are formed
- how to interpret provisions in contracts
- what action the parties can take to enforce the other party's obligations if there has been a breach of contract (i.e. "remedies for breach of contract").

Writing is normally not needed to create a contract

Contrary to what is often assumed, although most contracts will be in writing because this makes it easier to prove what was agreed on, it is not normally necessary for a contract to be in writing, or to be in the form of a formal contract, to be valid. Provided they fulfil the legal requirements for there to be a contract, oral agreements can be binding contracts, as can informal written exchanges, including those in electronic form.

The Requirements of Writing (Scotland) Act 1995 sets out exceptions to this rule. It provides that a limited category of legal documents, including contracts for the sale of land and wills, are only valid if they are in writing and signed in a manner in accordance with the rules in the legislation.

Freedom of contract

The rules work on the basis of the principle of "freedom of contract". This means that the parties to a contract are normally allowed to make binding agreements as they wish, with the general law acting as default law only when the parties have not contracted out of it or varied it in some way by agreement.

Exceptions to freedom of contract

Although freedom of contract is the general principle, it is not all-encompassing. There are also certain rules which regulate what the parties can agree on, which may mean that certain contractual obligations are not enforceable, as well as rules imposed by law more generally. Examples include: the rules on penalty clauses; the rules on the essential validity of contracts (duress, fraud, error and misrepresentation); implied terms and unfair terms; as well as statutory obligations under consumer law, competition law and employment law for example.

What is the background to the Bill and the SLC's work in this area?

An overview follows of the history behind the project and the SLC's more recent work on contract law.

History behind the project

The SLC's work on contract law has a very long history.

The SLC explains in its Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses from 2018 ("the SLC Report") that the starting point for its review was a series of reports which it published in the 1990s, namely:

1. The Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (1993) ("The 1993 Report")
2. The Report on Interpretation in Private Law (1997) ("The 1997 Report")
3. The Report on Penalty Clauses (1999) ("The 1999 Report on penalty clauses")
4. The Report on Remedies for Breach of Contract (1999). ("The 1999 Report on remedies").

The recommendations in these reports were, however, never implemented. The SLC does not know the reason for the lack of any implementation. The SLC Report states that:

> " 1.2 ... The reasons for their non-implementation are not easy to discern. There does not seem to have been any significant opposition to the substance of the Reports at the time. But with the passage of two decades and more since they were published, we did not think it right simply to press for their implementation without further consideration of the issues that they raise."
>
> Scottish Law Commission, 2018[4]

The unimplemented reports themselves suggest that certain of the issues with Scottish contract law (e.g. in relation to formation of contracts) are even more long-standing and date back to when the SLC was set up in 1965. For example, the 1993 Report states that:

> " 1.1 More or less since its inception this Commission has been of the view that there was a need for some reform of the Scottish law on the formation of contracts. In recent years the Commission has been particularly concerned about the so-called postal rule, whereby a contract entered into by letter or telegram may be held to be concluded when an acceptance of an offer is posted. This is probably inconsistent with the expectations of non-lawyers, who would not expect to be bound by a contract until an acceptance of their offer reached them"
>
> Scottish Law Commission , 1993[5]

The footnote in this statement refers to the SLC's First Programme of Law Reform from 1965 which recommended:

> “ 10 ... a comprehensive review of the law of obligations arising by force of law, voluntary obligations, and delictual obligations with the ultimate object of codification.”
>
> Scottish Law Commission , 1965[6]

Given that the SLC recommended a comprehensive review of contract law 60 years ago, and has carried out a significant amount of research in this area since then, one question linked to the Bill is why certain changes in the law (e.g. abolition of the postal acceptance rule) have not been prioritised until now.

One factor may have been the fact that, up until the setting up of the Scottish Parliament in 1999, it could be difficult find parliamentary time at Westminster for law reform legislation (including Scottish law reform Bills). In that regard, a journal article by Nick Brotchie, the then Librarian of the Scottish Law Commission from 2009 entitled "The Scottish Law Commission: promoting law reform in Scotland" states that:

> “ As long as the Westminster Parliament in London held responsibility for enacting Scottish legislation there could be no assurance that sufficient parliamentary time would be devoted to Scottish measures. The result was that many law reform recommendations made by the Commission in its reports remained (and still remain) unimplemented by the government.”
>
> Brotchie, 2009[7]

The article also notes, however, that other barriers existed, notably "the absence of any duty placed on the government to give a response ... to final recommendations of either of the Law Commissions, let alone introduce bills in Parliament to implement those recommendations ..."

Difficulties finding time for legislation at Westminster would, however, not seem relevant to the SLC's reports from the 1990s as, in principle, the recommendations could have been legislated on by the Scottish Parliament. The Scottish Parliament itself updated its standing orders in 2013 with the aim of increasing the number of SLC bills which it could scrutinise. [8]

Given the delay in implementing the proposed changes to contract law, there is therefore a general question as to whether the implementation of SLC recommendations is working as effectively or as efficiently as it should.

General review of contract law in the SLC's Eighth Programme of Law Reform

The SLC's work is based on programmes of law reform as well as individual references from the Scottish and UK Ministers. [9]

Following on from its work in the 1990s, the SLC included a general review of contract law as a long term project in its Eighth Programme of Law Reform published in December 2009. [10] This work was carried forward in the SLC's Ninth and Tenth Programmes of Law Reform.

The SLC's webpage on the project states that the stimulus for its review of contract law was the publication in 2009 of the Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law ("DCFR").

The DCFR was an EU-wide research project led by a network of academics. It was aimed at drawing up model rules and principles in areas of private law (the law governing relationships between private individuals) including contract law. The European Commission provided support to the project on the basis that it could benefit the internal market and provide a reference point for discussions on the possible harmonisation of (elements of) European private law. [11] [12] Such harmonisation has not, however, taken place. [13]

Although the focus of the SLC's project was a general one, there was an emphasis on topics reviewed in the SLC's reports from the 1990s, such as formation of contract, interpretation of contracts, remedies for breach of contract, and penalty clauses; as well as a number of other discrete issues.

As part of the project, the SLC published the following four Discussion Papers, the results of which (along with further work and consultation responses) fed into the SLC Report:

- A Discussion Paper on Interpretation of Contract (February 2011) ("The 2011 Discussion Paper")
- A Discussion Paper on Formation of Contract (March 2012) ("The 2012 Discussion Paper")
- A Discussion Paper on Penalty Clauses (November 2016) ("The 2016 Discussion Paper")
- A Discussion Paper on Remedies for Breach of Contract (July 2017) ("The 2017 Discussion Paper").

The SLC's general review of contract law also resulted in legislation in other areas, namely:

1. Reform of third-party rights in contract, following the SLC's Report on Third Party Rights which led to the Contract (Third Party Rights) (Scotland) Act 2017.
2. Reform of the rules on execution in counterpart, following the SLC's Report on Formation of Contract: Execution and Counterpart which led to the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.

In March 2018, the SLC published its Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses. The Report recommended a number of reforms to Scots contract law based on an analysis of responses to the SLC's Discussion Papers . It was also accompanied by a draft Bill on which the SLC consulted.

The SLC was assisted in its work by an advisory group for each Discussion Paper which was made up of legal academics and lawyers (advocates and solicitors). A judicial advisory group made up of Senators of the College of Justice (i.e. judges sitting in the Supreme Courts in Scotland) also provided assistance for each Discussion Paper. [14] There was also a business advisory group for the SLC's Discussion Paper on Interpretation of Contract. Members of each advisory group are listed at Appendix B to the

SLC Report.

Further information on the project and the SLC's work can be found on the SLC's webpage on the project and in Chapter 1 of the SLC Report.

What were the SLC's findings and recommendations?

An overview follows of the general aims behind the SLC's review and its findings and recommendations on contract law. Chapter 2 of the SLC Report also provides an overview of the SLC's key recommendations.

General aims behind the SLC's work

Health check of Scots contract law

The SLC states in its report that the general aim behind its work was to give Scots contract law "a health check", noting that:

> " 1.4 We have had various general policy considerations in mind while preparing this Report. The aim of the whole exercise was to conduct a health check for the Scots law of contract in the light of international comparators, in particular the DCFR."
>
> Scottish Law Commission, 2018[4]

It also stresses that, notwithstanding Brexit, the DCFR is still relevant along with other international comparators, as it "provides a yardstick against which to assess the existing Scots law of contract".

The following specific aims are noted as being part of this "health" check:

Clarity and certainty

The SLC Report stresses that it is important that "the law of contract is as clear and certain as possible" both for professional advisers and also for lay people, noting that:

> " 1.11 ... For such parties it is even more important that the law be clear so that, further, it is relatively readily understood. The rules should not be surprising or too far out of line with ordinary common sense, especially in business."
>
> Scottish Law Commission, 2018[4]

Updating the common law and making the law more accessible

The SLC Report also emphasises that, although the common law nature of Scots contract law gives it a "degree of flexibility and responsiveness to changing social conditions", since Scotland is a small legal jurisdiction there may not be enough case law "to enable the law to keep moving with the times."

The report also stresses that the common law character of the law can limit "the law's accessibility to those without legal training or knowledge of its sources" noting that:

> “ 1.13 ... Some rules also become so firmly fixed over time that, even when plainly inappropriate in contemporary conditions, they cannot be easily shifted by way of judicial decision alone (at least below the level of the UK Supreme Court). Further, the continuity inherent in the common law has also led to the ongoing use of technical words and phrases which may once have been meaningful to non-lawyers but are now instead sources of mystification to the population at large.”

Encouraging the use of Scots law in contracts

The SLC Report also indicates, referring to a report by the Business Experts and Law Forum from 2008 ("the BELF report") that many businesses opt to make English law rather than Scots law the law which applies to their contracts. [15] The SLC, alluding to the BELF report, indicates that certain terms in Scots contract law may “alienate those unfamiliar with Scots law” and could be a reason for businesses opting to use English law.

It should be noted, however, that terminology is only one reason (out of 11) which the BELF report refers to as being why businesses may choose English rather than Scots law in contracts. In addition, the BELF report refers to "the procedural terms used by the Scottish courts" as being the issue rather than contract law terms *per se*.

Gaps in the common law

Another aim behind the SLC's work is to identify gaps in the law or areas where there are a differences in views as to what the law is. The SLC states in its report:

> “ 1.15 There are also the problems of gaps (or incompleteness) in the common law and of differences of view as to what the law is. The first problem arises where there are no, or only very few, judicial decisions on a particular issue. The second may arise from the same difficulty; but it can also arise from a plethora of decisions which cannot readily be reconciled with each other. The result can be varying analyses of the law by both judges and writers, with no way for the user of the law to determine which view is to be preferred ...”
>
> Scottish Law Commission, 2018[4]

Need to avoid making Scots law too divergent in relation to English law

The SLC Report also argues at paragraph 1.18 that, while the "two systems are already quite close to each other", there are benefits to business in ensuring that there is a degree of alignment between Scots contract law and English contract law given the cross-border nature of business.

SLC's summary on aims behind the recommendations in its report

The SLC summarises the aims behind its recommendations as follows:

> " 1.16 Our aim in recommending reforms in this Report has been therefore to produce rules that are as clear and certain as they can be made in a form that is comparatively accessible to lawyer and layperson alike, that is, in statute. We have sought to remove rules that are no longer justified in contemporary conditions and to supply ones providing answers to questions thrown up by these same conditions. We have also looked to produce clear answers on matters where differences of view have persisted over time with no resolution in sight. Finally we have sought to fill gaps, or remedy incompleteness, where such difficulties seem to cause real problems for legal practitioners and others using the law."
>
> Scottish Law Commission, 2018[4]

Formation of contract

The SLC's main recommendations on formation of contract are as follows:

1. Introduction of a statutory statement of the law on formation of contract covering:
    a. The general principles on the formation of contracts
    b. Rules on offer and acceptance
    c. Rules on the effect that a change of circumstances may have on an offer in Scots law.
2. Abolition of the "postal acceptance rule".

The SLC has decided that it is not necessary for the legislation to include a specific provision on "the battle of the forms". The SLC Report does argue, though, that its proposals on formation of contract (section 2 of the Bill) may assist courts in determining cases on the "battle of the forms".

Statutory statement of the law on formation of contract

As indicated, many of the key rules governing contract law in Scotland are based on the common law rather than rules in legislation.

One of the questions raised by the SLC in its 2012 Discussion Paper was whether there would be an advantage in having a comprehensive statutory statement of the law on formation of contract. The reasoning was that this could make the law more accessible (both for legal professionals and lay people), as well as providing a framework for some of the other reforms the SLC was considering on the formation of contracts (in particular the abolition of the postal acceptance rule).

The SLC Report states that there is general support for this proposal, albeit with some

critical caveats. It notes that:

> “ 3.8 The responses that we received were broadly positive, with only one opponent (Morton Fraser LLP). Those in support agreed with our reasoning, although some suggested alternative approaches. Some consultees were concerned about how such a scheme might be seen in relation to the pre-existing common law on the subject, and also about how it might contribute to a potentially damaging perception that Scots law had diverged in some possibly non-obvious way from English law.”
>
> Scottish Law Commission, 2018[4]

The SLC therefore recommends that there should be a statutory statement of the law on formation of contract. It stresses though that the aim is to clarify specific legal issues rather than changing the law radically or creating a system with more divergence from English law than is currently the case.

The SLC Report also argues that a statutory statement of the law would lessen the risk of the proposed reform happening in a piecemeal fashion, noting that:

> “ 3.9 ... a statutory statement of the law would provide a useful opportunity to set in context our proposed substantive reforms, rather than adding piecemeal statutory provisions to the present patchwork of case law and commentaries.”
>
> Scottish Law Commission, 2018[4]

Battle of the forms

The "battle of the forms" is a term for the situation where both parties to a contract use their own standard terms and conditions in an attempt to conclude a contract. The key question (for example, when there is a dispute) is whose terms and conditions govern any agreement formed.

The SLC Report characterises the issue as follows:

> “ 4.23 ... This phenomenon arises where two parties appear to conclude a contract, but purport to do so respectively on their own standard terms and conditions. In that situation, the effect of testing for agreement solely by offer and acceptance is often the appearance that no contract has been formed, despite a real underlying agreement between the parties. The question is whether that underlying agreement should be given precedence over the apparent outcome of the offer-acceptance analysis.”
>
> Scottish Law Commission, 2018[4]

The SLC Report explains that the standard offer and acceptance analysis could lead to the conclusion that there is no contract, but that the courts have often held that a valid contract has been concluded if there has been performance and a "demonstrable mutual intent to contract, despite conflict over the standard terms and conditions." According to the SLC, the Scottish courts generally take a “last shot approach” where the battle of the forms is "won" by the party which sends out its terms last (on the basis that this forms a counter-offer which is then accepted by the other party's conduct).

The 2012 Discussion Paper outlined that the current law can lead to difficulties such as parties continuing to refer to their own terms with the aim of being the "firer of the last shot fired" (and hence being the winner of the "battle of the forms"). It therefore asked for views on whether Scots law should move to a regime specifically aimed at dealing with the battle of the forms, for example the one in the DCFR which is focused on assessing whether

there is sufficient agreement on the substance of the contract (plus on any standard terms).

Following its consultation, and after having considered recent case law, the SLC takes the view that the statutory statement of the law should not include a specific provision on the battle of the forms. The SLC Report concludes that:

> " 4.43 Given the lack of consensus among consultees on the need for direct reform targeting the battle of the forms, we do not recommend such reform at this time. It is apparent from the cases discussed above that the current law still generates uncertainty in this area. Consultees appear to have taken the view, however, that the proposed solutions would not produce significantly more certain outcomes. That is much the same position that was reached when this matter was last canvassed in 1993. If the question is ever referred to the Supreme Court, that may clarify the position and we think that greater certainty would be welcome."
>
> Scottish Law Commission , 1993[5]

The SLC Report does argue though that its proposals on formation of contract (section 2 of the Bill) may assist courts in determining cases on the "battle of the forms". The SLC Report states:

> " 4.44. ... But if section 2 of our draft Contract (Scotland) Bill were to be implemented in legislation, as recommended above, further assistance would be available to the courts. The draft section provides that a contract is concluded on the parties coming to an agreement which they intend to have legal effect, and 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. It will not be necessary for parties to have reached agreement on every point in negotiation between them so long as the court can discern from their respective statements and conduct sufficient agreement to be a contract."
>
> Scottish Law Commission, 2018[4]

Scope of the statutory statement of the law on formation of contract

The proposed scope of the statutory statement of the law on formation of contract is outlined at chapters 4, 5 and 6 of the SLC Report. Three areas are covered:

1. General principles, including the abolition of the postal acceptance rule (Chapter 4)
2. Offer and acceptance (Chapter 5)
3. Change of circumstances (Chapter 6).

The proposals are briefly summarised below.

General principles

The SLC Report explains that three general principles are key to the law on the formation of contracts in Scotland:

1. Contracts as agreements
2. Party autonomy
3. The need for communication between the parties.

Contracts as agreements

The SLC Report emphasises that the key concept behind contracts is that they are agreements which give rise to binding legal relationships.

It explains that, in many cases, whether there is an agreement can be determined by establishing whether an offer to do something has been accepted. This is the so-called "offer and acceptance rule."

However, it also stresses that offer and acceptance is only one way of showing that there is an agreement, and that other possibilities exist:

> “ 4.7 ... The most significant practical example of formation without offer and acceptance is the formal written document which the parties intend to be their contract only after they have each signed it. Contracts may also be created by parties' performances or conduct, or by complex oral negotiations resolved at some decisive meeting of the parties. Another example may be multi-party contracts to which the several parties agree at different times without necessarily going through a series of exchanges of offer and acceptance.”

The SLC also explains that an agreement isn't sufficient in itself for the formation of a binding contract. In addition, there also needs to be:

- **An intention to create legal relations** - This depends on the facts, although the SLC notes that "commercial arrangements will generally be seen as creating legally enforceable relations between parties, while social ones will not."
- **An agreement on the essentials of the contract -** The essentials will vary depending on the type of contract. The SLC states, however, that "the usual minima are the parties to the agreement, the subject-matter of the contract ... and the price if any." If the essentials are agreed on, there can potentially still be a binding agreement even if the parties continue to negotiate on other matters (this depends on the facts).[i]
- **Certainty on the terms -** If the wording is too vague, or the agreement is incomplete, or parts of the agreement are mutually contradictory there may be no contract (the SLC Report notes, however, that uncertain parts of the contract may be treated as severable, with what remains being enforceable).

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i Wight v Newton 1911 SC 762

The SLC Report emphasises that the above general principles are "of considerable practical importance" and recommends that the statutory statement of the law on formation of contract includes provisions reflecting them.

This would include a requirement that the agreement "can be given legal effect". The aim here is to ensure that contracts can only be formed where they meet relevant statutory or common law requirements for formation. The SLC notes that this would also allow "for the operation of the rules of validity (fraud, force, error, misrepresentation etc) and of illegality and public policy, which may prevent an agreement being binding or enforceable" (footnote 26 of the SLC Report).

The SLC Report also recommends that the Bill allows for the parties to specify in negotiations the matters which have to be agreed on before any contract is concluded. The report notes that there is currently no direct authority on this issue in Scots law.

Party autonomy

The SLC Report stresses that, although there are legal rules on the formation of a contract and what is enforceable, the general rule is that the parties themselves are free to decide on how the contract is to be formed and what the content of the contract is to be.

The SLC notes that this principle, referred to as "party autonomy" allows the parties to a contract to:

> “ 4.54 ... decide that no contract will be concluded between them until its terms are recorded in writing and signed by each person. It also allows an offeror to specify a particular form or method of acceptance (for example, excluding the present postal acceptance rule by providing that an acceptance must reach the offeror to form a contract). Finally, it enables a party to make agreement on some specific matter a requirement for the conclusion of a contract despite agreement having been reached on other issues, so that there is no contract unless agreement on that particular matter has been reached.”

The SLC Report therefore recommends that the statutory statement of the law on formation of contract should provide that parties are free to exclude or derogate from its provisions. In other words, contracting out should be permitted.

Need for communication between the parties

One of the issues in determining whether a contract has been formed by agreement is establishing whether a statement by one party (e.g. an offer, an acceptance, the withdrawal or revocation of any of these) has reached the other party.

Under Scots law, offers, acceptances and their withdrawal or revocation don't have legal effect unless they are communicated to the other party. The two exceptions are:

1. The postal acceptance rule (i.e. the rule that an unqualified acceptance takes effect when the acceptance is posted, rather than when it reaches the person who made the offer)

2. The acceptance of general offers (e.g. car park notices which often indicate that the act of parking means entering into a contract).

The SLC Report explains in some detail, giving examples from case law, that Scots law takes an objective approach to whether communication has been made. In other words, the question is what a reasonable person would think the parties had intended based on the facts rather than the parties' subjective view. The SLC Report states that:

> " 4.59 ... this may make effective a communication about the existence and content of which the recipient is subjectively unaware."
>
> Scottish Law Commission, 2018[4]

The SLC Report notes that the approach taken by Scots law is consistent with the comparator instruments it reviewed (e.g. the DCFR) and that the 2012 Discussion Paper didn't propose any changes to this general rule.

The 2012 Discussion Paper did, however, ask for views on whether there might be merit in introducing special rules like those in the comparator instruments where delivery to the addressee or their place of business or habitual residence is held to constitute communication.

According to the SLC, there was, however, little support for this level of specificity from consultees. The SLC Report therefore concludes that:

> " 4.68 We accept the need for flexibility in this area, and have come to the conclusion that the best way to achieve this is by way of a rule stated at a high level of generality. We do not find presumptions or residual judicial discretions particularly attractive alternatives."
>
> Scottish Law Commission, 2018[4]

The SLC therefore recommends that the statutory statement of the law should provide that a notification reaches its addressee when it is:

> "made available to the addressee in such circumstances as to make it reasonable to expect the person to be able to access it without undue delay."

This general rule would apply to any notification made by a party including offers, withdrawals or revocations of offer, rejections of offers, acceptances, or withdrawals of acceptance. However, the SLC also recommends that the statutory statement of the law should set out illustrative examples of when a notification reaches a person in certain common situations.

Electronic communications

The SLC Report also discusses how the statutory statement of the law should deal with electronic communications in relation to the formation of a contract (e.g. email).

It takes the view that special rules are not needed but that more clarity is needed on what "made available to the addressee" means in the context of electronic communications.

The SLC Report discusses the advantages and disadvantages of various options in comparator instruments and academic literature, as well as comments by those who

responded to the 2012 Discussion Paper.

The SLC takes the view that it is better not to have default rules such as requiring parties to confirm receipt of emails before a communication is held to have been made. It thinks that this would create an additional burden for contracting parties as well as the risk of the legislation failing to keep up with technological developments. It also emphasises that the principle of party autonomy means that parties can always choose to apply such rules to their contracts should they so wish.

The SLC's view is that the best approach is a rule similar to the one in the DCFR where an electronically transmitted notice is held to have reached its addressee when it becomes accessible to that party. The SLC explains that a notification is generally taken to be accessible when the message enters the addressee's communications system in such a way that it is available when the addressee next makes use of the system. According to the SLC, using accessibility to the addressee as the legal test avoids some of the technical difficulties that can arise in electronic communications (such as delays and failures in the transmission of emails between servers).

The SLC concludes that:

> " 4.81 We think, however, that the accessibility rule, read in the light of the general provision already recommended (that a notification only reaches its addressee when it is made available to that person in circumstances making it reasonable to expect the person to be able to access it without undue delay) is a workable one which enables fair apportionment of the risks of mis- or non-communication between the parties involved. [4] "

The SLC therefore recommends that the statutory statement of the law includes a provision that a party is to be taken as being aware of an electronic communication addressed to it when the communication becomes accessible to the addressee.

Abolition of the postal acceptance rule

The postal acceptance rule acts as an exception to the general principle in Scots contract law that notifications need to reach the other party for communication to be established.

Under the postal acceptance rule, which is derived from 19th century English case law, an unqualified acceptance takes effect in Scotland when the acceptance is posted by the offeree (person accepting an offer), rather than when it reaches the offeror (person making an offer).

The 2012 Discussion Paper

The 2012 Discussion Paper discusses in detail the origins of the postal acceptance rule, the reasons for its existence and its consequences. It explains that the rationale is as follows:

> “ 4.9 The rationale for the rule is essentially that the offeror, having initiated the transaction and in doing so having use of the postal service in its contemplation, should bear the risks inherent in the period of time between the posting of the acceptance and its arrival with the offeror, while the offeree may rely on having a contract after doing all in its power to conclude one. The offeree may also benefit from a presumption that a letter which has been posted has also been received.”
>
> Scottish Law Commission , 2012[16]

It also explains that the rule is now much less relevant as there are a wide range of alternative, quicker means of communication available (e.g. email) noting that:

> “ 4.12 ... the idea that one or other of distant negotiating parties needs protection from the risks inherent in the gap of time between the sending and receiving of a letter from a special rule of law is less persuasive than may have seemed to be the case in the mid-nineteenth century and before.”
>
> Scottish Law Commission , 2012[16]

It also indicates that the rule does not reflect business practice and that there is "common use in offers of clauses requiring an acceptance to reach the offeror to be effective". In other words, business tends to contract out of the postal acceptance rule.

Given these issues, the 2012 Discussion Paper recommended abolishing the postal acceptance rule.

It did, however, state that one important element of the postal acceptance rule is "the protection of the offeree who has sent an acceptance unaware that a revocation of the offer is on its way from the offeror at the same time." The SLC therefore thought that there should be a rule, in line with international comparators (see para. 3.20 of the the 2012 Discussion Paper) that

> “ 4.14 ... an offer may not be revoked once the offeree has sent an acceptance, on the basis that a party which has done all it can to effect an acceptance should thereafter be free from concern about subsequently arriving revocations.”
>
> Scottish Law Commission , 2012[16]

SLC Report

The SLC Report agrees with the proposal to abolish the postal acceptance rule noting that:

> “ 4.88 There was unanimity amongst consultees that there was no need to retain the postal acceptance exception in modern conditions.”
>
> Scottish Law Commission , 2012[16]

However, it takes a different view on the 2012 Discussion Paper's proposal that there should be a rule that prevents revocation of an offer being effective if the offeree had dispatched an acceptance before the revocation was communicated to it. The SLC Report notes that:

> “ 4.19 ... The response of consultees to this question was more mixed perhaps because the proposal could be seen as qualifying quite significantly the effect of abolishing the postal acceptance rule.”

It also notes that the speed with which written and oral communications can now be made lessens the need for a rule. Consequently, although the SLC states that "the debate is finely balanced" it concludes that such a rule does not need to be introduced.

Previous SLC work on the issue

It is worth noting that the SLC was of the view that the postal acceptance rule needed amending more than half a century ago in the 1970s.

In that regard, the 1993 Report states, referring to paragraphs 47-50 of the SLC's consultative memorandum on the Formation of Contract from 1977 ("Memorandum 36"):

> “ 4.7 When this question was considered by the Commission in the 1970s, when none of the existing members was a member, the unanimous view of the commissioners was that the postal rule should be changed. We ourselves are of the same view.”

The 1993 Report narrates certain reasons for delays in dealing with the issue (e.g. a desire to interest the Law Commission for England and Wales in a joint project on the postal acceptance rule). However, given that there seems to have been a general view in Scotland since the 1970s that the postal acceptance rule should be abolished one question is why a change in the law was not prioritised until now.

General offers

The SLC Report explains that international comparators include rules which allow contracts to be formed where the offeree performs certain acts even though these are not notified or known to the offeror. This acts as an exception to the general rule that an acceptance must reach the offeror for a contract to be formed.

The circumstances in question are as follows:

- the offer itself so provides, expressly or impliedly (most typically in a general offer)
- the parties have established a practice to that effect between themselves
- there is a usage to that effect, for example, in a particular trade.

The SLC Report explains that a similar exception for general offers exists in Scots and English law. An example given is car park notices which often indicate that the act of parking means entering into a contract with the owners of the car park.

Although there were dissenting voices (notably from the Law Society and the Faculty of Advocates), the SLC notes that consultees "broadly responded positively" to its proposal to include this specific exception in the statutory statement of the law on formation of contract.

The SLC therefore recommends that the statutory statement of the law on formation of contract includes the provisions in the international comparators mentioned above and that a contract is concluded when the offeree begins to perform the required act.

Offer and acceptance

As noted, one of the main methods of establishing that a binding agreement exists (and that a contract has been formed) is to determine whether an offer has been made which has been accepted.

The 2012 Discussion Paper took the view that some of the common law rules on offer and acceptance were not as clear or as certain as they could be. It therefore recommended that the statutory statement of the law of formation of contract should clarify the rules.

The SLC Report follows this approach and recommends that the statutory statement of the law includes rules on the following issues:

Definition of offers

The 2012 Discussion Paper proposed that an offer should be defined as a proposal made to one or more specific persons containing sufficiently definite terms to form a contract and indicating the intention of the offeror to be bound if the offer is accepted by the other party or parties.

It also suggested that a proposal made to the general public should not be treated as an offer unless it otherwise meets the general criteria for an offer.

Following feedback from the SLC's consultation, the SLC Report largely follows these proposals whilst recommending that the wording on offers to the general public be included in the core definition of offers rather than in negative terms.

The SLC Report also recommends, as did the 2012 Discussion Paper, that the rules on offers to the general public should not affect the possible application of the law on unilateral promises. This is to cover situations where a unilateral promise (e.g. to pay a reward for the performing of a specified act) might be binding on the party making it even though there is no agreement and hence no contract.

In Scotland and the rest of the UK, unlike the situation under the DCFR, advertisements of goods/services for sale at a stated price are treated as "invitations to treat" and not offers. The customer responding to the statement therefore makes the offer and the business can accept or decline it (e.g. if they do not have stock or capacity). Following its consultation, the SLC takes the view that there is no reason to change the existing law on the basis that any benefits for consumers which might follow from the DCFR approach wouldn't be outweighed by downsides for business (particularly for small businesses who may not have access to legal advice).

Withdrawal and revocation of offers

The SLC Report also recommends that the statutory statement of the law on formation of contract should include provisions clarifying the rules on when offers can be withdrawn (i.e. where the offer has not reached the offeree) or revoked (i.e. in certain situations

where has reached the offeree and has taken effect).

Rejection of offers

If an offer is rejected, there is no agreement and hence no contract. The SLC Report recommends that the statutory statement of the law explicitly includes this rule noting that:

> " 5.32 The comparator instruments and present Scots law all hold that an offer falls when it is rejected by the offeree, even if it is irrevocable or time-limited. In the 2012 DP we took the view that this rule should be included in any statutory statement of the law on formation of contract, and consultees agreed."
>
> Scottish Law Commission, 2018[4]

Definition of acceptance

As the SLC's approach involves a general definition of "offer", a definition of "acceptance" is also needed. The SLC Report states that:

> " 5.39 The comparator instruments define acceptance as a statement or conduct by an offeree indicating assent to the offer. This is consistent with present Scots law. In the 2012 DP, we proposed that any form of statement or conduct by the offeree should be an acceptance if it indicates assent to the offer. 5.40 Consultees were generally supportive of that proposal ..."
>
> Scottish Law Commission, 2018[4]

The SLC therefore recommends that the statutory statement of the law should provide that:

1. Any form of statement or conduct by the offeree is an acceptance if it indicates unqualified assent to the offer.

2. Acceptance by conduct is effective when the offeror becomes, or ought to have become, aware of the conduct in question.

Although there can be cases where silence may constitute acceptance, this is not normally the case. The SLC therefore recommends that the statutory statement of the law should provide that silence or inactivity by the offeree does not, of itself, constitute acceptance.

Time limits for acceptance

By definition there need to be rules on what time limits there are for accepting offers. The SLC Report notes that:

> " 5.47 The comparator instruments all have rules requiring acceptances to reach the offeror within any time limit stated in the offer or, if there is no express time limit, within a reasonable time. The current postal acceptance rule apart, the general rule in Scots law is to the same effect."
>
> Scottish Law Commission, 2018[4]

The SLC Report recommends a general rule in the statutory statement of the law which reflects this. It also recommends specific provisions to deal with computing time limits for acceptance and for dealing with situations where there is a course of conduct or agreement between the parties that contracts can be concluded by an unnotifed acceptance.

The SLC Report notes that the comparator instruments contain two further default rules under which late acceptances may be effective, but stresses that consultees were generally not in favour of the inclusion of these rules. The SLC Report therefore concludes that "the statutory statement of the law on formation of contract should not make special provision for late acceptances" (para.5.65).

Qualified acceptances are counter offers

In line with the current common law rules, the SLC Report recommends that a qualified acceptance should be treated as a counter offer.

The 2012 Discussion Paper raised the question whether Scots law should align with rules in the comparator instruments where a qualified acceptance is only treated as a counter offer if it contains terms materially different from those in the offer. The SLC Report notes that most consultees did not favour this approach on the basis that it would introduce too much uncertainty into the law (in particular in relation to what "materially different" might mean). The SLC therefore does not recommend changing the law in this way.

Withdrawal of acceptances

In the 2012 Discussion Paper the SLC proposed that, if the postal acceptance rule was to be abolished, a rule would be needed, in line with the comparator instruments, allowing an acceptance to be withdrawn if it reaches the offeror before or at the same time as the acceptance would have become effective (para. 4.37). The reason for that is that without the postal acceptance rule there will be a period of time where the offeree will be able to change their mind on acceptance and will be able to use a speedier mode of communication to inform the offeror of this.

As the aim is to abolish the postal acceptance rule, the SLC recommends the introduction of this proposal noting that consultees unanimously supported it (para. 5.76 of the SLC Report).

Change of circumstances

The 2012 Discussion Paper proposed that the statutory statement of the law on formation of contract should include provisions which reflect the common law rule that an offer may lapse if there is a material change of circumstances.

The SLC Report follows this approach whilst recommending that the test should be whether there has been a “fundamental change of circumstances”. It also proposes that the statutory statement should include a rule clarifying that an offer ceases to be capable of acceptance as a result of the death or loss of capacity of either party before the conclusion of the contract.

The SLC does not think it necessary for there to be a specific rule to deal with what happens to unaccepted offers by corporate bodies when there is a corporate reorganisation (e.g. in the situation where the corporate body which made the offer no longer exists). According to the SLC, these types of situations would be covered by the general rule covering fundamental changes of circumstance.

The SLC indicates following consultation that, under the current law, an offer does not lapse merely because one of the parties becomes insolvent before the contract is

concluded. It notes that:

> " 6.26 ... As the 1993 Report pointed out, persons may contract until the date of sequestration, and the trustee has powers to adopt or disclaim contracts previously entered into. It also observed that businesses may continue to trade after insolvency, and may even manage to trade their way out of insolvency, in which case it would be dangerous were offers to lapse on apparent insolvency."
>
> Scottish Law Commission, 2018[4]

The SLC Report therefore recommends that the statutory statement includes a provision indicating that, in general, the insolvency of an offeror or an offeree prior to the acceptance of an offer is not in itself a fundamental change of circumstances causing the offer to lapse. The report also recommends, however, that it should also be made clear that this rule does not affect the application of any other enactment or rule of law to the transaction proposed in the offer.

Interpretation of contract

All systems of contract law have rules on interpreting the meaning of provisions in a contract. The rules are particularly important in contractual disputes as these can often turn on what the terms in a particular contract mean.

In its Discussion Paper on Interpretation of Contract from 2011, which drew on earlier work from 1997, the SLC highlighted that there was uncertainty in the Scots law rules on interpreting contracts. This was due, in part, to the developments stemming from the decision of Lord Hoffman in the English ICS case at the House of Lords [ii] which allowed courts a wider use of "context" to interpret legal documents.

According to the Discussion Paper:

> " 4.3 Under the law in England before the ICS case, where a contract was reduced to writing a court was not supposed to go outside the document for any further terms or material that would contradict what had been written (the parole evidence rule). Reference to external material was allowed only where the document was ambiguous or unclear. But Lord Hoffmann argued that the process of interpretation must involve examining the context in which words are used: "the background of facts ... plays an indispensable part in the way"
>
> Scottish Law Commission, 2011[17]

The Discussion Paper explained further that, although "the Scottish courts have now developed the law on the interpretation of contracts to a position of reasonable clarity on a number of points" (para. 5.28) there were still numerous areas of uncertainty following the ICS case. These included how to deal with context and surrounding circumstances when interpreting contracts as well as how to deal with evidence on pre-contractual negotiations and subsequent conduct (para. 5.29).

The Discussion Paper therefore proposed reforming the law by means of a a legislative statement which would provide general rules on the interpretation of contracts (Chapter 7).

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ii Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28

However, having analysed responses to the Discussion Paper and more recent case law, the SLC Report concludes that legislation on this issue would now no longer be appropriate. It notes in particular that:

> " 7.4 The law has moved on again since 2011, both in Scotland and England, and appears to have become more settled (along the same lines) in each jurisdiction ... 7.5 In the light of these more recent developments, we have determined that now is not an appropriate time to recommend legislative reform of the law of contractual interpretation. This is not to say that we feel complete satisfaction with, or clarity in, the equilibrium that appears to have been achieved; but we would need more reason than that to disturb the equilibrium when our consultation also showed no strong consensus around any alternative model."
>
> Scottish Law Commission, 2018[4]

The Bill does not therefore propose any rules on the interpretation of contracts.

Remedies for breach of contract

There are default rules in Scots contract law on what action the parties can take if there has been a breach of contract. These are known as remedies for breach of contract and include both judicial remedies (i.e. court actions) and "defensive" or "self-help" remedies (i.e. remedies exercised by parties themselves which do not require court proceedings to be raised).

2017 Discussion Paper on Remedies for Breach of Contract

The 2017 Discussion Paper examined the Scots law on remedies for breach of contract in detail and compared it with the rules in the DCFR.

This included analysing the following self-help remedies:

- **Retention** - withholding the performance of obligations under the contract pending performance by the other party of its obligations.
- **The rules on anticipatory breach** - these allow a party to exercise remedies for breach of contract in anticipation of a breach by the other party, e.g. where the other party "repudiates" the contract by indicating that it will not perform the contractual obligations.
- **Rescission** - termination of the contract when there has been a fundamental breach of contract (i.e. a "material" breach which goes to the root of the contract).
- **Price reduction and the right of the parties to "cure" (i.e. remedy) non-performance of the contractual obligations.** These are not general options under Scots contract law although they are under the rules in the DCFR.

In addition, the 2017 Discussion Paper also analysed the following judicial remedies:

- **Specific implement** - a court order compelling performance of the contractual obligations.

- **Damages -** court actions aimed at compensation for loss due to breach of contract.
- **Gain-based damages -** court awards focussed on the gain made by the party which has breached the contract (these are currently not possible under Scots contract law as it works on the basis that damages for breach of contract are purely compensatory).

It also considered:

- **Transferred loss claims -** this refers to the situation where a breach of contract occurs and loss results, but that loss is sustained by a person who is not party to the contract.
- **Contributory negligence -** this refers to situations where the person bringing the action (the pursuer) has contributed in some way to the loss caused.

The approach taken by the 2017 Discussion Paper was:

1. to raise potential options for reform for each of these specific areas of law; and
2. to propose that the existing law and any reforms could potentially be included in a comprehensive statutory statement of the law on remedies for breach of contract.

What reforms did the SLC recommend in relation to remedies?

The SLC Report makes certain recommendations for reform in this area. However, as outlined below, these are more limited than the proposals raised as options for reform in the 2017 Discussion Paper. In particular, the SLC Report does not recommend a statutory statement of the law on remedies for breach of contract.

No statutory statement of the law on remedies for breach of contract

In the first place, the SLC Report does not recommend a statutory statement of the law on remedies for breach of contract.

The SLC Report states that, although there was some significant support for the idea of a statutory statement of the law on remedies for breach of contract:

> " 9.10 ... it met with much more substantial opposition than the proposal for a restatement on formation: in particular, from the Faculty of Advocates, the Society of Solicitor Advocates, the Law Society of Scotland, and a number of commercial law firms. We accept that this level of opposition means that the time is not ripe for such a major innovation in the form of the law of remedies."
>
> Scottish Law Commission, 2018[4]

The SLC Report also notes that some of the remedies discussed (notably, specific implement) are not limited to breach of contract cases, and that a statutory restatement confined to breach of contract might inadvertently create anomalies within the overall legal system. An additional issue is lack of time and resources to carry out the work. The SLC Report states that:

> “ 9.11 ... whereas we have been able to develop the formation proposal over quite a long period of time (and with the considerable benefit of consultation on an initial draft Bill), the resources needed to produce an equivalent on remedies for breach (above all, time) are simply not available given other priorities within our Tenth Programme of Law Reform.”
>
> Scottish Law Commission, 2018[4]

Limited reforms to existing rules on remedies for breach of contract

The recommendations for reform of the rules on remedies (Chapter 10 of the SLC Report) are also more limited in scope than those raised as potential options in the 2017 Discussion Paper.

The recommendations relate to three main areas:

Mutuality of contract: effect on party in breach

Mutuality of contract is a Scots law concept which is based on the principle that contractual rights and obligations are reciprocal and that the enforceability of one party’s rights may be conditional on them also performing their contractual duties. According to the 2017 Discussion Paper (paragraph 2.8), this has two major consequences:

> “
>
> - if one party does not perform, the other need not perform, i.e. it can withhold performance;”
>
> - a party which has not performed or is not willing to perform its obligations cannot compel the other to perform.”
>
> Scottish Law Commission, 2017[18]

One difficulty relates to the rule that a party which has not performed or is not willing to perform its obligations cannot compel the other to perform. According to the 2017 Discussion Paper, some judicial formulations of this rule could be read as meaning that a party in breach may not exercise any rights under the contract or sue for damages for its breach by the other party. The 2017 Discussion Paper stated however, that this "was neither what mutuality entailed, nor what it should" noting that its meaning "was that a party against whom the remedies of retention or rescission had been properly exercised could not sue for implement of the contract or for damages for its breach" (para. 2.17). As a result:

> “ 2.18 ... a contract-breaker can recover payments to which it had become entitled before the breach for which the contract was terminated. There seems no reason to doubt that the same party can claim damages for breaches against it prior to the termination as well.”
>
> Scottish Law Commission, 2018[4]

The SLC follows this approach. It recommends that the law includes a provision that a party in breach of contract:

> “ 10.11 ... may nonetheless exercise any right, or pursue any remedy arising out of the other party’s breach provided that the latter breach occurred before the second party rescinded the contract for the first breach.”
>
> Scottish Law Commission, 2018[4]

Restitution after termination

One of the questions which can arise after a contract is terminated is whether the parties have to give back any benefits received under the contract (this is known as "restitution"). The 2017 Discussion Paper gives as an example the sale of a faulty vehicle where "the buyer is entitled to terminate and reclaim the price, but must also return the vehicle to the seller."

The 2017 Discussion Paper noted at paragraph 4.32 that, while there is case law that a party to a contract who has made payment in anticipation of a performance which never occurs has a remedy of restitution,[iii] there is an absence of consensus amongst commentators as to the legal basis for this remedy. The 2017 Discussion Paper therefore asked whether the law should be reformed (potentially in line with the rules in the DCFR) to provide clarity on this point or whether it should be left to develop through further case law.

The SLC Report notes that there was majority support amongst consultees for a solution broadly in line with the rules in the DCFR. The SLC Report therefore states that:

> “ 10.22 We have come to the conclusion that the detailed provision in the DCFR should be substantially replicated in our draft Bill, albeit re-phrased for greater clarity in the context of Scots law. A new remedy is being provided, and the legislation should make clear its nature and scope. We have however taken on board the comments from the Faculty of Advocates and the Law Society of Scotland that the DCFR rules could be improved upon and we have therefore deviated from the DCFR approach in our draft Bill where we thought it appropriate.”
>
> Scottish Law Commission, 2018[4]

Contributory negligence

Contributory negligence refers to situations where the person bringing a damages action has contributed in some way to the loss caused. The general rule in the Law Reform (Contributory Negligence) Act 1945 ("the 1945 Act") is that the damages recoverable shall be "reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage."

The 2017 Discussion Paper notes that contributory negligence has "long been available as a defence in delictual claims[iv], but that its availability as a defence to claims based on breach of contract has been an open question for some time" (para 10.1). This is because "fault" in the 1945 Act has been interpreted by the courts as only covering claims for breach of contract where it is concurrent with a delictual obligation, or where there is an obligation that would give rise to a breach of statutory duty (for details, see paragraphs 10.33-10.36 of the SLC Report). Damages actions which are solely contractual in nature are therefore not covered by the current rules on contributory negligence.

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iii Stork Technical Services (RBG) Ltd v Ross’s Executor [2015] CSOH 10A

iv I.e. actions for damages based on breach of a duty of care or some other wrongful act

The preferred option proposed by the 2017 Discussion Paper was to amend the law so that contributory negligence could be used as a defence to all claims of damages for breach of contract.

The SLC Report follows the approach proposed in the 2017 Discussion Paper noting that there was "support from a majority of consultees". It therefore recommends that the 1945 Act be amended so that the fault of either party includes a reference to a breach of contract by either party, but with a right to contract out of this provision.

Areas where no legislative reform proposed

The SLC has decided not to recommend legislation in a wide range of areas where options for reform were proposed in the 2017 Discussion Paper.

The reasons for this decision relate both to the SLC's decision not to recommend a general restatement of the law of remedies for breach of contract, but also reflect input which the SLC has received from stakeholders during the consultation process on specific issues.

In certain cases consultees have taken the view that the law is working well, or that the law is capable of being developed by the courts so as to deal with the issues raised by the SLC. In other cases, responses which the SLC has received have given a mixed view of the need for reform. In the case of transferred loss claims, a narrow majority of consultees agreed with the SLC that there was a need for reform. However, the SLC has taken the view that further investigation of the issue would be needed and that it has insufficient time and resources to carry this out at present.

Full details of the SLC's reasoning can be found in Chapters 11 to 18 of the SLC Report which deal with the law on:

- Retention and withholding performance (Chapter 11)
- Anticipatory breach (Chapter 12)
- Termination (Chapter 13)
- Other self-help remedies (Chapter 14)
- Enforcing performance (Chapter 15)
- Damages (Chapter 16)
- Gain-based damages (Chapter 17)
- Transferred loss claims (Chapter 18).

As outlined elsewhere in this briefing the Scottish Government now intends to introduce provisions on the law of retention by way of amendments to the Bill. This follows further consultation on the SLC's proposals, and on the law of retention.

Penalty clauses

The law on damages for breach of contract is default in nature rather than being prescriptive or mandatory. As a result, contracts can include their own rules on the damages which will apply if there is a breach. The law doesn't, however, give the parties to a contract complete freedom to do this. Instead, where a contractual arrangement on damages is found to be a "penalty clause" it will be unenforceable.

As explained in detail in Chapter 2 of the 2016 Discussion Paper, up until recently the way the law broadly worked was that:

- contractual clauses which attempted to provide for the recovery of a genuine pre-estimate of loss, known as "liquidated damages", were enforceable.
- clauses which provided for a payment to be made instead of damages, but which did not base this on any attempt to pre-estimate loss, were regarded as penalty clauses, and were unenforceable.

The SLC considered these rules in its 1999 Report on penalty clauses which made various recommendations for change and included a draft Bill (see paras 2.7-2.19 of the 2016 Discussion Paper for a summary). Recommendations included replacing the "genuine pre-estimate of loss" test with one where penalty clauses would be unenforceable if they are "manifestly excessive" (the aim being to make the test more straightforward to apply and to cover situations where it is impossible to estimate damages in advance). In addition, a recommendation was made to give courts the power to modify a penalty clause to make it enforceable rather than just taking a binary "yes/no" view on its enforceability.

The SLC's recommendations were not implemented following the publication of the 1999 Report. Some 20 years later, in 2010, the Scottish Government did, however, consult on whether the recommendations should be brought into effect. [19] Consultees' responses were, however, divided in comparison with the 1990s and the Scottish Government's conclusion was that it would be best if the SLC were to re-consider penalty clauses as part of its wider review of contract law. [20]

The SLC carried out this review which resulted in the 2016 Discussion Paper. However, by that point the law on penalty clauses had changed due to UK Supreme Court judgments in November 2015 in the cases of Cavendish Square Holdings BV v Makdessi and ParkingEye Ltd v Beavis.[v]

The SLC Report summarises the core concept behind these judgments as follows:

> " 19.9 ... While as a matter of public policy the law sets its face against the imposition of a punishment of one contracting party (the debtor) by another (the creditor) by way of a penalty clause, it is no longer a general pre-condition of a clause's enforceability that it be a pre-estimate of the financial loss which the creditor will suffer as a result of the conduct for which the penalty is incurred. While a clause of that character remains generally enforceable, the substantive question is whether the clause offers protection for a legitimate interest of the creditor that is not extravagant, exorbitant or unconscionable."

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v [2015] UKSC 67

It also explains that that the new legal test is wider than the previous one as actual performance of the contract is held to be a legitimate interest, which means that clauses aimed at matters such as incentivising one party to perform, or achieving profit margins may be enforceable depending on the circumstances. A clause is, however, either enforceable or it is not, as the Supreme Court rejected the argument that courts should have the power to modify a penalty clause.

As a result of this change in the law, the 2016 Discussion Paper proposed three potential options:

1. to leave the law to develop in the light of the Cavendish/ParkingEye judgment;
2. to abolish the present common law on penalty clauses altogether; or
3. to abolish the present common law against penalties and replace it with a new regime.

It also noted that that the SLC's final view would be strongly guided by consultees' responses (para 1.12).

Based on the responses to the 2016 Discussion Paper, the SLC has taken the view that the best approach to penalty clauses would be to allow the law to develop in the light of the Cavendish/ParkingEye judgment.

The SLC Report states that "a clear majority of consultees favoured the first option" and that there was strong support from commercial law firms and the professional bodies for this option. An additional argument in favour of the first option is that it leaves Scots law substantially in line with its English counterpart.

The SLC Report also stresses that outright or partial abolition of the penalties rule was opposed by all consultees largely on the basis that the rule protects weaker parties such as employees and small and medium-sized enterprises when they contract with stronger parties.

The SLC Report states that the primary reasons for not recommending legislative reform are:

- the lack of evidence that the Cavendish/ParkingEye judgment is creating major difficulties in legal practice.
- the fact that the new penalty clause rule is still capable of being used to strike down clauses which are excessively penal.
- the fact that the Supreme Court has pointed the law in what seems to the SLC to be the right general direction, while still leaving it open for further refinement in the future.

The Bill does not therefore include provisions on penalty clauses.

What does the Bill do?

The Bill implements the SLC's recommendations in relation to :

- a statutory statement on the law on formation of contract.
- remedies for breach of contract.

It also follows a Scottish Government consultation from July 2024 seeking general views on the SLC Report , and in particular whether the consultation views received by the SLC in 2018 were still broadly held. [21]

In relation to the Scottish Government's 2024 consultation, the Policy Memorandum states that with the exception of the law on retention, which respondents felt was less clear now than when the SLC made its recommendations:

> " 10. ... the majority of respondents expressed continued support for the SLC's recommendations and were not aware of material developments in the law or practice that required those recommendations to be revisited."
>
> Scottish Parliament, 2025[22]

The Bill's Policy Memorandum further explains that the overall policy aim is to reform the law to produce rules that are as clear, certain and accessible as possible. It states in more detail that:

> " 6 ... Contract law impacts on day to day economic life in relation to all types of transactions and for businesses and individuals alike. Many contracts are made, carried through, and become the subject of disputes between parties who have no professional assistance. The Scots law of contract has largely developed as a matter of common law which limits the law's accessibility to those without legal training. It is therefore important, economically and socially, that the contract law regime in Scotland is fit for the 21st century. The Bill restates and reforms aspects of the law of formation of contract and aspects of the law of remedies for breach of contract. The overall policy aim is to produce rules that are as clear, certain and accessible as possible."
>
> Scottish Parliament, 2025[22]

An overview follows which summarises the various sections of the Bill. This is followed by a brief summary of the Scottish Government's proposals on the law of retention which the Scottish Government is proposing to introduce by way of amendments to the Bill.

Part 1 - Formation of contract

Part 1 of the Bill is the statutory statement of the law on formation of contract.

Section 1 - Party autonomy

Section 1 of the Bill implements the SLC's recommendations in relation to party autonomy. It provides that parties are free to exclude or derogate from the provisions on formation of contract in sections 2-13 of the Bill. In other words, they can contract out of any or all of these provisions. Section 1(2)(a) provides that any such alternative arrangement may be

express or implied.

The Policy Memorandum explains that examples of contracting out in relation to the formation of a contract include:

> " 11. ... parties agreeing that no contract will be concluded between them until its terms are recorded in writing and signed by each person; an offeror specifying that a particular form or method of acceptance is required; or, a party making agreement on some specific matter a requirement for the conclusion of a contract despite agreement having been reached on other issues."
>
> Scottish Parliament, 2025[22]

Section 2 - Formation of contract

Section 2 of the Bill provides the general principle that contracts are agreements having sufficient content between two or more parties which are intended to have legal effect. This general principle underpins the statutory statement on the law on formation of contract.

The core part of the general principle is in section 2(1) of the Bill which states:

> " A contract is concluded 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."

Section 2(2) provides that, if the parties agree on sufficient matter for the law to recognise their agreement as a contract under section 2(1), then there can be a contract even though they are continuing to negotiate on other matters relevant to the transaction.

Section 2(3) operates as an exception to section 2(2) as it allows the parties to specify in advance the matter or matters on which there needs to be agreement before any contract is concluded. If the parties do this and there is no agreement on these matters, then there will be no contract.

Section 2(4) provides that the existence of agreement between parties is to be determined from their statements and conduct, including but not limited to offers and acceptances. The Explanatory Notes explain the scope of this provision as follows:

> " 17. ... Thus, for example, agreement may be expressed in a single document subscribed to by all parties or implied from parties' actings only, or from a combination of their conduct with statements not amounting to offer and acceptance."
>
> Scottish Parliament, 2025[23]

Section 3 - Conclusion of contract by unnotified acts

Section 3 implements the SLC's recommendation that there should be a provision allowing a contract to be formed where the offeree performs certain acts even though these are not notified or known to the offeror (i.e. general offers). This acts as an exception to the general rule in section 13 that an acceptance must reach the offeror for a contract to be formed.

Under section 3(1), a contract to be formed on these grounds where:

- an offer provides for this expressly or impliedly;
- the parties to the prospective contract have established a practice between or among themselves to that effect; or
- there is a usage common to those parties to that effect.

Section 3(2) states that the contract is concluded on the offeree beginning to perform the acts in question.

Under section 3(3), sub-sections (1) and (2) are subject to section 11(1)(b), which provides that the performance must begin within any time limit for acceptance stated in the offer.

Section 4 - What constitutes an offer

Section 4 implements the SLC's recommendations on the definition of an offer.

Section 4(1) specifies that two elements are necessary for a proposal to constitute an offer:

1. the offeree must have reasonable grounds to suppose that the proposer intends the proposal to result in a contract if accepted, and
2. 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.

Under section 4(2), an offer may be addressed to a specific person or persons, persons in general, the public at large or persons of a particular description.

Under section 4(3), these rules are without prejudice to the possible application of the law on unilateral promises. This is aimed at clarifying that a proposal made to the general public (for example, to pay a reward for performing a specified act) may alternatively be analysed as a unilateral promise to pay to the person who satisfied the stipulated conditions and may still be binding on the party making it even though there is no agreement and hence no contract (see para. 24 of the Explanatory Notes)

Section 5 - Revocation of offers

Section 5 lays down rules on when offers can be revoked and "relates to the scenario where an offer has reached the offeree but has not yet been effectively accepted by the offeree" (Explanatory Notes, para. 26).

The key rule is that an offer may be revoked if this reaches the offeree before an acceptance is completed, i.e. before the acceptance reaches the offeror (section 5(1)(a)).

If, however, an agreement has been reached through the statements or conduct of the offeree, then the revocation has to take place before the agreement in question has been reached (section 5(1)(b)).

Where there is a general offer (i.e. under section 3) revocation is only effective if it reaches the offeree before the latter begins the performance which concludes the contract (section 5(1)(c)). In such a case, revocation needs to be effected by the same means used to make the offer, or as specified in the offer (section 5(3))

Under section 5(4) an offer can be made irrevocable in the offer itself or if the offeror

otherwise declares that the offer is irrevocable and this declaration reaches the offeree.

Section 6 - Lapsing of offer on fundamental change of circumstances

Section 6(1) provides the general rule that an offer lapses and can no longer be accepted where there is a fundamental change of circumstances. This specifically includes death or loss of capacity[vi] of either party before conclusion of the contract (section 6(2)). The Explanatory Notes clarify that this:

> " 30. ... does not however change the rule that contracts and other obligations, as distinct from offers, generally continue to bind the estates of parties to such obligations who happen to die during their currency."
>
> Scottish Parliament, 2025[23]

Insolvency (defined further in section 6(4), the definition of which can be amended by regulation) does not cause an offer to lapse (section 6(3)).

In line with the SLC's recommendations, Section 6(5) provides that the rules in section 6(1) to (4) do not affect the application of any other enactment or rule of law to the transaction proposed in the offer.

Section 7 - Acceptance of offer

Section 7(1) provides that any form of statement or conduct by the offeree qualifies as acceptance if it shows unqualified assent to the offer. Under section 7(2) acceptance by conduct concludes the contract when the offeror becomes or ought to become aware of the conduct in question. This does not affect the further possibility of acceptance by an unnotified act under section 3 (Explanatory Notes, para. 37).

Silence or inactivity does not in itself show unqualified assent to an offer (section 7(3)), although it can be sufficient in exceptional cases (Explanatory Notes, para. 38).

Section 8 - Qualified acceptance of offer

Sections 8(1) and (2) provide that an acceptance which includes any terms additional to or different to those of the offer, or for the omission of any terms from the original offer, is to be treated as a rejection of the initial offer and as a counter-offer.

Section 9 - Rejection of offer

Section 9 provides that an offer lapses and ceases to be capable of acceptance upon its rejection by the offeree.

Section 10 - Withdrawal of offer or acceptance

Section 10 provides that an offer, even if it is irrevocable under section 5, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer ("reaches" is defined in section 13(3)). It also makes similar provision for the withdrawal of an acceptance by the offeree.

Section 11 - Time limits

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vi Loss of capacity is defined in section 6(7) of the Bill by reference to the definition of "incapable" in the Adults with Incapacity (Scotland) Act 2000.

Section 11 provides for time limits for acceptances of offers (both by statement and by conduct). In general, acceptances must be completed within any time limit stated in the offer or, where there has been no such stipulation, within a reasonable time after the taking effect of the notification of the offer.

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

Section 12 provides that, if an offer requires a response from the offeree within a period of time without making it clear when the period begins, the period of time starts to run when the offer reaches the offeree.

Section 13 - When notification takes effect

Section 13(1) provides that any notification in relation to formation of contract (e.g. an offer, acceptance, counter-offer, withdrawal, rejection, revocation or declaration) only has legal effect when it reaches the person (the addressee). Under Section 13(2) this is subject to the rules in section 11(1)(a) on time limits for acceptances of offers.

Section 13(3) provides that a notification reaches its addressee when the notification is made available to that person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay. The Explanatory Notes state that, "this is a broad and flexible test which enables contracting parties to deliver notifications to each other in the way which suits their needs best" (para. 55).

Section 13(4) provides illustrative examples of when notification is taken to have reached a person in commonly encountered situations. This includes notification transmitted by electronic means (section 13(4)(d)), which is to be taken to reach a person when it becomes available to be accessed by the person (i.e. in line with the SLC's recommendations). The Explanatory Notes include the following clarifications on these provisions:

> “ 57. ... The provision focuses on the accessibility to the addressee as the test of legal effectiveness, in order to avoid some of the technical difficulties that may arise from the nature of electronic communications (for example, delays and failures in the transmission of emails between servers). With regard to a notification made by email, however, an appropriately worded, automatically generated out-of-office response may make it unreasonable under section 13(3) to expect the addressee to be able to obtain access to it without delay. The same applies where an electronic communications system generates an automatic message advising of a notification’s non-delivery in the addressee’s system.”
>
> Scottish Parliament, 2025[23]

Section 14 - Abolition of postal acceptance rule

Section 14 abolishes the postal acceptance rule as recommended by the SLC. The general rules on contracting out in section 1 do not apply to section 14. However, the Explanatory Notes clarify that it will still be possible for parties to opt in to postal acceptance. The Explanatory Notes state:

> “ 60. ... By virtue of section 1’s application to section 7, however, parties can agree that a postal acceptance will conclude a contract upon the former’s dispatch.”
>
> Scottish Parliament, 2025[23]

Section 15 - Interpretation of Part 1

Section 15 provides rules on the interpretation of certain key terms in Part 1 of the Bill.

Part 2 - Remedies for breach of contract

Part 2 includes provisions on remedies for breach of contract. With the exception of the provisions regarding contributory negligence, Part 2 is concerned with "defensive" or "self-help" remedies (i.e. remedies exercised by parties themselves which do not require court proceedings to be raised.)

Section 16 - Party autonomy

Section 16(1)(a) provides that parties are free to contract out of the provisions in section 17-21 of the Bill. They can, therefore provide their own, different, rules on what remedies apply in relation to breaches of contract.

Section 16(1)(b) clarifies that, where a contract has been rescinded (terminated) due to a material breach, sections 17-21 of the Bill do not prevent the continuing effectiveness of any term of the terminated contract which was intended to remain effective after termination. Terms which deal with remedies for material breach and which are intended to survive termination will therefore trump the rules in sections 17-21 of the Bill.

Section 16(2) allows the parties to contract out of the new contributory negligence rule in section 22 of the Bill.

Under section 16(3) an agreement to contract out of the default rules may be express or implied.

Section 17 - Mutuality of contract

Section 17 implements the SLC's recommendations on mutuality of contract.

Section 17(2) abolishes any rule of law to the effect that a party who is in breach of contract is not entitled to exercise any right or pursue any remedy arising from a breach of contract by the other contracting party.

Section 17(3) clarifies, however, that the party in breach may not claim performance of duties which are lawfully retained (for example because they are not mutual or reciprocal to the first party’s breach).

Section 18 - Rescission for breach of contract: return of benefits received

Section 18, along with sections 19 to 21, implements the SLC's recommendations that there should be a new remedy of return of benefits received after rescission (termination) of a contract for material breach.

Paragraph 70 of the Explanatory Notes explains the main rule noting that that:

> “ Section 18(1) and (4) provides that where a contract is rescinded for breach, and parties have previously rendered conforming performances under a contract but not received the reciprocal counter-performances, there should be reciprocal restitution of the benefits received through the unreciprocated performances. This therefore redresses the economic imbalances caused by rescission of a partly performed contract (see discussion of the issue in paragraphs 10.12 to 10.27 of the Report).”
>
> Scottish Parliament, 2025[23]

Under Section 18(2), however, the rules in sections 18-21 do not apply where one party's conforming performance of an obligation has been met by conforming performance by the other of a reciprocal obligation. The Explanatory Notes explain that this is required:

> “ 71. ... to prevent restitution after rescission meaning that every rescinded contract has to be unwound back to the position at the outset of the contract.”
>
> Scottish Parliament, 2025[23]

Sections 18(5) to (8) provide detailed rules as to how reciprocal restitution works in practice, in particular, rules on how the benefit is to be returned according to whether or not it took the form of money, with non-money benefits to be returned if still transferable.

Section 19 - Value of benefit

Section 19 provides for rules on the valuation of a non-money benefit that is not returnable by the recipient under sections 18(6) and (7).

Section 20 - Compensation for reduction in value of a returned benefit

Section 20 requires the recipient of the benefit to pay compensation for any reduction in its value through a change in its condition between the time of receipt and the return to the other party.

Section 21 - Use and improvement

Section 21(1) requires the recipient of the benefit to pay a reasonable amount for any use made of it. Section 21(2) entitles the recipient to payment of the value of any improvements made to the benefit which the other party can readily obtain by dealing with it. The Explanatory Notes note that:

> “ 80. ... This entitlement does not exist, however, if either the improvement was itself a breach of contract, or the recipient made the improvement knowing, or when it ought to have known, that the benefit would have to be returned.”
>
> Scottish Parliament, 2025[23]

Section 22 - Amendment of Law Reform (Contributory Negligence) Act 1945

Section 22 amends section 5 of the Law Reform (Contributory Negligence) Act 1945 with the aim of making it clear that the defence of contributory negligence under the Act applies to all claims of damages for breach of contract.

Part 3 - General

Section 23

Section 23 regulates the scope of the Bill, and contains a number of savings provisions for other matters that affect formation of contract (including preserving the common law on formation to deal with matters that have not been envisaged and included in the Bill), mutuality of contract and remedies for breach of contract.

The Explanatory Notes explain that one effect of the rule on remedies (section 23(1)(iii)) is that, in line with existing Scots law rules on remedies, the new remedy of return of benefits after rescission can be combined with other existing remedies so long as their exercise together is compatible with one another (see para 69).

Under section 23 the provisions in the legislation are also without prejudice to any enactment or rule of law which:

- requires writing for the formation of a contract;
- prescribes a form for a contract;
- regulates any question which relates to the essential validity of a contract;
- provides protection against unfair contract terms; or
- provides protection for a particular category of contracting person.

Section 24

Section 24 provides commencement dates for various sections of the Bill. Section 24 and sections 15, 23 and 25 come into force on the day after Royal Assent. The other provisions come into force on a day stipulated by regulations by the Scottish Ministers.

Section 25

Section 25 states that the short title of the Act is the Contract (Formation and Remedies)(Scotland) Act 2025.

Law of retention

The law of retention is a remedy for breach of contract which involves the temporary withholding or suspending of performance of contractual obligations that are due to be performed until the other party performs its obligations.

The remedy of retention is closely linked to the concept of mutuality of contract. The SLC Reportstates that:

> “ 11.3 This concept can be compared with Scots law’s broader concept of mutuality of contract, which plays an important role in relation to retention. Where both parties have rights and duties under the contract, these rights and duties are interdependent or reciprocal and the enforceability of one party’s rights is conditional upon the same party performing its own duties. This underpins the retention remedy: if one party does not perform, the other need not perform, ie it can retain or withhold its own performance.”
>
> Scottish Law Commission, 2018[4]

As indicated, the SLC Report took the view that the law of retention did not need statutory reform. The SLC states in its report that:

> “ 11.32 Given our decision not to recommend a general statutory restatement of the law of remedies for breach of contract, we have thought it best to leave further clarification of the law of mutuality and retention to the courts and to practitioners. Accordingly we make no other recommendation for legislative reform on these matters.”
>
> Scottish Law Commission, 2018[4]

However, responses to the Scottish Government's consultation on the SLC Report in 2024 indicated that as a result of subsequent case law, the law of retention is now less clear than when the SLC published its Report and that the law would benefit from clarification (see para 10 of the Policy Memorandum).

The Scottish Government therefore consulted on a statutory scheme for the law of contractual retention in March 2025.

The consultation summarised the case law in question and the main difficulties and criticisms of the existing law. These include the fact that:

- **it is unclear whether all of one parties' obligations are the counterparts to the other parties' obligations under the same contract where a contract is performed in stages.**
- **the breach needs to be material but not so material as would justify rescission**: the consultation states that this is an unhelpful distinction and that there is a lack of clarity as to how serious the breach has to be to allow retention.
- **there is the potential for abuse of the remedy** where the obligation which one party has failed to perform has a much lower value or is of much less significance than the counterpart obligation on the other party.

The consultation therefore included a potential restatement of the law aimed at dealing

with these difficulties.

The Policy Memorandum notes that the Scottish Government intends to introduce provisions on the law of retention by way of amendment to the Bill (para. 10.). The Policy Memorandum also notes that:

> “ 10 ... Draft provisions, together with an Explanatory Note and Policy Note can be found on the consultation webpage, together with an analysis of responses.”
>
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