

Call for Views

Contract (Formation and Remedies) (Scotland) Bill

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Delegated Powers and Law Reform Committee of the Scottish Parliament's call for views¹ on the Contract (Formation and Remedies) (Scotland) Bill² (**Bill**). We have the following comments to put forward for consideration.

Questions in the call for views

General

1. Do you consider that Scots contract law needs to be reformed through legislation?

We note that the overarching policy aim as set out in the Policy Memorandum is to restate and reform certain areas in the law of formation of contract, alongside reforming aspects of the law of remedies for breach³. The aim is to do so by producing a set statutory default rules that are clear, certain and as accessible as possible.

In our previous response⁴ to the Scottish Law Commission's consultation on the Contract Law Review Report 2018⁵ (**SLC Consultation**), we welcomed the proposals to create a standard set of default rules for contract law aimed at improving the law's accessibility for various types of users, both from within and outside of the legal profession. We expressed our view that such an approach would improve access to justice and enable less sophisticated users of contractual agreements to agree terms that are best suited to their needs.

We also previously welcomed the recognition attached to party autonomy and that an option exists to contract out of certain provisions of the Bill. We confirmed our belief that this approach recognises the principle of a freedom to contract and

¹ <https://yourviews.parliament.scot/dplr/contract-formation-and-remedies-scotland-bill/>

² <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/contract-formation-and-remedies-scotland-bill/introduction/spbill76s062025.pdf>

³ Paragraph 6 - [Policy Memorandum](#)

⁴ [Law Society of Scotland Consultation Response – Contract Law Review Report 2018](#)

⁵ [Scottish Law Commission - Contract Law Review Report: Consultation](#)

allows parties to a contractual arrangement the ability to determine the precise terms that will govern their legal relations.

However, to agree that Scots contract law “needs” to be reformed through legislation is potentially overstating matters. The existing common law regime does operate reasonably well in practice and Scots law contracts are concluded in a wide array of sectors without unsurmountable practical and legal difficulties. The current law is generally well understood by the profession (and those who are direct parties to the contract in question) and allows for the conclusion of contracts which meet the requirements of those who wish to engage in agreements subject to Scots law.

That being said, it is clear that a new statutory regime has the potential to offer benefits to certain parties by offering users a means to form agreements without a detailed understanding of case law or wider academic and institutional writings. We particularly support sections 23(e) and (f) which preserve relevant protections against unfair contract terms and for vulnerable persons.

2. The Scottish Law Commission (SLC) did not include a number of aspects it consulted on in the Bill, including rules on the interpretation of contracts, rules on various aspects of the law of remedies for breach of contract, rules on penalty clauses, and specific rules on the “battle of the forms”. Are you content with this approach, and the reasons given by the SLC for not including these aspects?

It is important that clarity and certainty is achieved in the law surrounding these important areas of Scots Private law. We believe that this will allow individuals and wider business to properly govern their legal relations.

In our previous response to the SLC Consultation, we highlighted our belief that the law on interpretation is not yet settled. However, given that the facts underpinning interpretation are by their nature highly fact-specific, we highlighted that legislative reform may unnecessarily constrain judicial ability to balance the various principles of interpretation on a case-by-case basis. We remain concerned that constraining the judiciary in dealing with complex factual scenarios could potentially lead to rigid interpretations that do not consider the nuanced realities of more complicated commercial transactions.

In terms of the “battle of the forms”, we stated our belief that it would be difficult to achieve an overriding statement on this principle and that this may be better left to development through case law. However, we do acknowledge that the issues relating to the “battle of the forms” sit squarely in the formation of an agreement and are the cause of frequent disputes in practice. Therefore, whilst it may not be possible to address these issues within a statutory framework during this parliamentary session, we believe it may be pragmatic to consider whether an underlying solution can be found in the future to assist in better clarifying this complex area of contract law.

3. What is your view on the fact that the majority of the provisions in the Bill are default provisions which parties can contract out of?

We believe that this is the correct approach and allows the parties the necessary autonomy to contract on terms of their own choice. We therefore believe that it is crucial that section 1 and section 16 of the Bill, which enable the parties to contract out of the Bill's default rules, are retained. Whilst we consider that these rules are useful as a guide to governing contractual relations for certain individuals and smaller business transactions, we believe that there is a risk that these provisions may be too inflexible and restrictive for more complex contracts and certain corporate transactions.

See our comments in our response to the proposed contractual retention codification at Question 10.

4. Do you have any views on how the Bill, and its new terminology, will operate, particularly in relation to the pre-existing common law on contracts? Is the language sufficiently clear?

Based on feedback we have received, we believe that the majority of contracts are concluded by either (i) lay persons with less interest in consulting on the underlying legal position; or (ii) legal practitioners on behalf of their clients. The former would likely benefit from access to a clear legislative position that is easy to understand, both in terminology and effect. In the absence of this, it is envisaged that consumer organisations and bodies may also offer guidance to individuals and smaller businesses by providing summaries of the legislation for consultation by such parties.

We believe that the current draft of the Bill does not represent a radical departure from the existing common law regime. As a result, we anticipate that practitioners will be able to apply the legislation with relative ease as the terminology is generally clear, accessible, and readily understandable without reference to case law or commentary. We believe this contrasts with the current regime which can require consultation of a variety of case law and writings in order to understand the core legal principles in question.

Part 1 of the Bill – Formation of Contracts

5. In general, are you content with Part 1 of the Bill? Do you think it will achieve its aims of making the law clearer, more certain and more accessible?

Part 1 deals with formation of the contract and attempts to codify existing common law principles in one place through its use of default rules. These default rules are to act as a starting point in negotiations insofar as they can be relied upon to provide for common contractual situations.

We welcome the attempts to make the law clearer, more certain and more accessible in line with our comments made in Question 1. We also believe that the express terminology referring to the parties' intention that their communications

have legal effect is clearer and more readily understandable than the common law concepts of will, desire, and engagement. As such, we believe these represent a modern and new approach to this area of law.

6. What are your views on the individual provisions in Part 1 of the Bill? Are there any specific issues in relation to Part 1 of the Bill which we should be aware of?

In order to ensure certainty for the parties, we believe that the wording in section 2(3) of the Bill should be amended to include either *express communication* to confirm the parties' agreement on a specific matter prior to the contract being formed, or that both parties signal their agreement that the particular matter is to be settled prior to formation. In its current form, the Bill risks being interpreted as preventing formation where one of the contracting parties subjectively intends not to contract prior to agreement on a certain point. We believe this risks creating significant legal uncertainty and that it is the parties signalled "intent" that is the crucial point in question.

A further point which may require clarification can be found at section 13(4)(d) (it is reasonable to expect that a person is able to access a notification "*transmitted by electronic means, when it becomes available to be accessed by the person*"). We believe that uncertainty may arise in a common situation found in practice relating to "*out of office*" messages. It is unclear whether the Bill would be interpreted so as to provide that an email is available (i) upon delivery to the recipient's inbox i.e. instantaneously upon the sender sending the email; or (ii) upon delivery to the recipient's inbox and assuming that no "*out of office*" is received with an anticipated return date. We believe this issue is further complicated by a lack of clarity in the Bill as to how to apply this provision to instances where email or instant messaging servers are down and thus communications are not received in a timely manner. We would therefore ask that further consideration is given to these points.

Closely linked to the above point is the abolition of the postal acceptance rule, which we welcome. In support of this, we point to feedback we have received that suggests the majority of contracts (including commercial agreements) are now concluded electronically. With the increasing use of digital technologies, we believe there remains little justification for retaining specific protections for acceptances sent by post. This represents a deviation from parties' general expectations of legal communications (for example, the majority of notice provisions in contracts indicate that where a notice is sent by post, it does not take effect until at least a day after posting to allow for delivery to the recipient, and that it must generally be sent by recorded delivery to ensure receipt).

Furthermore in corporate transactions, the widespread use and ability for parties to hold contracts as "undelivered" allows users the flexibility to conclude agreements without being subject to the risks of outdated (or unreliable) forms of document transfer.

7. What is your view on whether the statutory statement on contract formation could differentiate Scots and English law in a way that might deter cross-jurisdictional business?

In our consultation response we highlighted our belief that the approach of using a statutory statement of law would not deter any form of cross-jurisdictional business given that the parties have the autonomy to contract out of provisions that are problematic between the two jurisdictions (should they wish).

However, we are aware that Scottish parties are increasingly “contracting out” generally by concluding contracts to be governed by English law and subject to the jurisdiction of the Courts of England and Wales. This is particularly the case in sophisticated commercial contracts. Whilst both Scots and English law currently share a characteristic of largely common law regimes in respect of contract formation, there are clear and significant distinctions to be drawn between the two jurisdictions (particularly in regard to the requirement of consideration in England and Wales). These prior distinctions have not resulted in any significant impact in cross-jurisdictional trade. The creation of a statutory regime in Scotland, therefore, will not likely result in concerns that Scots law has deviated from that of England and Wales, especially considering the emphasis being placed on party autonomy to overcome any such difficulties.

It is difficult to predict how parties to contracts might perceive the availability of a statutory regime in Scots law, but it is hoped that a modernised and clarified law might assist in curbing the trend of “contracting out” and encourage parties to conclude their contractual agreements using Scots law (in turn submitting to the jurisdiction of the Scottish Courts).

Part 2 of the Bill – Remedies for Breach of Contract

8. In general, are you content with Part 2 of the Bill? Do you think it will achieve its aims of making the law clearer, more certain and more accessible?

We recognise that Part 2 of the Bill addresses only certain remedies that are available upon the event of breach. We believe this could result in fragmentation (and thus legal uncertainty) for practitioners, wider business and individuals alike when navigating both statutory and common law remedies that are available upon breach.

We would therefore welcome further reform to address the full range of remedies that are available such as damages, specific implement and interdict so as to ensure that the statutory provisions are both comprehensive and consistent in application.

9. What are your views on the individual provisions in Part 2 of the Bill? Are there any specific issues in relation to Part 2 of the Bill which we should be aware of?

We welcome these attempts in line with our comments at Question 8.

10. What is your view on the Scottish Government's plan to make changes to the Bill at Stage 2 in relation to the law of retention?

In our previous engagement with the SLC Consultation, we welcomed attempts to clarify the law of retention. However, we are uncertain that the current proposals that are to be introduced by way of an amendment to the Bill at Stage 2 adequately address more complex transactions and contractual arrangements. We therefore believe it is crucial that the parties retain the ability to contract out of the proposed provisions relevant to the law of retention.

In support of this, we point to the example of derivatives and similar sophisticated financial instruments which depend on the precise operation, in an international context, of complex contractual mechanisms in the event of breach (and on the occurrence of various events that may or may not constitute breach or a termination event). The powers available to the parties upon the occurrence of a given breach or non-breach event (and combinations of) can be highly structured including; options to delay performance; non-performance; termination; closing out and netting of different transactions (or combinations of transactions). This is alongside retaining a choice in how to apply the collateral provided in the contractual arrangement, often using different valuation methodologies in different situations under different options. Scottish financial institutions (and other large Scottish business entities) are routinely party to these type of contracts and so we consider it is crucial that these important issues are incorporated into any reforms to the law of retention.

With this in mind, we would flag the following provisions⁶ which we believe risk creating uncertainty in their interpretation or appropriateness in sophisticated financial contracts:

- *Section 21A(2)(b) counterpart obligations may be contained in separate contracts as long as the contracts form part of the same transaction.*
- *21A(3)(a) must be a material breach in the case of an anticipatory breach.*
- *21(4) The effect of the contractual retention must not be clearly disproportionate to the effects of the breach or anticipatory breach.*
- *21B Where PA exercises contractual retention for an anticipatory breach by PB in accordance with section 21A(1)(b), PA must notify PB of the contractual retention.*

In addition to these, we also believe that enabling a damages payment as a mandatory retention “cure” in section 21A(6) undermines the flexibility required in more sophisticated financial agreements.

For these reasons (and the possible associated uncertainty that is caused), we consider that section 21D should expressly preserve contractual set-off, closing out rights and the netting of obligations in any attempt to codify the law of retention. This is in consideration of our belief that reference in section 21D(a)(v)

⁶ [Draft Provisions to Reform the Law of Contractual Retention](#)

to “any other circumstances in which the right to retain or abate obligations is conferred” may not sufficiently capture these important rights that are available to parties in more complex contractual arrangements.

We believe it is also important to note that section 21D(b) does not introduce a new “power of a court to refuse the exercise of contractual retention where that retention is or would be inequitable”. We therefore believe that this should be amended to expressly preserve the current law of retention to that effect.

Part 3 of the Bill

11. In general, are you content with Part 3 of the Bill?

We have concerns that the ancillary provision at section 24(2) of the Bill is too wide in giving Scottish Ministers the powers to amend the legislation *ex post facto*. We consider this extension as being unwarranted, particularly given the importance that is placed on party autonomy throughout the provisions contained in the Bill.

12. Do you have any other comments on the content of the Bill? For example, is there anything else you think should or should not have been included in the Bill?

We are aware that this Bill does not fully codify Scots contract law in the areas of interpretation, penalty clauses, the “battle of the forms” alongside certain areas of remedies upon breach. These areas are to remain governed by the common law, which we are broadly supportive of at this stage.

However, we would urge that caution is taken as to how these new statutory provisions will interact with existing precedent, particularly in the early stages of implementation should the Bill pass. We consider this to be a complex process and, in the absence of a considered approach, we believe that the reforms could lead to a period of legal uncertainty in certain areas.

As a result, we believe it is important that the Scottish Government assist in this process by providing clear guidance on the final provisions of the Bill (if passed). We also suggest that an appropriate awareness campaign is used to assist individuals, wider business and practitioners on how these provisions will impact already established principles in contract law.



For further information, please contact:

Richard Male
Policy Team
Law Society of Scotland
DD: 0131 476 8113
richardmale@lawscot.org.uk