



Law Society
of Scotland

Consultation Response

Draft Contract (Formation) (Scotland) Bill

November 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Obligations Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Law Commission's call for views on the *draft Contract (Formation) (Scotland) Bill*.¹ The Sub-committee has the following comments to put forward for consideration.

Comments

We consider that, in general terms, the Bill appears to be well drafted. The idea of using a single term (notification) to cover the operation of offers, revocations etc is admirable. It would be helpful in our view, however, if a word other than notification could be found. In normal circumstances, notification is made of something which has already happened but here the offer, etc is made when the notification takes effect.

One way of doing this would be to replace notification with communication. So an offer, acceptance etc takes effect on its communication and communication is deemed to take place in the circumstances set out in s.3.

Given how comprehensive the legislation is, the absence of a provision which states that an effective acceptance of an offer leads to the conclusion of a contract looks slightly remiss. It would be good to include this specifically in the legislation. Otherwise cases could arise where it might be argued that a valid contract failed because there was no agreement in the sense of a meeting of minds because an irrevocable offer had been accepted after the offeror has changed his or her mind.

We also support the objective of ensuring that Scottish contract law keeps pace the DCFR. Irrespective of Scotland's position within the EU, it is clearly desirable to have a law of contract which measures up to

¹ <https://www.scotlawcom.gov.uk/files/1015/0428/1339/BillCON.pdf>

international comparators. Among other documents, such as the Unidroit PICC, the DCFR is a useful part of that process.

Ordering of Bill provisions

The present order seems to be effective and logical.

s.2 Formation of contract: general

S.2(2) refers to agreement on terms and is clearly intended to take the place of the common law requirement for there to be consensus as to the essential terms of a contract (in addition to intention to create a legal relationship). Reading subsections 2(1)(b) and 2(2) together indicates that interpretation of subsection 2(2) will turn on the question of issue of necessity - ie can the contract be given effect without that provision? That sounds very similar to the existing essential term test. We consider that the common law test is more readily understandable, in addition to the benefit of established case law which further increases the level of legal certainty. If the intention is to codify the existing position, then we are of the view that it would be preferable to maintain the current test, which is well understood, and would allow us to retain the benefit of the relevant case law.

s.3 When notification takes effect

We welcome the decision to deal with formation of contract through electronic communications and the detailed rules for ascertaining when a notification takes effect in this context.

We note the SLC choice of the term “by electronic means” to allow for technological developments. We support this approach. However, we believe that further consideration may be needed to balance the interests of the parties and provide sufficient clarity in the context of electronic communications. In some respects the general principle for electronic communications in subsection 3(3)(d) - that notification is effective when the electronic communication is available to be accessed by the person – appears to be appropriate (by analogy to other means of delivery). But we are concerned that the criterion of “being available to be accessed” might not be appropriate in certain circumstances, in part because, in contrast to physical correspondence, electronic mail most commonly goes to a particular individual's inbox rather than through the firm-wide letterbox

There also appears to be a tension between subsection 3(2) and subsection 3(3)(d) and we do not consider that the drafting is sufficiently user –friendly. S.3(3)(d) is to be interpreted "without prejudice to the generality of sub-section (2)" but this leaves the reader with a general rule and a specific one which are incompatible in foreseeable problem situations. It is not clear whether, in a situation where notification has been made by electronic means, considerations of the general position in subsection 3(2) should also be brought in. The issue of an out of office email is particular relevant here.

Read on their own, the provisions as drafted appear to give little comfort to someone seeking to rely on an out of office notification. The natural reading of s.3(2) is that the circumstances informing the expectation are known (or should be known) to the notifier prior to or at the time of making the notification. If that were not the case, a notification could be retrospectively stripped of effect by a later communication which changed the circumstances; this seems undesirable. That being the case, the out of office response would only come after the communication had become available to be accessed and so could not affect the conclusion of the contract. In the majority of cases, this will in fact be the desired outcome for both parties. We also note that the rules in s.3 are mere default rules which parties can alter as they wish. Furthermore, we would not favour a specific attempt to legislate with respect to out of office notifications because the technological specificity of such a provision would make it awkward to apply to other electronic communications in the future.

At the same time it is important to note that it will often not be reasonable, practically speaking, to expect that a person who is out of the office (due to holidays, sickness etc) will be able to obtain access to an email without undue delay in terms of s.3(2). However, in terms of subsection 3(d), notification occurs when the email is available to be accessed. In this scenario the email could, at least hypothetically, be accessed but a question could be raised as to whether the offer or acceptance has been effectively communicated.

This question may be particularly pertinent where the recipient is out of the office for a protracted period of time – for example if the recipient is on maternity/paternity/adoption leave and their inbox is not being checked. Similar issues would arise in the case of long-term sickness leave or an automatically-generated response when the intended recipient had in fact left the organization to which an email was sent. Yet, arguably the email would nevertheless comply with condition that it is “available to be accessed” in terms of s.3(3)(d). The interrelation between 3(2) and 3(3)(d) becomes very important here and we are not sure that it is clear enough as currently drafted. In this context it could be helpful to give consideration to the effect of a clearly worded out-of-office return email and whether this should affect the analysis of notification.

s.4 Abolition of rule of law as to when notification of postal acceptance takes effect

We agree with the SLC that this current rule relation to notification of postal acceptance is outdated and support its abolition as set out in s.4.

s.5 What constitutes an offer

S.5(2) should provide for an offer to be address to a specific class of persons. While technically an offer could be to the public at large and the terms could limit those who could effectively accept the offer by setting conditions within the offer itself, it would be clearer to state in legislation that an offer can be made to a class.

s.6 Revocation of offer

We agree that fixing a time limit for an offer's acceptance should not be treated as a declaration of irrevocability.

s.7 Lapsing of offer on material change of circumstances

We welcome the clarification that if the offeror or offeree dies or otherwise loses capacity to make a decision to conclude the contract after an offer has been made, this constitutes a material change of circumstances, meaning that no contract can be concluded.

We further support the position that insolvency of either an offeror or offeree should not result in an offer lapsing. However, some thought should be given to the drafting here since there seems to be a gap regarding partnerships. They are not individuals (other than for the purposes of the Consumer Credit Act 1974) but neither are the 7(4)(b) insolvency devices applicable to them). There could be similar issues applicable to offers made on behalf of trusts and certain statutory corporations. The cleanest solution would probably be to delete the qualifying words at the beginning of paras (a) and (b) and just to have one long list of all of the examples of insolvency.

s.9 Conclusion of contract by unnotified acts

We agree that this exception to the general rule that an acceptance must reach the offeror in order to form a contract between the parties is consistent with the principle of party autonomy and welcome the certainty provided by explicit statement in the draft legislation.

s.10 Withdrawal

Providing for withdrawal of an "irrevocable offer" does not seem to make sense as by definition an irrevocable offer must be one which is not capable of being revoked. Otherwise the use of the term "irrevocable" is meaningless.

The policy, however, is a sound one. This rule is doing something different from the normal withdrawal: it is about preventing the offer or acceptance from taking effect rather than about bringing the effect to an end. Perhaps it would be better to frame the rule in terms of offers and acceptances not taking effect in the given circumstances rather than being withdrawn.

s.11 Time limits

It would be helpful if s.11(1)(a) cross referred to s.8(1) as it would therefore read more consistently with s.11(1)(b). Furthermore, as currently drafted it is not clear whether s.11(1)(a) is intended to refer only to s.8(1)(a) or to both s.8(1)(a) and s.8(1)(b). We are of the view that it should include both in order to ensure that statements and conduct are treated consistently.²

s.13 Rejection of an offer

The words “...(whether or not an irrevocable offer)...” are unnecessary and could be deleted. (See comments in relation to s.10 above.

s.14 Counter-offer

We support the clarification provided by draft s.14 that if terms of a notification are additional to or different from the original offer, this represents a rejection of the initial offer and constitutes a counter-offer in its own right. Furthermore, we agree with the approach that such additions or alterations do not need to be material for the notification to amount to a rejection and counter-offer. The removal of an assessment of materiality should provide greater certainty for both/all parties contemplating conclusion of a contract.

For further information, please contact:

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² Subject to the condition set out in s.8(2) that such conduct must be conduct of which the offeror is, or ought to be, aware.