Law Society of Scotland

Consultation Response

Scottish Law Commission – Contract Law Review Report 2018

September 2024

Photo: Fort William

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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.

The Obligations Law Sub-committee welcomes the opportunity to consider and respond to the consultation on the Scottish Law Commission (**SLC**) Contract Law Review Report 2018.

Responses to Questions

Question 1

The reforms proposed by the SLC are mostly a set of default rules in so far as parties may choose by agreement to provide otherwise. This seems to be a sensible and helpful approach. Default rules provide a useful starting point for negotiations. They are efficient in so far as they can be relied upon for common situations which should reduce transaction costs and enable parties to focus on where they may want to make alternative provision. They also provide legal certainty which is vital in this area of the law.

Are you content with this approach?

☒ Yes

☐ No

☐ Don't know

If not, please provide your reasons.

We welcome the proposals for a statutory statement of law containing default rules aimed at improving the laws accessibility to various types of users, both within and outside of the legal profession.

Improving access to justice remains a central pillar to the policy work undertaken at the Law Society of Scotland. We believe that codifying a set of default rules will serve to facilitate a better understanding of the law in this area, for members of the public, those operating in business as well as members of the legal profession. This, in turn, will offer those with lesser means an opportunity to engage with legal process than would have otherwise been the case.

At the same time, we welcome the draft Bill's recognition of the freedom to contract and recognition of the principle of party autonomy to enable those privy to an agreement the ability to decide which provisions they want to include when forming and governing their legal relations. This will enable sophisticated commercial parties to continue to tailor contractual agreements to their own specific needs (which we anticipate will be most useful to sophisticated commercial parties).

In view of this, we will continue to watch with interest as to the passage of any Bill that is introduced to the Scottish Parliament and would welcome an opportunity to provide further input on any further consultation in this important area of law.

Question 2

The report was published in March 2018, over 6 years ago now. At the time of publication there had been relatively recent case law which informed a number of the recommendations made in the report. Some specific areas are discussed in some detail below, but it would be helpful to know whether at a general level you consider that there have been changes which are material to the recommendations made in the report.

Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Report?

- ☐ Yes
- ☒ No
- ☐ Don't know

If yes, please provide details.

The Contract (Third Party Rights) Scotland Act 2017 came into force shortly before the publication of the Report. We are not otherwise aware of any substantive legislation materially impacting Scots contract law since the publication of the Report. We are not aware of any case law materially impacting upon any of the main topics of the Report which ought to alter or update any of the recommendations.

Question 3

Are you aware of change in contract law practice which impacts on any of the recommendations contained in the Report?

- ☐ Yes
- ☒ No
- ☐ Don't know

If yes, please provide details.

No. We note that commercial contract drafters often refer to 'playbooks' in the initial stages of drafting and negotiation to ensure that clients' preferred default positions are reflected as far as possible in the drafts under discussion. These playbooks assist in standardising the process of reviewing and negotiating contracts. The draft legislation set out in the Report may assist in providing clearer legal reference points for some aspects of drafting, as well as the process of concluding commercial contracts.

Question 4

The SLC report contains a draft Contract (Scotland) Bill to give legislative effect to their recommendations. As noted above it can be found within the SLC report at Appendix A. The Bill has 25 sections. Part 1 of the Bill relates to formation of contract, Part 2 relates to remedies for breach of contract and Part 3 contains general provisions.

Do you agree that the provisions contained in the draft Contract (Scotland) Bill give effect to the recommendations of the SLC?

- ☒ Yes
- ☐ No
- ☐ Don't know

If not, please provide details.

Yes. The draft Bill in its current form appears to give effect to the recommendations of the SLC.

Question 5

The SLC produced a Business and Regulatory Impact Assessment (BRIA). BRIAs are intended to estimate the costs, benefits and risks of any proposed legislation that impact the public, private or third sectors. The only calculated costs in the BRIA relate to training which will have been worked out on the appropriate costs for 2018.

Is there anything in the BRIA that requires to be updated?

- ☐ Yes
- ☒ No
- ☐ Don't know

If so, please provide any updated data.

We welcome the BRIA analysis and the recommendations that flow from this. Other than the costs associated with further training being updated to account for the rising costs seen in more recent times, both within the profession and outside of this, we do not believe any substantive changes to the assessment need to be made.

We echo the views set out in the BRIA that the legislation proposals provide a clear indication of this jurisdiction's commitment to ensuring that Scots contract law is modern and accessible. This is underpinned by a policy of promoting access to justice which, as discussed in our response to question 1 above, the Law Society is keen to support.

We are also of the view that the option of "doing nothing" outlined in the BRIA report is neither desirable nor would keep contract law in Scotland on an even keel with English law, international jurisdictions, or international comparators such as the Draft Common Frame of Reference (**DCFR**). We note that the proposals would provide clarity on a number of issues which are currently the topic of debate and confusion in English law, and therefore agree that the proposals would assist in demonstrating that Scots law is a desirable choice of law in concluding contracts.

We therefore agree with the SLC's recommendation that has been proposed - namely Option 2 and an introduction of the Bill to provide further clarity in contract law in Scotland.

Question 6

Section 17 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 provides that Ministers must prepare and publish a Child Rights and Wellbeing Impact Assessment (CRWIA) in relation to a Bill that Scottish Ministers intend to introduce. A CRWIA is a process, tool and report which is used to identify, research, analyse and record the anticipated impact of, among other things, a legislative provision.

Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the SLC's draft Bill?

- ☐ Yes
- ☐ No
- ☒ Don't know

If so, what are they?

We do not have any comments to make on this question, save to note that the legislative proposals do not appear to impact (adversely or otherwise) the current rules on the capacity of children and young people to enter contractual agreements set out in the Age of Legal Capacity (Scotland) Act 1991.

Question 7

Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the SLC's draft Bill?

- ☐ Yes
- ☐ No
- ☐ Don't know

If so, what are they?

We do not have any comments to make on this question.

Question 8

The recommendation that there should be a statutory statement of the law on formation of contract was well supported. But as part of their policy consideration, the SLC noted that some respondents had raised concerns that "it might contribute to a potentially damaging perception that Scots law had diverged in some non-obvious way from English law."

The SLC considered that "our detailed recommendations for substantive law reform are limited. The major change relates to the law on postal acceptances, which we believe will bring the law into line with general legal practice on both sides of the border. In addition, we propose legislative clarification of the law on electronic communication in contract formation. The clarification is consistent with existing principles of Scots and English law."

Are you satisfied that the approach of a statutory statement on contract formation does not differentiate Scots and English law in a way that might deter cross-jurisdictional business?

☐ Yes

☒ No

☐ Don't know

If not, please give your reasons.

We welcome the draft Bill's use of a statutory statement on contract formation given this addresses instances where there is a lack of case law to provide certainty on a new or complex point of law. We therefore consider that this approach is entirely logical and will assist in helping to fill any gap that exists in Scot's law.

However, given that the draft Bill also allows for party autonomy in overriding the statutory statement in an attempt to achieve a convergence between two systems (if required), we see that an option does exist to bring the two jurisdictions more in line with one another. Ultimately, having an option to use statutory statement in relation to contract formation will facilitate users' greater flexibility in ensuring that their contractual agreements are governed in a way that best suits their needs and geographical locations.

In doing this, we consider that a statutory statement on contract formation serves to re-enforce the notion that Scotland's legal system is "hybrid" in nature thereby enjoying the benefits and strengths of both civil and common law jurisdictions. For this reason, we do not consider that the approach in using a statutory statement of law will deter any form of cross-jurisdictional business given that a convergence or divergence between the two jurisdictions can be achieved should the parties want this.

We also note that a clear statutory statement of the key Scots law rules on the formation of contract, as set out in the Bill, may assist in facilitating discussions between solicitors in cross-border contexts. This will allow the Scots position to be presented clearly and concisely, a reduce the current need to draw upon case law and academic commentary.

Question 9

The statutory statement on formation of contract includes an 'accessibility rule' in respect of electronic communication. As set out in the explanatory note to the

draft Bill, "[t]he 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)".

Are you aware of any technical advances/ practical changes which postdate the Report which may impact on this approach?

☐ Yes

☐ No

☒ Don't know

If so, please provide details.

We welcome the abolition of the Postal Acceptance Rule and note the Draft Bill's provision for transmission *"by electronic means".* We consider this allows for technological developments other than email which may include encrypted data services and other tools and infrastructure enabling the communication of a notification. We support this and are not aware of any technical advances or practical changes which may impact the approach.

However, in terms of the drafting itself, we continue to have concerns as to the tension that exists between subsection 13(3) and subsection 13(4)(d) of the draft Bill. We do not consider that the drafting is sufficiently clear or user friendly. Subsection 13(4)(d) is to be interpreted *"without prejudice to the generality of sub-section (3)"* but this leaves the user with both a general and specific rule which we consider as being incompatible in foreseeable problem situations. It is not clear whether, in a situation where notification has been made by electronic means, the further general position provided at subsection 13(3) should also be considered or simply ignored and would welcome further clarity on this.

Further, the current wording of section 13(4)(d) could lead to significant practical difficulties and questions (leading to disputes and litigation) regarding the meaning of this clause. Whilst the explanatory note acknowledges that this subsection may be disapplied by an "*appropriately worded*" out of office provision, it is unrealistic to expect parties to turn their minds to the question of how their out of office messages will impact on purported contractual communications. It is not clear why parties making contractual communication should have certainty that their notification should be taken to have reached the addressee when it is physically delivered to a place of business or residence (given that the addressee may be away from the premises for an unknown period of time) but should face uncertainty upon receipt of an out of office message.

The operation of this provision appears sensible in the event that a non-delivery message is received, and perhaps in the case of out of offices advising that the intended recipient is permanently unavailable (for example, in the case of a business, because they no longer work at the intended contracting party). Otherwise, further clarity on how such messages ought to shape the expectations and positions of prospective contracting parties would be helpful.

We would also welcome further clarity on section 13(4)(b), as legal persons in particular may have more than one place of business – it may be helpful for the provision to confirm whether this refers to the registered office and/ or main place of business, or if any place of business within Scotland (or the UK) is sufficient.

Question 10

The issue of the 'battle of the forms', where parties believe a contract to be concluded but do so on the basis of their own standard terms and conditions, has not been included in the statutory statement beyond the general principle set out in section 2 of the SLC's draft Bill.

Are you content with the approach taken in respect of the battle of the forms?

☐ Yes

☐ No

☒ Don't know

If not, please provide reasons.

We note from historical caselaw in relation to the "battle of the forms" that issues can arise in applying an overarching statement on contractual interpretation. This stems from the fact that the underlying facts of a dispute are rarely the same thereby creating uncertainty as to how the law should be applied in certain or novel situations.

For this reason, we consider that an overriding statement on the battle of the forms will be difficult to achieve and that it may be appropriate for the Courts and the Judiciary to control and deal with any dispute on a case-by-case basis, thereby developing the law in a well-thought and incremental manner.

However, we would ask that consideration is given to those who lack the means in bringing a dispute before the Court and would welcome further consultation as to how the interests of such parties can be protected. We would not advocate a position whereby a small number of organisations with sufficient means to bring a case before the Courts are able to influence and develop the law in this area to suit their interests alone.

Question 11

The SLC recommended that there should be an exception in relation to the acceptance of general offers, in the circumstances where a contract is formed once the offeree begins to perform certain acts. An example given was a notice in a private car park advising that a charge would be levied for parking there (the offer) and someone parking there (acceptance).

Are you content with the approach taken in respect of the acceptance of general offers?

☒ Yes

☐ No

☐ Don't know

If not, please provide reasons.

Whilst we continue to have the view that Section 2 (4) of the draft Bill provides for the acceptance of a general offer through the conduct of the parties, we do not object to the clarification offered by the inclusion of Section 3 (1). We consider that this provides a further alternative provision on which a party can rely to ensure that a valid contract has been formed.

Question 12

At present Scots (and English) law would see these as invitations to treat, so that it is the customer responding to the statement who makes the offer and the business whose stock or capacity is potentially affected which may then accept or decline that offer.

Are you content with the approach of rejecting a special rule about proposals by businesses to supply goods from stock, or to supply services, at a stated price?

☐ Yes

☐ No

☐ Don't know

If not, please provide reasons.

Yes. Whilst uniformity with international instruments is an understandable and worthwhile policy aim, we agree that the current Scots position strikes a better balance between protection of traders and the protection of consumers. We are not aware of empirical research on the matter but would expect that most traders and consumers would not expect that consumers were entitled to purchase goods at any price stated.

We wish to emphasise however that declining to follow the DCFR's approach in this instance should not prevent any future reforms or policy work aimed at protecting consumers from unfair or anti-competitive pricing practices. Rather, we agree that in the case of this specific issue, the Scots approach is preferable to that in the DCFR.

Question 13

The report does not propose legislative reform or a statutory statement of the law on interpretation on the basis that the uncertainty in the law in the courts has since been broadly resolved through 2 cases in the UK Supreme Court.

Do you agree that the law on interpretation is settled and that legislative reform is not needed or wanted?

☐ Yes

☒ No

☐ Don't know

If not, please give your reasons.

In light of the judicial and academic discussion cited above, we do not consider that the law on interpretation in Scotland is settled. However, we do not consider that any legislative reform should be appropriately framed to account for the fact that *Arnold v Britton (2015) UKSC16* and *Wood v Capital Insurance Services (2017) UKSC 24* are English appeals, and the Court of Session was not ultimately bound to mirror these judgments. It is noted that an appeal to the Supreme Court was refused in *Ashtead Plant Hire Company Ltd v Granton Central Developments Ltd (2020) CSIH 2*, which appears to depart from the Supreme Court's position and, although the appeal papers do not immediately appear to be publicly available, the matter of apparent divergence between the Scots and English positions does not appear to have constituted grounds for the Supreme Court to consider this question.

Further consultation as to whether there are justifications and sound policy considerations justifying a Scots-specific approach would be helpful. We would note that the application of the law on interpretation is by its nature highly fact-specific, and legislative reform may risk unnecessarily constraining judicial ability to balance the various principles of interpretation in a case-by-case basis.

Question 14

Retention is a "self-help" remedy which is based on the idea of obligations in a contract being interdependent or reciprocal, so if one party does not perform then the other party need not perform. In its report the SLC considered it best to leave further clarification of the law on retention to the courts and practitioners.

In the light of the subsequent case law do you consider that the law of retention would benefit from clarification?

☒ Yes

☐ No

☐ Don't know

If yes, please provide details.

We are of the view that the law in relation to retention of performance is less clear than when the SLC issued its Report and therefore requires further clarification. This stems from recent case law has seen developments in a number of the controls on retention. This case by case approach has led to uncertainty as to how retention operates and how it ought to be controlled.

In support of this, we draw on two reviews on the law of retention in Scotland - Richardson, L 2018, 'The scope and limits of the right to retain contractual performance', Juridical Review, vol. 2018, no. 4, pp. 209-229 and Richardson, L 2018, 'What do we know about retention now?' - Edinburgh Law Review, vol. 22, pp. 387-392.

In view of these reviews, we would suggest that analysis of all of the controls and how they interact with each other is needed in order to determine how best to control retention.

Question 15

Recission means the termination or cancellation of a contract which has been rescinded. The SLC considered that the current law on the matter is unclear. There was strong support for this proposed reform which is provided for at section 18 of the SLC draft Bill and introduces a new remedy which is intended to address the economic imbalance which may be caused when a partly performed contract is subject to rescission.

Are you content with the proposed approach taken to restitution following recission?

☒ Yes

☐ No

☐ Don't know

If not, please provide your reasons.

Yes, we agree that clarity is to be welcomed for the reasons set out in the SLC's Report, and are content with sections 18-21 of the draft Bill. We agree with the analysis in the Report which draws on the DCFR, and additionally note the provisions of the (English) Law Reform (Frustrated Contracts) Act 1843 which provide for (broadly) similar rules as to the entitlements of parties to a frustrated contract.

Question 16

In light of the decision in *Primeo* are you content with the proposed approach taken to apply the defence of contributory negligence to claims of damages for breach of contract?

- ☐ Yes
- ☐ No
- ☐ Don't know

If not, please provide your reasons.

We do not have any comments to make on this question.

Question 17

No further reforms are recommended in respect of "anticipated breach" (the SLC's preferred term for what is often known as "anticipatory breach").

"Anticipated breach" describes conduct by a debtor that will justify the creditor in exercising remedies available on breach even though the time for the debtor's performance has not yet arrived.

Are you aware of any developments in case law which suggest that the law of anticipated breach needs reform?

☐ Yes

☒ No

☐ Don't know

If yes, please provide details.

We are not aware of any case law developments which would necessitate reform and are consent with the SLC's initial conclusions.

Question 18

On the basis that gain-based damages are apparently not available in Scotland, the SLC sought views on reasonable fee awards and accounts of profit. Whilst there was some support for the former it was felt that reform was not needed as there was no significant support for legislation and consultees tended to take the view that such an award could already be made if an appropriate case arose, or the law was capable of being developed by the courts. On the latter there was no clear support. Consequently, reforms in this area were not recommended – further developments in the courts were to be awaited.

Are you aware of any developments in the courts which are either helping or hindering this area of the law?

☐ Yes

☒ No

☐ Don't know

If yes, please provide details.

We are not aware of any relevant developments in the courts, but would agree with the conclusion that the judiciary are best-placed to develop the law on this topic as required.

Question 19

The SLC concluded that to provide a satisfactory solution would require a significant piece of work and that would not be possible at that time.

Do you have any views on the current state of the law in respect of transferred loss claims?

☒ Yes

☐ No

☐ Don't know

If yes, please provide details.

We are broadly in agreement with the SLC's previous conclusions that reform of the law on transferred loss may well be helpful, but that significant work is needed to ensure that any such reforms are satisfactory and adequately account for methods used in practice to allow for enforceable rights on the part of those who would otherwise encounter a damages 'black hole', and give sufficient consideration to whether such methods provide sufficient protection in such cases. There is obvious tension and overlap in the laws on transferred loss and third party rights, and consultation and reform must also consider whether the boundary between these remedies is adequately delineated, particularly in light of contrasting judicial opinion on whether transferred loss operates in line with the intention (imputed or otherwise) of the contracting parties or purely as a matter of policy.

In particular, it would likely assist to have clarity on the questions of: (i) the party on whom the loss falls- whether the loss should be treated as that of the innocent contracting party, or the third party, (ii) the role of contractual intention and (iii) whether the third party ought to have the ability to recover the loss in its own name or compel the innocent contacting party to recover on its behalf.

We are of the view that the most recent case on transferred loss in the Scottish courts (*Forthwell Ltd v Pontegadea UK Ltd* [2024] CSOH 59) does not definitively answer in full the questions remaining as to the limits and operation of the transferred loss doctrine in Scots law.

Question 20

Has the UK Supreme Court decision produced certainty or has it caused any difficulties or created unfairness? The UK Supreme Court case is Cavendish Square Holding and ParkingEye Ltd [2015] UKSC 67.

☒ Yes

☐ No

☐ Don't know

Where possible, please provide details to support your view.

We continue to be of the view that it is commonplace for commercial contracts to set out the commercial or social justification for any clause which may be considered as being a penalty clause, for example, to ensure the prompt payment of goods or services.

Furthermore, we believe that it remains common practice to frame such clauses as a conditional primary obligation rather than a purely secondary obligation, for example, payment on a specified event. We consider that such careful drafting can avoid engaging the penalty rule if the provision is drafted on that basis.

In practice, the *Cavendish/ Parking Eye* decision has allowed a helpful framework to consider the enforceability of liquidated damages clauses, in the context of both contractual drafting and disputes considering whether such clauses should be treated as penalties.

For these reasons, we consider that these UK Supreme Court have provided clarification as to the law in respect of penalty clauses which has, in turn, led to parties taking steps to adjust their commercial agreements. This is helping to ensure that any amount that is sought by an innocent party upon breach cannot be considered as being unduly harsh.

For further information, please contact:

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