Scottish Law Commission

(SCOT LAW COM No 144)

Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purposes of promoting the reform of the law of Scotland. The Commissioners are:

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Scottish Law Commission

Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods

To: The Right Honourable the Lord Rodger of Earlsferry, QC,
Her Majesty's Advocate

We have the honour to submit our Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods.

(*Signed*) C K DAVIDSON, *Chairman*
E M CLIVE
PHILIP N LOVE
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KENNETH F BARCLAY, *Secretary*
14 June 1993

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Part I Background and Recommendation

Introduction

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.[1] 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. Lawyers acting for offerors usually take care to opt out of the rule. It is not the normal rule in European contract laws. It gives rise to unnecessary difficulties, which we discuss later. It is not clear whether or not it applies, or might be held to apply, to contracts concluded by certain modern means of communication.

The 1977 memorandum on formation of contract

1.2 In 1977 this Commission published a consultative memorandum on the *Formation of Contract*,[2] which sought views on questions relating to the formation of contracts—such as, when a statement or a display of goods should be regarded as an offer, as opposed to a mere invitation to do business; the effect of a general offer, such as an offer of a reward; the effect of an acceptance on a standard form not meeting exactly the terms of the offer (the so-called "battle of the forms"); the effect of an offer which provides that silence will be the equivalent of acceptance; possible alteration of the postal rule; and the effect of revocations of offers. The Commission received helpful comments on memorandum 36 and devoted some time to the consideration of policy before work on this subject was temporarily suspended because of changes in personnel, changes in priorities and a desire to interest the Law Commission for England and Wales in a joint project on the postal rule.

The consultation paper on the battle of the forms

1.3 On one topic—the "battle of the forms"—the Commission felt the need for further advice from consultees and issued a supplementary consultation paper.[3] This sought views on some provisional proposals for dealing with the problem which arises when a purported acceptance of an offer contains some additional terms, perhaps in a standard form used by the offeree generally, which do not materially affect the terms of the offer and which are ignored by the offeror. Must the view be taken that no contract has been concluded, because the terms of the acceptance did not fully meet the terms of the offer, or can a contract be held to be concluded and, if so, on what terms? This supplementary consultation produced useful comments which caused the Commission to reconsider some of its provisional proposals.

1. See eg the Commission's *First Programme* (Scot Law Com No 1, 1965), p5, discussing the work to be done under the programme subject of obligations.
2. Memorandum No 36 (March 1977) (which we refer to in this report as "memorandum 36"). Memorandum No 37 (March 1977) on *Constitution and Proof of Voluntary Obligations: Abortive Constitution* also has a bearing on some of the issues discussed in this report.
3. Scot Law Com, Consultation Paper on *Contract Law—Exchange of Standard Term Forms in Contract Formation* (1982).

The report on requirements of writing

1.4 Memorandum 36 did not deal with the legal requirements of writing for the constitution or proof of contracts. The Commission dealt with this subject separately in its report on *Requirements of Writing* which was published in 1988.[1] The recommendations in the report were designed to modernise and clarify the relevant Scottish law, which is still based largely on 17th century statutes and accumulated case law. In relation to contracts, the report had four main policy objectives:–

1. to reduce to the acceptable minimum the number of cases where writing is required by the general law of Scotland for the formal validity of a contract;
2. to reduce to the acceptable minimum the formalities required in those cases where writing is required for formal validity;
3. to rationalise and simplify the law on the execution of documents which are intended to be self-proving (i.e. probative in the evidential sense); and
4. to abolish the few remaining requirements of proof by writ or oath.

The recommendations in the report were accepted by the Government and a Private Members' Bill to implement the report was introduced in Parliament by Mr Allan Stewart MP during the 1988–89 Session. Unfortunately this Bill did not proceed, for reasons unconnected with its substance. We understand the difficulties faced by Ministers in finding space for law reform Bills in the legislative timetable. Nonetheless we must place on record our deep disappointment that this useful, non-controversial law reform measure has not yet been implemented.

Consultation with Law Commission

1.5 The early efforts of both Law Commissions on a proposed uniform contract code for the whole of Great Britain did not meet with success and there has, not surprisingly, been some reluctance on both sides to commit resources to any similar grand venture which might prove equally fruitless. Nonetheless it seemed to us that there would have been advantages in a joint exercise on the limited topic of the postal rule. We attempted to interest the Law Commission in such a project in 1984 and again in 1988 but without success. We understand that there were various reasons for the reluctance of the Law Commission to become involved in a joint project, including a desire to wait and see whether the United Kingdom would ratify the United Nations Convention on Contracts for the International Sale of Goods; the undesirability of limiting an exercise to the postal rule; the results of an earlier consultation on firm offers which revealed no great dissatisfaction with the existing law; a feeling that it might be difficult to keep questions on the formation of contract isolated from the question of consideration in contract law; and concerns about resources. We fully understand the position of the Law Commission. Our options then were to abandon work on contract formation or to proceed on our own. We were reluctant to see all the work in this area, by highly respected former members of this Commission and its staff, and by consultees, go to waste. We thought, and our consultees thought, that there was a strong case for changing the postal rule and that there was also a case for a few other minor adjustments or clarifications, some of them consequential on the abolition of the postal rule. We were aware that reform of the Scottish law on contract formation (which, for example, does not have any requirement of consideration and which recognises the possibility of firm offers) involves different considerations from reform of the English law on the same subject. We were also aware that the success of the United Nations Convention on Contracts for the International Sale of Goods made a review of the law in this area particularly opportune at this time. We therefore decided to proceed with the consultation paper which led to this report. For reasons which will quickly become apparent we see the recommendations in this report as an important step towards, and not away from, international harmonisation of laws on contract formation.

1. Scot Law Com No 112, 1988.

The European TEDIS programme

1.6 TEDIS stands for Trade Electronic Data Interchange Systems. The TEDIS programme was launched by a Decision dated 5 October 1987 of the Council of Ministers of the European Economic Community.[1] To a large extent the programme is concerned with non-legal matters which are beyond the scope of this report. However, one aspect of the programme was the identification of legal problems which might inhibit the development of trade electronic data interchange.[2] There are few such problems so far as Scottish private law is concerned. The general rule is that contracts can be entered into by any means and, with a few exceptions, do not require writing for their validity or proof. As we have noted, our report on *Requirements of Writing*[3] recommended further improvement and clarification of the law in this respect. The Civil Evidence (Scotland) Act 1988 (which implemented a report of this Commission)[4] abolished the hearsay rule in civil proceedings and provided for the general admissibility of "statements", which are defined as including any representation "however made or expressed" of fact or opinion. The Carriage of Goods by Sea Act 1992 (which implements a joint report of the English and Scottish Law Commissions)[5] makes provision for the law on bills of lading and other shipping documents to be adapted, by statutory instrument, to cater for computer-based developments in this area. So the position is generally satisfactory. The postal rule may, however, cause a problem because it is not entirely clear into which category—non-postal or postal—contracts concluded by certain electronic data interchange techniques would fall. Moreover many European countries do not have the postal rule. The TEDIS programme therefore reinforces the case for a re-examination of the postal rule in this country. The programme may have further implications for the law on the formation of contracts at a later date but it seems doubtful whether these will prove to be fundamental. Problems of authentication and reliability of messages are, for example, problems of technique rather than principle and arise already in relation to traditional methods of concluding contracts.

The United Nations Convention

1.7 The United Nations Convention on Contracts for the International Sale of Goods ("the Vienna Convention") was adopted in April 1980. By June 1992 the Convention had been ratified, or acceded to, by 34 states, including many of the United Kingdom's major trading partners.[6] Other states are likely to become parties soon.[7] The Convention was prepared by experts on contract law from many countries and is, to some extent, an amalgam of civil law and common law traditions. Perhaps for this reason its rules are very similar to the existing rules of Scottish law. The Scottish Law Commission, when consulted as part of the consultation exercises carried out by the Department of Trade in 1980 and by the Department of Trade and Industry in 1989,[8] recommended that the United Kingdom should become a party to the Convention. The English Law Commission has also given a favourable response. Whatever may be decided on this point, the Convention contains a modern, internationally agreed set of rules on the formation of certain contracts. These rules now apply very widely in international trade. Given that Scots law has a tradition of being receptive to the best international legal developments, given the obvious

1. Decision No 87/499/EEC—OJL 285, 8.10.1987.
2. See the Reports published by the Commission of the European Communities on *TEDIS—The Legal Position of the Member States with respect to Electronic Data Interchange* (Sept 1989) and *The Legal Position of the EFTA Member States with respect to Electronic Data Interchange* (Oct 1991).
3. Scot Law Com No 112, 1988.
4. Evidence—*Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Scot Law Com No 100, 1986).
5. *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No. 196; Scot Law Com No 130, 1991).
6. For example (in alphabetical order), Australia, Austria, Canada, China, Denmark, Egypt, Finland, France, Germany, Italy, the Netherlands, Norway, Russia, Spain, Sweden, Switzerland and the USA.
7. See eg the report of the New Zealand Law Commission on *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's proposed Acceptance* (Report No 23, 1992).
8. The Department issued a consultative document on the *United Nations Convention on Contracts for the International Sale of Goods* in June 1989. We have found this document very helpful in preparing this report.

advantages for Scottish traders, lawyers and arbiters in having our internal law the same as the law which is now widely applied throughout the world in relation to contracts for the international sale of goods, and given the sensible tradition in Scotland of not having different rules for the formation of contracts of different types, it seemed to us that it would be worth considering whether the more general rules on contract formation in the Vienna Convention could be adopted as part of the general law of Scotland on the formation of contracts. We therefore analysed the rules relating to contract formation in the Convention in the light of the Commission's earlier consultations and policy decisions, and we reached the provisional conclusion that they would form a very satisfactory basis for the internal law of Scotland in this area. However, as some years had elapsed since the publication of the Commission's consultative memorandum on the *Formation of Contract*[1] and as that memorandum had not focussed on the terms of the United Nations Convention, which was only in the course of preparation at the time, we decided that it would be appropriate to have further consultation before reaching a firm conclusion.

The consultation paper on formation of contract

1.8 In September 1992 we therefore published a consultation paper on the *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* in which we sought views on a provisional proposal that the provisions of certain articles of the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on 11 April 1980 should be adopted, with minor modifications, as part of the general law of Scotland relating to the formation of contracts. We are very grateful to all those who responded.[2]

1.9 There was general support for the provisional proposal but a few commentators had reservations about the form of the legislation proposed. One concern was that the draft Bill which was attached to the consultation paper could have given the false impression that the Vienna Convention had been ratified by the United Kingdom. Another was that it did not make it clear that the new rules on formation of contract would not affect existing protective legislation such as that protecting consumers. There were also a few constructive suggestions in relation to particular provisions. We have modified our original proposals to try to take account of all these comments.

Recommendation

1.10 Our recommendation can be stated quite shortly at this stage. It is that

> **Provisions based on Articles 4, 6, 8, 9, 10 and 13 to 24 of the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on 11 April 1980, with the minor modifications shown in the Schedule to the draft Bill appended to this report, should be adopted as part of the general law of Scotland relating to the formation of contracts.**

1.11 We emphasise that our recommendation is confined to the law on the formation of contracts. We are concerned in this report with whether a contract has come into existence—not with such questions as whether it is invalid on the ground of incapacity or what the remedies may be for its breach. Moreover, our recommendation is only that certain provisions based on articles in the Convention should be adopted "as part of" the general law of Scotland. The draft Bill appended to this report is not intended to contain an exhaustive statement of the law relating to the formation of contracts. Accordingly any question not settled by it would continue to be regulated by the existing law. Clause 1(2) of the draft Bill contains an express provision to make this clear. It provides that the Bill does not affect the operation of any enactment or rule of law which

1. Memorandum No 36 (March 1977).
2. A list of those who submitted written comments is in Appendix B.

(a) provides protection against unfair contract terms, or protection for any special category of contracting party, such as consumers

(b) requires writing for the constitution of a contract or prescribes a form for a contract (as e.g. in the area of consumer credit) or requires a contract to be proved by writ or oath[1]

(c) enables a contract to be concluded otherwise than by offer and acceptance, or

(d) regulates any question relating to the formation of a contract which is not provided for by the Bill.

1. This provision of the draft Bill could be simplified if the recommendations in our report on *Requirements of Writing* (Scot Law Com No 112, 1988) were implemented. See para 1.4 above.

Part II General Rules

Introduction

2.1 In this Part we examine articles 4, 6, 8 to 10 and 13 of the Vienna Convention and assess their suitability for adoption as part of the general law of Scotland relating to the formation of contracts. Part I of the Convention also contains other articles, but they would be inappropriate for adoption for these purposes. Articles 1 to 3 delimit the sphere of application of the Convention: our proposed rules would apply more widely. Article 5 deals with the liability of the seller of goods for death or personal injury caused by the goods. It is not applicable to contract formation. Article 7 deals with the interpretation of the Convention as an international instrument and would not be suitable for general use in relation to the internal law on contracts.[1] Article 11 provides that a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It is not suitable as a rule for contracts generally in Scots law because some important types of contract do require writing for their formation. We have dealt with the questions covered by this article in our report on *Requirements of Writing*.[2] Article 12 relates to Contracting States which have opted out of Article 11 and is of no relevance for the purposes of this report.

Scope of the rules

2.2 Article 4 of the Convention provides as follows.

> "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) the effect which the contract may have on the property in the goods sold."

It would be useful to include in the adopted rules an introductory provision modelled on this article and designed to make it clear that the new rules are confined to questions of formation and that questions of validity (for example, on the ground of error or incapacity) are not covered. The words "except as otherwise expressly provided in this Convention", although perhaps unnecessary, could be retained to prevent arguments about the distinction between a non-existent contract and an invalid contract.[3]

Contracting out

2.3 Article 6 of the Convention allows parties to vary or opt out of its provisions. It provides as follows.

> "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

1. We have no doubt, however, that in interpreting any provisions of the Convention adopted into our law the courts would have regard to their international origin and, if the United Kingdom became a party to the Convention, to the undesirability of having different rules governing domestic and international sales.
2. Scot Law Com No 112 (1988).
3. See *Mathieson Gee (Ayrshire) Ltd* v *Quigley*, 1952 SC (HL) 38.

There is nothing to say that the exclusion, derogation or variation must be express.[1] Article 6 is an important provision which preserves the basic principle of contractual freedom. For our purposes the reference to article 12 (which is not reproduced in our draft Bill) would be deleted. With this minor modification we regard article 6 as an essential part of the rules on contract formation. It would, for example, enable members of an electronic data interchange network to agree on rules among themselves on such matters as what would be regarded as an effective offer or acceptance or when a contract would be regarded as concluded. It would also enable parties, if they so wished, to disapply the Convention's rules, which we are about to consider, for the interpretation of any statements made in the course of concluding a contract.

Interpreting statements and conduct of the parties

2.4 A question which can arise in relation to the formation of a contract is whether statements or conduct by one party are to be held to bear (a) the meaning that party intended them to bear, or (b) the meaning the other party attached to them, or (c) the meaning a hypothetical reasonable observer would have attached to them, or (d) a meaning derived from some combination of these rules. Once this has been decided, a subsidiary question is whether extrinsic evidence is admissible to establish what has to be established. Article 8 of the Vienna Convention regulates these questions as follows.

> "(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

These provisions are of limited scope in the context of this report, which is concerned only with the formation of contracts. We are not here concerned with the question whether a contract, duly formed by offer and acceptance,

(a) is invalid on some such ground as incapacity, error, force or fear

(b) has been inaccurately recorded in a formal document, which requires rectification

(c) contains terms other than those which, by agreement of the parties, have been recorded in a formal document

(d) means one thing rather than another, or

(e) has subsequently been varied.

In short, we are concerned with formation, not with validity, rectification, contents, interpretation or variation. In relation to the narrow question of formation, the results of applying article 8 would usually be similar to the results reached under the existing law. Where they would differ they would, in our view, be likely to be better.

2.5 Some examples may be helpful.

1. A and B entered into a written contract for the sale by A to B of "the estate of Dallas". A said he meant the estate of Dallas as shown on a plan used during the negotiations. B said he intended the estate, which was more extensive, shown in the titles as the estate of Dallas. The court looked at the evidence of the negotiations which showed that A's intention was to sell the estate shown

1. See Honnold, *Uniform Law for International Sales* (2nd ed 1991) p 126.

on the plan "and that that intention was made clear to the buyer."[1] A's view prevailed. The same result would have been reached under article 8(1). A's intent was known to B.

2. A offered to lease a farm from B. A intended his offer to include the terms of an earlier offer which he had made a month earlier and which had not been expressly rejected. He did not make this clear to B. B thought that the terms of the offer were all contained in the second offer. The court, after considering all the circumstances of the case, including the negotiations between the parties and their subsequent conduct, found that B did not know, and had no reason to be aware, of A's intent and that there was no contract.[2] Under article 8 the question whether B knew or could not have been unaware of A's intent would have been equally relevant, but once that had been decided in the negative it might well have been found under article 8(2) that a reasonable person in B's position would have understood that A's second offer contained all the terms.[3] It might well, therefore, have been held that a contract had been entered into on the terms in the second offer.

3. A offered a piano to B "at the value of £26, payable at 15s per month". B accepted the offer. B later fell behind with the payments and A attempted to repossess the piano. A said he intended to let the piano to B on hire-purchase. B said he had understood the offer as an offer to sell the piano for a price payable by instalments. The sheriff held that there was no contract because there was no *consensus in idem*. The Court of Session held that there was a contract of sale. Although there was evidence that A intended to offer the piano on hire-purchase, he did not make that clear to B. In a famous statement Lord President Dunedin said that "commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say."[4] The same conclusion would have been easily reached under article 8. B had no knowledge of A's actual intent and no reason to be aware of it. A reasonable person in B's position would have understood the offer as one of sale, payment to be made by instalments.

4. P signed a formal guarantee in favour of a bank. When sued for payment she averred that "she did not intend to contract as guarantor" and that "there was no agreement between her and the pursuers." There were no averments that she had been induced by the bank to sign the document in error or that the bank knew, or ought to have known, of her true intentions. P's averments were held to be irrelevant.[5] The same result would have been quickly reached under article 8. P's intent by itself would be irrelevant under article 8(1) unless it was also shown that the bank knew or could not have been unaware of it. There was not even the beginning of a case under article 8(2).

5. A offered, in writing, to settle an action for a certain sum with "interest at 10 per cent from 16th March 1971". B accepted, in writing, repeating the reference to "interest at 10 per cent from 16th March 1971". Later B realised that he had made a mistake. He had always intended interest to run from the date stated in the summons, namely 16th March 1969. He tried to have the contract set aside on the ground that when he wrote 1971 he really meant 1969. (Of course, if he had written 1969 there would have been no contract because the acceptance would not have met the offer.) The court found, after considering the evidence of the negotiations and subsequent actings of the parties, that B had genuinely intended interest to run from 16th March 1969 but that this "was unknown to, and could not reasonably have been known to, the offeror". It was held that

1. *Houldsworth* v *Gordon Cumming* 1910 SC (HL) 49. See also *Sutton & Co* v *Ciceri & Co* (1890) 17 R (HL) 40 where one party made clear to the other that he attached a particular meaning to an ambiguous word ("statuary") and where the court held that that meaning must prevail.
2. *Buchanan* v *Duke of Hamilton* (1878) 5 R (HL) 69. See also *Stuart & Co* v *Kennedy* (1885) 13 R 221, esp. at p223.
3. This was more or less accepted by the Lord Chancellor in the House of Lords (at p78) but by that stage B was not insisting on the point that there was a contract on the terms of the second offer.
4. *Muirhead and Turnbull* v *Dickson* (1905) 7 F 686 at p694.
5. *The Royal Bank of Scotland plc* v *Purvis* 1990 SLT 262.

B was not entitled to have the contract reduced.[1] The same result would no doubt have been reached on an application of article 8.

6. A, a medical practitioner, entered into negotiations with B, a firm of plant hirers, engineers and building contractors, for the removal of silt from a pond on his property. It was clear from the beginning of the negotiations that A wanted B to carry out the work and not just supply plant for him to operate himself.[2] Eventually, after inspecting the site, B wrote a letter offering to supply the necessary plant "for the excavation and removal to point indicated of the mould at present deposited in your pond". A wrote confirming his telephone acceptance "of your offer to remove the silt and deposit from the pond" and saying that he would be glad if B would commence the work at their early convenience. B carried out the work. A dispute then arose about their charges. Both parties assumed that a contract had been entered into. The Lord Ordinary and the majority of the Inner House proceeded on the footing that there was a contract. However, the House of Lords, without considering the earlier negotiations[3] or the subsequent actings,[4] held that, although the parties thought there was a contract, there was in fact no contract. B had offered to supply plant. A had purported to accept an offer to do the work. If the question whether a contract had been concluded had been argued before the Lord Ordinary under reference to article 8 it is possible that the result would have been different. If due consideration had been given to all the relevant circumstances—including the fact that A had all along made it clear that he wanted a quotation for doing the work, that the negotiations may well have explained why the offer was made in the terms it was,[5] and that the subsequent conduct of the parties was consistent only with a contract for doing the work—then B's offer might well have been interpreted as an offer to supply the plant with operators rather than an offer to supply the plant for A to operate himself. Indeed if the question whether a contract had ever been concluded had been argued in certain ways from the beginning under the existing law it is quite possible that the result would have been different because it would have been arguable that extrinsic evidence was admissible, not for the purpose of determining or interpreting the terms of the contract but for the purpose of deciding whether there ever was a contract in the first place[6].

2.6 In relation to the interpretation of concluded written contracts there are well-established rules relating to the non-admissibility of parole evidence or extrinsic evidence.[7] These rules are subject to many exceptions. In particular there is an exception which allows the court to look at surrounding circumstances in order to see what was the intention behind the words used in the contract[8]. However, they are undoubtedly stricter, particularly in relation to evidence of prior negotiations and subsequent conduct, than the rules in article 8. Two consultees suggested that it would be undesirable to have one set of rules applying for the purpose of deciding whether a contract had been formed and another applying for the purpose of interpreting a

1. *Steel's Tr* v *Bradley Homes* 1972 SC 48. Some of the dicta in this case were criticised by Lord Marnoch in *Spook Erection (Northern)* v *Kaye* 1990 SLT 676. However, that was a case in which there was no question as to the interpretation of the statements in the offer and acceptance. The only question was whether the seller could escape from his contract on the ground that he did not know the true value of what he was selling. It was held that he could not and that it made no difference that the buyer did know the true value and knew that the seller did not. This type of case would not be affected by the adoption of article 8. *Steel's Tr* v *Bradley Homes* was followed in *Angus* v *Bryden* 1992 SLT 884.
2. See *Mathieson Gee (Ayrshire) Ltd* v *Quigley* 1949 SLT (Notes) 27.
3. Evidence of these had been held by the Lord Ordinary to be inadmissible in relation to "a written contract ... not alleged to be reducible". See 1949 SLT (Notes) 27.
4. See 1952 SC (HL) 38 at p43.
5. See 1949 SLT (Notes) 27. B's engineer was alleged to have explained that an all-in price for the work would have been inadvisable from A's point of view because the firm would have had to quote a very high price to cover themselves and that a quotation based on charges for the time the plant was hired would be better.
6. See *Steuart's Trs* v *Hart* (1875) 3R 192 at p 201; *Anderson* v *Lambie* 1954 SC (HL) 43 at p 65. See also para 2.6 below.
7. See Walker & Walker, *Evidence*, Chap XXI; Macphail, *Evidence*, Chap 15; Gloag, *Contract* (2nd edn 1929), Chap XX; McBryde, *Contract*, Chap 19.
8. *Inglis* v *Buttery* (1878) 5 R (HL) 87 at p103. See also *Von Mehren & Co* v *Edinburgh Roperie and Sailcloth Ltd* (1901) 4 F 232 at p239 and *Houldsworth* v *Gordon Cumming* 1910 SC (HL) 49 at p51.

concluded contract. There is certainly a case for reconsidering the rules on interpretation and we intend to do that in a later discussion paper. We do not think, however, that that need hold up a recommendation in relation to the question of formation. The law already recognises that the rules on the non-admissibility of extrinsic evidence which are applicable to the interpretation of written contracts do not apply when the question is whether a contract should be reduced[1] or rectified.[2]

> "Rules as to the interpretation of contracts do not apply to cases where the question really is whether the contract is binding on the parties. So parole evidence is admissible to prove that one or other party never gave any assent, or that his assent was obtained by misrepresentation, fraud, or other improper means. And it is competent to prove that a written contract was entered into in circumstances or with objects which make it void or reducible as a *pactum illicitum*"[3]

The question whether a contract is reducible on the ground of certain types of error is essentially similar to, and indeed may overlap with, the question whether a contract was ever concluded in the first place and we think that it would be entirely appropriate to apply the same rules on the admissibility of evidence to both. We do not believe that this would give rise to difficulty. A court is already liable to be faced with the situation where, having considered extrinsic evidence for the purpose of deciding whether a contract should be reduced or rectified, it decides that the contract is binding and accurately reflects the parties' common intention. No-one, so far as we are aware, suggests that, having reached that stage, the court should then ignore the meaning which it has decided the contract has and proceed to interpret it anew without regard to the extrinsic evidence. One practical effect of adopting article 8 in relation to formation alone would be to direct the attention of parties' legal advisers to the question whether a contract had been concluded in the first place. This would be a good thing in itself: it would help to avoid situations like that which arose in the case of *Mathieson Gee (Ayrshire) Ltd v Quigley*.[4] where the case was argued all the way through the Court of Session on the footing that there was a contract only for it to be held in the House of Lords that there was not.

2.7 In its consultative memorandum on *Constitution and Proof of Voluntary Obligations: Abortive Constitution*[5] this Commission consulted on some of the matters covered by article 8. The results of that consultation suggested that, in relation to the formation of contracts, rules like those in article 8 were likely to be seen by Scottish lawyers as being very similar to the existing law of Scotland and as being acceptable. This conclusion was confirmed by the current consultation.

Usages and established practices

2.8 In deciding whether a contract has been concluded it may sometimes be necessary to decide whether to have regard to usages, and to practices established by the parties between themselves. Article 9 of the Vienna Convention deals with this question in these terms.

> "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
>
> (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew

1. *Steuart's Trs* v *Hart* (1875) 3R 192 at p 201; *Glasgow Feuing and Building Co* v *Watson's Trs* (1887) 14 R 610; *Anderson* v *Lambie* 1954 SC (HL) 43 at pp 62 and 65; *Angus* v *Bryden* 1992 SLT 884. In *Houldsworth* v *Gordon Cumming* 1909 SC 1198 at p1206 Lord Low noted that there was a difference between an action for reduction of a written contract (where evidence of prior negotiations would be admissible) and an action on the construction of such a contract (where they would not be). The case eventually established that, even on construction, evidence of prior negotiations was admissible to determine the subject matter of the contract. See 1910 SC (HL) 49.
2. Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8(2).
3. Gloag, *Contract* p 365 (footnotes omitted).
4. 1952 SC (HL) 38.
5. Memorandum No 37 (1977) paras 12 to 19. This part of the memorandum dealt with the question of *dissensus* and discussed, among other things, rules of a UNIDROIT draft law on the validity of contracts for the international sale of goods which were very similar to the rules now in article 8 of the Vienna Convention.

or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Article 9 as it appears in the Convention relates not only to the formation of a contract but also to the terms or content of the contract, and indeed this will be its main sphere of application. In the context of this report, however, article 9 would be concerned only with the formation of a contract. Although it would have only a very limited application in this sphere it could still be useful on occasion. For example, there may be a usage or established practice in a certain trade that a contract is concluded at a particular moment, such as the fall of an auctioneer's hammer. The article could also be useful in relation to the development of new practices on contract formation, such as those based on new electronic means of communication.

2.9 For the purposes of our draft Bill article 9 would need to be slightly modified. First, the phrase "their contract or its formation" in paragraph (2) should be changed to "the formation of their contract" to reflect the more limited scope of the rule in the present context. Secondly, the words "in international trade" in paragraph (2) should be deleted, for obvious reasons.

Definition of writing

2.10 Article 13 of the Convention says that, for the purposes of the Convention, "writing" includes telegram and telex. There is a reference to writing in article 21(2), which we are proposing for adoption. Although the definition in the Convention might be thought to be a little old-fashioned it is only an inclusive definition and, as it might conceivably help to resolve a doubt, we think that it should be included. In the draft Bill it appears as a sub-paragraph of the paragraph containing article 21. It qualifies the phrase "letter or other writing". In this context it is clear that what is referred to is the actual communication itself and not the techniques, such as printing, typewriting and so on, which are used to produce it. For this reason, the definition of "writing" in the Interpretation Act 1978 would not be suitable in this context.[1]

When does a communication reach the addressee?

2.11 In several contexts it is important, under the Convention, to know whether a communication from one party has reached the other party. Article 24 helps to resolve this problem by providing as follows.

"For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."

Article 10 helps to resolve the problem of a person who has more than one place of business. It provides as follows.

"For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence."

Article 10(b) is unnecessary for the part of the Convention with which we are concerned. It is therefore omitted from the Schedule to the draft Bill appended to this

1. See Interpretation Act 1978, Schedule 1—"Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form.

report. Article 10 (a) in the draft Bill is included as a sub-paragraph of the paragraph containing article 24, to which alone it is relevant. It will be noted that delivery to the place of business is only one of several ways in which an indication of intention may reach an addressee. For example, sending an acceptance to the mailing address given on the offer would be sufficient and usual. The rules in article 24 prevent any argument that a communication did not reach a party because that party was not in the office or was not at home at the time.[1] They seem to us to be reasonable.

1. See eg *Burnley* v *Alford* 1919 2 SLT 123 where it was held that a recall of an offer took effect when it arrived at the other party's office, although he argued that it lay there unopened for three days.

Part III The Offer

Introduction

3.1 In this part of the report we discuss articles 14 to 17 of the Vienna Convention, which deal with questions relating to offers, most of which were also discussed in memorandum 36.

What is an offer?

3.2 It is sometimes necessary to decide whether a statement by one party is an offer or merely, say, an indication of a willingness to do business. Article 14 deals with this kind of problem. It provides as follows.

> "(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.
>
> (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

We discuss the second sentence of article 14(1) and the question of general offers (such as offers of reward) later.[1] The other rules in article 14 are in line with the existing law of Scotland and would, in our view, provide a useful statutory solution to some of the problems which we discussed in memorandum 36.[2] For example, under article 14 the display of goods in a shop window, or on the shelves of a supermarket, would not normally constitute an offer because it would not be addressed to "one or more *specific* persons". The same would apply to the placing of goods in automatic vending machines, and to the publication in newspapers of advertisements of articles for sale, and to the advertisements in mail order catalogues. Similarly, the exposure of articles for sale by auction would not be an offer to sell but merely an invitation to bid. This is the existing law.[3] All of these results under article 14 are in line with the preferred solutions of those who commented on the relevant paragraphs of memorandum 36.

3.3 The second sentence of article 14(1) gives rise to a problem of interpretation.[4] Does it merely state what is sufficient, or does it state what is necessary? It is not necessary for us to express a view on this question because the second sentence of article 14(1) would clearly be inappropriate in provisions which, like those of our draft Bill, are intended to cover contracts generally, many of which will not relate to goods and some of which will not provide for a price.

3.4 The question of general offers, such as offers of reward for returning lost items or offers of prizes to those winning competitions,[5] also requires careful consideration in the light of article 14(2) of the Convention. This question has given rise to much discussion in Scotland, where the law recognises that a unilateral promise may constitute a binding legal obligation. Most cases involving general undertakings to pay a

1. See paras 3.3 and 3.4 below.
2. See memorandum 36 pp8–19.
3. *Fenwick* v *Macdonald, Fraser & Co* (1904) 6 F 850; Sale of Goods Act 1979, s57.
4. See the DTI Consultative Document (1989) paras 23–28.
5. See McBryde, *Contract*, pp60–62; Walker, *Contracts* (2d edn, 1985) pp29–31, 115–116.

reward or prize or to provide some benefit to anyone fulfilling a particular condition have been argued in Scotland on the basis of contract, rather than unilateral promise, the general offer being regarded as accepted by fulfilling the required condition.[1] It has been suggested, however, that at least some such cases would be better regarded as unilateral promises.[2] Article 14 leaves it open, as at present, for a pursuer to argue either way, depending on the facts and the available evidence.[3] It is clear from article 14(2) that a proposal which is not addressed to one or more specific persons may nonetheless be an offer in certain circumstances. Article 14(2) is concerned with the distinction between offers and invitations to treat, and allows a proposal to persons in general to be regarded as an offer, rather than a mere invitation to make offers, if this is clearly indicated by the person making the proposal.[4] A general offer of a prize or reward is not normally a mere invitation to make offers: no further negotiation is normally envisaged. So it ought to be as easy to construe such a statement as an offer, provided there is a clear indication of an intention to be bound, as it is under the existing law. Article 14 would not change the law in relation to so-called general offers. It would merely preserve the existing position.

3.5 Our general conclusion is that article 14, with the deletion for present purposes of the second sentence of paragraph (1), would be a useful addition to Scottish law.

When is offer effective?

3.6 For various purposes it may be necessary to decide when an offer becomes effective. For example it may be important to know whether the offer can be accepted. Nothing done by the addressee of an offer before the offer becomes effective could constitute an acceptance. Moreover, the offeror may be allowed greater latitude in withdrawing an offer before it becomes effective than in revoking an offer once it has become effective. This is because at the earlier stage the offeree has no legitimate expectations.

3.7 Article 15 of the Vienna Convention deals with these questions as follows.

> "(1) An offer becomes effective when it reaches the offeree.
>
> (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer."

Article 16 proceeds to deal with the revocation of an offer. The Convention therefore draws a distinction between the withdrawal of an offer (which prevents it becoming effective) and the revocation of an offer once it has become effective. It is clear that both paragraphs of article 15 must be read together and that the second paragraph qualifies the first.

3.8 Article 15 has to be read along with article 24 which says that an offer "reaches" the addressee

> "when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence."

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1. See eg *Petrie* v *Earl of Airlie* (1834) 13 S 68; *Law* v *Newnes Ltd* (1894) 21 R 1027; *Hunter* v *Hunter* (1904) 7 F 136; *Hunter* v *General Accident Fire and Life Insurance Corpn* 1909 SC 344; 1909 SC (HL) 30.
2. See Walker, *Contracts* (2d edn, 1985) pp29–31; Scottish Law Commission, Consultative Memorandum on *Unilateral Promises* (Memo No 35, 1977) p11.
3. At present a unilateral promise requires to be proved by writ or oath. In our report on *Requirements of Writing* (Scot Law Com No 112, 1988) we have recommended the abolition of all requirements of proof by writ or oath. However, we have also recommended that a gratuitous obligation, other than one undertaken in the course of business, should require to be constituted in writing. This would be subject to a rule whereby the obligation (even if not in writing) could be rendered binding by certain actings in reliance on it. See clause 1(2) and (3) of the draft Bill appended to Scot Law Com No 112. These rules would make it much easier to proceed on the basis that so-called general offers were actually binding unilateral promises, particularly where they were made in the course of a business.
4. See, too, article 18(3) which allows assent to certain offers to be indicated by performing an act and without notice to the offeror.

As we have seen, article 10(a) resolves the problem of a person who has more than one place of business.

3.9 Article 15, when read with article 24, is in line with the existing Scots law,[1] and, in our view, provides a satisfactory solution to the problems in this area which were discussed in memorandum 36.[2]

Revocation of offer

3.10 The Vienna Convention deals with the question of revocation of offers in article 16, which is in the following terms.

> "(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
>
> (2) However, an offer cannot be revoked:
>
> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
>
> (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Again, "reaches" has to be read in the light of article 24.

3.11 Article 16(1) is the existing general rule in Scotland.[3] It was also the main provisional proposal made in memorandum 36 on the assumption that the postal rule would be changed.[4] It protects the position of an offeree who has dispatched an acceptance. There is no perfect answer to this question but it seems reasonable enough to expect the offeror, who has initiated the process and given the offeree the expectation of being able to accept, to take responsibility for ensuring that a revocation of the offer actually reaches the offeree before an acceptance has been dispatched.

3.12 Article 16(1) does not appear to apply very happily to the situation where an acceptance is not "dispatched" but is, say, made orally in the presence of the offeror or is indicated by performing an act in the circumstances covered by article 18(3). The appropriate result in such cases is clearly that an offer ought to be capable of revocation until the contract is concluded, but ought not to be capable of revocation after the contract has been concluded. In fact this result is reached by article 16(1). A purported revocation after the contract had been concluded would be too late, because of the opening words "until a contract is concluded". A revocation which reached the offeree before the acceptance by speech or act would be effective because the offeree would not in fact at that time have dispatched an acceptance. It is irrelevant that the offeree may never have intended to "dispatch" an acceptance. The drafting may not be particularly elegant but it achieves the right result and, in the interests of uniformity, should not be changed. It will be noted that one result of article 16(1) is that a person who makes a general offer to the public which can be accepted by performing some specified act should be careful to provide in the offer for a suitable time limit or terminating event or method of recall. Otherwise the offer would remain open for acceptance for a reasonable time because it would be practically impossible to ensure that a revocation reached all the potential acceptors. This is already a problem with general offers under the existing law.[5]

3.13 Article 16(2)(a) provides that an offer cannot be revoked "if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable".

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1. See *Thomson* v *James* (1855) 18 D 1 at p10, 11; *Burnley* v *Alford* 1919, 2 SLT 123.
2. Paras 20 to 24.
3. See *Thomson* v *James* (1855) 18 D 1; *Smith* v *Colquhoun's Tr* (1901) 3 F 981; *McMillan* v *Caldwell* 1991 SLT 325.
4. Para 54.
5. See McBryde, *Contract*, pp 70–71.

This provision reflects a difference of views during the negotiation of the Convention.[1] Some countries thought that the stating of a fixed time for acceptance meant that the offer was irrevocable until that time. Others thought that it meant only that it could not be accepted after that time (but might still be revoked before that time). The result of article 16(2)(a) as drafted is that whether an offer is irrevocable will be a matter of construction of the offer in each case, taking into account the rules on interpretation in article 8,[2] and bearing in mind that the stating of a fixed time within which an offer is open for acceptance will normally indicate irrevocability. This is essentially the same as the existing law of Scotland,[3] as the following examples show.

(1) The offer stated that the offeree had the offer of an estate at a certain price "for ten days from this date". The Lord Ordinary said *obiter* that the offeror "was not entitled to withdraw his offer before the expiry of the ten days".[4]

(2) The offer said that it was "made on condition of acceptance within three days". Here the condition was construed as meaning only that the offer could not be accepted after the expiry of the three days. It did not indicate irrevocability within the three days.[5]

(3) A qualified acceptance (which is treated in the same way as an offer) said: "It is a condition of this acceptance that missives must be concluded by 12 noon on Thursday 28 June, 1979". It was held that this did not indicate irrevocability.[6]

We think that it is a sensible rule that whether an offer is irrevocable should be a question of construction, and that an allowance of a fixed time for acceptance should normally be regarded as an indication of irrevocability within that time. We are not aware of any practical difficulty having been caused by the existing Scottish rules on firm offers, which appear to have worked satisfactorily for over two hundred years. We think, therefore, that article 16(2)(a) could safely and usefully be adopted as part of the law of Scotland on contract formation.

3.14 Article 16(2)(b) provides that an offer cannot be revoked "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer." It might seem at first sight that it would rarely, if ever, be reasonable for the offeree to rely on an offer as being irrevocable if the offer itself does not indicate that it is irrevocable, particularly as any statements made by the offeror in the offer may be interpreted, under article 8(2) "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.". Article 16(2)(b) could, however, come into operation where the offer itself did not indicate irrevocability but where there was a collateral assurance on which it was reasonable for the offeree to rely. Under the existing law of Scotland any such assurance might not be enforceable as a unilateral promise either because it could not reasonably be construed as a promise or because there was no possibility of proof by writ or oath.[7] The position would be better, particularly in relation to business contracts, if the recommendation in our report on *Requirements of Writing*[8] on the abolition of the requirement of proof by writ or oath were implemented, but there could still be rare cases where article 16(2)(b) could be useful. For example, a contractor may have submitted a tender on the basis of collateral assurances from suppliers that their offers to sell materials at certain prices were firm

1. See the DTI Consultative Document (1989) para 31; Honnold, *Uniform Law for International Sales* (2d edn 1991) pp205–209.
2. See paras 2.4 to 2.7 above.
3. See Gloag, *Contract* (2d edn 1929) p35. English law is different, because of the doctrine of consideration: *Dickinson* v *Dodds* (1876) 2 Ch D 463. See Treitel, *The Law of Contract* (8th edn, 1991) pp139–141, and 147, where it is noted that the English rule can cause hardship to offerees.
4. *Littlejohn* v *Hadwen* (1882) 20 SLR 5 at p7 (referring to the decision of the House of Lords in *Marshall* v *Blackwood* (1747) Elchies, *voce* Sale, No 6, and not following *Dickinson* v *Dodds*, above). See also *A & G Paterson* v *Highland Railway Co* 1927 SC (HL) 32 at p38.
5. *Heys* v *Kimball and Morton* (1890) 17 R 381 at p384.
6. *Effold Properties Ltd* v *Sprot* 1979 SLT (Notes) 84.
7. It is also possible that a collateral promise to keep an offer relating to heritable property open would have to be in probative form or holograph or adopted as holograph. See *Littlejohn* v *Hadwen* (1882) 20 SLR 5. See also this Commission's Consultative Memorandum on *Unilateral Promises* (Memorandum No 35, 1977) pp13–18.
8. Scot Law Com No 112 (1988). See the long footnote to para 3.4 above.

for a certain period.[1] These assurances might not qualify as terms of the offers or as enforceable collateral promises but could nevertheless make it reasonable for the contractor to rely on the offers. It is clear that the contractor could suffer prejudice if the offers were revoked after the tender had become binding. Although the rule in article 16(2)(b) would probably have only limited effect, given the scope of article 16(2)(a) and the fact that a unilateral promise is enforceable in Scots law (if it can be proved by the appropriate means), we think that the rule is a reasonable extension of the law on firm offers and that it could usefully be adopted.[2]

Termination of offer

3.15 The Vienna Convention provides, in article 17, that an offer comes to an end (and will therefore not be open for later acceptance) when a rejection reaches the offeror. The actual words of article 17 are as follows.

> "An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

This is also the existing law in Scotland.[3] It will be a question of construction whether a communication is a rejection. Normally a qualified acceptance would be construed as a rejection and a counter-offer. This is expressly provided for in article 19(1), considered later, and is also the existing law in Scotland.[4] The Convention, however, contains a special rule for certain cases involving trivial differences between offer and acceptance.[5] Article 17 seems to us to contain a clear, sensible and unsurprising rule which could be adopted without difficulty.

3.16 An offer may terminate otherwise than by rejection. Some other ways in which an offer may terminate are mentioned in the Convention. Article 18, for example, clearly implies that an offer terminates on the expiry of the time fixed in it for acceptance, or if no such time is fixed, on the expiry of a reasonable time.[6] Some ways in which an offer may terminate are not, however, mentioned in the Convention. In Scots law an offer may terminate on a material change of circumstances.[7] For example, in the case of *Macrae* v *Edinburgh Street Tramways Co*[8] a tender had been made by the defence in an action for payment for work done. The action was referred, by consent, to a judicial referee. He issued notes on an intended award which would have been less than the amount tendered. Two months later the pursuer purported to accept the tender. It was held that he could not do so. Lord President Inglis said:

> "It may, in my opinion, as a general rule in the law of offer and acceptance, be stated that, when an offer is made without a limit of time being stated within which it must be accepted, it may become inoperative by reason of any important change of circumstances, without any formal withdrawal of the offer being made. It may have been made in such circumstances as to be a reasonable offer as between both parties, but after it is made circumstances may so alter as to make it utterly unsuitable and absurd, and I do not suppose that it can be disputed that when the change of circumstances is so important the offer would not remain binding."

In another case a tender made by the defenders at an early stage in an action for damages for personal injuries was held not to be open for acceptance after the death

1. See Treitel, *The Law of Contract* (8th edn 1991) p141.
2. Bell thought that a similar rule might already be part of the law of Scotland. See *Commentaries* (7th edn) I, 344.
3. Gloag, *Contract* (2d edn 1929) p37, approved in *Wolf & Wolf* v *Forfar Potato Co* 1984 SLT 100.
4. See *Wolf & Wolf* v *Forfar Potato Co* 1984 SLT 100; *Rutterford Ltd* v *Allied Breweries Ltd* 1990 SLT 249. See also *Findlater* v *Mann* 1990 SLT 465 where there were two concurrent qualified acceptances which were both treated as offers.
5. Article 19(2). See paras 4.17 to 4.19 below.
6. See para 4.8 below.
7. In English law similar results can be obtained by the rather less satisfactory technique of implying a term into the offer that it is not to be open for acceptance after the occurrence of certain events. See Treitel, *The Law of Contract* (8th edn.,1991) p 44 and *Financings Ltd v Stimson* [1962] 3 All ER 386.
8. (1885) 13 R 265. This case was followed in *Bright* v *Low* 1940 SC 280 (where an acceptance of a tender "came too late" when made after the judge of first instance had given judgment). See also *Lawrence* v *Knight* 1972 SC 26 (where one of the grounds of decision was that "the pursuer did not accept the offer within a reasonable time").

of the pursuer had completely altered the basis of the claim in relation to future loss of earnings.[1] The Convention does not say, and clearly does not intend,[2] that article 17 is to be taken as referring to the *only* way in which an offer may be terminated. It just does not regulate all the possible methods of termination. This being so, the existing rules of Scots law on other methods of termination would continue to apply.[3]

3.17 We deal in the next part of the report with the effect of the death, insanity or insolvency of either party in the period after an offer becomes effective but before it is accepted.[4]

1. *Sommerville* v *NCB* 1963 SC 666.
2. As is clear from article 18(2).
3. See clause 1(2)(d) of the draft Bill.
4. See paras 4.10 to 4.13 below.

Part IV The Acceptance

Introduction

4.1 In this part of the report we discuss articles 18 to 22 of the Vienna Convention. These are the most significant articles for the purposes of this report. If adopted they would result in a change in the "postal rule".

What is an acceptance?

4.2 Article 18(1) of the Convention is as follows.

> "(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance."

It will be remembered that all of the provisions in our draft Bill, including this one, would be subject to any enactment or rule of law requiring writing, or a particular type of writing, for the constitution of a contract.[1] So an acceptance of an offer to sell a house would still have to be in writing and, under the existing law, the writing would have to be attested or holograph or adopted as holograph.[2] With this important qualification, the first sentence of article 18(1) seems to us to be acceptable. It answers, in the way preferred by our consultees, the problems posed in Memorandum 36 about purported acceptances by a third party,[3] and purported acceptances in ignorance of the offer.[4] Article 18(1) refers only to "the offeree" and to assent "to an offer". The second sentence, which provides that silence or inactivity does not in itself amount to acceptance, represents the general rule in Scots law. As Gloag puts it—"A man cannot generally force a contract on another by stating that he will hold his offer as accepted if it is not refused within a specified time".[5] The words "in itself" in the Convention (like the word "generally" in Gloag's statement) provide some flexibility for cases where in the whole circumstances silence or inactivity could reasonably be taken to indicate assent. Article 6 of the Convention (parties can derogate from provisions in Convention) and article 9 (on usages and established practices) also provide flexibility for special cases.[6] There may, for example, be cases where a party proposes that his or her own silence be taken as an acceptance after the lapse of a certain time and where the other party accepts this proposal. Here one party is not trying to force a contract on the other party and there is no reason why a contract should not be held to be concluded.[7]

4.3 Article 18(1) would not prevent an offeror from stipulating that an acceptance had to be in a particular form—for example, signed writing—or had to be authenticated in a particular way—for example by use of an agreed electronic code—before it would be an effective acceptance. An unqualified acceptance in any other form, or not authenticated in the required way, would not conclude a contract. The offeree would be saying, in effect, "I agree to your stipulation about form [or authentication] but I am not complying with it". As the parties can, under article 6, derogate from

1. See draft Bill, clause 1(2).
2. If our report on *Requirements of Writing* (Scot Law Com No 112, 1988) were implemented signed writing would be enough.
3. See Memorandum 36, para 26.
4. See Memorandum 36, para 27.
5. *Contract* (2d edn 1929) p28.
6. See Memorandum 36, paras 37–40 where some special cases are discussed.
7. See Honnold, *Uniform Law for International Sales*, (2d edn 1991) para 160.

the provisions in the Convention, the result would be an ineffective acceptance. It would be a question of construction in each case, in the light of article 8, whether the offeror's statement as to form or authentication amounted to a requirement of compliance, failing which acceptance would be ineffective, or merely to an indication of one possible way of replying which would be acceptable or preferred.[1]

When is acceptance effective?

4.4 The first sentence of article 18(2) provides that–

> "(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror."

This, if adopted in Scotland, would change the special rule whereby, contrary to the general rule that an acceptance is effective when it is communicated to the offeror, a postal acceptance becomes effective when the letter is posted.[2] This would, in our view, be a good thing. The existing postal rule gives rise to well-recognised difficulties. What happens, for example, if the letter of acceptance is lost in the post and never arrives? Logically a contract has been concluded,[3] but some Scottish judges have doubted whether this would actually be held to be the law if the situation arose.[4] What if the letter of acceptance is wrongly addressed, or unstamped?[5] There is no Scottish authority directly in point. What if the acceptance is withdrawn by telegram, telex, fax or telephone after it had been posted but before it had reached the offeror? Logically, the withdrawal is too late, because a contract has already been concluded, but this result may seem unpalatable.[6] Does the rule apply to a qualified acceptance, or is a qualified acceptance to be treated as an offer for this purpose? If the latter, is it not anomalous to have one rule for unqualified acceptances and another for qualified acceptances? How far does the rule apply to quasi-postal acceptances? Does it apply if the letter is passed to a letter exchange scheme[7] or to a private messenger?[8] Does it apply to telegrams?[9] Does it apply to acceptances by telex?[10] What if a telex communication is not instantaneous—for example, because the message is sent out of hours?[11] What about an acceptance sent by fax? If the rule does apply to an acceptance by fax, what if the acceptance is fed into the sender's fax machine but, because of a fault in the recipient's machine, emerges in an unreadable form? What about various forms of electronic data interchange?[12] The postal rule clearly gives rise to many problems, including an increasing number of problems of demarcation. The law would be much more coherent if there were only one rule for all means of communicating an acceptance.

4.5 It might be argued that the postal rule should be retained because it enables the offeree who, by posting an acceptance, had done everything possible to conclude

1. See *Yates Building Co* v *Pulleyn* [1975] CLY 388 (CA); *Muir Construction Ltd* v *Hambly* 1990 SLT 830.
2. See *Thomson* v *James* (1855) 18 D 1; *Jacobsen, Sons & Co* v *Underwood & Son Ltd* (1894) 21 R 654.
3. This view was applied by the English Court of Appeal in *Household Fire Insurance* v *Grant* (1879) LR 4 Ex D 216 in relation to an allotment of shares.
4. See *Higgins & Sons* v *Dunlop, Wilson & Co* (1847) 9 D 1407 *per* Lord Fullerton at p1414; *Thomson* v *James*, above, *per* Lord President McNeill at p12; *Mason* v *Benhar Coal Co* (1882) 9 R 883 *per* Lord Shand at p890; *J M Smith Ltd* v *Colquhoun's Tr* (1901) 3 F 981.
5. See the discussion in McBryde, *Contract* (1987) p85.
6. *Cf Countess of Dunmore* v *Alexander* (1830) 9 S 190. There are, however, different ways of interpreting this case.
7. Like the Rutland Exchange in Edinburgh.
8. In *Thomson* v *James*, above, at pp13, 15 and 26 the view was expressed that, if the offer had been delivered by a servant of the offeror, delivery of the acceptance to that servant would have concluded a contract. It is easy to imagine cases, however, where a messenger would have no authority to receive an acceptance.
9. It has been so applied in England: *Bruner* v *Moore* [1904] 1 Ch 305.
10. It was not so applied in the English case of *Entores Ltd* v *Miles Far East Corporation* [1955] 2 QB 327.
11. In the English case of *Brinkibon Ltd* v *Stahag Stahl* [1983] 2 AC 34 it was said that such cases would have to be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.
12. The fax and EDI problems are discussed in Gardner, "Trashing with Trollope: A Deconstruction of the Postal Rules in Contract" (1992) 12 Oxford Journal of Legal Studies 170 at pp192–194.

the contract, to act safely in the knowledge that the contract is complete. However, as was pointed out in Memorandum 36,[1]

> "in Scotland at least, such reliance might prove to be misplaced if the offeree's letter never in fact arrived.[2] Moreover, it may be objected that the law should be equally solicitous of the interests of the offeror who, having received no acceptance, may himself have acted upon the belief that no contract had come into existence. In a situation in which there must always be a time-lag between the acceptance leaving the offeree and reaching the offeror and in which consequently each may have, and act upon, contrary beliefs as to the willingness of the other to contract, it is possible to take the view that the law should not discriminate against the offeror. After a reasonable time has elapsed since making the offer during which no reply has been received, it is arguable that the offeror should not be bound by an acceptance which has been posted but has not yet been delivered. The offeror is in ignorance as to the actings of the offeree; the latter has full knowledge of what the position is. He knows that his acceptance has been posted; he knows (or ought to know) that mail is not infrequently delayed. If he chooses nevertheless to act on the assumption that his letter will arrive expeditiously the risk that his confidence may be misplaced should be borne by him."

To this it may be added that the sender of an acceptance is in a better position to know whether at the time of dispatch the medium of communication chosen is likely to be subject to any unusual hazards or delays. For this reason too it seems reasonable that the risk of any such hazards or delays should fall primarily on the offeree.[3]

4.6 The Commission also observed in Memorandum 36 that the postal rule was probably contrary to the expectations of lay people.[4]

> "It is thought that a layman would be somewhat surprised to learn that ... it is the present law that an offer stated to be open for acceptance until 5 pm on Friday can be validly accepted by a letter arriving at 10 o'clock on the following Monday morning.".

Solicitors commonly opt out of the postal rule in contracts for house purchase or sale.[5] The consultees who expressed a view on this point in response to Memorandum 36 (including the consulted Court of Session judges, the Faculty of Advocates and the Law Society of Scotland) all favoured replacing the postal rule by a receipt rule. Views had not changed between 1977 and 1992. All of those who expressed a view on this issue in response to our 1992 consultation paper on formation of contract supported abolition of the postal rule. No-one put forward any argument in its favour. A few put forward arguments against it. The Scottish Consumer Council said

> "We warmly welcome the Commission's proposal to amend this, since the present rule is contrary to common-sense expectations."

Professor David Walker said

> "The postal rule is an anomaly and inconsistent with the rules for acceptance by oral communications, telephone and probably telex, and with the rules for offers and withdrawal of offers. Whatever rule is adopted there will be a period of uncertainty, with one party or other not knowing whether the acceptance has arrived, but the balance of convenience lies in favour of a uniform rule that contractual communications are effective when they have been received."

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1. Para 48.
2. See *Mason* v *Benhar Coal Co.* (1882) 9 R 883 *per* Lord Shand at p890; *J M Smith Ltd* v *Colquhoun's Tr.* (1901) 3 F 981.
3. See Honnold, *Uniform Law for International Sales* para 162. Article 21(2), considered below, slightly qualifies the risk.
4. Para 49. It should be noted that in other contexts posting is not sufficient. See eg *McCann* v *Secretary of State for Social Services* 1983 Scolag 93 (giro cheque); *Elliot, Applicant* 1984 SLT 294 (making application for stated case).
5. The Law Society of Scotland's standard style of offer says that "This offer, unless sooner withdrawn, will remain open for acceptance by letter *reaching us* not later than ...." (Emphasis added.

Professor William McBryde said

> "I am particularly pleased to see ... the proposed abolition of the "posting rule" which is almost indefensible in logic and practice and the consequences of which the parties will avoid by the terms of an offer if the matter is given any thought...."

4.7 When this question was considered by the Commission in the 1970's, 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. We therefore favour the adoption of the first sentence of article 18(2) as part of the Scottish law on the formation of contracts. We recognise the desirability of having the same rule on this matter throughout the United Kingdom, as well as throughout Europe and indeed the world. The rules in the Vienna Convention seem to us to be the best available basis for the achievement of such uniformity.

4.8 The remainder of article 18(2) provides that

> "An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise."

The existing Scottish law is also that an acceptance is not effective if it is outwith the time fixed by the offeror[1] and that, if no time is fixed, the offer must be accepted within a reasonable time.[2] Also, as under the Convention, what is a reasonable time will depend on the circumstances of the transaction.[3] It will be remembered that, under articles 8 and 9, usages of trade or established practices may have to be taken into account. In commodity trades, where prices fluctuate rapidly, a prompt acceptance would doubtless be required. The Convention provides, in our view, a reasonable set of rules on time for acceptance, capable of applying to a wide variety of circumstances and techniques of communication. So far as the last sentence of article 18(2) is concerned, there is no Scottish authority to the effect that an oral offer must be accepted immediately unless the circumstances indicate otherwise, but this seems a reasonable proposition.

> "According to the standard of the reasonable observer, the shopkeeper's offer to his customer over the counter may need almost immediate acceptance. It is too late for the customer to return next day, even although the goods are not perishable or the price has not altered. The shopkeeper would reasonably have regarded himself as free to sell the goods to someone else after his customer had left his presence."[4]

Adoption of article 18(2) would provide authority for this sort of approach. The words "unless the circumstances indicate otherwise" and the general rules of interpretation in articles 8 and 9 would provide flexibility.

4.9 The Convention does not provide that an offer is terminated by a material change of circumstances. However, as noted earlier,[5] the draft Bill would make it clear that the existing rules of Scots law on that subject would continue to apply.

4.10 The Convention does not provide expressly that an offer cannot be accepted after the death of either party, but this would seem to be the effect of its provisions. An acceptance could not, it is thought, be said to "reach" an offeror who had already died. It is true that under article 24 an acceptance "reaches" an offeror when it is delivered to "his place of business or mailing address." However, once an offeror has died it is no longer "his" place of business or mailing address. It is a deceased offeror's former place of business or mailing address. Similarly, the Convention seems

1. *Farries* v *Stein* (1800) 4 Pat 131.
2. *Glasgow Steam Shipping Co* v *Watson* (1873) 1 R 189 at p193; *Hall-Maxwell* v *Gill* (1901) 9 SLT 222. See McBryde, *Contract*, p66–67.
3. See Gloag, *Contract* (2d edn, 1929) p36; McBryde, *Contract*, p67; Walker, *Contracts*, p118.
4. McBryde, *Contract*, p67.
5. See para 3.16 above.

to envisage only acceptance by "the offeree". An offeree who had already died could not indicate assent. Suppose, however, that an offeree posts an acceptance and then dies while it is in the post. Is a valid contract concluded when the acceptance reaches the offeror? It is thought not. There could be no valid contract if, at the moment of conclusion, there was in fact only one party. If legal incapacity at the moment of conclusion of contract would be a ground of invalidity, and the Convention does not prevent that,[1] then it seems clear that death would be too. Death is the ultimate incapacity.

4.11 Although there is an absence of conclusive authority,[2] one view is that the existing general rule in Scots law is that "an offer falls by the death of either party before acceptance.".[3] As Lord President McNeill put it in *Thomson* v *James*[4]

> "Death or insanity may prevent the completion of the contract as effectually as the most complete revocation, but they are not properly revocations of the offer. They are not acts of the will of the offerer, and their effect does not rest upon a supposed change of purpose. They interrupt the completion of the contract—that is, the making of the contract, because a contract cannot be made directly with a dead man or lunatic. The contract is not made until the offer is accepted: and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract directly with him. You cannot by adhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding on him, whether his death or insanity be or be not known to you"

Adoption of article 18 would confirm this view of the existing law.

4.12 The Convention does not provide for the effect of any mental disorder or mental illness or other incapacity of either party which supervenes after the offer becomes effective but before a contract has been concluded. However, as we have seen, the Convention does not preclude reliance on a ground of invalidity such as incapacity.[5] The existing law, under which a contract may be invalid on the ground of the incapacity of either party at the time when it is entered into, would therefore apply.[6] A valid contract cannot be entered into by a person who, at the time when the contract is concluded, lacks capacity to contract.[7]

4.13 Neither under the Convention nor under the present law is there any rule that an offer lapses merely because one of the parties becomes insolvent before the contract is concluded. Indeed the Bankruptcy (Scotland) Act 1985 envisages that a person may enter into contracts right up to the date of sequestration and that the permanent trustee may adopt any such contract where adoption would be beneficial to the administration of the debtor's estate (unless adoption is precluded by the express or implied terms of the contract) or may refuse to adopt any such contract.[8] Many businesses continue trading after insolvency, and some manage to trade their way out of insolvency.[9] We think that it would be dangerous to have any rule that

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1. See para 2.2 above.
2. Opinions were reserved in *Sommerville* v *NCB* 1963 SC 666.
3. Gloag, *Contract* (2d edn 1929) p37. See also McBryde, *Contract*, pp72–73.
4. (1855) 18 D 1 at p10.
5. See article 4.
6. See *Loudon* v *Elder's Curator* 1923 SLT 226 (Here the offeror was *incapax* when the offers were made and when the contracts were concluded. It was the latter time which was regarded as important.) See also the *dicta* of Lord President McNeill in *Thomson* v *James* (1855) 18 D 1 at p10 quoted in para 4.11 above.
7. See McBryde, *Contract*, p73. In theory this rule could be open to abuse but there is no suggestion that that has ever happened. There is a heavy onus of proof on anyone alleging contractual incapacity.
8. S42. See also s36 which provides that a transaction by a debtor "in the ordinary course of trade or business" or a (non-collusive) "transaction whereby the parties undertake reciprocal obligations" is not challengeable as a fraudulent preference even if entered into in the six months before the date of sequestration and s34 (on gratuitous alienations) which envisages that a debt can be validly incurred by an insolvent right up to the date of sequestration.
9. Under the Insolvency Act 1986 an administrator or receiver normally has power to carry on the business of the company. See ss14 and 55, Schedule 1, para 14 and Schedule 2, para 14.

an offer lapsed on, say, the apparent insolvency of either party.[1] In some cases an offer or acceptance may contain an express or implied condition as to the continued solvency of the other party but this would be a question of provision or interpretation, not a rule of law. The legal effect of actual sequestration or winding up on a contract by the bankrupt or company after that date is not governed by the Convention,[2] and would continue to be governed by the existing law.[3]

Acceptance by performance

4.14 The general rule, as we have seen, is that an acceptance becomes effective when the indication of assent reaches the offeror. This is qualified by article 18(3) which provides as follows.

> "(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph."

This is only a slight extension of the position which would be reached by applying article 6, which would clearly allow both parties to agree that acceptance could be by acts, or particular acts, not notified to the offeror. The extension consists in allowing the offeror alone "by virtue of the offer" to allow effective acceptance in this way.[4] The provision could be useful not only in certain common trading contexts but also in relation to general offers.[5] It could, in our view, usefully be adopted. It should be noted, however, that article 18(3) does not mean that it will always be safe for a seller who receives an offer in the form "Please send such and such goods at price stated in your latest price list" to rely on the dispatch of the goods, without any notification to the buyer, as constituting an immediately effective acceptance. If the goods take a long time in arriving the buyer may be able to say that by the time of their arrival more than a reasonable time had elapsed and that the seller's indication of assent comes too late. The seller will not be able to rely on article 18(3) unless it can be shown that by virtue of the offer or as a result of practices which the parties had established between themselves or by usage, the seller was permitted not only to accept by conduct (possible under article 18(1) anyway) but also to do so effectively "without notice to the offeror".[6] A simple order for goods does not necessarily have this effect. Sellers should therefore, and no doubt would in any event as a matter of good commercial practice, promptly inform buyers in such circumstances that the goods have been dispatched.

4.15 One effect of article 18(3) is that an offeror can opt into the postal rule. The offer can say "This offer may be accepted by posting a letter of acceptance and such acceptance will be effective from the time of posting without any notice being given to me." It seems unlikely, however, that many offerors would wish to do this.

Qualified acceptance

4.16 Article 19 of the Convention deals with qualified acceptances and also with the so-called battle of the forms. It provides as follows.

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1. It was provisionally suggested in memorandum 36, para 64, that the notour bankruptcy of the offeror or offeree should cause the offer to lapse in cases where the contract, if concluded, would place upon the bankrupt an obligation to pay. We do not recommend the enactment of any such rule.
2. See article 4.
3. A sequestrated bankrupt is not deprived of capacity to contract and can, for example, enter into ready-money contracts with the funds allowed for subsistence. However, most dealings "of or with" the debtor relating to the estate vested in the permanent trustee are of no effect in a question with the permanent trustee. See the Bankruptcy (Scotland) Act 1985, s32(1),(2),(8) and (9).
4. See Farnsworth in Bianca-Bonell, *Commentary on the International Sales Law*, pp170–171.
5. See para 3.4 above. In the famous English case of *Carlill* v *Carbolic Smoke Ball Co* (1893) 1 QB 256 an offer to pay £100 to any user of a carbolic smoke ball who caught influenza was held to be accepted by acts without there being any need to notify the offeror of the acceptance.
6. See Honnold, *Uniform Law for International Sales* (2d edn 1991) p225.

"(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially."

Article 19(1) contains the normal rule and requires no further comment.[1] It resolves any doubt there may be about the effect of a qualified acceptance.[2]

4.17 Article 19(2) attempts to solve the problem which arises when an offer is met by an acceptance, perhaps on a standard printed form, which contains certain immaterial additional or different terms.[3] The Commission consulted on this question in its Consultation paper on *Contract Law—Exchange of Standard Term Forms in Contract Formation* (1982). The paper noted that under the existing law an acceptance had to meet the offer precisely or it would not conclude a contract. It also noted, however, that the conduct of the offeror could often be construed as an implied acceptance of the additional or different terms in the offeree's supposed acceptance, with the result that the contract would be concluded on the terms in the offer as so modified.[4] The paper considered various solutions attempted or proposed in other jurisdictions, including the much-criticised section 2–207 of the American Uniform Commercial Code, and sought views on a number of provisional proposals, including a proposal that

"Where there are differences between the terms of an offer and those of a purported acceptance of it, but it is reasonable to infer from the conduct of the parties that they share an assumption that a contract between them has been concluded, a contract should be deemed to have come into existence."[5]

The terms of the contract would be those on which the parties had agreed together with either (a) "such other terms as may be necessary to give the contract proper effect" or (b) "such other terms as may be reasonable". This provisional proposal was not well received by those who commented on it. It was generally thought that it would lead to great uncertainty.

4.18 The Consultation Paper also put forward a provisional proposal based on article 19 of the Vienna Convention. This attracted a more favourable response, although some commentators doubted whether it would in practice make much difference. It was observed that if the parties were not contracting on the same standard terms the chances were that their terms would differ materially. Several commentators thought that the interpretation of "materially" could give rise to difficulties.

4.19 In the light of the consultation on this subject we would not wish to recommend the solution outlined at the end of paragraph 4.17. It would involve creating a contract for the parties and would give rise to great uncertainty. The solution in article 19(2) and (3) of the Vienna Convention is much closer to the existing approach to this

1. See para 3.15 above.
2. See McBryde, *Contract* p80.
3. See Forte, "The Battle of the Forms" 1979 JLSS 375; Forte "The Battle of the Forms—Postscript or Epitaph" 1980 JLSS 69 and Forte and MacQueen, "Contract Procedure, Contract Formation and the Battle of Forms", 1986 JLSS 224.
4. Consultation Paper, p2. See eg *BRS* v *Crutchley* [1968] 1 All ER 811. See also *Butler Machine Tool Co Ltd* v *Ex-Cell-O Corporation* [1979] 1 WLR 401 and *Uniroyal Ltd* v *Miller & Co Ltd* 1985 SLT 101.
5. P26.

problem. The main difference would be that instead of inferring acceptance from the offeror's actings (for example, in sending goods) acceptance of non-material additions or variations could be inferred from the offeror's failure to object without undue delay. Given that practically all alterations of any importance would be material under article 19(3), which does not provide an exhaustive list, we do not think that this would be an objectionable erosion of the requirement of objective agreement. Article 19(2) does not, of course, prevent even material new terms from being held to have been accepted by conduct or statements by the offeror. We have now consulted on this question several times. It is clear that some commentators would like a provision which went further than article 19 and attempted to resolve the problems which arise when there is a material difference between the terms in the parties' respective forms. It is equally clear that that is the last thing which some other commentators would wish. They would object strongly to any attempt to rewrite the contract for the parties. Article 19 steers a middle course between these two views. It would be a minor improvement but anything more would run the risk of causing uncertainty and would meet with strong objections.

Calculating the time for acceptance

4.20 A well-drafted offer will state precisely the time by which it must be accepted. However, some offers may simply use such words as "within three days". Article 20 of the Convention helps in such cases. It provides:

> "(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.
>
> (2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows."

As this is merely an aid to interpretation, and as the rules are reasonable enough in themselves, we can see no difficulty in adopting it. It is always open to an offeror to specify the time for acceptance in some other way. For example, if the offeror says "You must accept within five days from the receipt of this letter" the period for acceptance runs from the time of receipt and not from the date on the letter or the envelope. If the offeree accepts within the time allowed in the offer, the acceptance will be in time. The parties will have varied the normal rule in article 20, as they are free to do under article 6. So far as unvaried, article 20 would continue to apply. So paragraph 2 would still apply in calculating the five days.

4.21 It seems clear that article 20 applies to a period of time fixed for acceptance whether that is construed as a time after which acceptance will be too late or as a time within which the offer is to be irrevocable.[1]

4.22 It will be noted that a definition of business days by reference only to British holidays would not be appropriate as the rules may have to apply to international contracts. It will also be noted that the question is not whether the day on which the last day for acceptance falls is a business day, but whether the notice of acceptance cannot be delivered at the address of the offeror because that day is a non-business day.

1. See Farnsworth in Bianca—Bonell, *Commentary on the International Sales Law* (1987) p187.

Effect of late acceptance

4.23 The basic rule under the Convention is, as we have seen, that the acceptance must reach the offeror within the time fixed in the offer or, if no time is fixed, within a reasonable time.[1] Article 21 deals with the situation which arises if an acceptance arrives late. It provides:

> "(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.
>
> (2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect."

4.24 Article 21(1) produces practically the same result as the existing law, under which the late acceptance would be treated as a counter-offer which the offeror could accept [2]. The only difference may be that under article 21(1) the time of conclusion of the contract may be the arrival of the acceptance[3] and not, as under the existing law, the communication of the offeror's oral assent to it or the dispatch of a written notice of assent. However, given the need for a response "without delay" this difference is probably more theoretical than practical. The requirement of a response "without delay" also reduces any opportunity the offeror may have to speculate, on a fluctuating market, at the offeree's expense. It would be wrong to allow a longer time than necessary during which the offeror had the option of holding the other party bound or not. For this reason we prefer the solution in article 21(1) to the provisional proposal in memorandum 36 which would have enabled the offeror to treat a late acceptance as effective without any need for notification to the other party.[4] A majority of those who commented on this proposal in memorandum 36, including the consulted judges and the Faculty of Advocates, thought that the offeror's right to treat a late acceptance as effective should be subject to a requirement to communicate this to the offeree.

4.25 Article 21(2) deals with the situation where the reason for the late arrival of the acceptance is some abnormal delay in its transmission. This is a problem which does not arise in this form under the postal rule, where it is the posting which completes the contract. Article 21(2) applies only where the letter or other writing (which includes a telex or telegram)[5] "shows" that it ought in the normal course of transmission to have arrived in time. Unlike article 21(1), which enables the offeror to opt in to a contract by a prompt notification, article 21(2) requires the offeror to opt out by a prompt notification. The difference in approach is justified because in the situation covered by article 21(2) the offeree could reasonably have assumed that a contract had been concluded. Article 21(2) seems to us to be a sensible corollary to the change in the postal rule.

4.26 Normally, it may be supposed, late acceptances would not be very late. Interesting questions arise, however, if an acceptance arrives weeks or even months late. If there is no question of delay in transmission then the acceptor can hardly complain if the offeror exercises the option under article 21(1) to hold the contract concluded. Suppose, however, that an acceptance is delayed for months in the post and that, by the time it arrives, the market has changed in such a way that it would be to the advantage of the offeror and the disadvantage of the acceptor to have a contract concluded on the terms in the offer. Can the offeror conclude a contract by notification

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1. Article 18(2).
2. *Wylie and Lochhead v McElroy* (1873) 1 R 41; Gloag, *Contract* (2d end 1929) p37.
3. This seems to be the effect of article 21(1) which makes the *acceptance* effective. However, some commentators think that it is the offeror's oral communication or the dispatch of his notice which fixes the time of conclusion of the contract. See Honnold, *Uniform Law International Sales* (2d edn 1991) p243, note 1. The problem is discussed by Farnsworth in Bianca-Bonell, *Commentary on the International Sales Law*, pp193–194.
4. Para 51 and proposition 30(a).
5. Article 13.

under article 21(1) or even, if the reason for the delay is obvious from the letter, by keeping silent and allowing article 21(2) to take effect? This raises a question as to the effect of changed circumstances on an acceptance, similar to that considered earlier in relation to an offer.[1] There is no existing Scottish authority directly in point but in cases where it would be "utterly unsuitable and absurd"[2] to regard the late acceptance as still intended to be operative it ought to be possible, with the aid of article 8, to imply a condition that it is not to be operative in the circumstances which have occurred. In certain situations even a simple statement like "I accept your offer" would require to be interpreted. Does it mean "I accept your offer and I intend this acceptance to be capable of taking effect at any time no matter how long it may be lost in the post" or "I accept your offer but I do not intend this acceptance to be capable of becoming effective beyond a reasonable time from the date of dispatch"? A reasonable person, interpreting the acceptor's statement in the circumstances of a very late arrival after a material change in market conditions, would no doubt construe it in the second sense and, under article 8(2), this would be sufficient to prevent the offeror from taking unfair advantage of the delay in transmission. The problem is probably academic because in practice the acceptor would no doubt soon ask "Did you get my letter?" and would then either accept again or indicate that the acceptance was withdrawn.

Withdrawal of acceptance

4.27 Article 22 of the Vienna Convention provides that

> "An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

This is a simple and obvious rule which is consistent with article 15, on the withdrawal of an offer before it becomes effective. Under the postal rule of the existing law there is a logical difficulty in saying that an acceptance once posted can be withdrawn by, say, a telephone call or a telegram which reaches the offeror before the acceptance.[3] There is no such difficulty under the Convention where the acceptance normally becomes effective only when it reaches the offeror.[4]

4.28 A possible disadvantage of article 22 when read with article 16 (which requires a revocation of an offer to reach the offeree before an acceptance has been dispatched) is that it enables the offeree to speculate safely at the offeror's expense. For example, the offeror may have offered to sell a commodity at a certain price. The offeree posts an acceptance and then watches the market. If the price stays steady or goes up the offeree lets the acceptance take effect. If the price goes down the offeree telephones to withdraw it.[5] However, the offeror can reduce this risk by setting a very short time limit for acceptance or even by requiring immediate acceptance by the most rapid means of communication available. On one view of the existing law,[6] the risk has always been there in Scotland. Yet it does not seem to have caused practical problems.

Conclusion of contract by acceptance

4.29 Article 23 of the Vienna Convention provides that:

> "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention."

This merely makes explicit what is already implicit in article 18(2) when it says when an acceptance becomes effective. It should not be assumed from article 23 that a contract can be concluded only by means of an offer and acceptance.[7]

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1. See paras 4.9 to 4.13 above.
2. Lord President Inglis' expression in *Macrae* v *Edinburgh Street Tramways Co* (1885) 13 R 265 at p269.
3. See Gloag's discussion of *Countess of Dunmore* v *Alexander* (1830) 9 S 190 in *Contract* (2d edn 1929) at pp38–39.
4. Article 18(2).
5. See Farnsworth in Bianca-Bonell, *Commentary on the International Sales Law* (1987) at pp196–197.
6. See Gloag, *Contract* (2d edn 1929) pp38–39.
7. See para 1.11 above.

Appendix A

Formation of Contracts (Scotland) Bill

ARRANGEMENT OF CLAUSES

DRAFT

OF A

BILL

TO

A.D. 1993. Prescribe rules for the purposes of Scots law relating to the formation of contracts.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Rules applicable to formation of contracts.

1.—(1) Subject to the following provisions of this section, the rules set out in the Schedule to this Act (which are based, subject to modifications, on articles 4, 6, 8, 9 and 10 and 13 to 24 of the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on 11 April 1980) shall have effect in relation to the formation of contracts.

(2) This Act is without prejudice to the operation of any enactment or rule of law which—

(a) provides protection against unfair contract terms, or protection for any special category of contracting party;

(b) requires writing for the constitution of a contract or prescribes a form for a contract or requires a contract to be proved by writ or oath;

(c) enables a contract to be concluded otherwise than by offer and acceptance; or

(d) regulates any question relating to the formation of a contract which is not provided for by this Act.

Short title, commencement and extent.

2.—(1) This Act may be cited as the Formation of Contracts (Scotland) Act 1993.

(2) This Act shall come into force at the end of the period of 2 months beginning with the day on which it is passed.

(3) This Act extends to Scotland only.

General

The Bill is part of the Scottish Law Commission's programme of work on reform of the law of contract undertaken under the item on *Obligations* in its First Programme. In the light of earlier consultations on the law relating to the formation of contract the Commission would have wished to make recommendations for clarification and reform. These recommendations would have resulted in the substance of the law of Scotland in this area being virtually the same as the rules on formation of contract in the United Nations Convention on Contracts for the International Sale of Goods. In these circumstances it seemed to the Commission that there would be legal and commercial advantages in using the relevant rules in the Convention as a model. It must be emphasised that this is a voluntary adoption of those rules. The United Kingdom has not yet ratified the Convention and there is no obligation to give any of its provisions the force of law in any part of the United Kingdom.

Clause

Subsection (1) implements the recommendation in paragraph 1.10 of the report. The modifications made to the relevant articles of the Convention are very minor. Some are necessary because the draft Bill (a) is limited to contract formation but (b) is not confined to sale. Others consist of the substitution of "Schedule" or "Rule" for "Convention".

Subsection (2)(a) is designed to preserve special protections for consumers or other categories of contracting parties, such as the provision of a "cooling-off period" before terms are regarded as having been accepted.

Subsection (2)(b) is inserted because certain contracts require writing for their constitution or proof and others are not properly executed unless entered into in a prescribed form. See eg the Consumer Credit Act 1974 s61. This paragraph would have to be changed if the Commission's report on *Requirements of Writing* (Scot Law Com No 112, 1988) were implemented.

Although most contracts are concluded by offer and acceptance it is possible for a contract to be concluded in other ways, such as by several parties signing a previously prepared document. The Schedule to the Bill is expressed in terms of offer and acceptance but subsection (2)(c) makes it clear that this does not prevent contracts from being concluded in other ways.

Subsection (2)(d) makes it clear that the Schedule is not an exhaustive statement of the Scottish law on contract formation. There are gaps, and these will be filled by the existing law. An example, discussed in paragraph 3.16 of the report, is the effect of a material change of circumstances on an offer.

Clause 2

Clause 2 contains the provisions on short title, commencement and extent.

SCHEDULE

RULES APPLICABLE TO FORMATION OF CONTRACTS

Note: Modifications of the Convention made for the purposes of this Act comprising omissions are indicated by dots and modifications by way of additions or substitutions are printed in italic type. The marginal notes indicate the article of the Convention on which the Rule concerned is based.

[Article 4] 1. *The Rules in this Schedule govern only* the formation of the contract.... In particular, except as otherwise expressly provided in this *Schedule, they are* not concerned with ... the validity of the contract or of any of its provisions or of any usage....

[Article 6] 2. The parties may exclude the application of this *Schedule* or ... derogate from or vary the effect of any of its provisions.

[Article 8] 3.—(1) For the purposes of this *Schedule* statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

[Article 9] 4.—(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to *the formation of* their contract ...a usage of which the parties knew or ought to have known and which ... is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

[Article 14] 5.—(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance ...

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

[Article 15] 6.—(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

[Article 16] 7.—(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

[Article 17] 8. An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

[Article 18] 9.—(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within

Schedule

Full comments on the provisions in the Schedule are given in the text of the report.

SCH.

a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in ... paragraph *(2) above*.

[Article 19]

10.—(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of ... goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

[Article 20]

11.—(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

[Article 21]

12.—(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

[Article 13]

(3) For the purposes of this *Rule* "writing" includes telegram and telex.

[Article 22]

13. An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

[Article 23]

14. A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this *Schedule*.

[Article 24]

15.—(1) For the purposes of this ... *Schedule*, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

[Article 10]

(2) For the purposes of this *Rule* ... if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract ... .

Appendix B

List of those who submitted written comments on any or all of the propositions or questions put forward for consideration in

(a) Memorandum No 36 on the *Formation of Contract* (1977)

(b) the Consultation Paper on *Contract Law: Exchange of Standard Term Forms in Contract Formation* (1982), or

(c) the Consultation Paper on *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (1992).

(a) Memorandum No 36

Automatic Vending Association of Britain
Court of Session Judges
Faculty of Advocates
Institute of Auctioneers and Appraisers in Scotland
Law Society of Scotland
Lord Stott
Post Office Users' Council for Scotland
Scottish Grocers' Federation
Scottish Retail Drapers Association
University of Aberdeen, Faculty of Law Working Party
University of Glasgow, Faculty of Law

(b) The 1982 consultation paper

Association of Scottish Chambers of Commerce
Mr Hugh Beale
Mr J A Bertenshaw (Company Secretary, Mullard Ltd)
British Insurance Association
Confederation of British Industry
D B Projects Ltd
Distillers Co. plc (Legal Department)
Faculty of Advocates
Ford Motor Company Ltd
IBM United Kingdom Ltd (Legal Department)
Imperial Chemical Industries plc (Legal Department)
Law Society of Scotland
Scottish Law Agents Society
University of Aberdeen, Faculty of Law Working Party
Mr Stephen Woolman, Faculty of Law, University of Edinburgh

(c) The 1992 consultation paper

Association of British Insurers
Professor Hugh Beale
Convention of Scottish Local Authorities
Council of Mortgage Lenders
Court of Session Judges
Faculty of Advocates
Professor W M Gordon
Mr George Jamieson
Law Society of Scotland (Consumer Law Committee)
Professor W W McBryde
Mr J A McLean, WS

Scottish Consumer Council
Scottish Enterprise
Scottish Grocers' Federation
Sheriffs' Association (Committee of the Council)
Sheriffs Principal
Ms Elaine E Sutherland
University of Aberdeen, Faculty of Law Working Party
Professor Emeritus David M Walker
Professor W A Wilson

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