

# <Contract (Formation) (Scotland) Bill>

[<CONSULTATION DRAFT>]

An Act of the Scottish Parliament to make further provision as respects the formation of contract; and for connected purposes.

## *Autonomy of parties*

### **1 Application of provisions of this Act**

- (1) Sections 2, 3, 5 to 7, 8(3) and 9 to 14 apply in relation to the formation of a contract except in so far as—
  - (a) the offer, or any counter-offer, provides otherwise, or
  - (b) the parties have, before the offer is made, come to an agreement which (whether in regard to the formation of that contract or to the formation of contracts which include that contract) provides otherwise.
- (2) Such provision as is referred to in paragraph (a) or (b) of subsection (1)—
  - (a) may be express or implied, and
  - (b) may be to the effect that the contract will be concluded—
    - (i) in a way other than in accordance with those sections, or
    - (ii) in accordance with those sections but with such modifications to them as the parties may agree between themselves.

## *Requirements for the conclusion of a contract*

### **2 Formation of contract: general**

- (1) A contract is concluded on the parties coming to an agreement—
  - (a) which they intend to have legal effect, and
  - (b) which, after taking any relevant enactment or rule of law into consideration, can be given legal effect.
- (2) A contract is concluded on the parties coming to an agreement on all but one matter or all but some matters provided that the agreement is, notwithstanding the failure with regard to that matter or those matters, an agreement such as is mentioned in subsection (1).
- (3) But where a party requires that, for a contract to be concluded, there must be agreement on a specific matter there is no contract unless the parties come to an agreement on that matter.

- (4) For the purposes of subsections (1) to (2), whether there is agreement or not may be determined from the statements and conduct of the parties (whether or not such statements and conduct consist of, or include, the acceptance of an offer).

### *Notification*

#### **3 When notification takes effect**

- (1) In relation to the formation of a contract, a notification to a person of an offer, acceptance, counter-offer, withdrawal, rejection, revocation or declaration takes effect on reaching that person.
- (2) For the purposes of subsection (1), a notification reaches a person when it is made available to the person in such circumstances as make it reasonable to expect the person to be able to obtain access to it without undue delay.
- (3) Without prejudice to the generality of subsection (2), a notification is to be taken to reach a person—
  - (a) when it is delivered to the person,
  - (b) when it is delivered to the person's place of business,
  - (c) in a case where either the person does not have a place of business or the notification does not relate to a business matter, when it is delivered to the person's habitual residence, or
  - (d) in the case of a notification transmitted by electronic means, when it becomes available to be accessed by the person.
- (4) Subsection (1) is subject to section 11(1)(a).

#### **4 Abolition of rule of law as to when notification of postal acceptance takes effect**

Any rule of law whereby, in relation to the formation of a contract, an acceptance sent by means of a postal service takes effect when posted is abolished.

### *Offers*

#### **5 What constitutes an offer**

- (1) For a proposal to constitute an "offer" in relation to the formation of a contract—
  - (a) the proposer must intend that it will result in a contract if accepted, and
  - (b) the proposal must be one which, after taking any relevant enactment or rule of law into account, could be given legal effect as a contract if accepted.
- (2) Any such offer may be addressed—
  - (a) to a specific person, or
  - (b) to the public at large.
- (3) Subsections (1) and (2) are without prejudice to the application of any—
  - (a) enactment, or
  - (b) rule of law,as respects the constitution of a unilateral promise.

## **6 Revocation of offer**

- (1) An offer in relation to the formation of a contract may be revoked by the offeror but only if notification of the revocation takes effect before any such notification as is mentioned in subsection (2) takes effect.
- (2) That notification is—
  - (a) of acceptance of the offer by the offeree, or
  - (b) of statements or conduct of the offeree by virtue of which it may be determined (as mentioned in section 2(4)) that agreement has been reached.
- (3) Subsections (1) and (2) are subject to subsections (4) to (6).
- (4) Any such offer addressed to the public at large may be revoked by the offeror but, in relation to any individual member of the public, only if notification of the revocation takes effect before such notification as is mentioned in subsection (5) takes effect.
- (5) That notification is as set out in subsection (2) except that for the references in that subsection to the offeree there are substituted references to the individual.
- (6) Any notification of revocation under subsection (4) is to be given—
  - (a) in a case other than is mentioned in paragraph (b), by the same means as were used to make the offer, and
  - (b) in a case where the means of notification of any revocation is specified in the offer, the means so specified.
- (7) Revocation under subsection (1) or (4) is ineffective if—
  - (a) it is manifest from the terms of the offer in question that it is intended to be irrevocable, or
  - (b) the offeror has, in a declaration which has taken effect, stated that it is irrevocable.

## **7 Lapsing of offer on material change of circumstances**

- (1) An offer in relation to the formation of a contract lapses on a material change of circumstances and having lapsed can no longer be accepted.
- (2) Without prejudice to the generality of subsection (1), there is a material change of circumstances if, after the offer is made but before a contract is concluded, the offeror or offeree—
  - (a) dies, or
  - (b) becomes incapable of making any decision as to whether to conclude the contract.
- (3) But an offer such as is mentioned in subsection (1) does not lapse where, after it is made but before a contract is concluded, the offeror or offeree becomes insolvent.
- (4) For the purposes of subsection (3)—
  - (a) an offeror or offeree who is an individual becomes insolvent when—
    - (i) that person's estate is sequestrated,
    - (ii) that person grants a trust deed for creditors or makes a composition or arrangement with creditors,

- (iii) a voluntary arrangement proposed by that person is approved,
  - (iv) that person's application for a debt payment programme is approved under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002, or
  - (v) that person becomes subject to any other order or arrangement analogous to those mentioned in sub-paragraphs (i) to (iv) anywhere in the world, and
- (b) any offeror or offeree which is not an individual becomes insolvent when—
- (i) a decision approving a voluntary arrangement entered into by that person has effect under section 4A of the Insolvency Act 1986,
  - (ii) that person is wound up under Part 4 or 5 of that Act of 1986 or under section 367 of the Financial Services and Markets Act 2000,
  - (iii) a receiver is appointed, under section 51(1) or (2) of that Act of 1986, over all or part of the property of that person,
  - (iv) that person enters administration ("enters administration" being construed in accordance with paragraph 1(1) and (2) of schedule B1 of that Act of 1986), or
  - (v) that person becomes subject to any other order or arrangement analogous to those mentioned in sub-paragraphs (i) to (iv) anywhere in the world.
- (5) Subsections (1) to (4) are without prejudice to the application of any enactment, or rule of law, in relation to the transaction with regard to which the offer is made.
- (6) In subsection (2)(b), "incapable" has the meaning given to that expression by section 1(6) of the Adults with Incapacity (Scotland) Act 2000.

## **8 Acceptance of offer**

- (1) In this Act, any reference to acceptance of an offer is to—
- (a) a statement (in whatever form), or
  - (b) conduct (of whatever kind),
- of the offeree which shows the unqualified assent of the offeree to the offer.
- (2) But any such conduct as is mentioned in subsection (1)(b) must be conduct of which the offeror is, or ought to be, aware.
- (3) Silence or inactivity is not in itself to be taken to show such assent.

## **9 Conclusion of contract by unnotified acts**

- (1) Subsection (2) applies, in relation to the formation of a contract, where—
- (a) an offer provides expressly or impliedly,
  - (b) the parties to the prospective contract have established a practice between or among themselves to the effect, or
  - (c) there is a usage common to those parties to the effect,
- that the performance (even without notification of performance or of acceptance to the offeror) of certain acts by the offeree will conclude the contract.
- (2) The contract is concluded on the offeree's beginning to perform the acts in question.

- (3) Subsections (1) and (2) are subject to section 11(1)(b).

*Withdrawal*

**10 Withdrawal**

In relation to the formation of a contract—

- (a) an offer, whether or not an irrevocable offer, may be withdrawn by the offeror if notification of the withdrawal takes effect before, or at the same time as, the offer takes effect, and
- (b) an acceptance may be withdrawn by the offeree if notification of the withdrawal takes effect before, or at the same time as, notification of the acceptance takes effect.

*Time limits*

**11 Time limits**

- (1) In relation to the formation of a contract—

- (a) notification of the acceptance of an offer is effective only if it reaches the offeror before, and
- (b) such performance as is mentioned in section 9(1) is effective only if it is begun before,

the expiry of any period of time stipulated in the offer as a period within which the offeree must respond to the offer (or, in any case where there has been no such stipulation, within a reasonable time after the taking effect of the notification of the offer).

- (2) Subsections (2) and (3) of section 3 apply for the purposes of subsection (1)(a) as they apply for the purposes of subsection (1) of that section.

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

- (1) Subsection (2) applies where, in relation to the formation of a contract, the terms of an offer—

- (a) stipulate that the offeree must respond to the offer within a period of time, but
- (b) do not make clear when the period is to begin.

- (2) The period begins on the taking effect of the notification of the offer.

*Rejection of an offer*

**13 Rejection of an offer**

On the taking effect of a notification of the rejection of an offer (whether or not an irrevocable offer) in relation to the formation of a contract the offer lapses.

*Counter-offer***14 Counter-offer**

- (1) Subsection (2) applies where, as regards an offer (in this section referred to as “the original offer”) in relation to the formation of a contract, a notification by the offeree provides for any or all of the following—
  - (a) terms additional to those of the original offer,
  - (b) terms different from those of the original offer,
  - (c) the omission of terms of the original offer.
- (2) The notification by the offeree (however expressed) is both—
  - (a) notification of a rejection of the original offer, and
  - (b) notification of a counter-offer (whether or not terms of the original offer are expressly or impliedly included in the terms of the counter-offer).

*General***15 Interpretation**

- (1) In this Act (except where the context otherwise requires)—
  - “acceptance” is to be construed in accordance with section 8,
  - “counter-offer” is to be construed in accordance with section 14,
  - “offer” is to be construed in accordance with section 5,
  - “offeree” means a person to whom an offer is made,
  - “offeror” means a person who makes an offer, and
  - “postal service” has the meaning assigned by section 27(1) of the Postal Services Act 2011.
- (2) In this Act, any reference to the taking effect of a notification is to be construed in accordance with section 3.

**16 Saving**

The provisions of this Act are without prejudice to any enactment or rule of law which—

- (a) provides protection against unfair contract terms,
- (b) provides protection for a particular category of contracting person,
- (c) requires writing for the constitution of a contract,
- (d) prescribes a form for a contract, or
- (e) regulates any question which relates to the formation of a contract but is not provided for by the provisions of this Act.

**17 Commencement**

- (1) This section and sections 15, 16 and 18 come into force on the day after Royal Assent.

- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulation appoint.
- (3) Different days may, under subsection (2), be appointed for different purposes.

**18 Short title**

The short title of this Act is the Contract (Formation) (Scotland) Act 2017.