Scottish Government Consultation on the Scottish Law Commission Report on Review of Contract Law

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Scottish Government
Riaghaltas na h-Alba

Scottish Government Consultation on the Scottish Law Commission Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses

Ministerial Foreword

In March 2018, the Scottish Law Commission (SLC) published a report and a draft Bill on a review of contract law which was the final output of a reform project that began in 2010. The recommendations include a statutory statement of the law in relation to formation of contracts, the abolition of the postal acceptance rule and some reshaping of aspects of the law in relation to remedies for breach of contract.

Contract law impacts on day to day economic life in relation to all types of transactions, for businesses and individuals alike. The overall objective of the SLC's recommendations is to ensure that certain aspects of contract are as clear, certain and up-to-date as possible. If parties negotiating a contract are being advised by lawyers, this will enable the advice to be given with a reasonable degree of confidence. However, many contracts are made, carried through, and become the subject of disputes between parties who have no professional assistance. It is important that our contract law is clear so that it is relatively readily understood by lawyer and non-lawyer alike.

The 2021 Programme for Government set out that the Scottish Government is "…giving consideration to a longer-term programme of implementation of Scottish Law Commission Reports to be introduced during this Parliament…" which included contract law. Already this parliamentary session the Scottish Government has brought forward 3 Bills in 3 years which have implemented recommendations of the SLC.

It has, though, been 6 years since the recommendations on contract law were published. In line with the process that Scottish Ministers set out to the Scottish Parliament in respect of potential Bills implementing older SLC recommendations, this consultation will seek to establish:

- Whether the landscape around this area of the law has changed since the Report was published and, if so whether the changes are material to the recommendations contained in the Report.

- That the consultation views received by the SLC are still broadly held.

I am pleased therefore to publish this consultation paper and I look forward to considering the responses which will inform our policy in this area.

Introduction

This consultation seeks general views on the Scottish Law Commission – Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses[1] ("the SLC Report"). In recognition that it has been 6 years since the Report was published and in line with the process the Scottish Ministers have set out to the Delegated Powers and Law Reform Committee in respect of potential Scottish Law Commission (SLC) Bills[2], the consultation will seek to establish:

- Whether the landscape around this area of the law has changed since the Report was published and if so whether the changes are material to the recommendations contained in the Report.

- That the consultation views received by the SLC are still broadly held.

The Scottish Government has had an opportunity to carefully consider the recommendations made in the Report. It welcomes the thorough and comprehensive review that the SLC has undertaken and shares the view that the reforms should make the law clearer and more accessible. The Scottish Government is therefore supportive of the recommendations and the principles behind them.

In 2021, the Scottish Government committed to giving consideration to a longer-term programme of implementation of SLC Bills during this parliamentary session[3]. This included consideration of SLC Reports on matters such as trusts, judicial factors and contract law. Bills taking forward recommendations made by the SLC in the reports on trusts and judicial factors have been introduced to Parliament using the parliamentary procedure for Bills that implement SLC recommendations[4]. The Trusts and Succession (Scotland) Act 2024 has received Royal Assent. The Scottish Government has begun work on two other SLC reports, including the Report on Review of Contract Law which this consultation considers[5]. Should this consultation bring to light significant or substantive issues for which the SLC did not make a recommendation then the Scottish Government would have to consider carefully whether including any such provision in future legislation, if that is the decision taken, would meet Parliament's criteria for an SLC Bill.

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[1] Available at https://www.scotlawcom.gov.uk/files/1115/2222/5222/Report_on_Review_of_Contract_Law_-_Formation_Interpretation_Remedies_for_Breach_and_Penalty_Clauses_Report_No_252.pdf.

[2] Available at https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/correspondence-from-the-minister-for-victims-and-community-safety-to-the-delegated-powers-and-law-re.pdf.

[3] See the Legislative Programme section in the Programme for Government, available at https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/pages/12/.

[4] See Rule 9.17A of the Scottish Parliament's Standing Orders for more information, available at https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-9-public-bill-procedures#topOfNav.

[5] The other is the Report on Aspects of Leases: Termination, published in 2022, available at https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf.

Background

The SLC reported in March 2018 on a review of contract law dealing with the topics of: formation, interpretation, remedies for breach and penalty clauses. The report represented the final output from a general review of contract law which began in 2010[6].

The general review itself built on a previous review carried out in the 1990s and takes account of developments in the law both domestically and internationally over the period since that earlier review.

As the SLC set out in the Business and Regulatory Impact Assessment (BRIA) which accompanied their Report "[c]ontract law impacts on day-to-day economic life in relation to all types of transactions and for businesses and individuals alike. It is therefore important economically and socially that the contract law regime in Scotland is fit for 21st century conditions[7]".

The SLC's aim in reviewing this area of the law was to assess whether legal intervention was necessary to simplify and modernise the law as well as ensuring that it is clear and certain not only for professional advisers but for laypersons too. They did so by examining Scots law against international comparators.

Whilst the review examined a range of topics relating to the law of contract, its recommendations focussed on formation of contract and to a more limited extent, remedies for breach of contract.

The Report recommended a general statutory statement of the law relating to formation of contract. In addition, it recommended that the postal acceptance rule be abolished. Recommendations relating to remedies for breach of contract were focused on 3 topics. They are:

- the principle of mutuality;
- restitution following rescission; and
- contributory negligence.

A general statutory statement of the law on remedies was not recommended because of lukewarm support and the fact that substantively more time and work would have been needed to undertake a general statement.

No recommendations were made to reform the law on interpretation of contract, on the basis that recent case law seemed to have addressed uncertainties in the law in this area. Similarly, recent case law as well as lack of support for reform meant that no recommendations were made in relation to penalty clauses.

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[6] Available at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/contract-law-light-draft-common-frame-reference-dcf/.

[7] Available at https://www.scotlawcom.gov.uk/files/9315/2222/6728/Business_and_Regulatory_Impact_Assessment_-_Report_on_Review_of_Contract_Law_Report_No_252.pdf.

General

All of the topics examined by the SLC are touched on in this consultation exercise, some in more detail than others. It would be helpful to have your comments in respect of some general issues. Your views are also sought on specific issues. The SLC Report, which contains a draft Bill at Appendix A, can be accessed using the link provided at Footnote 1 above.

Default Rules

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

Q1. Are you content with this approach? If not, please provide your reasons.

Changes in the law or practice

The Report was published in March 2018, over 6 years ago now. At the time of publication there had been relatively recent case law which informed a number of the recommendations made in the Report. Some specific areas are discussed in some detail below, but it would be helpful to know whether at a general level you consider that there have been changes which are material to the recommendations made in the Report. A summary of the recommendations is set out in Chapter 21 of the SLC Report.

Q2. Are you aware of any subsequent case law or legislation which impacts on any of the recommendations contained in the Report? If yes, please provide details.

Q3. Are you aware of change in contract law practice which impacts on any of the recommendations contained in the Report? If yes, please provide details.

Draft Bill

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

Q4. Do you agree that the provisions contained in the draft Contract (Scotland) Bill give effect to the recommendations of the SLC? If not, please provide details.

Business and Regulatory Impact Assessment

The SLC produced a Business and Regulatory Impact Assessment (BRIA) which was published with their Report (which can be accessed using the link provided at Footnote 7 above). BRIAs are intended to estimate the costs, benefits and risks of any proposed legislation that impact the public, private or third sectors.

In the BRIA the SLC have set out the rationale for the approach they have recommended. They have examined 2 options in terms of doing nothing or legislating in line with their draft Bill and the costs and benefits of each option. The only calculated costs in the BRIA relate to training which will have been worked out on the appropriate costs for 2018.

Q5. Is there anything in the BRIA that requires to be updated? If so, please provide any updated data.

Child Rights and Wellbeing Impact Assessment

Section 17 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024[8] ("the 2024 Act") provides that Ministers must prepare and publish a Child Rights and Wellbeing Impact Assessment (CRWIA) in relation to a Bill that Scottish Ministers intend to introduce. A CRWIA is a process, tool and report which is used to identify, research, analyse and record the anticipated impact of, among other things, a legislative provision.

Although the relevant section is not yet in force, if Scottish Ministers were to decide to introduce legislation to reform the Scots law of contract then any legislative provision would have to be compatible with the requirements of the 2024 Act.

In order to assist us with any assessment of the potential impact of the proposals contained in the SLC's draft Bill we ask:

Q6. Are there any direct or indirect impacts on children and young people as a result of the legislative proposals set out in the SLC's draft Bill? If so, what are they?

Q7. Is there any impact on specific groups of children and young people as a result of the legislative proposals set out in the SLC's draft Bill? If so, what are they?

[8] Available at https://www.legislation.gov.uk/asp/2024/1/contents/enacted.

Formation of Contract

A major focus of the Report and the provisions in the draft Bill is on formation of contracts. As already mentioned, the Bill provides for a general statutory statement of the law relating to formation of contract. In doing so it updates, simplifies and improves the accessibility of the law with the aim of ensuring that it is fit for purpose.

Postal acceptance rule

In addition to the statutory statement of the law, another substantive reform is to abolish the postal acceptance rule on the basis that it causes uncertainty and is not likely to be known to laypersons[9]. Well advised parties exclude the postal acceptance rule in their initial communications in order to avoid the result that a communication which never reached them can bind them in contract. This recommendation was supported unanimously by those responding to the SLC. It was considered no longer relevant to modern day standards.

Statutory statement of the law

The recommendation that there should be a statutory statement of the law on formation of contract was well supported. But as part of their policy consideration, the SLC noted that some respondents had raised concerns that “it might contribute to a potentially damaging perception that Scots law had diverged in some non-obvious way from English law[10].”

The SLC considered that “our detailed recommendations for substantive law reform are limited. The major change relates to the law on postal acceptances, which we believe will bring the law into line with general legal practice on both sides of the border. In addition, we propose legislative clarification of the law on electronic communication in contract formation. The clarification is consistent with existing principles of Scots and English law[11].”

Q8. Are you satisfied that the approach of a statutory statement on contract formation does not differentiate Scots and English law in a way that might deter cross-jurisdictional business? If not, please give your reasons.

Electronic communication

The statutory statement also provides the necessary context for some much-needed clarification on electronic communication in contract formation.

The statutory statement on formation of contract includes an ‘accessibility rule’ in respect of electronic communication. This can be found at section 13(4)(d) of the draft Bill which provides that a notification transmitted by electronic means is to be taken to reach a person “when it becomes available to be accessed by the person”.

[9] See paragraphs 4.86 to 4.89 of the SLC’s Report.
[10] See paragraph 2.12 of the SLC’s Report.
[11] See paragraph 3.8 of the SLC’s Report.

As set out in the explanatory note to the draft Bill, "[t]he provision focuses on the accessibility to the addressee as the test of legal effectiveness, in order to avoid some of the technical difficulties that may arise from the nature of electronic communications (for example, delays and failures in the transmission of emails between servers)".

The SLC rejected the view of some consultees that the test should be about confirmation of receipt. The SLC's view was that a suitably detailed 'out of office' message should make it clear whether or not it would be reasonable to think that the recipient did in fact have access to the notification. Ultimately it is a default rule which parties can diverge from, but the SLC also considered that it was capable of keeping up with future developments in electronic communication.

Q9. Are you aware of any technical advances/ practical changes which postdate the Report which may impact on this approach? If so, please provide details.

Battle of the forms

Importantly, section 2 of the draft Bill contains a general principle that supports the statutory statement on formation.

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, taking any relevant enactment or rule of law into consideration, has both—

(i) the essential characteristics of a contract of the kind in question, and
(ii) sufficient content,
for it to be given legal effect as a contract of that kind.

(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 (3), 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).

The issue of the 'battle of the forms', where parties believe a contract to be concluded but do so on the basis of their own standard terms and conditions, has not been included in the statutory statement beyond the general principle set out in section 2. The SLC's view is that whilst the battle of the forms creates uncertainty as demonstrated by a number of court cases, the "proposed solutions [found in international instruments] would not produce significantly more certain outcomes."

Instead the recommendation was that section 2 of the draft Bill would enable courts to develop solutions through the application of the general principle.

In 2012, the view of respondents was that the battle of the forms creates significant problems. The SLC tested support for a special regime to tackle the issue but there was a mixed response. Ultimately, as indicated above, no recommendations were made. Some case law[12] at the time demonstrated the courts' willingness to address issues arising from the battle of the forms and it is expected that the general principle as set out at section 2 of the draft Bill will help the courts further to address the issue. Reliance on the common law approach may of course be less helpful to those without the necessary resources to consult a solicitor or seek a resolution in court.

Q10. Are you content with the approach taken in respect of the battle of the forms? If not, please provide reasons.

Miscellaneous

There are 2 further issues we would like to highlight.

Firstly, the SLC recommended that there should be an exception in relation to the acceptance of general offers, in the circumstances where a contract is formed once the offeree begins to perform certain acts. An example given was a notice in a private car park advising that a charge would be levied for parking there (the offer) and someone parking there (acceptance). Whilst there was broad support, both the Faculty of Advocates and the Law Society of Scotland thought that this exception was not needed. The former was considered to be unnecessary and on the latter it was thought that clarity around acceptance by conduct would make it unnecessary.

The SLC considered that express provision was nonetheless helpful. Section 2(4) of their draft Bill provides that the existence of agreement between parties is to be determined from their statements and conduct, including but not limited to offers and acceptances. Section 3(1) provides for an exception to the general rule that an acceptance must reach the offeror in order to form a contract between the parties. A contract may be concluded by an offeree beginning to perform acts mentioned expressly or impliedly in an offer as having that effect. This also applies where the parties have previously established a practice between themselves to that effect or where there is a usage common to the parties having that effect.

Q11. Are you content with the approach taken in respect of the acceptance of general offers? If not, please provide reasons.

Secondly, the Draft Common Frame of Reference (DCFR) contains a rule that advertisements, catalogues and displays of goods or services for sale by a business at a stated price are offers to supply until the stock is exhausted or the business becomes incapable of supplying the service. At present Scots (and English) law would see these as invitations to treat, so that it is the customer responding to the statement who makes the offer and the business whose stock or capacity is

[12] Specialist Insultation Ltd v Pro-Duct (Fife) Ltd [2012] CSOH 79 and Grafton Merchanting Gb Ltd t/a Buildbase v Sundial Properties (Gilmerton) Ltd, 2013, G.W.D, 17-349.

potentially affected which may then accept or decline that offer. The SLC rejected the need for a special rule about proposals by businesses to supply goods from stock, or to supply services, at a stated price on the basis that it may unduly expose traders, including small traders[13]. Whilst there was broad agreement from consultees, this approach is different from that in the DCFR which is seen as more protective of consumers/ customers.

Q12. Are you content with the approach of rejecting a special rule about proposals by businesses to supply goods from stock, or to supply services, at a stated price? If not, please provide reasons.

[13] See paragraphs 5.12 to 5.16 of the SLC's Report.

Interpretation of Contract

The Report does not propose legislative reform or a statutory statement of the law on interpretation on the basis that the uncertainty in the law in the courts has since been broadly resolved through 2 cases in the UK Supreme Court[14]. The SLC considered that it should be left to the courts to develop the law further using the framework established by the UK Supreme Court. It was the view of the SLC that previously conflicting views of the courts on this issue had therefore settled down and a need for legislation by way of remedy was not required.

More recently, however, views have been expressed that the Court of Session is taking a very narrow approach to the interpretation of contracts, one which is narrower than that established by the UK Supreme Court in Wood v Capita Insurance Services ["Wood"][15]. In Wood, Lord Hodge stressed the iterative or unitary approach to interpretation, and said that it did not matter whether the process began with examination of the factual background or the language of the contract, so long as the court balances the indications given by each approach in determining the meaning of the provisions. In striking the balance the court had to consider the quality of the drafting, the possibility that a party might have agreed something that in the longer term did not serve its interest, and the possibility that the contested term represented a negotiated compromise or was the most the parties could agree at the time of entering into the contract. Where there were rival meanings, the court could use its appreciation of business common sense to make a choice between them.

In a series of articles since Wood, David Sellar KC argues that the law which had been authoritatively summarised by the Supreme Court in Wood, and which reflects Scots law as much as English law, has not been clearly followed in subsequent decisions of the Court of Session. For instance, in the 2022 case of Paterson v Angelline (Scotland) Ltd[16] and the 2023 case of Lagan Construction Group Ltd v Scots Road Partnership Project Ltd[17], it is said that the Inner House either confined its attention to, or placed undue emphasis upon, linguistic meanings in the contract.

Additionally, it has been suggested that in the case of Ashtead Plant Hire v Granton Central Developments Ltd[18] the Inner House of the Court of Session considered the principles of contractual interpretation but emphasised commercial common sense in a way that the UK Supreme Court would regard as inappropriately departing from the contract's language[19].

Q13. Do you agree that the law on interpretation is settled and that legislative reform is not needed or wanted? If not, please give your reasons.

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[14] Arnold v Britton [2015] UKSC 36,[205] AC 1619 and Wood v Capita Insurance Services [2017] UKSC 24, [2017] AC 1173.
[15] This has been criticised by, for instance, David P Sellar KC in a series of recent articles (2022 SLT (News) 135, 2023; SLT (News) 31, 2024 SLT (News) 17).
[16] [2022] CSIH 33.
[17] [2023] CSIH 28.
[18] [2020] CSIH 2.
[19] See Lorna Richardson, "Commercial common sense again: what role in contract interpretation?" Edinburgh Law Review, 2021, 25(1), pp. 89-94.

Remedies for Breach of Contract

The SLC had considered prior to their Report that a comprehensive statutory restatement of the law could be of benefit in respect of remedies for breach of contract but as this proposal was not widely supported and indeed there was some significant opposition, no such recommendation has been made.

In the main there was a lack of support for many of the reforms. For example, a number of technical reforms were considered. There was little support for general reform in this area and it was concluded that the law as it stands is fit for purpose. The SLC consulted on three further possible reforms which were characterised as "self-help remedies[20]." The first (price reduction) was not supported by the majority. Similarly, most respondents were against a debtor's right to cure defective performance. Finally, there was limited support for the remedy of a creditor's right to have non-conforming performance remedied. As a result, and in the light of stakeholder views, no recommendations were made on these aspects.

Whilst there was some consensus around some potential reforms relating to the enforcement of performance, recommendations were not proposed on the basis that it would create an undesirable divergence between remedies for breach of contract and the general law of remedies.

The SLC consulted again on the topic of damages for non-patrimonial loss as there had previously been support for reform in this area[21]. Views had changed, however, and the level of support had fallen and with consultees taking the view that the courts were now developing the law on a case-by-case basis. The SLC were content to leave things both to the courts and further academic research and no recommendations were made.

The SLC did however recommend 3 individual reforms all of which are intended by way of default rules. These recommendations are discussed in more detail below and your views on aspects of these are welcome.

Principle of mutuality

The first of these reforms relates to "mutuality." It is intended to clarify that when two parties (A and B) to a contract are each in breach of the contract, A may exercise any right or pursue any remedy arising from B's breach, provided B's breach occurs before B rescinds the contract for A's breach (if it can)[22]. It is qualified in so far as the party in breach is not entitled to claim performance of any duties which have been retained lawfully.

Closely aligned to the principle of mutuality is the remedy of retention. Retention is a "self-help" remedy which is based on the idea of obligations in a contract being interdependent or reciprocal, so if one party does not perform then the other party need not perform. Before its Report, the SLC considered that the remedy of

[20] See Chapter 14 of the Report.
[21] See Chapters 16 and 17 of the Report.
[22] The relevant (default) provision can be found at section 17 of the draft SLC Bill.

retention was generally functioning reasonably well and that clarification of certain issues was required more than reform, but the extent of the clarification needed was not clear. In its Report the SLC considered it best to leave further clarification of the law on mutuality and retention to the courts and practitioners.

Since the Report was published there has been further case law which has raised questions about how and when retention can be used. Some of the issues raised by J H & W Lamont of Heathfield Farm v Chattisham Ltd[23] were highlighted in an article[24] which noted that while the 3 judges of the Inner House reached the same decision they did so by contradictory routes. For instance, taking as an example the judges' approach to Lord Jauncey's comments in Bank of East Asia[25], Lord Drummond Young suggested that they should not be construed as suggesting that in instalment contracts the presumption of interdependence is in some way reduced. Lord Malcolm, however, relied on Lord Jauncey's comments in finding that the parties' obligations were not counterparts.

Furthermore, in a novel development, Lord Drummond Young suggested that retention only operates in relation to substantive, as opposed to ancillary obligations in a contract. The Lord President noted that the right to retain is generally only available to secure future performance, not for past breaches that are unlikely to be repeated. Yet this is in conflict with the decision of the Supreme Court in Inveresk v Tullis Russell[26]. The decision in J H & W Lamont also emphasised the lack of clarity regarding the court's equitable control of the right to retain and the factors that may be taken into account in finding that retention had been used inequitably.

It may therefore be said that the law in relation to retention of performance is less clear than when the SLC issued its Report. Without further clarification it is likely to be difficult for legal professionals to definitively advise their clients about the state of the law in Scotland. This may be especially unsatisfactory given that retention can operate as a self-help remedy, that is, one a party may exercise on its own behalf and without seeking professional advice or obtaining an order from the court.

Q14. In the light of the subsequent case law do you consider that the law of retention would benefit from clarification? If yes, please provide details.

Restitution after rescission

The second reform relates to restitution following rescission. There was majority support for the "principle that where parties have rendered performances under a contract but not received the reciprocal counter-performances, and the contract is

[23] [2018] CSIH 33, 2018 SC 440.
[24] "What do we know about retention now?", Lorna Richardson, Edinburgh Law Review, 2018, 22(3), pp. 387-39.
[25] 1997 SLT 1213. (Cited in footnote 5, page 102 of Report). "I do not consider that the authorities warrant so broad a proposition as that any material breach by one party to a contract necessarily disentitles him from enforcing any and every obligation due by the other party."
[26] [2010] UKSC 19, 2010 SC (UKSC) 106.

then terminated, there should be restitution of the performances in question[27]." Any remedy is to be reciprocal. The SLC considered that the current law on the matter is unclear. There was strong support for this proposed reform which is provided for at section 18 of the SLC draft Bill and introduces a new remedy which is intended to address the economic imbalance which may be caused when a partly performed contract is subject to rescission.

Q15. Are you content with the proposed approach taken to restitution following recission? If not, please provide your reasons.

Contributory Negligence

The final reform in respect of remedies relates to contributory negligence. Section 22 of the SLC's draft Bill provides that the defence of contributory negligence applies to all claims of damages for breach of contract. This is achieved by amending the Law Reform (Contributory Negligence) Act 1945[28] ("the 1945 Act").

There was broad support for this reform in earlier consultations but the draft Bill which accompanied the Report published by the SLC in 1999[29] provided for this recommendation differently. Section 3 of the 1999 draft Bill allowed damages to be reduced to take account of the fact that both parties to a contract or unilateral voluntary obligation may have contributed to the loss or harm. In the SLC's draft Bill accompanying its 2018 Report, section 22 amends section 5 of the 1945 Act to extend the definition of 'fault' in that section to include breach of contract.

A recent decision by the Judicial Committee of the Privy Council in Primeo Fund v Bank of Bermuda (Cayman) Ltd[30] ("Primeo") concerned claims of breach of contractual duties in the context of fraud, including whether the statutory defence of contributory negligence applied to a claim in contract. The Judicial Committee confirmed that a defence of contributory negligence is, in principle, available in a contractual damages claim where a claimant relies on concurrent duties in contract and in tort (delict). The significance of the decision lies with the Cayman Islands' statutory provision – which was the subject of analysis in the case – being closely modelled on the rule applicable in section 1(1) of the 1945 Act.

Q16. In light of the decision in Primeo are you content with the proposed approach taken to apply the defence of contributory negligence to claims of damages for breach of contract? If not, please provide your reasons.

Miscellaneous

Finally, there were a few areas where reforms were not recommended by the SLC and the view was taken that broadly the courts should be able to develop the law as necessary. The first is that no further reforms are recommended in respect of "anticipated breach" (the SLC's preferred term for what is often known as "anticipatory breach").

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[27] See paragraph 10.28 of the Report.
[28] Available at https://www.legislation.gov.uk/ukpga/Geo6/8-9/28/contents.
[29] Available at https://www.scotlawcom.gov.uk/files/4712/7989/6640/rep174.pdf.
[30] [2021] UKPC 22, available at https://www.jcpc.uk/cases/jcpc-2019-0089.html.

“Anticipated breach” describes conduct by a debtor that will justify the creditor in exercising remedies available on breach even though the time for the debtor’s performance has not yet arrived. The leading case on anticipated breach in Scots law since 1999 is AMA (New Town) Ltd v Law[31]. The SLC considered options for reform, but there was no real consensus that reforms were needed and mixed views from those in favour of reform on what they should look like. The SLC concluded that the law could develop without statutory reform.

Q17. Are you aware of any developments in case law which suggest that the law of anticipated breach needs reform? If yes, please provide details.

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

Q18. Are you aware of any developments in the courts which are either helping or hindering this area of the law? If yes, please provide details.

The SLC considered again the issue of transferred loss claims. The issue arises where a breach of contract occurs and loss results, but is sustained by a person who is not party to the contract. For instance, T (the third party) suffers a loss but is not a party to the contract and so does not have title to sue for breach of contract. C (the creditor), by contrast, has title to sue but has suffered no loss. Given the compensatory nature of damages in Scots law, C is not entitled to damages. D (the debtor) has broken the contract but does not incur liability to anyone for doing so, with the loss falling on T. Overall, this scenario produces a problematic result.

There was support for a statutory statement – reflecting the current law – with some clarifications. A “substantial minority of the consultees” thought that the current law was incorrect. On further consideration the SLC concluded that to provide a satisfactory solution would require a significant piece of work and that would not be possible at that time. Some consultees also suggested that well advised parties would make provision for the matter in their contracts. Accordingly, no recommendation was made.

Q19. Do you have any views on the current state of the law in respect of transferred loss claims? If yes, please provide details.

[31] [2013] CSIH 61.

Penalty Clauses

The SLC had reported previously on penalty clauses and that Report[32] was referenced by the UK Supreme Court in the conjoined cases Cavendish Square Holding and ParkingEye Ltd[33] which re-worked the law on penalty clauses in England and Wales but did not abolish the rule against penalties altogether.

In a 2016 Discussion Paper the SLC sought views on: letting the UKSC decision bed in; abolition of the rule against penalties; as well as a reform scheme. There was no appetite for abolition and the suggested reforms were not widely supported. There was however a consensus for letting the UK Supreme Court decision bed in. The SLC agreed with this assessment and no reforms were recommended. The SLC considered that the legal (case law) developments in this area should be kept under review.

Q20. Has the UK Supreme Court decision produced certainty or has it caused any difficulties or created unfairness? Where possible, please provide details to support your view.

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[32] The Report on Penalty Clauses was published in 1999 and is available at https://www.scotlawcom.gov.uk/files/1812/7989/6621/rep171.pdf.

[33] [2015] UKSC 67.

How to Respond

Responding to this Consultation

We are inviting responses to this consultation by **27 September 2024**.
Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (http://consult.gov.scot). Access and respond to this consultation online at https://consult.gov.scot/justice/scottish-law-commission-report-contract-law-review/. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **27 September 2024**.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send along with your response to ContractLaw2024@gov.scot or by post to:

Private Law Unit
Scottish Government
Area GW 15
St Andrews House
Edinburgh
EH13DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

To find out how we handle your personal data, please see our privacy policy: https://www.gov.scot/privacy/

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at http://consult.gov.scot. If you use the consultation hub to respond, you will receive a copy of your response via email. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to michael.paparakis@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: http://consult.gov.scot. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

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Any enquiries regarding this publication should be sent to us at

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