SCOTTISH LAW COMMISSION

CONSULTATION PAPER

ON

FORMATION OF CONTRACT: SCOTTISH LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

September 1992

This Consultation Paper is intended to elicit comments and does not represent the final views of the Scottish Law Commission. The Commission would be grateful for comments by 31 October 1992.

CONSULTATION PAPER

The purpose of this consultation paper is to seek views on a proposed recommendation that the provisions of articles 4, 6, 8 to 11 and 13 to 24 of the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on 11 April 1980 should be adopted, with certain minor modifications, as part of the general law of Scotland relating to the formation of contracts. A draft Report (with draft Bill) is attached.

If the recommendation were implemented, the main changes of substance would be:-

(a) the abolition of the postal rule, whereby a letter of acceptance concludes a contract when it is posted rather than when it reaches the other party.[1]

(b) a limited solution, based on traditional offer and acceptance doctrines, to some of the problems posed when a purported acceptance of an offer contains some additional or different terms which do not materially alter the terms of the offer and which are ignored by the offeror (the so-called "battle of the forms"),[2]

(c) a more liberal approach (although the extent of the change should not be exaggerated) to the circumstances which can be taken into account in interpreting a written offer or acceptance for the purpose of deciding whether or not a contract has been concluded.[3]

(d) a change in approach, although not in the results likely to be reached, to the question whether an offer is terminated by a change in circumstances before it is accepted.[4]

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[1]See attached draft report paras 4.4 to 4.7.

[2]See attached draft report paras 4.20 to 4.23.

[3]See attached draft report paras 2.4 to 2.7.

[4]See attached draft report paras 4.9 to 4.13.

For the rest, the provisions of the Convention on contract formation are very similar to the existing law of Scotland. The Convention has now been widely adopted and already regulates many international sales contracts. Even if the United Kingdom does not accede to the Convention there would be advantages in adopting its provisions on contract formation as part of our law. Scotland would then have a modern, up-to-date set of rules on contract formation in line with those widely adopted internationally. It is worth noting that sales contracts entered into by Scottish firms will often already be governed by the Convention. This is because it applies where the parties have their places of business in different States and

> "the rules of private international law lead to the application of the law of a Contracting State."[1]

So if a Scottish firm enters into an international sales contract which is governed by the law of, say, France, Germany, Italy, Australia or Canada it will already be affected by the Convention. If the United Kingdom were to accede to the Convention - and the pressure for that to happen must be constantly increasing as more and more of our major trading partners become parties - then there would be even stronger arguments for adopting the Convention's rules on contract formation as part of our law. It would be difficult to justify having one rule on contract formation for a contract entered into with a company in London and another for a contract entered into with a company in, say, Paris or Frankfurt. We emphasise, however, that the Commission's provisional recommendation is not dependent on the United Kingdom's accession to the Convention. It is our view that the rules in the Convention are worth adopting on their merits whatever happens in relation to the Convention.

The Commission has already consulted on the law relating to formation of contract and we have taken the results of that consultation into account in writing the draft report which is attached. However, that consultation is now rather old and it did not focus on the terms of the United Nations Convention, which was only in the course of preparation when the Commission's consultative memorandum on Formation of Contract

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[1]Art 1(1)(b). Contracting States may opt out of this ground of application at the time of becoming a party to the Convention (art 95) but very few have done so.

(Memorandum No 36) was published. The Convention adds a new dimension to any consideration of reform in this area and provides a new opportunity for international harmonisation of laws. We would therefore be very grateful for the views of consultees on the recommendation in the attached report. We hope that those who gave the Commission the benefit of their views in the earlier round of consultation will not feel that this further request for views is too much of an imposition.

The Commission would be grateful if comments on this Consultation Paper were submitted by 31 October 1992. All correspondence should be addressed to:-

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NOTE

1. In its report on this subject the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultation Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Consultation Paper can be used and attributed.

DRAFT REPORT

FORMATION OF CONTRACT: SCOTTISH LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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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 consultative memorandum

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 English Law Commission in a joint

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[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.

project on the postal rule.

The supplementary consultation paper

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.[1] 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.

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.[2] 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.

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[1]Scot Law Com, Consultation Paper on Contract Law - Exchange of Standard Term Forms in Contract Formation (1982).

[2]Scot Law Com No 112, 1988.

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 English 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 English 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 English contract law; and concerns about resources. We fully understand the position of the English 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 this report. For reasons which will quickly become apparent we see it as an important step towards, and not away from, international harmonisation of laws on contract formation.

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

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[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).

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.[1] Other states are likely to become parties soon.[2] 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,[3] 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

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[1]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.

[2]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).

[3]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.

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 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 have 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 have concluded that they would form a very satisfactory basis for the internal law of Scotland in this area. In the remaining parts of this report we consider the Convention's rules in more detail and compare them with the existing Scottish rules.

Recommendation

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

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

1.9 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 what the terms of the contract are or what the remedies may be for its breach.

1.10 The articles of the Convention with which we are here concerned deal mainly with the conclusion of contracts by offer and acceptance. This is by far the most common method of concluding contracts but it is by no means the only method. A multipartite

contract may, for example, be concluded by more or less simultaneous acceptance of a prepared draft. For the avoidance of any doubt the draft Bill makes it clear that it does not prevent a contract from being concluded otherwise than by offer and acceptance.[1]

[1]See clause 1(3).

PART II - GENERAL RULES

Introduction

2.1 In this Part we examine articles 4, 6, 8 to 11 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 as part of the general Scots law on contract formation. 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 12 relates to Contracting States which have opted out of Article 11 (contracts need not be in writing) 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.

> Article 4
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> 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:
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> (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 part of this article in the adopted rules, just to make it clear that questions of validity (for example, on the ground of error or incapacity) were not covered. However, for our purposes, the words "of sale and the rights and obligations of

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[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.

the seller and the buyer arising from such a contract" would fall to be deleted as would the whole of paragraph (b). 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.[1]

Contracting out

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

Article 6

> 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.

This 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.

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. Article 8 of the Vienna Convention regulates this as follows.

ARTICLE 8

> (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

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[1]Cf *Mathieson Gee (Ayrshire) Ltd* v *Quigley*, 1952 SC (HL) 38.

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 circumstance.

(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 invalidity or variation of concluded contracts or with the rectification of documents. We are not concerned directly with the interpretation of concluded contracts, although questions of interpretation may sometimes merge into questions of formation. What looks like a concluded contract may turn out not to be when the offer and acceptance are interpreted.[1] Within the limited scope of this report 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 on the plan "and that that intention was made clear to the buyer."[2] 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

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[1]See eg *Houldsworth* v *Gordon Cumming* 1910 SC (HL) 49 at p52; *Mathieson Gee (Ayrshire) Ltd* v *Quigley* 1952 SC (HL) 38.

[2]*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.

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.[1] 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.[2] 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 dictum, 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."[3] 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

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[1]*Buchanan* v *Duke of Hamilton* (1878) 5 R (HL) 69. See also *Stuart & Co* v *Kennedy* (1885) 13 R 221, esp. per Lord Shand at p223.

[2]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.

[3]*Muirhead and Turnbull* v *Dickson* (1905) 7 F 686 at p694.

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.[1] 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 B was not entitled to have the contract reduced.[2] The same result would no doubt

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[1]The *Royal Bank of Scotland plc* v *Purvis* 1990 SLT 262.

[2]*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

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.[1] 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[2] or the subsequent actings,[3] 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. Under 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,[4] and that the subsequent conduct of the parties was

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adoption of article 8. *Steel's Tr* v *Bradley Homes* was followed in *Angus* v *Bryden* 1992 GWD 1-38.

[1]See *Mathieson Gee (Ayrshire) Ltd* v *Quigley* 1949 SLT (Notes) 27.

[2]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.

[3]See 1952 SC (HL) 38 at p43.

[4]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

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. We cannot be sure of the outcome but we can say that the approach under article 8 would have been less blinkered than that actually adopted by the House of Lords.

2.6 As the last example shows, there may be some cases - those where the question whether a contract has been concluded depends on a proper interpretation of a written offer and acceptance - where the adoption of article 8(3) in relation to contract formation might conflict with the existing rules on the non-admissibility of parole evidence or extrinsic evidence in relation to written contracts.[1] However, these rules are subject to so many exceptions that the practical effect of this change is unlikely to be great. In particular there is an exception for "surrounding circumstances" which has been explained as follows.

> "You may ... look at the surrounding circumstances ... and see where was the intention. You do not get at the intention as a fact ... but you see what is the intention expressed in the words used as they were with regard to the particular circumstances and facts with regard to which they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is perfectly legitimate."[2]

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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.

[1]See Walker & Walker, Evidence, Chap XXI; Macphail, Evidence, Chap 15. Note, however, that in *Houldsworth* v *Gordon Cumming* 1909 SC 1198 at p1206 Lord Low assumed 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. See also Gloag, Contract (2nd edn 1929) p365, approved in *Bell Brothers (HP) Ltd* v *Aitken* 1939 SC 577 at p585.

[2]*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*

This exception goes a long way to bridge any gap there may be between article 8(3) and the existing law. There are also exceptions relating to usages of trade[1] and many other matters.[2] Even if no exception applied and article 8 did conflict with a rule excluding parole or extrinsic evidence (as might be suggested, for example, if the intent which a person had in making a written offer were determined by having regard among other things to his subsequent conduct)[3] we would not regard this as a reason for not adopting article 8. It must be remembered that under article 8(1) the intent of the party will not by itself be conclusive. It will also be necessary to ask whether the other party knew, or could not have been unaware, of that intent. This being so, there would seem to be no good reason for excluding any potentially helpful evidence as to that intent.[4] Article 8(2), of course, adopts an objective approach. Rules excluding parole or extrinsic evidence in the interpretation of written statements may be useful as a safeguard where the substantive law places too much weight on subjective intent. Where the substantive law adopts a more objective approach, as the modern Scottish law does and as article 8 does, rules excluding extrinsic evidence of relevant circumstances are likely to lead to difficulty, confusion and injustice. In short, in so far as article 8 does conflict with existing rules on the non-admissibility of extrinsic or parole evidence - and that is probably only to a very limited extent in the present context - we think that it is a move in the right direction.

1910 SC (HL) 49 at p51.

[1]Walker & Walker Evidence, pp289-290; Macphail, Evidence, para 15.30.

[2]See generally, Walker & Walker, Evidence, Chap XXI; Macphail, Evidence, Chap 15.

[3]See Macphail, Evidence, paras 15.25 to 15.29. *Mathieson Gee (Ayrshire) Ltd* v *Quigley* 1952 SC (HL) 38 at pp41 and 43. Although it is generally said that reference to subsequent conduct is inadmissible for the purpose of construing a statement in a contract, there are cases where the courts have looked at a person's subsequent conduct in attempting to determine what his intent must have been at the time of signing an offer or acceptance. See eg *Buchanan* v *Duke of Hamilton* (1878) 5 R (HL) 69 at p78; *Harvey* v *Smith* (1904) 6 F 511 at pp518-519; *Steel's Tr* v *Bradley Homes* 1972 SC 48 at pp49 and 53.

[4]Foreign courts appear to find evidence of subsequent actings helpful in this context. See Macphail, Evidence para 15.28.

2.7 In its consultative memorandum on Constitution and Proof of Voluntary Obligations: Abortive Constitution[1] this Commission consulted on some of the matters covered by article 8. The results of that consultation suggest to us that article 8 is likely to be seen by Scottish lawyers as being very similar to the existing law of Scotland and as being acceptable.

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.

ARTICLE 9

(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 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. It could be useful in this sphere. 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

[1]Memorandum No 37 (1977) paras 12 to 19.

present context. Secondly, the words "in international trade" in paragraph (2) should be deleted, for obvious reasons.

Meaning of "place of business"

2.10 Article 10 of the Vienna Convention deals with the meaning of "place of business" for the purposes of the Convention.[1] It provides as follows.

ARTICLE 10

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 because the only relevant article (article 24, considered later) already contains a special rule for parties with no place of business. Article 10(b) is therefore omitted from the Schedule to the draft Bill appended to this report.

Writing not generally required

2.11 Article 11 of the Convention provides as follows.

ARTICLE 11

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 may be proved by any means, including witnesses.

We have dealt with the questions covered by this article in our report on Requirements of Writing.[2] Here it is only necessary to say that article 11 usefully reflects the general rule in Scots law. However, there are exceptions (for example, for contracts relating to land) and these would require to be covered. Given that other articles in the Convention (for example, article 18 on what constitutes an acceptance) presuppose that there is no

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[1]This is important under article 24 which provides that an offer etc "reaches" the addressee when it is delivered to his place of business. See para 2.13.

[2]Scot Law Com No 112 (1988).

requirement of writing, the best way of catering for those cases where writing is required in Scots law would be by means of a general exception in the enacting clause.[1] The words "of sale" would be deleted from article 11 for our purposes because the rule would be of general application.

Definition of writing

2.12 Article 13 of the Convention says that, for the purposes of the Convention, "writing" includes telegram and telex. If the only reference to writing were in article 11 (writing not required) then this definition could be omitted as unnecessary. However, there is also a reference to writing in article 21(2), which we are proposing for adoption. This gives some point to the retention of article 13.

When does a communication reach the addressee?

2.13 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.

Article 24

> 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, as we have seen, resolves the problem of a person who has more than one place of business. The rules in article 24 prevent the recipient of a communication from arguing that it did not reach him because he was away from his office or home at the time.[2] They seem to us to be reasonable.

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[1]See the draft Bill, clause 1(2).

[2] 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.

ARTICLE 14

(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

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[1]See paras 3.3 and 3.4 below.

[2]See memorandum 36 pp8-19.

law.[1] 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.[2] Does it merely state what is sufficient, or does it state what is necessary? In particular, does it mean that a proposal which leaves the price "open" can never constitute an offer? The natural reading seems to us to be the former. In other words, the sentence should be read as if the words "but not necessarily only if" were inserted after the word "if". This is the only interpretation which squares with article 55 of the Convention which says that

> "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."

Although it is possible for a State to declare that it will be bound by Part III of the Convention, where article 55 appears, but not by Part II, where article 14 appears, the expectation of the framers of the Convention must have been that this would be the exception.[3] The Convention must have been intended to be read as a whole. The only way of reconciling article 14(1) with article 55 is to treat the second sentence of article 14(1) as stating merely a sufficient condition. On this view the second sentence of article 14(1) presents no problems for Scots law. It could co-exist with section 8(2) of the Sale of Goods Act 1979 which provides that where the price is not determined as mentioned in section 8(1) "the buyer must pay a reasonable price". However, even although we believe that the second sentence of article 14(1), when read with article 55, could readily be adopted, we think that it would be better in the context of general rules on contract formation to leave it out. An alternative would be to keep it in but also to bring in article 55. This, however, would overlap with section 8 of the Sale of Goods Act 1979 and would take us beyond the sphere of contract formation and into implied terms.

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[1] *Fenwick* v *Macdonald, Fraser & Co* (1904) 6 F 850; Sale of Goods Act 1979, s57.

[2] See the DTI Consultative Document (1989) paras 23-28.

[3] In fact it has proved to be the exception. Only a few States have opted out of Part II.

3.4 The question of general offers, such as offers of reward for returning lost items or offers of prizes to those winning competitions,[1] 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 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.[2] It has been suggested, however, that at least some such cases would be better regarded as unilateral promises.[3] Article 14 leaves it open, as at present, for a pursuer to argue either way, depending on the facts and the available evidence.[4] 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.[5] A general offer of a prize or reward is not normally a

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[1]See McBryde, Contract, pp60-62; Walker, Contracts (2d edn, 1985) pp29-31, 115-116.

[2]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.

[3]See Walker, Contracts (2d edn 1985) pp29-31; Scottish Law Commission, Consultative Memorandum on Unilateral Promises (Memo No 35, 1977) p11.

[4]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.

[5]See, too, article 18(3) which allows assent to certain offers to be indicated by performing an act and without notice to the offeror.

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.

ARTICLE 15

(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. A British drafter would probably have inserted "Subject to paragraph (2)" at the beginning of article 15(1) but we do not recommend that that should be done. It is clear that both paragraphs must be read together and it is important, if the maximum advantage is to be gained from adopting the internationally agreed rules in the Convention, to make the minimum number of alterations possible.

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."

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 the following terms.

ARTICLE 16

(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

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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 98; *McMillan* v *Caldwell* 1991 SLT 325.

would be changed.[1] It protects the offeree's position once he has dispatched an acceptance. There is no perfect answer to this question - which involves a bit of juggling with objective and subjective views on the conclusion of a contract - but it seems reasonable enough to expect the offeror, who has initiated the process and given the offeree the expectation that it is in his power 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(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". This provision reflects a difference of views during the negotiation of the Convention.[2] 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,[3] 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,[4] 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

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[1]Para 54.

[2]See the DTI Consultative Document (1989) para 31; Honnold, Uniform Law for International Sales (2d edn 1991) pp205-209.

[3]See paras 2.4 to 2.17 above.

[4]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.

days".[1]

(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.[2]

(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.[3]

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.

3.13 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

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[1] *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.

[2] *Heys* v *Kimball and Morton* (1890) 17 R 381 at p384.

[3] *Effold Properties Ltd* v *Sprot* 1979 SLT (Notes) 84.

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.[1] The position would be better, particularly in relation to business contracts, if the recommendation in our report on Requirements of Writing[2] 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 him materials at certain prices were firm for a certain period.[3] 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 he could suffer prejudice if the offers were revoked after he had become bound by his tender. 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.[4]

Effect of rejection of an offer

3.14 The Vienna Convention provides 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 the Convention are as follows.

ARTICLE 17

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

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[1]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.

[2]Scot Law Com No 112 (1988). See para 3.4 note 4 above.

[3]See Treitel, The Law of Contract (8th edn 1991) p141.

[4]Bell thought that a similar rule might already be part of the law of Scotland. See Commentaries (7th edn) I, 344.

This is also the existing law in Scotland.[1] 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.[2] The Convention, however, contains a special rule for certain cases involving trivial differences between offer and acceptance.[3] Article 17 seems to us to contain a clear, sensible and unsurprising rule which could be adopted without difficulty.

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[1]Gloag, Contract (2d edn 1929) p37, approved in *Wolf & Wolf* v *Forfar Potato Co* 1984 SLT 100.

[2]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.

[3]Article 19(2). See paras 4.21 to 4.23 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.

ARTICLE 18

(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

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[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.

if it is not refused within a specified time".[1] 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.[2] There may, for example, be cases where a party proposes that his 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.[3]

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 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.[4]

When is acceptance effective?

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

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[1]Contract (2d edn 1929) p28.

[2]See Memorandum 36, paras 37-40 where some special cases are discussed.

[3]See Honnold, Uniform Law for International Sales, (2d edn 1991) para 160.

[4]See Memorandum 36, paras 32-33, commenting on the English cases of *Manchester Diocesan Council for Education* v *Commercial and General Investments Ltd* [1970] 1 WLR 241 and *Yates Building Co* v *Pulleyn* [1975] CLY 388 (CA).

(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.[1] 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,[2] but some Scottish judges have doubted whether this would actually be held to be the law if the situation arose.[3] What if the letter of acceptance is wrongly addressed, or unstamped?[4] 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.[5] 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[6] or to a private messenger?[7] Does it apply to telegrams?[8] Does it

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[1]See *Thomson* v *James* (1855) 18 D 1; *Jacobsen, Sons & Co* v *Underwood & Son Ltd* (1894) 21 R 654.

[2]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.

[3]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.

[4]See the discussion in McBryde, Contract (1987) p85.

[5]Cf *Countess of Dunmore* v *Alexander* (1830) 9 S 190. There are, however, different ways of interpreting this case.

[6]Like the Rutland Exchange in Edinburgh.

[7]In *Thomson* v *James*, above, at pp13, 15 and 26 the view was expressed, obiter, 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

apply to acceptances by telex?[1] What if a telex communication is not instantaneous - for example, because the message is sent out of hours?[2] 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?[3] 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 in his power to conclude the contract, to act safely in the knowledge that the contract is complete. However, as was pointed out in Memorandum 36,[4]

> "in Scotland at least, such reliance might prove to be misplaced if the offeree's letter never in fact arrived.[5] 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

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a messenger would have no authority to receive an acceptance.

[8] It has been so applied in England: *Bruner* v *Moore* [1904] 1 Ch 305.

[1] It was not so applied in the English case of *Entores Ltd* v *Miles Far East Corporation* [1955] 2 QB 327.

[2]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.

[3]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.

[4]Para 48.

[5] 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.

> 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 he chooses 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 him.[1]

4.6 The Commission also observed in Memorandum 36 that the postal rule was probably contrary to the expectations of lay people.[2]

> "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.[3] 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.

4.7 When this question was considered by the Commission at a time when none of the existing members was a member, the unanimous view was that the postal rule should be changed. We ourselves are of the same view. We therefore favour the adoption of the

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[1]See Honnold, Uniform Law for International Sales para 162. Article 21(2), considered below, slightly qualifies the risk.

[2]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).

[3]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.)

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

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[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, 66-67.

[3] See Gloag, Contract (2d edn, 1929) 36; McBryde, Contract, 67; Walker, Contracts, p118.

left his presence."[1]

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 in the period before it is accepted. However, some cases involving a change of circumstances could be decided by saying that, when due account is taken of the circumstances of the transaction, a reasonable time for acceptance has elapsed. For example, in the case of *Macrae* v *Edinburgh Street Tramways Co*[2] 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. That type of case would present no great difficulty under the Convention. The provision on reasonable time could be applied.

4.10 Suppose, however, that an offer to buy goods at a certain price has allowed a fixed time for acceptance and that within that time there is a material change of circumstances, such as severe damage to the goods. The position under the Scottish authorities is not as clear as might be thought. Some writers say that an offer falls on a material change of circumstances.[3] However, in the leading case[4] Lord President Inglis was careful to confine his remarks to the situation where there was no time fixed for acceptance. He 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

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[1]McBryde, Contract, p67.

[2](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").

[3]See McBryde, Contract, p71; Walker, Contracts, p118.

[4]*Macrae* v *Edinburgh Street Tramways* (1885) 13 R 265 at p269.

> 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." (Emphasis added.)

In memorandum 36 the Commission expressed the provisional view that there was no sufficient reason for confining the effect of change of circumstances to cases where no time limit had been stated.[1] It was suggested that:

> "It might, however, serve to clarify the law if it were to be provided by statute that a material change of circumstances should lead to the termination of an offer only where, if the contract had already been concluded, that change of circumstances would have resulted in its discharge by frustration."

This proposal was supported by those consultees who commented on it. However, when the Commission (as then constituted) was considering its policy on this matter it decided against a reference to the law on frustration (which is complex) and in favour of a direct provision, the general policy being that an offer would lapse if, because of an important change in circumstances, it had become utterly unsuitable and absurd.

4.11 In the absence of any such provision in the Vienna Convention the matter would have to be approached as one of construction. Essentially the question is whether the offer is to be interpreted as being conditional on the goods remaining in a certain condition. Here article 8(1) could be of assistance. Suppose, for example, that, after inspecting B's car, A writes to B offering to buy the car at a price which is about the market value of a car of that age in good condition, and giving B two days in which to accept. An hour after receipt of the offer the car is badly damaged in a collision. Is the offer to be interpreted as applying (a) whatever the car's condition or (b) only if it is in more or less the same condition as when A inspected it? Article 8 says that the offer is to be interpreted according to A's intent where B "knew or could not have been unaware what that intent was". Here, it is suggested, B could not have been unaware that A's intent was to offer to buy a car which was more or less in the same condition as when he inspected it. Article 8(2) could also be helpful. It provides that, if article 8(1) does not

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[1]Para 61.

apply,

> "statements made by ... 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."

Here a reasonable person would, we suggest, interpret A's offer as being an offer for the car in substantially the condition it was in when inspected,[1] and not as an offer for the car no matter what its condition. Any other interpretation would be "utterly unsuitable and absurd" given the general rule that, even after a contract is concluded, goods remain at the seller's risk until property in them is transferred to the buyer.[2] It would be highly unreasonable to expect an offeror to insure against damage to a car which he or she might never own because the offer might not be accepted.

4.12 The same technique could also be used in relation to other types of case. For example, a tender made by the defenders at an early stage in an action for damages for personal injuries would not be interpreted as being open for acceptance after the death of the pursuer had completely altered the basis of the claim in relation to future loss of earnings;[3] an offer to carry goods on a particular ship would not be interpreted as being open for acceptance after the ship had been destroyed, or confiscated by the government for an indefinite period; an offer by an actor to perform on a particular date would not be interpreted as being open for acceptance if the actor had in the meantime become so seriously ill that he would never act again.[4] In all of these cases a reasonable person would interpret the offer as being subject to an implied condition that it would lapse in the events which happened. The same could be said of any case where, in Lord President Inglis' words, the offer had become "utterly unsuitable and absurd" because of a material change of circumstances.

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[1]See *Financings Ltd* v *Stimson* [1962] 3 All ER 386 (where the Court of Appeal interpreted an offer in precisely this way).

[2]Sale of Goods Act 1979, s20(1).

[3]*Sommerville* v *NCB* 1963 SC 666.

[4]See memorandum 36, para 61.

4.13 It seems to us that the provisions of the Convention would enable satisfactory results to be reached in cases of what might be called pre-contractual frustration. There would clearly be dangers in giving too much scope to offerors to escape from contracts on the ground of a change in circumstances between offer and acceptance. Offerors can protect themselves by setting time limits for acceptance and including appropriate conditions if they wish to.[1] If they fail to do so, then only in the clearest cases, where any reasonable person would say that the offer must be interpreted as impliedly providing for lapse in the events which happened, should the offer terminate because of such a change in circumstances. The Convention is, we think, able to cope with such cases. It would, however, be desirable, for the avoidance of doubt about the interaction of the common law rules and the Convention, to provide expressly that an offer is not terminated automatically by a change in circumstances but may, having regard to article 8, be interpreted as being subject to an implied condition that it is to terminate in certain circumstances.[2] This is the approach adopted in English law[3] and it would be more consistent with the Convention than the existing Scottish approach. We would not expect the results to be very different.

4.14 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 he 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 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

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[1]See eg *Looker* v *Law Union and Rock Insurance Co* [1928] 1 KB 554 (condition that health of person whose life was being insured should remain meanwhile unaffected).

[2]See the new para (2) added to article 17 of the draft Bill appended to this report.

[3]See Treitel, The Law of Contract (8th edn, 1991) p44.

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 a fortiori death would be too. Death is the ultimate incapacity.

4.15 Although there is an absence of conclusive authority[2] the existing general rule in Scots law is thought to be 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 what is probably the existing law. In memorandum 36 it was provisionally proposed that, where the offeror or offeree had died,

> "the question whether the offer is terminated should be determined by the same considerations as determine whether a contract is frustrated upon the death of either party occurring after the contract has been concluded."[5]

There was a mixed reaction to this on consultation. The Law Society of Scotland agreed but the consulted Court of Session judges and the Faculty of Advocates thought that the death of the offeror or offeree should continue to cause the offer to lapse. An example given in memorandum 36 was that of "an offer relating to the supply of coal to a household, whether made by the coal merchant as an offer to sell or by the householder

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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]Para 61 and proposition 36.

as an offer to buy.".[1] It was suggested that the offer should not lapse on the householder's death. However this example seems to us to reveal the difficulties of disregarding the death. Suppose that the coal merchant makes an offer to Mrs X to supply a ton of coal. Mrs X then dies before accepting. Who is to be allowed to accept the offer? By the time an executor is confirmed it would almost certainly be too late for acceptance. A reasonable time would have elapsed even if no time limit for acceptance had been stated in the offer. There is no-one else who could accept. It is no better if the householder has made an offer to buy. Suppose that Mrs X has made an offer by telephone to buy a ton of a particular kind of smokeless fuel, at a price which the coal merchant has quoted, for delivery the next day. The coal merchant says that he is not sure if he has the fuel in stock and that he will telephone later that day to say whether he can accept the offer. When he telephones to accept the offer he is told that Mrs X has in the meantime had a heart attack and has died. It does not seem to us to be obvious that he should be able to accept the offer and conclude a contract with a non-existent person. Under the Convention it is clear that no contract could be concluded on the basis of the offer because the acceptance could not reach the offeror. However, a new contract could be entered into by a surviving member of the household if the fuel were still required. This result seems to us to be preferable to the one provisionally proposed in memorandum 36.

4.16 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.[2] 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.[3] A valid contract

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[1]Para 62.

[2]See article 4.

[3]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 4.15 above.

cannot be entered into by a person who, at the time when the contract is concluded, lacks capacity to contract.[1] We think that this approach is simpler and more principled than the approach suggested in memorandum 36 whereby the question whether the offer was terminated by the insanity of either party would have been determined by the same considerations as determine whether a contract is frustrated upon the insanity of either party occurring after it had been concluded. The approach under the Convention would differ from the existing law if the existing law is, as suggested by Gloag, that supervening insanity "amounts to a revocation of the offer".[2] The lack of any provision to this effect in the Convention is, however, welcome because, as was pointed out in memorandum 36,[3] there is no reason why a contract should not be concluded if a person makes an offer, and then has a short period of temporary incapacity, and then recovers by the time the offer is accepted.

4.17 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 he considers that 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.[4] Many businesses continue trading after insolvency, and some manage to trade their way out of

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[1]See McBryde, Contracts, 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.

[2] Gloag, Contract (2d edn 1929) p37.

[3]Para 36.

[4]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.

insolvency.[1] We think that it would be dangerous to have any rule that an offer lapsed on, say, the apparent insolvency of either party.[2] 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,[3] and would continue to be governed by the existing law.[4]

Acceptance by performance

4.18 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

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[1]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.

[2]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.

[3]See article 4.

[4]A sequestrated bankrupt is not deprived of capacity to contract and can, for example, enter into ready-money contracts with the funds allowed to him 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).

himself "by virtue of the offer" to allow effective acceptance in this way.[1] The provision could be useful not only in certain common trading contexts but also in relation to general offers.[2] 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 he received them more than a reasonable time had elapsed and that the seller's indication of assent reaches him too late. The seller will not be able to rely on article 18(3) unless he can show that by virtue of the offer or as a result of practices which the parties had established between themselves or by usage, he was permitted not only to accept by conduct (which he can do under article 18(1) anyway) but also to do so effectively "without notice to the offeror".[3] 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. The receipt of this notice by the buyer will mean that the indication of the seller's assent has reached him.

4.19 One effect of article 18(3) is that an offeror can opt into the postal rule if he so wishes. He can say in his offer:- "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.

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[1]See Farnsworth in Bianca-Bonell, Commentary on the International Sales Law, pp170-171.

[2]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.

[3]See Honnold, Uniform Law for International Sales (2d edn 1991) p225.

Qualified acceptance

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

ARTICLE 19

(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]

4.21 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

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[1]See para 3.14 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.

the contract would be concluded on the terms in the offer as so modified.[1] 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."[2]

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.

4.22 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 (as would often be the case in certain trades) the chances were that their terms would differ materially. Several commentators thought that the interpretation of "materially" could give rise to difficulties.

4.23 In the light of the consultation on this subject we would not wish to recommend the solution outlined at the end of paragraph 4.21. 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 problem. The main difference would be that instead of inferring acceptance from the offeror's actings (for example, in sending goods) his acceptance of non-material additions or variations could be inferred from his failure to object without undue delay. Given that

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[1]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.

[2]P26.

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. If we had been making recommendations solely in response to the Scottish consultation on this subject we might have concluded that legislation on the lines of article 19(2) and (3) was unnecessary because it would make little if any practical difference. However, given that it forms part of the Convention's provisions on contract formation, we can see no harm in adopting it.

Calculating the time for acceptance

4.24 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:

ARTICLE 20

(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.

4.25 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]

Effect of late acceptance

4.26 The basic rule under the Convention is, as we have seen, that the acceptance must reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time.[2] Article 21 deals with the situation which arises if an acceptance arrives late. It provides:

ARTICLE 21

(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.

4.27 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 if he wished.[3] The only difference may be that under article 21(1) the time of conclusion of the contract may be the arrival of the acceptance[4] and not, as under the existing law,

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[1]See Farnsworth in Bianca - Bonell, Commentary on the International Sales Law (1987) p187.

[2]Article 18(2).

[3]Wylie and Lochhead v McElroy (1873) 1 R 41; Gloag, Contract (2d end 1929) p37.

[4]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

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.[1] A majority of those who commented on this point, 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.

4.28 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)[2] "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 him 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.

4.29 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

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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.

[1]Para 51 and proposition 30(a).

[2]Article 13.

no question of delay in transmission then the acceptor has only himself to blame if the offeror exercises his 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 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] 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 ask "Did you get my letter?" when he did not hear promptly from the offeror and would then either accept again or indicate that the acceptance was withdrawn.

Withdrawal of acceptance

4.30 Article 22 of the Vienna Convention provides that

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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.

"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.[1] There is no such difficulty under the Convention where the acceptance normally becomes effective only when it reaches the offeror.[2]

4.31 A possible disadvantage of article 22 when read with article 16 (which requires a revocation of an offer to reach the offeree before he has dispatched an acceptance) 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 he lets his acceptance take effect. If the price goes down he telephones to withdraw it.[3] However, the offeror can reduce this risk by setting a very short time limit for the acceptance to reach him or even by requiring immediate acceptance by the most rapid means of communication available. On one view of the existing law,[4] the risk has always been there in Scotland. Yet it does not seem to have caused practical problems.

Conclusion of contract by acceptance

4.32 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."

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[1]See Gloag's discussion of *Countess of Dunmore* v *Alexander* (1830) 9 S 190 in Contract (2d edn 1929) at pp38-39.

[2]Article 18(2).

[3] See Farnsworth in Bianca-Bonell, Commentary on the International Sales Law (1987) at pp196-197.

[4]See Gloag, Contract (2d edn 1929) pp38-39.

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.[1]

[1]See para 1.10 above.

The Formation of Contracts (Scotland) Bill

ARRANGEMENT OF CLAUSES

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B I L L

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Prescribe rules for the purposes of Scots law relating to the formation of contracts. A.D. 1992.

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 provisions of the United Nations Convention on Contracts for the International Sale of Goods adopted at Vienna on 11 April 1980 which (as modified for the purposes of this Act) are set out in the Schedule to this Act shall have the force of law in Scotland in relation to the formation of contracts generally and not only to the formation of certain contracts for the sale of goods.

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

(3) Nothing in this Act precludes the formation of a contract otherwise than by offer and acceptance.

Short title, commencement and extent.

2.—(1) This Act may be cited as the Formation of Contracts (Scotland) Act 1992.

(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.

SCHEDULE

PROVISIONS OF THE CONVENTION

General provisions

Article 4

This Convention governs only the formation of the contract.... In particular, except as otherwise expressly provided in this Convention, it is not concerned with ... the validity of the contract or of any of its provisions or of any usage ....

Article 6

The parties may exclude the application of this Convention or ... derogate from or vary the effect of any of its provisions.

Article 8

(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.

Article 9

(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 10

For the purposes of this Convention ... 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 ...

Article 11

A contract ... need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

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Article 13

For the purposes of this Convention "writing" includes telegram and telex.

Formation of Contract

Article 14

(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

(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

(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

(1) An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

(2) An offer is not terminated automatically by a change in circumstances but may, having regard to article 8, be interpreted as being subject to an implied condition that it is to terminate in certain circumstances.

Article 18

(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 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

SCH. act is performed within the period of time laid down in the preceding paragraph.

Article 19

(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

(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

(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 22

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

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Article 23

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

Article 24

For the purposes of this ... 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.

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.

APPENDIX B

List of those submitting comments on Memorandum No 36, or supplementary consultation paper on Contract Law: Exchange of Standard Term Forms in Contract Formation.

Memorandum 36

Automatic Vending Association of Britain
Court of Session judges (per Lord Allanbridge, Lord Dunpark and Lord Ross)
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

Supplementary consultation paper

Association of Scottish Chambers of Commerce
Mr Hugh Beale, Faculty of Law, University of Bristol
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