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The Scottish Experience

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## **Contract Formation between Distant Parties:**

### **The Scottish Experience**

Hector L MacQueen

#### **1.1 Contract formation in Scotland: offer, acceptance, counterpart execution and agreement**

#### **1.2 Law Reform: Scotland in Europe**

1.2.1 The offer and acceptance model and contract as agreement

1.2.2 Communication: postal and other acceptances

1.2.3 Protection against revocation of offers?

1.2.4 When is an offer irrevocable?

1.2.5 Withdrawal of irrevocable offer?

1.2.6 Revoking or withdrawing acceptances?

#### **1.3 Conclusions**

## **1.1 Contract formation in Scotland: offer, acceptance, counterpart execution and agreement**

In 1684 the Duke of Gordon engaged Robert Smith to serve him and his family 'in chirurgery and physic, and also to supervise his buildings and architecture' – an interesting combination of medical and property services. Smith's salary was to be 200 merks a year plus board when the Duke was at home and a daily subsistence allowance otherwise. Smith and the Duke each signed a copy of their agreement, then exchanged these copies. Some seventeen years later, in 1701, Smith obtained decree in Edinburgh Sheriff Court against the Duke for non-payment of 2,823 pounds Scots due under the contract, this representing 'so many years board wages, during the years the Duke did not live at home, at the rate of 12 pence per day'.<sup>1</sup> The scale of Smith's claim suggests that the Duke did not spend much time at home. The Duke sought to appeal in the Court of Session in Edinburgh, on the basis that 'by the contract produced by the charger himself [i.e. Smith], it appears, the clause pursued on is a marginal note, and which, not being subscribed by the Duke, but only by Smith himself, can never oblige the Duke.' The court held, however, 'that mutual contracts having two doubles need not be subscribed by both parties-contracters, but it was sufficient in law if the Duke's principal was signed by Smith and his counterpart by the Duke.' The court 'therefore sustained the marginal note, though not signed by the Duke, seeing it was contained in his own double uncanceled'. The report of *Smith v Duke of Gordon* summarises the effect of the decision as being that 'if a mutual contract is executed by two counterparts, it is sufficient if each party subscribes the paper containing what is prestable on himself'.<sup>2</sup> The court thus took a fairly liberal approach to the effect of the Duke's undoubted subscription of the double in Smith's possession as embracing the unsubscribed marginal note thereon, with perhaps some sort of personal bar (estoppel) arising from the fact that he had not struck out the note in his own double even though that part of the document had indeed been subscribed by Smith. It should however be observed that the court noticed that the clause in the marginal note 'seemed materially to differ' in the two copies, and remitted the case for further inquiry on this point before the ordinary judge (presumably the Sheriff in Edinburgh).

*Smith v Duke of Gordon* is a decision which seems to have passed virtually unnoticed in cases and legal texts for the next 300 years, apart from a reference in Lord

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<sup>1</sup> A merk was worth 2/3 of a pound Scots, itself valued in 1707 at one-twelfth of a pound sterling.

<sup>2</sup> *Smith v Duke of Gordon* (1701) Mor 16987. *Cubbison v Cubbison* (1716) Mor 16988 also involved 'doubles of a writ', and in that case there were three such 'doubles'.

Bankton's *Institute of the Laws of Scotland*, published between 1751 and 1753,<sup>3</sup> and one citation in 1957 in *Wilson v Fenton Bros (Glasgow) Ltd*.<sup>4</sup> That case involved the exchange by parties of duplicates of a patent licence agreement, each party signing one copy and then handing that copy over to the other. It was held that the licence agreement had been validly executed, and the judge said: 'In my view, the documents produced and to which I have referred, establish the fact of a completed agreement between the pursuers and the defenders.' He went on to observe:

The form of the agreement is not a usual one in Scotland, but, as all the negotiations were conducted in England, the method of having two copies, of which one copy is signed by each party and delivered to the other party, was adopted in conformity, as I am informed, with a common practice in England.<sup>5</sup>

This comment encapsulates why the *Duke of Gordon* case is so surprising at first sight: the mode of contract formation in late seventeenth-century Scotland apparent in that case is one that more recent Scots lawyers, certainly those of the twentieth century, have associated exclusively with English practice, especially conveyancing practice; so much so, in fact, that when English commercial lawyers took it up as a way of concluding written deals between remote parties, there were plenty of Scots lawyers who thought that such a thing was not legally possible in Scotland.<sup>6</sup>

One of the reasons why modern Scots lawyers got into these difficulties was because for two centuries they had been taught that the usual way in which a contract was created was by a bilateral process of an offer by one party met by an acceptance thereof by the offeree. In this way they have perhaps fallen into the trap of excessive formalism in matters of contract formation as identified in Shawn Bayern's contribution to this volume.<sup>7</sup> The model remains a familiar one in standard transactions in which lawyers typically act for their clients: notably house purchases but also other transactions relating to the sale or lease of land. The written offer and acceptance are usually known as the 'missives', and together these documents when executed and subscribed by the appropriate party in the written form

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<sup>3</sup> Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights with observations upon the agreement or diversity between them and the laws of England* (2 vols, Edinburgh, 1751-2), I, xi, 36 (also available in a reprint as vols 41-43 in the Stair Society series, edited with an introduction by William M Gordon). Note too Bankton's observation on the English law, at I, xi (Observations on the Laws of England), 17.

<sup>4</sup> *Wilson v Fenton Bros (Glasgow) Ltd* 1957 SLT (Sh Ct) 3.

<sup>5</sup> *Wilson v Fenton Bros (Glasgow) Ltd*, per Sheriff-Substitute J C E Hay, at 5.

<sup>6</sup> See Scottish Law Commission, Review of Contract Law. Report on Formation of Contract: Execution in Counterpart (Scot Law Com No 231, April 2013), paras 1.2-1.3.

<sup>7</sup> [REFER SHAWN BAYERN'S CHAPTER.]

required by law meet those requirements as well as making clear that the parties have reached agreement.<sup>8</sup>

But the doctrines associated with offer and acceptance, painfully learned by generations of law students and applied with variable degrees of success in tackling tutorial and examination problems, do not appear to have been in the forefront of the Scots law on contract formation in general before 1800. For all of the authoritative writers prior to that time, offer and acceptance was certainly a way in which contracts might be formed but equally certainly not the only one.<sup>9</sup> The key requirement was, in the language of Stair (the greatest of these writers), the exercise of free will by parties to engage with each other 'of purpose to oblige'.<sup>10</sup> Engagement was to be distinguished from, first, desire, 'a tendency or inclination of the will towards its object',<sup>11</sup> which was insufficient to create a right. Similarly with resolution, 'a determinate purpose to do that which is desired'<sup>12</sup> but still no more than 'an act of the will with itself'.<sup>13</sup> 'The only act of the will which is efficacious', wrote Stair, 'is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform.'<sup>14</sup> Engagement might be by one party alone, and was not necessarily a two-or-more-person process: hence the enforceability of a unilateral promise in Scots law, and also the possibility of third-party rights in a contract.<sup>15</sup> A *pactum* or paction 'is the consent of two or more parties, to some things to be performed by either of them; for it is not a consent in their opinions, but a consent in their wills, to oblige any of them; and it is much to be considered, whether the consent be given *animo obligandi*, to oblige or not'.<sup>16</sup> It was this classic Will Theory understanding of the basis of conventional or voluntary obligations that made it relatively unproblematic, I would suggest, for the Scottish courts at the turn of the seventeenth and eighteenth centuries to see an exchange by parties of duplicate documents, each subscribed only by the other, as simply one of the ways in which such obligations might come into existence.

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<sup>8</sup> See generally Douglas J Cusine and Robert Rennie, *Missives* (2<sup>nd</sup> edition, Edinburgh: Butterworths/Law Society of Scotland, 1999); Requirements of Writing (Scotland) Act 1995 s 2(2).

<sup>9</sup> See Hector L MacQueen, "'It's in the post!' Distance Contracting in Scotland 1681-1855", in *Essays in Property and Conveyancing in Honour of Robert Rennie*, edited by Frankie McCarthy, James Chalmers and Stephen Bogle (Glasgow: Open Book Publishers, forthcoming).

<sup>10</sup> James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (2<sup>nd</sup> edn, Edinburgh: 1693), I, x, 13. I have used the tercentenary edition (a reprint of the 2<sup>nd</sup>) published under the editorship of David M Walker by Edinburgh University Press in 1981.

<sup>11</sup> Stair, *Institutions*, I, x, 2.

<sup>12</sup> Stair, *Institutions*, I, x, 2.

<sup>13</sup> Stair, *Institutions*, I, x, 2.

<sup>14</sup> Stair, *Institutions*, I, x, 2.

<sup>15</sup> Stair, *Institutions*, I, x, 3-6.

<sup>16</sup> Stair, *Institutions*, I, x, 6.

Even in modern Scots contract law, as Professor McBryde has observed in the leading contemporary treatise on the subject, '[o]ffer and acceptance ... should not be regarded as the necessary form of every contract.'<sup>17</sup> The master concept of contract in Scots law to which McBryde elsewhere refers remains that of an 'agreement between two or more parties ... intended to establish, regulate, alter or extinguish a legal relationship and which gives rise to obligations and has other effects, even in respect of one party only'.<sup>18</sup> McBryde's chapter on offer and acceptance is preceded by one entitled 'The Formation of a Contract', and in this he explores requirements for enforceable agreements in general – notably for present purposes an intention to create legal relations, agreement on the 'essentials' of the contract, and certainty of terms.<sup>19</sup> Offer and acceptance is but one means of showing that the parties have reached agreement; there are other possibilities. McBryde instances many everyday, undoubtedly contractual, situations such as the purchase of a ticket to travel on a local bus which do not fit readily into the offer-acceptance model.<sup>20</sup> Another example may be multi-party contracts to which the several parties agree at different times without necessarily going through a series of exchanges of offer and acceptance.<sup>21</sup> Back in the first part of the twentieth century the approach of the other major modern contract scholar, Professor William Murray Gloag of Glasgow, was similar: his first chapter was on the 'Requisites of Contract', looking at such matters as the meaning of obligation, contract as agreement, legal relations and patrimonial interest, and formalities in general, before turning in a second chapter to 'Formation of Contract', mainly (but not exclusively) taken up with the rules of offer and acceptance.<sup>22</sup>

In his chapter on formation, McBryde also discusses the situation touched upon by *Shawn Bayern*, that where the parties agree to put their contract into a single document or set of documents.<sup>23</sup> While the general rule of Scots law is that writing is not required for the constitution of a contract save in the case of contracts for the creation, transfer, variation or extinction of a real right in land,<sup>24</sup> nothing prevents parties from putting their contracts into writing if they so wish.<sup>25</sup> The main focus of McBryde's discussion of this topic is not analysis

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<sup>17</sup> W W McBryde, *The Law of Contract in Scotland* (3rd edn, Edinburgh: Scottish Universities Law Institute, 2007) para 6.05.

<sup>18</sup> McBryde, *Contract*, para 1.03.

<sup>19</sup> McBryde, *Contract*, chapter 5.

<sup>20</sup> McBryde, *Contract*, paras 6.04-6.05.

<sup>21</sup> The classic example in the books is *Clarke v Earl of Dunraven (The Satanita)* [1897] AC 59 (yacht race competitors bound by competition rules as contract to which all had at various points subscribed). Other examples might be partnerships, unincorporated associations, the rules of tender competitions which bind all tenderers, and pension funds.

<sup>22</sup> W M Gloag, *The Law of Contract* (2<sup>nd</sup> edn, Edinburgh: W Green & Son Ltd, 1929), chs I and II.

<sup>23</sup> McBryde, *Contract*, paras 5.41-5.44, and also para 5.79.

<sup>24</sup> Requirements of Writing (Scotland) Act 1995, s 1(1). See further McBryde, *Contract*, paras 5.71-5.78.

<sup>25</sup> McBryde, *Contract*, para 5.79.

of the process in terms of offer and acceptance, but the relationship between the written agreement and the parties' preceding agreement.<sup>26</sup> Implicit throughout is that the former is a contract, formed by virtue of its having been executed by the parties with the intention that it should be the basis of the legal relationship between them thenceforth, not by any process of offer and acceptance. Gloag possibly put the matter more plainly when he stated: 'Parties may, indeed, put their agreement into writing ...'<sup>27</sup> This situation is then now another example of a contract formed without offer and acceptance. The parties' mutual consent is shown by the terms of the document itself and, where it has been signed by the parties, by those signatures.

This all said, there is no doubt that the doctrine of offer and acceptance continues to be a major element in the Scots law on formation of contract. As already noted, McBryde and Gloag devote whole chapters to the topic, and other contract textbooks treat the subject at length.<sup>28</sup> There is plenty of case law, ancient and modern, in which the doctrine has been carefully applied, sometimes with controversial results.<sup>29</sup> An offer is a proposal by the offeror to the offeree, which will become a contract binding upon both parties upon the offeree's unconditional acceptance. Prior to such acceptance the offeror may withdraw the offer unless it contained a commitment not to do so. Such a commitment is explained by the Scots law concept of a gratuitous promise binding without acceptance by the promisee. The analysis of statements as offer or acceptance is generally conducted on an objective basis: '[C]ommercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say.'<sup>30</sup> 'The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.'<sup>31</sup> The result can be that parties who thought they had a contract turn out to have been wrong;<sup>32</sup> or that a party can be held to a contract other than the one he thought he had entered;<sup>33</sup> or that parties who were never actually

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<sup>26</sup> McBryde, *Contract*, paras 5.41-5.44.

<sup>27</sup> Gloag, *Contract*, 161.

<sup>28</sup> See e.g. Hector L MacQueen and Joe Thomson, *Contract Law in Scotland* (3<sup>rd</sup> edn, Haywards Heath: Bloomsbury Professional, 2012), paras 2.10-2.43.

<sup>29</sup> See e.g. Cusine and Rennie, *Missives*, paras 3.18-3.32.

<sup>30</sup> *Muirhead & Turnbull v Dickson* (1905) 7 F 686 per Lord President Dunedin, at 694.

<sup>31</sup> Gloag, *Contract*, 6.

<sup>32</sup> *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC (HL) 38 (parties litigated on basis of contract's existence: House of Lords held there never was a contract between them).

<sup>33</sup> *Muirhead & Turnbull v Dickson* (1905) 7 F 686 (contract one of sale rather than hire purchase).

simultaneously of one mind as to a particular transaction can be found to have nonetheless contracted.<sup>34</sup>

In general, offers, withdrawals thereof and acceptances have their effects upon communication to the other party, although communication too is determined objectively, with parties to be taken as having read that which in the ordinary course of business they ought to have read and being bound by the result. Thus in *Burnley v Alford* in 1919 it was held that there was no contract when A had sent an offer to B at the latter's home address, B had gone on holiday without leaving a forwarding address, A then sent a revocation of offer to B at his home address, and B, on returning from holiday, had not opened the revocation letter before posting an acceptance of offer to A.<sup>35</sup> Had a set of appropriate facts arisen, the later nineteenth-century Scottish courts would probably have analysed the case of cross-offers as the English court did in *Tinn v Hoffmann*,<sup>36</sup> and in the fashion criticised by Shawn Bayern:<sup>37</sup> i.e., no contract, because the subjective meeting of minds could not prevail over the objective fact that neither party knew of the other's intention at the time of making their own communications, and so these could not be treated as responses to each other.<sup>38</sup>

The objective approach is also apparent in the more recent Outer House decision of *Carmarthen Developments Ltd v Pennington*.<sup>39</sup> This case involved a decision on whether a postal notice purifying suspensive conditions in a contract sent by law firm Dickson Minto took effect before the recipient solicitor (Mr Soeder), acting on behalf of his clients, sent a fax resiling from the contract. Lord Hodge set out what he took to be the general approach (emphases supplied):

What amounted to communication depends in the first place on the contract. Where, as here, the contract did not exclude ordinary postal delivery ... the delivery by a postman of the letters to the solicitors' office by pushing the envelope containing them through the letter box would have amounted to service of notice *whether or not the lawyers promptly opened the envelope*. The defender's solicitors would then have had possession of the notices. *It is the task of the recipients of mail to arrange*

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<sup>34</sup> *Thomson v James* (1855) 18 D 1 (postal acceptance sent at same time as offeror's postal revocation held to conclude contract at moment of posting).

<sup>35</sup> *Burnley v Alford* 1919 2 SLT 123.

<sup>36</sup> *Tinn v Hoffmann & Co* (1873) 29 LT 271. The case is cited without adverse comment in most Scottish contract texts: David M Walker, *The Law of Contracts in Scotland* (3<sup>rd</sup> edn, Edinburgh: T & T Clark, 1995), para 7.43; McBryde, *Contract*, para 6.33; MacQueen & Thomson, *Contract*, para 2.18; *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME), vol 15, para 634. It is not referred to, however, in Glog, *Contract*.

<sup>37</sup> [REFER SHAWN BAYERN'S CHAPTER.]

<sup>38</sup> Whether this would have been true before *Thomson v James* in 1855 is more open to question: see MacQueen, "It's in the post!", forthcoming.

<sup>39</sup> *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139.

*for its prompt handling and the sender of a notice cannot be prejudiced by internal delays in so doing ... Thus it appears to me that the contract envisaged that service would be effected as soon as the mail arrived in the solicitors' office.*<sup>40</sup>

The complicating factor in the case was that the notice was not delivered to the recipient's office by the postal service but was instead collected from the sorting office by Mr Soeder before his own office opened for business. The notice was but one of a collection of letters addressed to his firm, gathered by the sorting office in a zipped bag for convenience; the whole process of collection was in accordance with the firm's usual practice. It was also the Mr Soeder's habit to do this as part of the school run with his daughters; pausing en route to the school to leave the mailbag at his office before setting his children down and returning to the office to open the letters in the bag. On the day in question, however, the mailbag had been taken to the school before the solicitor's office and had therefore not been opened before the fax purporting to resile from the contracts took effect. Lord Hodge held that in these circumstances the notice had been communicated before the resiling fax had taken effect, saying:

In the present case the postman did not have an opportunity to deliver the mail to the offices of the defender's solicitors because it was the practice of Mr Soeder and his colleagues to uplift the mail from the Post Office at Jedburgh. In my opinion that practice placed the defender's solicitors in a similar position before the mail bag arrived at their office to that which they would have been in had the envelope fallen through their letter box. I do not consider that the fact that the Dickson Minto envelope was in a zipped mail bag with other letters prevented Mr Soeder from taking possession of the notices when he uplifted the mail on the Monday morning. He would have known that the mail bag contained letters. ... The contracts in this case provided for service on the solicitors and parties would in all probability have expected postal service to be effected by a postman delivering the letters to the solicitors' offices. There is no suggestion that parties addressed their minds to the question of when service would be effected if a partner uplifted the firm's mail from the Post Office. I am satisfied that considerations both of sound business practice and also of the attribution of risk once the letters were in Mr Soeder's control point to service of the notices occurring when he uplifted the mail bag. ... Common sense points towards this answer. I recognise that different considerations might apply if at the weekend a member of staff of the defender's solicitors happened to be in the

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<sup>40</sup> *Carmarthen*, para 31.

Post Office and chose to pick up a mail bag and leave it in the firm's office for consideration on the next working day, but those are not the circumstances of this case.<sup>41</sup>

It may well be that this approach illustrates how, as Shawn Bayern suggests, the objective analysis produces results mixing detailed factual investigation with more generalised standards of reasonable expectations and reasonable behaviour.<sup>42</sup>

A crucial exception to the requirement of communication, whether understood objectively or subjectively, is however the postal acceptance rule, by which in Scots law, as in the English and many other Common law legal systems, a posted acceptance is effective to conclude a contract from the moment of posting.<sup>43</sup> The modern rationale for this rule is essentially that the offeror, having initiated the transaction and in doing so having use of the postal service in its contemplation, should bear the risks inherent in the period of time between the posting of the acceptance and its arrival with the offeror, while the offeree may rely on having a contract after doing all in its power to conclude one.

Gloag seemed to think it essential to the rule that the parties should have been previously negotiating by post, writing under the heading, 'Contracts by Letter – Date of Completion':

In the ordinary case a contract is completed at the date when the acceptance is dispatched, by the channel of communication, if any, expressly agreed upon; if none, by the ordinary method of communication usual in cases of this particular class. And in the absence of any indication of an intention to the contrary it will be assumed that an offeror contemplates a reply by post; if so, the contract is completed when the acceptance is posted.<sup>44</sup>

But McBryde takes a different, more flexible, view of the matter, suggesting that the English approach of asking whether acceptance by post was within the parties' contemplation is to be preferred.<sup>45</sup> In Scotland, further, the offeree may also benefit from a presumption that a letter which has been posted has also been received.<sup>46</sup> The English extension of the 'postal rule' to acceptance by telegram would probably have been followed in Scotland had the

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<sup>41</sup> *Carmarthen*, paras 32-33.

<sup>42</sup> [REFERENCE SHAWN BAYERN'S PAPER.]

<sup>43</sup> Gloag, *Contract*, 33-35; McBryde, *Contract*, paras 6.114-6.118; SME vol 15 para 629.

<sup>44</sup> Gloag, *Contract*, 33. The preceding paragraph is headed 'Conditions in Offer by Letter'.

<sup>45</sup> McBryde, *Contract*, para 6.118(3).

<sup>46</sup> *Chaplin v Caledonian Land Properties* 1997 SLT 384. See comments on this point in McBryde, *Contract*, para 6.116, fn 345.

question ever arisen for decision.<sup>47</sup> But doubt remained, and remains, about the English decision of *Household Fire Insurance Co v Grant*<sup>48</sup> in which it was held that even if a posted acceptance never reaches the intended party a contract will be concluded despite the offeror's ignorance of its obligations; there are several judicial dicta against it from the mid-nineteenth century down to the present.<sup>49</sup> An acceptance posted within a time limit set by an offer but arriving with the offeror only after the limit's expiry nonetheless concludes a contract between the parties.<sup>50</sup> There is however room for doubt as to whether there is a contract when an offeree who has posted an acceptance succeeds in communicating a withdrawal of that acceptance to the offeror that arrives with the latter before or at the same time as the acceptance. That is a possible interpretation of the 1830 case of *Countess of Dunmore v Alexander*,<sup>51</sup> in which a servant who had indicated willingness to enter employment by the Countess received simultaneously from her two letters, the one sent first confirming the Countess' wish to employ the servant, the other stating a change of mind. The court's decision that there was no contract is sometimes seen as resulting from a view that a postal acceptance can be cancelled by an over-taking retraction. It can however be analysed in other ways, for example, as the withdrawal of an offer rather than an acceptance.<sup>52</sup>

## **1.2 Law Reform: Scotland in Europe**

This then is the basic state of the law which the Scottish Law Commission first reviewed in the 1970s, looked at again in the early 1990s, and has considered once more in a Discussion Paper published in 2012.<sup>53</sup> The basis upon which the reviews have been carried out has evolved over time. The 1970s exercise was perhaps the ultimate fruit of the efforts which had gone initially into the preparation of a Contract Code for the whole of the United Kingdom as the country prepared for membership of what was then known as the European Community.<sup>54</sup> In the early 1990s, the Commission was building upon the apparent success

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<sup>47</sup> See the English decision in *Bruner v Moore* [1904] 1 Ch 220, seemingly accepted by Gloag, *Contract*, 33 note 7. The grant of a public monopoly of the telegram service to the Post Office in 1869 (see Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's Online Pioneers* (London: Weidenfeld & Nicholson, 1998), 161-2; Duncan Campbell-Smith, *Masters of the Post: The Authorized History of the Royal Mail* (London: Allen Lane, 2011), 175-183) probably played a significant part in this development of the law.

<sup>48</sup> (1878-79) LR 4 Ex D 216 (CA).

<sup>49</sup> See McBryde, *Contract*, para 6.115, for the doubting authorities, and add *Sloans Dairies v Glasgow Corp* 1977 SC 223 (IH) per Lord Dunpark at 239.

<sup>50</sup> *Jacobsen, Sons & Co v Underwood & Son Ltd* (1894) 21 R 654.

<sup>51</sup> *Countess of Dunmore v Alexander* (1830) 9 S 190.

<sup>52</sup> McBryde, *Contract*, para 6.53. See further MacQueen "It's in the post!", forthcoming.

<sup>53</sup> See Consultative Memorandum No 36 on Constitution and Proof of Voluntary Obligations: Formation of Contract (1977); Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods (Scot Law Com No 144, 1993); Review of Contract Law: Discussion Paper No 154 on Formation of Contract (March 2012, henceforth DP No 154).

<sup>54</sup> On the abortive Contract Code project see Hector L MacQueen, 'Glory with Gloag or the Stake with Stair? T B Smith and the Scots Law of Contract', in *A Mixed Legal System in Transition: T B Smith and the Progress of*

of the (Vienna) Convention on the International Sale of Goods 1980 (CISG) in establishing an internationally acceptable regime on, inter alia, formation of contract. The 2012 exercise was similar in spirit in that it examined Scots law in the light of international – mostly, European – standards which themselves represent evolutions from the CISG: the Unidroit Principles of International Commercial Contracts (PICC), the (Lando) Principles of European Contract Law (PECL) and, most recently, the Draft Common Frame of Reference (DCFR): Principles, Definitions and Model Rules of European Private Law, prepared for the European Commission by a mainly academic group of lawyers from all over the European Union and published in 2009.<sup>55</sup> The European Commission's grander ideas of a common contract law for the whole of the European Union dwindled to a proposal for an 'optional instrument' Common European Sales Law (CESL) confined to cross-border distance and online transactions before even that was abandoned in December 2014.<sup>56</sup> But the CESL ~~still~~ included detailed rules on contract formation developed from those in the earlier instruments. Clearly these rules could still be used for any further European Union regime that may be proposed in future. In the meantime, however, in Scotland they can form the basis for a 'health check' for the general law of contract.

### 1.2.1 *The offer and acceptance model and contract as agreement*

In relation to contract formation and the rules of offer and acceptance, the international and European documents show a significant development from the CISG on. Article 23 of the CISG simply defines the moment of conclusion of a contract as being when an acceptance of an offer became effective, i.e. in general, when it 'reaches' the offeror, is the nearest that that text comes to defining a contract. While it does not expressly preclude the possibility that a contract may be concluded in other ways, the rule as stated can give the impression that offer and acceptance is a necessary condition for such conclusion, especially when most of its other specific rules are indeed about offer and acceptance. But whatever its suitability for the international commercial sales that are the subject matter for the CISG, that this is inappropriate as the only rule of contract formation emerges from the development of

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*Scots Law*, edited by Elspeth Reid and David L Carey Miller (Edinburgh: Edinburgh University Press, 2005), 138-72 at 157-63.

<sup>55</sup> For the relationship between the CISG and the other instruments mentioned, see Hector L MacQueen, 'Europeanisation of Contract Law and the Proposed Common European Sales Law', in *Commercial Contract Law: Transatlantic Perspectives*, edited by Larry A DiMatteo, Qi Zhou, Séverine Saintier and Keith Rowley (New York: Cambridge University Press, 2013), 529-558, 530-532.

<sup>56</sup> Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, available at [http://ec.europa.eu/justice/contract/files/common\\_sales\\_law/regulation\\_sales\\_law\\_en.pdf](http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf). The texts from the proposal discussed in this chapter have undergone virtually no substantive change in the amendments adopted in a legislative resolution by the European Parliament on 26 February 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0159&format=XML&language=EN>.

the CISG text by the PICC, which makes clear that a contract may also be concluded by conduct of the parties showing that they have reached agreement.<sup>57</sup> The PICC also further elaborates a further rule that parties may agree that their agreement is not to become effective as a legally binding contract until it has been reduced to a particular form or they have reached agreement on a particular matter.<sup>58</sup> It also provides that there may be a contract even although the parties are not fully agreed on all terms.<sup>59</sup>

The DCFR contains no statement like that of Article 23 of the CISG, although, as we will see in some detail below, it does have an elaborate structure of rules of offer and acceptance otherwise very similar to those in the CISG. For the DCFR the governing principle of contract formation is the existence of a sufficiently certain agreement between parties with an intention for it to have legal effect,<sup>60</sup> while it also states that there may be a contract even although the negotiations between the parties cannot be analysed in terms of offer and acceptance.<sup>61</sup> The proposed CESL states that agreement is reached by acceptance of an offer, which may be either explicit or by other statements or conduct indicating intention.<sup>62</sup> It does not seem that this is meant to preclude the possibility of reaching agreement by methods other than offer and acceptance, although the matter could usefully be clarified in the text by the European Commission before the proposal becomes law.

The DCFR lays down that an agreement is sufficient if (a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or (b) the terms of the contract, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect.<sup>63</sup> The proposed CESL, however, simply **said** that agreement is sufficient if the terms agreed, supplemented if necessary by the rules of the CESL itself, have sufficient content and certainty to be given effect as a contract.<sup>64</sup> Like the PICC both texts express a rule that, if one of the parties refuses to conclude a contract until the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.<sup>65</sup> But the DCFR principle of party autonomy means that

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<sup>57</sup> PICC art 2.1.1.

<sup>58</sup> PICC art 2.1.13.

<sup>59</sup> PICC art 2.1.14.

<sup>60</sup> DCFR II.-4:101.

<sup>61</sup> DCFR II.-4:211.

<sup>62</sup> Proposed CESL Art 30(2).

<sup>63</sup> DCFR II.-4:103(1).

<sup>64</sup> Proposed CESL Art 30(1)(c).

<sup>65</sup> DCFR II.-4:103(2); proposed CESL Art 30(4).

parties are also free to agree that there will be no contract between them until it has been reduced to writing and, if they so wish, signed in some form or other.

The provisional view of the Scottish Law Commission is that if there were to be a general legislative statement of the law on formation of contract it would be necessary to go further than the simple statement in the CISG that a contract is formed by offer and acceptance, and that the other matters referred to in the DCFR and the PICC would also have to be brought in.<sup>66</sup> To that extent, at least, the Commission would accept Shawn Bayern's argument that offer and acceptance should not be seen as the only mode of contract formation.<sup>67</sup> The rules in the DCFR and the other texts are consistent with present Scots law and, moreover, of considerable practical importance. A statutory restatement of the Scots law of contract formation should therefore include similar rules. The most appropriate model to adopt for these purposes from those surveyed would, it is suggested, be that provided by the Expert Group revision of the DCFR prior to the CESL proposal, which appears to cover all the points in a succinct and intellectually lucid fashion:

- (1) A contract is concluded if:
  - (a) the parties reach an agreement;
  - (b) they intend the agreement to have legal effect; and
  - (c) the agreement, supplemented if necessary by rules of law, has sufficient content and certainty to be given legal effect.
- (2) Agreement may be reached by acceptance of an offer or by other statements or conduct.
- (3) The intention of the parties that the agreement will have legal effect is to be determined from their statements and conduct interpreted in accordance with the rules on interpretation in Article 12.
- (4) If one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.<sup>68</sup>

It might, however, be useful also to make specific reference, as in the PICC,<sup>69</sup> to the situation where one or more of the parties wishes there to be no contract until the agreement is recorded in a particular form, although this is probably covered by the rule that the parties must intend their agreement to have legal effect before it can have contractual force.

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<sup>66</sup> DP No 154, paras 2.9, 2.12.

<sup>67</sup> [REFERENCE SHAWN BAYERN'S ARTICLE.]

<sup>68</sup> Commission Expert Group on European Contract Law, Feasibility Study for a Future Instrument in European Contract Law, 3 May 2011 ([http://ec.europa.eu/justice/contract/files/feasibility\\_study\\_final.pdf](http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf)), art 29. For the Expert Group's task, see DP No 154, para 1.3.

<sup>69</sup> PICC art 2.1.13; and see Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2009) 291.

One clear advantage of this approach is that it leaves no doubt that a deliberate exchange of identical documents each signed by one of the parties is, as an agreement, a contract, just like a mutual document signed by all the parties. On this basis, it was possible for the Scottish Law Commission to go forward and make a Report in 2013 on the vexed topic of execution in counterpart, and for an implementing Bill to be put before the Scottish Parliament in May 2014, without it being seen as an anglicisation of Scots law.<sup>70</sup> As already noted, there is nothing in the principles of Scots law to prevent a contract being created in this way.<sup>71</sup> It was necessary to ensure that the formal requirements with regard to obligatory writing are complied with, and the opportunity was also taken to modernize the rules on delivery to recognize electronic transmission as a potential method of meeting that requirement,<sup>72</sup> but underpinning it all is the clear view that parties' exchange of identical copies of a contract so that each ends up with a copy signed by the other party is a way of showing agreement with intention to be bound as between the respective parties to that exchange.

All this said, however, offer and acceptance will continue to be a key method of making contracts: parties who want to be sure they have a contract are thereby provided with a mechanism by which it can be achieved without too much formality. It is also important to remember that in modern business practice, parties rarely meet in person to negotiate, never mind complete, their contracts. When a court is considering the existence or not of a contract between parties who were physically remote from each other at the time of their negotiations, offer and acceptance analysis remains a useful analytical tool. Current European developments do not suggest any perception that offer and acceptance analysis has had its day in the sun. There are detailed rules on the subject in the recent international instruments as there have long been in domestic laws, and these provide a platform for recent detailed reform proposals from the Scottish Law Commission. One option which the Commission puts forward is a statutory restatement (with amendments to the present law where appropriate) of the law on formation; and if this comes to pass, most of it will be taken up, one imagines, with rules on offer and acceptance.<sup>73</sup>

### *1.2.2 Communication: postal and other acceptances*

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<sup>70</sup> Scot Law Com No 231, 2013; Legal Writings (Counterparts and Delivery) (Scotland) Bill 2014 (for which see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/76414.aspx>).

<sup>71</sup> See text accompanying notes 1-17. The Bill was passed in February 2015.

<sup>72</sup> See sections 1, 4 of the Bill.

<sup>73</sup> DP No 154, para 1.28.

A key question in offer and acceptance, now as in the past, is that of communication: the extent to which it is necessary between the parties to a formational exchange, and what will constitute communication for these purposes. Just as in the eighteenth and nineteenth centuries the development of postal and then telegraphic and telephonic communications raised critical questions about these matters for the law to answer,<sup>74</sup> so in the twentieth and twenty-first centuries we have had successively to consider the telex,<sup>75</sup> the fax, email, connecting through websites, and SMS or text messaging or simple downloading and streaming as means by which distant parties seek to contract with each other. Not all of these devices have as yet received definitive characterisations from the courts; and one task of law reform is surely to provide such answers so that negotiating parties can know where they stand without the potential additional expense involved in resorting to litigation for such clarification as the judges may be able to give.

Under the CISG rules on contract formation (drawn up of course before the digital revolution of the late twentieth century), it is important to know whether a communication from one party has 'reached' the other party, be it an offer, an acceptance, or a withdrawal or revocation of either of the former two. This was because until such reaching took place, in general, no such communication had legal effect. It was accordingly necessary to define what would constitute reaching for these purposes: 'when it is made orally to [*the addressee*] 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.'<sup>76</sup> The PICC, the DCFR and the proposed CESL adopt and, in the case of the latter two, elaborate the concept of 'reaching' in respect of what they call 'notices', a further concept which covers a variety of communications including, but not limited to, offers, acceptances and their withdrawal or revocation.<sup>77</sup> The approach in the texts is an objective one: 'reaching' does not necessarily involve the intended recipient's actual knowledge, either that there has been a communication from the sender or, even more so, what the contents of that communication may be.<sup>78</sup>

In contrast to the CISG and the PICC, however, the DCFR makes no express mention of oral notices, although clearly the face-to-face or telephonic communication is covered by

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<sup>74</sup> On the development of the postal system in the eighteenth and early nineteenth centuries in Scotland, see A R B Haldane, *Three Centuries of Scottish Posts: an historical survey to 1836* (Edinburgh: Edinburgh University Press, 1971). For the wider British context see Campbell-Smith, *Masters of the Post*, chapters 3-5.

<sup>75</sup> *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *Brinkibohn Ltd v Stahag Stahl etc* [1983] 2 AC 34.

<sup>76</sup> CISG art 24.

<sup>77</sup> PICC art 1.10; DCFR, I.-1:109 (and see commentary, DCFR, vol 1, p 340); Proposed CESL, art 10.

<sup>78</sup> Vogenauer and Kleinheisterkamp, *PICC Commentary*, 205-206; DCFR, vol 1, p 113 (Comment C).

its provisions. In general in such situations the recipient will have simultaneous knowledge both of the fact of communication and of the content of the communication. But any legal effect that other, non-oral forms of communication have applies from delivery to the recipient's residence or place of business, as the case may be. Thus, for example, a posted letter which has been delivered to its addressee's office but not yet opened will probably be regarded as having reached its recipient, at least from the point at which it would be reasonable for it to have been opened. The DCFR commentary says that this covers 'for example, leaving a message in a place which the addressee is known to check regularly'.<sup>79</sup> Whether this would extend to having notified the addressee of a registered or couriered letter awaiting collection from the local depot of the post office or courier is, however, not clear.<sup>80</sup>

What then of the postal acceptance? The basic rule in the CISG (and, following it, the PICC) – that an acceptance concludes a contract when it reaches the offeror, *not* when it is posted<sup>81</sup> – is not quite emulated in the DCFR, which confines its otherwise similar rule to the case where the acceptance is 'dispatched'.<sup>82</sup> This suggests that the principle set out is not necessarily applicable to, for example, situations where the parties are dealing face-to-face or on the telephone.<sup>83</sup> The proposed CESL replaces 'dispatched' with the simpler 'sent',<sup>84</sup> but its formulation seems to have the same implication of non-application except between parties operating from different places. However the words are to be interpreted, it is clear that the instruments do not have any special rule whereby postal acceptances take effect on posting.

Unlike their predecessors, the DCFR (followed in this by the proposed CESL) add a considerable amount to all this in dealing specifically with the legal effect of electronic communications. The objective concept of 'reaching' the recipient continues to apply but it is given further definition. Under the DCFR and the proposed CESL an electronically transmitted notice 'reaches' its addressee when it becomes accessible to that party.<sup>85</sup> Thus a fax received (but not necessarily printed out, if, for example, the machine has run out of paper) on the addressee's fax machine, or a voice mail recorded on the addressee's telephone message system can be taken as having 'reached' the addressee by becoming

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<sup>79</sup> DCFR, vol 1, p 113.

<sup>80</sup> Not under PICC provisions, according to Vogenauer and Kleinheisterkamp, *PICC Commentary*, 206; but PICC has no equivalent to DCFR I.-1:109(4)(d) or the proposed CESL art 10(4)(d).

<sup>81</sup> CISG art 18(2); PICC art 2.1.6(2).

<sup>82</sup> DCFR II.-4:205.

<sup>83</sup> See the comments in DCFR, vol 1, p 314 (Comment B).

<sup>84</sup> CESL art 35(1).

<sup>85</sup> DCFR art I.-1:109(4)(c); CESL art 10(4)(c).

'accessible' to that party even if not actually accessed.<sup>86</sup> Thus, in a context where the concept of 'business hours' is relevant, a communication that reaches the addressee's system outside those hours will become accessible for the purposes of the DCFR and the proposed CESL rules when the next period of business hours opens.<sup>87</sup>

By emphasising accessibility to the addressee as the test of legal effectiveness in this way, the DCFR and the proposed CESL avoid some of the technical difficulties that may arise from the nature of the infrastructure through which an online communication makes its way from sender to addressee, helpfully described as follows by Eliza Mik:

Most online communications ... rely on the client-server architecture. In the case of email, there are at least two originating devices (the sender's mail-client and the outgoing mail-server) and two terminating devices (the addressee's incoming mail-server and the mail-client). Is it the mail-client or the mail-server that should be taken into account? ... [T]here may be substantial delays between the moment a message arrives at the server and the moment it is transferred to the client ... [O]nline communications are characterized by a number of novel risks. The Internet is not like the post or the telephone. Despite its ubiquity, it does not (yet) have the uniformity of one global system. The Internet is heterogeneous – each of its component networks retains some individual characteristics. Routing from one network to another may involve a conversion between the 'idiosyncrasies of the two original networks' and require the trans-coding, translation or reformatting of messages. Each of these operations aims to adapt the message to the requirements of the next step in the transmission. Such conversions are, however, not always successful. As a result, there are many reasons an email may not be delivered or be delivered in unreadable form.<sup>88</sup>

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<sup>86</sup> This probably also holds good under PICC: Vogenauer and Kleinheisterkamp, *PICC Commentary*, p 206.

<sup>87</sup> The problem in *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139 (see text accompanying notes 39-41) is also worthy of note in this regard.

<sup>88</sup> Eliza Mik, 'Formation Online' in *Contract Formation: Law and Practice*, edited by Michael P Furmston and Greg J Tolhurst, (Oxford: Oxford University Press, 2010), paras 6.59-6.60. An example of when there may be more than two devices on each side of a transaction is when parties are using mobile devices such as blackberries, tablets, netbooks and laptops 'which rely on the classic architecture but interpose an additional server between the incoming mail-server and the end-user. The message is pushed to the terminating device because the addressee previously configured a server or device to do so' (Mik, 'Formation Online', para 6.47, fn 131). The use of the concept of 'accessibility' to determine whether or not an electronic communication has reached its recipient should mean that it does not matter which machine the latter uses to gain access. It also suggests, however, that automatic 'out of office' response messages should make clear if a party is also not using any other means of access to incoming email communications.

It has been suggested that the default rule as to when an email communication is received by its addressee should be arrival on the server that manages that party's email.<sup>89</sup> This is in line with the UNCITRAL Model Law on Electronic Commerce,<sup>90</sup> whose Article 15(2) provides:

Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

Arrival at the recipient's server will generally make the communication accessible to the addressee and so satisfy the DCFR test, even if the addressee does not in fact access it. The objective requirement of 'accessibility' probably also means that the email which the addressee cannot access as a result of the operation of the network, or firewalls, or anti-virus filters, is an effective notice none the less; likewise if the communication fails because a recipient's inbox is full or is consigned by security systems to a 'suspected spam' folder. In all these cases the email is an effective notice because the obstacles to accessing the email are within the addressee's control: the addressee has selected the system by which it wishes to receive communications of the type in question. The position may be different if the sender is alerted by the system to the fate that has befallen its attempted communication, in which case the sender should know that the communication has failed and make another attempt.<sup>91</sup> Automatic 'out of office' or 'vacation' messages set up by an

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<sup>89</sup> Donal Nolan, 'Offer and Acceptance in the Electronic Age' in *Contract Formation and Parties*, edited by Andrew Burrows and Edwin Peel (Oxford: Oxford University Press, 2010), 76; Vogenauer and Kleinheisterkamp, *PICC Commentary*, 206; Mik, 'Formation Online', paras 6.55-6.67.

<sup>90</sup> Adopted in 1996; available at [http://www.cnudmi.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.cnudmi.org/pdf/english/texts/electcom/05-89450_Ebook.pdf).

<sup>91</sup> Nolan, 'Offer and Acceptance in the Electronic Age', 76-79 (founding on the principles stated by Denning LJ in *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327 at 333-4. See also Furmston and Tolhurst, *Contract Formation*, at para 6.57.

absent addressee may also postpone the effectiveness of an email notice but much might depend on the specificity and reliability of the absentee's message.

The generally objective approach of Scots law to when a communication is made is consistent with the approach found in the international texts forming the basis for the Scottish Law Commission review, and no change to that basic position is proposed. It would be for consideration whether in any statutory restatement the rule should be stated in terms of 'notices', as in the PICC, the DCFR and the proposed CESL, or whether it would be preferable to follow the original CISG model and express the rule in terms of offers, acceptances and other indications of intention such as revocation of an offer. Most respondents agreed that any statutory restatement of the law on formation of contract should provide that, in general, any relevant statement of a party's intention should have effect only when its intended addressee should have become aware that it had been made.

Scots law generally has a flexible approach as to when a communication of one party's intention should have become known to its addressee, and there are no rules specifying, for example, delivery to the addressee or the latter's place of business or habitual residence as in the international texts. The words of Lord Wilberforce in one of the leading modern English cases were cited and applied in the *Carmarthen* case: 'No universal rule can cover all such cases: they must 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.'<sup>92</sup> While this is attractive in the context of what may often be complex fact situations, it may be open to the criticism that only by going to court will it be possible to get an answer to the question in any given case. Nor have the Scottish courts so far had any opportunity to consider the question of when an electronic communication of a party's intention takes effect. The international texts, here including the UNCITRAL Model Law on Electronic Commerce, seem to favour a broadly similar default rule, namely that the communication takes effect when it becomes accessible to its intended addressee, which is generally taken to be when the message enters the addressee's communications system and becomes accessible to that person.<sup>93</sup> This appears to be a workable rule and one which fairly apportions the risks of mis- or non-communication between the parties involved.

The Scottish Law Commission thinks that there should be a single general rule or principle on when acceptances become effective, whether between parties who are face-to-

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<sup>92</sup> *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH* [1983] 2 AC 34 at 42, and see *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139, per Lord Hodge, para 33.

<sup>93</sup> See text accompanying notes 85-91.

face or who are distant from each other.<sup>94</sup> As between the texts of the international instruments, it feels that the CISG/PICC version is to be preferred because it clearly covers all situations, including those where distant parties are nonetheless in virtually instantaneous communication with each other, such as on the telephone, and better reflects the general position at present in Scots law. The Commission was informed that in the light of the present state of the law on postal acceptances it is conventional for formal offers of a contract to stipulate that to be effective acceptances must reach the offeror.<sup>95</sup> Thus it is no longer the case that commercial usage and practice favour the postal acceptance rule, whatever the position may have been in the nineteenth century. The courts will give effect to such eliminations of the postal rule where they are made, no doubt recognising important underlying commercial realities.<sup>96</sup>

The Scottish Law Commission therefore provisionally concludes that, with one exception to be discussed further below, there is now no need to provide for a postal exception to the general rule that an acceptance must reach the offeror to conclude a contract.<sup>97</sup> The Commission has taken the view since 1977 that in general both offers and acceptances should be effective only when they have reached the other party.<sup>98</sup> Such a position would better accord with the reasonable expectations of ordinary people and indeed, the commercial community, in Scotland. All respondents to the Discussion Paper agreed that the general rule on when an acceptance becomes effective and concludes a contract should be when the indication of assent reaches the offeror. The Commission's proposal will thus bring the law into line with standard business practice.

At the same time the rule would be one from which parties can in turn step out. This may be particularly important for a supplier in e-commerce faced with the possibility of

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<sup>94</sup> DP No 154 paras 4.6-4.13.

<sup>95</sup> For an example see the Property Standardisation Group pro forma 'Offer to Sell - Vacant Possession' (v6), clause 23, available at: <http://www.psglegal.co.uk/>. See also George L Gretton and Kenneth G C Reid, *Conveyancing* (4<sup>th</sup> edn, 2011), para 3.14 ('The postal rule ... is generally regarded as a nuisance, but happily it can be excluded if the offer expressly states that the acceptance is to 'reach this office' by the stated deadline'); Cusine and Rennie, *Missives*, para 3.14 ('In order to avoid complications arising from the 'postal rule' it is usual to provide that the acceptance must reach the other party by a particular time on a specified date.').

<sup>96</sup> On this point modern Scottish books usually cite an English case (*Holwell Securities v Hughes* [1974] 1 WLR 155, in which the English Court of Appeal held that the postal acceptance rule can only take effect where the terms of the offer allow for the displacement of the need for actual communication and that an offer that requires 'notice in writing to the intending vendor' does not accommodate the postal acceptance rule); but in fact the rule that the offeror can stipulate what will constitute valid acceptance goes back at least to George Joseph Bell, *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence* (5th edn, Edinburgh: 1835) vol 1, 327.

<sup>97</sup> DP No 154, para 4.13.

<sup>98</sup> Indeed, the postal rule is not found in the draft Contract Code prepared by the Law Commissions between 1965 and 1973 (on which see text accompanying note 54).

receiving more orders electronically than it can fulfil from its stock. Thus Amazon.co.uk uses the following clause on its website:

Your order is an offer to Amazon to buy the product(s) in your order. When you place an order to purchase a product from Amazon, we will send you an e-mail confirming receipt of your order and containing the details of your order (the 'Order Confirmation E-mail'). The Order Confirmation E-mail is acknowledgement that we have received your order, and does not confirm acceptance of your offer to buy the product(s) ordered. We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you and send e-mail confirmation to you that we've dispatched the product to you (the 'Dispatch Confirmation E-mail').<sup>99</sup>

In effect Amazon regards dispatch of the ordered goods and sending a confirmation email to the customer as acceptance. This would be effective under the Commission scheme.

There is finally perhaps a need in this scheme for an elaboration of when an electronically communicated offer or acceptance 'reaches' its addressee, along the objective lines of 'accessibility' (which may however not be inconsistent with the present general approach in Scotland). Consultation responses to the Scottish Law Commission were generally favourable to this approach as well.

### *1.2.3 Protection against revocation of offers?*

Having established this position, the Commission also recognised that an important function performed by the postal acceptance rule is the protection of the offeree from revocation by the offeror once the acceptance is posted. It is established in the present Scots law that offers can be terminated without liability unless either declared to be irrevocable in some way (a firm offer) or effectively accepted by the offeree.<sup>100</sup> Since the offeror's revocation can only take effect upon arrival at the offeree's place, any acceptance posted before that event renders the revocation of the offer ineffective, because a contract already exists from which the offeror cannot unilaterally withdraw.<sup>101</sup> It would be unsatisfactory if, as a result of the removal of the postal rule, such cases became disputes about which of the two communications had been first to reach its intended recipient and become effective. The Commission has therefore also proposed a rule dealing with this issue, namely, that an offer

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<sup>99</sup> See [http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=1040616](http://www.amazon.co.uk/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=1040616).

<sup>100</sup> McBryde, *Contract*, paras 6.45-6.46 and 6.57; Gloag, *Contract*, pp 35-36; Walker, *Contracts*, para 7.37; SME, vol 15, para 617.

<sup>101</sup> See e.g. *Thomson v James* (1855) 18 D 1.

may not be revoked once the offeree has sent an acceptance, on the basis that a party which has done all it can to effect an acceptance should thereafter be free from concern about subsequently arriving revocations.<sup>102</sup>

This again follows the approach found in the international instruments. The basic rule in these instruments is that an offer may be revoked at any time until the completion of acceptance by the offeree unless the offeror has declared it to be irrevocable.<sup>103</sup> It is, however, another question whether an offeree can be protected other than by finding that there is a contract as a result of posting it. The CISG view, accepted in the RFC and further affirmed by the PICC, the DCFR and the proposed CESL, is that the offeree who has done everything reasonably possible to effect an acceptance should be protected from the offeror's subsequently arriving revocation, but that it is not necessary to do so by holding that a contract is thereby concluded. Instead, as Lord Fullerton actually suggested for Scotland in *Higgins v Dunlop* in 1847,<sup>104</sup> the rule is that the offeror's revocation is ineffective from the moment the acceptance is posted. Whether or not there is then a contract depends upon the arrival of the acceptance at the offeror's place.<sup>105</sup>

Such a rule would clearly be the right one where the parties are in instantaneous or near-instantaneous communication with each other, and there seem to be no strong reasons for departing from it where the parties are distant and for some reason choosing the postal system rather than using the speedier forms of communication available to them. Consultees, however, were somewhat hesitant about a rule which appeared to be the postal acceptance rule in a different guise, with some thinking that it might be regularly departed from by offerors wishing to protect their power to revoke until the other party's acceptance was actually received, as well as questioning whether offerees should be protected in this way. How the Commission will proceed on this point remains to be seen.

#### *1.2.4 When is an offer irrevocable?*

CISG and PICC say that an offer cannot be revoked 'if it indicates, whether by stating a fixed time for acceptance *or otherwise* [emphasis supplied], that it is irrevocable'.<sup>106</sup> The RFC explained that the effect of the CISG formulation was to make the question of whether or not an offer was irrevocable a question of construction of its terms, 'bearing in mind that the

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<sup>102</sup> DP No 154, paras 3.20-3.21, 4.14.

<sup>103</sup> See CISG art 16(1); PICC art 2.1.4(1); DCFR II.-4:202(1); Proposed CESL art 32(1).

<sup>104</sup> *Higgins v Dunlop* (1847) 9 D 1407, 1414.

<sup>105</sup> See CISG art 16(1); PICC art 2.1.4(1); DCFR II.-4:202(1); Proposed CESL art 32(1). See also RFC, para 3.11.

<sup>106</sup> CISG art 16(2)(a). See also PICC art 2.1.4(2)(a).

stating of a fixed time within which an offer is open for acceptance will normally indicate irrevocability'.<sup>107</sup> This, it was said, was 'essentially the same as the existing law of Scotland', and 'a sensible rule'.<sup>108</sup> The DCFR (which has been followed in this regard by the proposed CESL) may put forward a slightly different, more limited, rule: an offer may indicate that it is irrevocable, or state a fixed time for its acceptance, in which case it is irrevocable.<sup>109</sup> It is, however, still a question of construction ultimately whether or not an offer has indicated its irrevocability, or stated a fixed time for its acceptance.

The DCFR/proposed CESL rule would therefore not necessarily change the outcome of the two Scottish cases described in the RFC and said there to be consistent with the CISG approach.<sup>110</sup> In the first of these, it was held that an offer 'made on condition of acceptance within three days' was one which could not be accepted after three days rather than one which was irrevocable within the same period.<sup>111</sup> Likewise in the second case an offer in which it was stated that the contract must be concluded by a particular date and time was held not to be irrevocable.<sup>112</sup> In 2012, the Scottish Law Commission thought that, subject always to whether an offer on its proper construction meets the requirements of irrevocability, the DCFR/proposed CESL formulation of the rule is more direct than that in the CISG and so more readily understood by the reader, and therefore suggested that, if there is to be a statutory restatement of the law of formation of contract, on this topic the DCFR/proposed CESL rule provides the better model to be followed.<sup>113</sup>

#### 1.2.5 *Withdrawal of irrevocable offer?*

Under the CISG and the PICC 'withdrawal' of an offer is to be distinguished from its 'revocation'. The difference is that an offer is 'withdrawn' if it has not yet taken effect as an offer (i.e. reached the offeree), but has to be 'revoked' if it has taken effect by virtue of having reached the offeree.<sup>114</sup> The DCFR and the proposed CESL draw the same distinction through their provisions on 'notices'.<sup>115</sup> While, unlike the CISG and the PICC, the DCFR and the proposed CESL do not mention the possibility of a notice being stated to be irrevocable,

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<sup>107</sup> RFC, para 3.13.

<sup>108</sup> RFC, para 3.13. The classic case is *Littlejohn v Hadwen* (1882) 20 SLR 5; see also *Marshall v Blackwood* (1747) Elchies, voce Sale, No 6, and *A & G Paterson v Highland Railway Co* 1927 SC (HL) 32.

<sup>109</sup> DCFR II.-4:202(3); Proposed CESL art 32(3).

<sup>110</sup> RFC, para 3.13.

<sup>111</sup> *Heys v Kimball and Morton* (1890) 17 R 381 at 384-385.

<sup>112</sup> *Effold Properties Ltd v Sprot* 1979 SLT (Notes) 85 (OH).

<sup>113</sup> DP No 154 paras 3.24-3.25. The Commission left open the question of whether an offeree's reasonable reliance should make an offer irrevocable, as under all the international instruments (ibid, paras 3.26-3.27).

<sup>114</sup> See Vogenauer and Kleinheisterkamp, *PICC Commentary*, pp 241 and 245; DCFR, vol 1, pp 114 (Comment F) and 301 (Comment A).

<sup>115</sup> DCFR I.-1:109(5); Proposed CESL art 10(5).

it would follow from the overall system that an irrevocability provision in an offer would not take effect until it reached the addressee. Thus such an offer could be withdrawn up to and including that point in time.

Scots law has not addressed this question directly but it would probably reach the same answer. Even if, as a promise within an offer,<sup>116</sup> the declaration of irrevocability may not require objective communication to the offeree to be effective, it is thought that the courts would find not bound the offeror who communicated withdrawal before or at the same time as the declaration.<sup>117</sup> In the RFC it was thought that the solutions provided by the CISG were satisfactory as well as in line with existing Scots law.<sup>118</sup> The subsequent minimal development of the CISG text by the PICC, the DCFR and the proposed CESL suggests that the first of these conclusions continues to hold good. The Scottish Law Commission therefore proposed that in any statutory restatement of the law on formation of contract, there should be a rule that an offer, even if it is stated to be irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.<sup>119</sup> This seemed to command support from consultees.

#### *1.2.6 Revoking or withdrawing acceptances?*

A final point is that, on one possible view of *Countess of Dunmore v Alexander*, acceptances once posted can in any event be revoked, so long as the revocation reaches the offeror before or at the same time as the acceptance.<sup>120</sup> While this result seems to go against the logic of the postal acceptance rule, it may confirm that the underlying policy of Scots law in this area is the protection of the offeree's interests ahead of those of the offeror; and certainly in the suggested scenario it is hard to see that the offeror suffers any prejudice in the result. The postal acceptance rule took shape in a world where the relatively newly developed postal system provided the only means of communication between distant parties. The position in the twenty-first century is (and indeed was for much of the twentieth) completely different, with a wide range of alternative means of communication available to the parties. While it remains common to use posted letters in business practice, copies of such documents will often first be faxed to their intended recipient or sent as attachments to emails. The documents themselves may really be formal confirmations of earlier telephone conversations and less formal email exchanges. Letters can be readily overtaken by faster

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<sup>116</sup> See McBryde, *Contract*, para 6.57.

<sup>117</sup> As to whether a promise must be communicated to the promisee to be binding, see SME vol 15 para 618.

<sup>118</sup> RFC paras 3.11-3.13.

<sup>119</sup> DP No 154, paras 3.16-3.19.

<sup>120</sup> See text accompanying note 51.

means of communication. In this context, the idea that one or other of distant negotiating parties needs protection from the risks inherent in the gap of time between the sending and receiving of a letter by means of a special rule of law is less persuasive than may have seemed to be the case in the mid-nineteenth century and before. If for example, Assumpta merely posts an acceptance to offeror Orlando, without using one of the many available means of letting him know that the communication is on its way, the latter might seem to have the stronger case for protection from delay in the mail system or actual loss in the post. This, it can be argued, would better accord with the ordinary expectations of those parties (particularly commercial entities) who engage in contracts, looking to the law to provide a reasonable and equitable allocation of risk.

### **1.3 Conclusions**

This paper has made two main points. The first of these is that in Scots law, and also under the international soft law instruments which have flowed from the CISG, it is reasonably clear that in principle contract arises from the objectively determined agreement of the parties and that it is not necessary to force every negotiation into the offer-acceptance model in order to determine whether or not a contract exists. The second is that none the less the offer and acceptance analysis is a means of determining whether or not a contract exists which is at its most useful when the parties are not dealing in each other's presence, particularly where they are exchanging written communications which are not picked up by the other side as soon as they are sent. It is not the only way for such remote parties to contract, as can be seen from the example of execution in counterpart; but it provides a path which parties wishing to contract can follow if they so choose, and which courts can deploy efficiently in the event of a dispute as to whether or not a series of communications has given rise to a contract.

If it is not necessary to deploy the offer-acceptance analysis to every potential contract, then we do not need to ask ourselves questions about, for example, the formal written contract signed by all parties together at a 'signing ceremony'. It is quite clear at the end of the process that there is a contract, and it is superfluous to debate whether each successive signatory was at the time of signing making an offer to all the other signatories and/or accepting the offer or offers made by preceding signatories. Likewise in the case of execution in counterpart. There might be more interesting issues if the signing ceremony or the counterpart execution process broke down half-way through, with some party or parties refusing to sign after others had executed the document. But whether offer and acceptance analysis will provide very useful answers in this context is doubtful. If there has been any

offer or acceptance, it has surely been only between the parties who have already signed; from the viewpoint of completing the contract properly, surely in general all must be bound or none.<sup>121</sup> A Scots lawyer might wonder whether the concept of the binding unilateral promise could have relevance for the parties who have already signed, by committing them in some way to adhere to the contract for at least a reasonable time (which might not be very long in the circumstances), or in barring (estopping) them from withdrawing altogether or seeking to renegotiate for their own particular interests; but in practical terms any such promise or bar would certainly not prevent negotiations with or on behalf of the party or parties declining to sign in order to overcome whatever the obstacle to completion might be.

From the point of view of law reform, the realisation that offer and acceptance is not necessary for contract cannot mean that the doctrines associated with the analysis should be simply swept away. It is clear that they continue to serve useful purposes, meaning that the law reform question is rather whether or not they could be made more useful in contemporary conditions, notably with regard to electronic communications. Also calling out for reform is the postal acceptance rule, which seems to have taken shape against the background of nineteenth-century business customs and expectations very different from those of today (as shown by its common exclusion by those aware of its existence). While the rule is a default one, meaning that parties can change it, it would seem better to have a default rule consistent with general expectations so that those unaware of it specifically are not taken by unpleasant surprise when it suddenly bites. But the new rule should be a default one too, so that parties such as Amazon working in new ways of doing business, can shape their transactions to meet their needs as well as possible.

A final law reform thought is that it is possible to solve other problems of contract formation without necessarily having to work within the straitjacket of offer and acceptance. To some extent the international soft law instruments and, following them, the proposed CESL have accordingly been able to develop a different approach to the problem touched upon by Shawn Bayern,<sup>122</sup> that of the 'battle of the forms', where the offer-acceptance analysis of parties' exchange of incompatible standard terms prior to an arrangement (usually) for the supply of goods or services between them should lead to the probably inappropriate conclusion of either no contract or contract on the terms of the last party to send in its terms because the other party's subsequent performance is taken as acceptance

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<sup>121</sup> McBryde, *Contract*, para 4.16, cites the case of *McCreath v Borland* (1860) 22 D 1551, where a disposition of land was not subscribed as it should have been by two creditors with securities over the land, but the document was held to be effective for the transfer of the land between sellers (who had subscribed) and buyer.

<sup>122</sup> [REFERENCE SHAWN BAYERN'S CHAPTER.]

by conduct.<sup>123</sup> The problem arises as a result of a business context in which ordinarily it would be inefficient to spend time negotiating the terms of the contract in question. Although in the United Kingdom the courts have on the whole favoured using the offer-acceptance analysis in such cases on the grounds of greater certainty than would be provided by some deeper search for what the parties may be taken objectively to have agreed, the certainty seems to be more for the courts themselves than the parties; the judges are spared the need to try and work out a solution beyond the respective sets of terms over which the parties failed to negotiate. The outcomes often seem random, dependent on factors which really have nothing to do with the parties' actual agreement, or lack of it. So the Scottish Law Commission put out for consultation the view that an approach less dominated by offer and acceptance might be preferable.<sup>124</sup> While consultation responses were by no means uniformly hostile to this idea, there was also undoubted concern about setting judges loose to impose their view of commercially sensible solutions to the difficulties of combatants in the battle of the forms. So the reign of offer and acceptance as perhaps the default approach to difficult questions of contract formation is by no means over yet in Scotland. But the days of its dominance may be numbered.

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<sup>123</sup> CISG art 19; PICC art 2.1.22; DCFR II.-4:209; Proposed CESL art 38.

<sup>124</sup> See generally DP No 154, chapter 5.