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Reply to Shawn J Bayern, “The nature and timing of contract formation”

Hector L MacQueen

Shawn Bayern puts an eloquent and in many respects persuasive case for dislodging the offer and acceptance analysis of contract formation from its dominant position in judicial as well as academic writing and teaching about the subject; even perhaps for its complete removal from the lexicon of the law. Few will disagree with the observation that a very large number of contracts are made in real life without the faintest hint of an offer on one side met by acceptance on the other: the relatively protracted oral discussions through which common understandings emerge as a basis for business parties' future actions, the implicit arrangements which develop from a course of dealing over time between such parties, or the everyday transactions which are carried through without a word being said on either side (such as buying a ticket on boarding the bus, purchasing goods from a vending machine, or parking one's vehicle in a paying car park).¹ As Professor Bayern points out, the process by which consumers make contracts on standard online retail websites is not readily explained in terms of offer and acceptance.² It seems an un-necessary absurdity to analyse the parties' successive signings of a mutually agreed written contract as a series of offers and acceptances by which the contract is finally concluded with the last signature. The only possible question in such a process seems to be about whether a party who has signed when others have still to do so can in the meantime withdraw; and it is not clear that the answer to that question can or should be provided through the doctrine of offer and acceptance.³

It is forty years since Lord Wilberforce remarked that “English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.”⁴ Just a few years later, however, in a case about when a telexed acceptance became effective to conclude a contract, the same judge produced another dictum which has been frequently reproduced in discussions of later forms of electronic communication such as faxes, emails and voice mails:

The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. and many other variations may occur. No universal rule can cover all such cases: they

¹ It used to be even more complex in the days of the writer's Edinburgh youth, when passengers boarded the bus, took a seat if available, then waited for a conductor to come round to collect the fare and issue the ticket while the bus proceeded on its route.

² CROSS-REFERENCE TO SHAWN'S PIECE.

³ CROSS-REFERENCE TO MY PIECE.

⁴ *The Eurymedon* [1975] AC 154 at 167.

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

⁵

...

Lord Wilberforce's final sentence here is perhaps a forerunner for Professor Bayern's "general interpretive inquiry" as a better approach to contract formation, asking whether the parties believe they have a contract and, if they differ on the matter, which of their beliefs is more reasonable in the light of all the relevant circumstances. Another example of such an approach may be found in my paper's discussion of the case of *Carmarthen Developments Ltd v Pennington*.⁶

There would undoubtedly be benefits if lawyers became less reliant on offer and acceptance as the first port of call when questions of contract formation arise. Professor Bayern refers to the problem of the 'battle of the forms', the resolution of which by offer-acceptance produces a surely false sense of certainty when the outcome is made utterly dependent on the chance occurrence of a 'last shot' followed by relevant activity on the other side.⁷ In England Richard Christou has argued that 'since neither [party] is willing that the other's standard conditions should apply, the proper inference is that neither set of terms was applicable, and the remaining terms of the contract will be governed by statute and common law.'⁸ A recent Scottish example of such an approach may, however, be provided by *C R Smith Glaziers (Dunfermline) Ltd v Toolcom Supplies Ltd*,⁹ in which the parties exchanged, respectively, 'purchase requisition order' and 'despatch note' forms for the supply of goods, the terms of neither of which, the judge found, could govern the parties' relationship when a dispute broke out about the quality of goods supplied in a particular transaction. It was not disputed, however, that many different contracts had come into existence between the parties from 1996 on and these had been successively performed over a period of several years. This course of dealing was important for the conclusion that a contract had also been formed on this occasion despite the inconsistencies of the parties' documents. The judge concluded that the contracts included the terms implied under section 14(2) (general fitness of the goods for their purpose) and 14(3) (reasonable fitness of the goods for the buyer's particular purpose) of the Sale of Goods Act 1979 as well as a further term implied in fact that the goods were to be the products of one particular manufacturer. It was not necessary for the purposes of the case to go any wider than this and determine what if any other terms might have been in the contract. But the failure of each side to ensure that its form was the basis for the contract terms did not prevent the court finding a practical method of resolving the dispute between them on a contractual footing.

Professor Bayern also provides a useful critique of the conclusion which seems to flow from offer-acceptance doctrine that 'cross-offers' produce no

⁵ *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels GmbH* [1983] 2 AC 34 at 42.

⁶ *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139; CROSS-REFERENCE TO MY PIECE.

⁷ CROSS-REFERENCE TO SHAWN'S PIECE.

⁸ Richard Christou, *Drafting Commercial Agreements* (4th edn, 2009) p 116.

⁹ [2010] CSOH 7.

contract.¹⁰ In the light of his argument it is of interest to look back at the facts of the only reported decision on the subject in the United Kingdom, the English case of *Tinn v Hoffmann & Co*,¹¹ and to find that the 'cross-offers' in the case did not come 'out of the blue' from each side but followed correspondence between the parties over the previous week in which they had discussed the possible transaction in some detail. It could have been said that overall the parties had reached consensus about the subject-matter of the contract (successive consignments of iron), the sequence of its delivery over time, and the price of the first two-thirds of the consignments; and for the dissenting judges that was enough to make a contract for the sale of that two-thirds. The same result might have been reached in Scots law before the mid-nineteenth century, where contract was formed by the concurrence of two expressions of intention to be bound by something without these expressions necessarily having to be communicated to the other party concerned;¹² but today it is generally thought that the doctrine of the majority in *Tinn v Hoffmann* - the disagreement over the price of the remaining third of the consignments was enough to prevent there being any contract at all - would be followed in the Scottish courts should the question arise.¹³ But if that happens, perhaps Professor Bayern's observations about the need to consider the overall context of the exchange of communications will have some countervailing influence on the result eventually achieved.

As I remark in my own paper, Scots law does not seem to have been unduly dependent on the offer-acceptance paradigm for contract, even if it stumbled in modern times over the question of counterpart execution.¹⁴ The key principle has been the identification of sufficient agreement between the parties intended to have legal effects in the subsequent relationship of the parties. There has also been the flexibility provided by the system's recognition of the binding effect of unilateral promises. The promisee's acceptance is not required to complete the promisor's obligation; nor indeed is any form of consideration, meaning that gratuitous obligations are fully enforceable. This has also allowed Scottish common law to recognise third party rights in contracts for over 400 years, binding because the contracting parties so provided and without any need for third party acceptance. It should be remembered in this context that Lord Wilberforce's comment about 'forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration' came in a case which was essentially about third party rights at a time before English law recognised these in the Contracts (Rights of Third Parties) Act 1999.¹⁵

¹⁰ CROSS-REFERENCE TO SHAWN'S PIECE.

¹¹ *Tinn v Hoffmann & Co* (1873) 29 LT 271. There is frequently confusion as to whether the defendant's name was spelled with one 'n' or two, which stems from the report itself using both forms. The better view would be that the name was spelled 'Hoffmann', looking in particular at the way in which the name was written as the signature of the firm in its letters to Joseph Tinn (who undoubtedly had two 'n'-s).

¹² See Hector MacQueen, "'It's in the post!' Distance Contracting in Scotland 1681-1855", in *Essays in Conveyancing and Property Law in Honour of Robert Rennie*, edited by Frankie McCarthy, James Chalmers and Stephen Bogle (Glasgow: Open Book Publishers, forthcoming 2015).

¹³ CROSS-REFERENCE TO MY PIECE.

¹⁴ CROSS-REFERENCE TO MY PIECE.

¹⁵ See above, text accompanying note 3.

Having said all this, however, it is important that we do not throw out the contract formation baby with the offer-acceptance bathwater. The doctrine of offer and acceptance has been with us since the Middle Ages,¹⁶ and is still to be found in use in admittedly variable but basically similar forms around the world. Professor Bayern rightly notes that the Code Civil of 1804 has no rules on offer and acceptance,¹⁷ but the concepts are nonetheless widely used in the French courts and 'a fair uniformity of practice has developed' in relation to such matters as 'public offers' (advertisements and the like), the revocability of offers, and requirements of communication for acceptances.¹⁸ Codes descended from the Code Civil, such as the Spanish *Código Civil*,¹⁹ the Italian *Codice Civile*,²⁰ the Dutch Civil Code,²¹ and the Louisiana and Quebec Civil Codes,²² all display increasingly elaborate rules on offer and acceptance as a means of forming contracts, while the German BGB devotes nine articles to the subject.²³ Against this background, it is no surprise to find that the Vienna Convention on the International Sale of Goods,²⁴ the Principles of European Contract Law,²⁵ the Unidroit Principles of International Commercial Contracts,²⁶ the Draft Common Frame of Reference,²⁷ and the now abandoned Common European Sales Law proposal²⁸ all contain similar and quite sophisticated systems of rules on forming contract by way of offer and acceptance.²⁹

The doctrine plays at least two roles in these and other systems. First, it is a useful means of focusing and possibly narrowing down analysis to a limited exchange of communications between negotiating parties in order to determine a dispute as to whether or not their negotiations produced sufficient agreement between them to be a contract. In the context of efficient dispute resolution this limitation of the scope for enquiry may be valuable. An exploration of the whole relationship between the parties to decide whether at a particular point a contract was concluded between them may be expensive and insufficiently bounded to produce any clear-cut result. It will also sometimes be important and relevant to be able to conclude reasonably swiftly that negotiating parties have *not* formed a

¹⁶ James Gordley, *Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), 45-9, 79-82, 139-40, 175-80.

¹⁷ *CROSS-REFERENCE TO SHAWN'S PIECE*.

¹⁸ See Barry Nicholas, *The French Law of Contract* (2nd edn, Oxford: Clarendon Press, 1992) pp 61-76.

¹⁹ *Código Civil* art 1262.

²⁰ *Codice Civile* arts 1326-1336.

²¹ NBW arts 6:217-6:225.

²² Louisiana Civil Code arts 1927-1945; Quebec Civil Code arts 1386-1396.

²³ BGB §§ 145-153.

²⁴ CISG arts 14-24.

²⁵ PECL arts 2:201-2:211.

²⁶ PICC arts 2.1.1-2.1.22.

²⁷ DCFR arts II.-4:201-II.-4:211.

²⁸ See the Proposed CESL arts 30-39 (subject to amendments 108-111 adopted by the European Parliament on 26 February 2014: see

<http://www.europarl.europa.eu/document/activities/cont/201309/20130925ATT71873/20130925ATT71873EN.pdf>). The abandonment of the project was announced on 16 December 2014: see

http://ec.europa.eu/priorities/work-programme/index_en.htm.

²⁹ Note too arts 17-27 of the Draft Australian Law of Contract, published in March 2014 and accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403603.

contract.³⁰ Second, it provides a system by which parties, especially those who are not dealing face-to-face, can set out to establish a contract between them. It is not the only such means, but it is one that many parties still find useful. Professor Bayern mentions his own house purchase as an example,³¹ and the exchange of offer and acceptance 'missives' by the parties' solicitors remains the standard way by which house sales are concluded in Scotland. There seems no reason to supplement such deliberate and structured communications with wider interpretive considerations in order to be sure that the parties have a contract.

In 2012 the Scottish Law Commission published a set of tentative proposals for the reform of the law on formation of contract in Scotland.³² These are summarised in my paper and, as that shows, many of the suggestions contained therein related to the law of offer and acceptance.³³ The responses from consultees, many in legal practice, did not suggest that a focus on offer and acceptance was misplaced, although there was interest in refining the law on various points. I would accordingly suggest that this very long-established and well-developed part of contract law still has a useful role to play, and that it is likely to remain with us for some time to come. But it should not be seen as the only way of establishing whether or not parties have entered contracts, or indeed, bearing in mind Scots law's separate treatment of unilateral promises and third party rights, voluntary or self-imposed obligations in general.

A final observation is Professor Bayern's general interpretive principle may be wider than would be acceptable to courts in the United Kingdom. At least in the interpretation of contracts, the English and Scottish judges favour exclusionary rules preventing reference to the pre-contractual negotiations and the post-contract behaviour of the parties.³⁴ In England and Wales the exclusion of evidence from the negotiations has been held to mean that the court cannot consider material showing that the parties had attached a particular meaning to a word or phrase which also has another meaning or meanings.³⁵ But it is not clear that this is also the law in Scotland, where the courts have accepted evidence that one party used a word or phrase with a particular meaning and that was known, or could reasonably be assumed to be known, to every other party to the transaction.³⁶ Both systems accept, however, that evidence may be led as to unusual meanings to be attached to words or phrases as the result of either custom, usages of a trade or the establishment of a 'private dictionary' between the parties.³⁷ Whether the exclusionary rules would be applied with the same rigour when a court is considering whether or not statements between parties give rise to a contract at all is perhaps

³⁰ In Scotland, see for example *WS Karoulias SA v Drambuie Liqueur Co Ltd (No 2)* 2005 SLT 813; *Aisling Developments Ltd v Persimmon Homes Ltd* 2009 SLT 494.

³¹ *CROSS-REFERENCE TO SHAWN'S PIECE.*

³² Scottish Law Commission Discussion Paper No 154 on Formation of Contract (March 2012).

³³ *CROSS-REFERENCE TO MY PIECE.*

³⁴ See further Lord Hodge's contribution to this volume.

³⁵ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, para 47.

³⁶ See *Houldsworth v Gordon Cumming* 1910 SC (HL) 49; *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657; Scottish Law Commission Discussion Paper No 147 Interpretation of Contract (February 2011), paras 5.23-5.27.

³⁷ McBryde, *Contract*, paras 8.46-8.52. For English law see Edwin Peel (ed), *Treitel The Law of Contract* (13th edn, London: Sweet & Maxwell, 2011), paras 6.024, 6.026.

open to question; but it seems most likely that the primary focus would be on the statements themselves and much less so on the overall context of the parties' relationship and its wider social setting. 'The judicial task,' wrote the leading Scottish text writer, William Gloag, 'is ... to decide what each [party] was reasonably entitled to conclude from the attitude of the other';³⁸ in the case where this statement won the endorsement of the House of Lords,³⁹ incorporation of a standard form by way of a course of dealing between the parties stretching back over at least four transactions was refused because on the particular occasion in question there had been a minor but (in context) entirely understandable departure from the usual manner of transacting. While the decision enabled the court to say that a liability exclusion clause did not form part of a contract for the carriage of goods by sea from one of the Scottish Western Isles to the mainland, there was no inquiry at all into the possible function of the clause in enabling the carrier to charge lower prices for its services, or into the general benefit of these lower prices for the island community to which the pursuer belonged. The half-century since the decision in this case has not seen any notable broadening of the judicial horizons in such contractual disputes.

³⁸ William M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, Edinburgh: W Green & Son, 1929), p 7.

³⁹ *McCutcheon v David MacBrayne Ltd* 1964 SC (HL) 28 per Lord Reid at 35.