2.2 While Scots law recognises that a voluntary obligation can arise from a unilateral declaration of will, i.e. a promise, the vast majority of voluntary obligations are created as a result of an agreement between the parties. A contract is formed when the parties have reached agreement - *consensus in idem* - on the essential terms of the contract always provided that they have intention to create legal obligations. As a consequence, the parties are obligated to perform what they have agreed to do. In other words, the parties undertake to act or refrain from acting and are *obligated* to perform their obligations as soon as the contract is made.

2.23 An acceptance is the final unqualified assent by the offeree to the terms stipulated in the offer. While an acceptance is usually made in words, an acceptance can be inferred from the positive conduct of the offeree. Conversely, if the offeree rejects the offer, the offer falls when the rejection is communicated to the offeror; the offer is then no longer capable of acceptance or of maturing into a contract. These positions are clear and obvious enough. The problems arise where during negotiations the parties make responses which are neither outright acceptances nor rejections.

2.41 The courts have tended to use the offer and acceptance analysis to provide an answer to this kind of conflict — even though it bears little relation to how the parties actually contract. So in the example, the court might argue that A’s quotation was an offer, B’s order form was a counter-offer, A’s receipt a counter-counter offer — albeit on the same terms as the original offer — and B’s *positive* conduct in performing the contract acceptance of A’s counter-counter offer. In other words, the battle of forms will be won by the party which gets its terms in last provided there is positive conduct on the part of the other side from which acceptance of the terms can be inferred.

2.44 As a general rule, writing is not required for the constitution of a contract in Scots law. Provided the parties intend to create legal relations, their agreement constitutes a contract as soon as it is reached. There is no need for writing and the existence of the contract can be proved by parole evidence.
2.64

(1) Where a promise or agreement is made in a commercial context, there is a presumption that the promisor or the parties to the agreement intend to enter legal relations. This covers the vast majority of agreements made in Scotland, since one of the parties will be acting in the course of business and the other will not (a consumer contract) or both parties will be acting in the course of their business.

2.86

Another way in which a third party may acquire rights under a contract is by assignation from one of the original contracting parties\(^3\). Assignation is a form of transfer of rights. A right arising under a contract may be transferred (assigned) by the creditor (cedent, assignor) to a third party (assignee) so as to give that third party a title to sue the debtor in the right for performance. Assignation can thus be distinguished from _jus quaesitum tertio_ since the latter is a creation of the original contract whereas assignation requires a further and independent juristic act by one of the contracting parties.

2.92

Although these rules may seem quite a substantial qualification on the general statement that there is no liability for pre-contractual negotiations, closer examination suggests that they are in fact quite limited.

- First, the issue of liability tends to arise only if a contract apparently results from the negotiations. For example if there is no apparent contract, usually there is no relevant loss upon which to base a delictual claim for any misrepresentation, fraud or force which may have been used. It seems of the essence of the whole idea of contract that prior to the moment of formation and legal commitment to a set of obligations, the parties are free: and that that freedom includes the right to withdraw from negotiations ie the freedom not to contract. Thus for example, if I invite tenders for the construction of a building on my land, I am not liable to the unsuccessful tenderers for the often quite substantial expenditure incurred in preparing their tenders while the successful tenderer must look to the contract to recoup whatever he may have spent in order to obtain it.

- Second, for most of the vitiating factors a positive action is required — a mis-statement, innocent, negligent or fraudulent; an act of force; giving advice or acting in a way which takes advantage of the trust and confidence reposed in one person by another. It is much harder to persuade a court to strike down an apparent contract or grant a delictual remedy in damages for inaction. The authorities, while by no means uniform, are on the whole against the idea of liability arising if I know that the other party is labouring under some misapprehension of which I take advantage without misrepresentation: the classic example is my purchase of a painting which through superior information I know is much more valuable than the price the seller is putting upon it. There is no general duty in contract law to disclose material information to the other party although there are specific instances in insurance, caution and fiduciary relationships such as trustee-beneficiary, principal-agent and company-director.

- Third, claims on the basis of these rules are rare, and successful claims even rarer, suggesting that the courts are suspicious of attempts to undermine contracts by attaching significance to the preceding negotiations.
3.31

Custom or commercial usages and practices which are certain, uniform, reasonable and notorious (in the sense that they are well known in the place where they are to apply and capable of ready ascertainment) are to be regarded as being ‘a term so well known in connection with the particular transaction that it was nothing but waste of time and writing to introduce it into the contract’. Today on this basis customs might be inferred from such things as industry codes of practice or standard forms of contract in widespread use in a particular sector such as the construction industry. 

3.40

Having identified the terms of the contract, the next question is, to what obligations do the terms give rise? This is a matter of construing and interpreting the contract. The purpose of the law of contract is to enforce what the parties have agreed on their common intention. But just as the process of asking whether the parties have agreed is detached from their actual state of mind, so is the process of determining what they have agreed. The basic approach is objective: to determine the meaning of what the parties have said, rather than asking what did they intend to say? Lord President Dunedin’s much-quoted words in *Muirhead & Turnbull v Dickson*, already referred to in a previous chapter, bear one more repetition: ’Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say’. And the nature of this objective approach as elaborated by Gloag has won judicial approval: ’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’. This is of especial importance with unilateral obligations, where the perspective of the reasonable creditor is applied. 

3.48

— The court will resist meanings which seem to give rise to an absurd result or to be contrary to common sense, and prefer those which seem to give the contract reasonable effect.

This rule has significant links to the issue of exploring the context and purpose of the agreement. An example of its use is *Eurocopy (Scotland) Ltd v Lothian Health Board*. This case was about the hire of photocopiers, the charge for which was calculated on the basis of the amount of paper used in the operation of the machines. The customer attempted to argue that this meant that the contract was one for the supply of unused paper rather than for the hire of the copier! The court rejected this argument, quoting a well-known dictum of Lord Diplock: ‘If detailed semantic and syntactic analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business commonsense’. There are, however, pitfalls in arguments based on common sense and absurdity. In *Scottish Special Housing Association v Wimpey Construction UK Ltd*, it was argued that certain clauses allowed building contractors, whose negligence had led to the destruction by fire of the property on which they were working, to insist that reinstatement was nonetheless at their employers’ expense. This seemed an absurd result to the Second Division. But the interpretation was upheld in the House of Lords where it was pointed out that the clauses in question were intended to apportion risk and the consequent insurance burden. To make the contractors liable for the fire would lead to wasteful double insurance.

— Negotiated terms will be taken as the better indicator of the parties’ intention.
3.49  
[...] 
— The contra proferentem rule  

Although there has been some debate about the precise nature of this rule, the best view is that it applies to ambiguous terms contained in contract documents which have been prepared by one of the parties rather than being the outcome of negotiation between the parties. The court will prefer the construction which is least favourable to the party putting the term forward (the proferens) or which is against (contra) that party’s interest.  
[...]

3.57  

Just as the word ‘warranty’ is found in Scottish legal usage with regard to contracts, so is the word ‘condition’. However, ‘condition’ is used not to characterise a type of contract term but rather to describe the circumstances or events upon the occurrence of which a contract term will become, or cease to be, enforceable; or, to put it another way, when a party to a contract has to perform or stop performing its obligations under the term.  
It is not necessarily the case that contractual obligations require immediate performance and it is equally clear that parties can provide for their obligations to end before complete performance.  
[...]

4.32  

It is now established that the creditor’s obligation of good faith does not arise unless the debtor has in fact acted under the undue influence of her partner or under an error induced by the partner’s misrepresentation. If a reasonable person in the position of the creditor would have inferred from her relationship that the debtor’s consent might not have been freely given, the contract between the debtor and creditor can be set aside on the ground of such undue influence or error unless the creditor has fulfilled the obligation of good faith.  
[...]

4.34  

It will be clear that the obligation of good faith laid down in Smith has received a very subdued welcome in Scotland. In these circumstances it is perhaps very unlikely that a duty to contract in good faith will be extended beyond cautionary obligations. Some of the doctrines we have already examined, in this chapter and elsewhere, could be treated as aspects of a good faith doctrine, for example force and fear, undue influence and implied terms. Yet a general duty to contract in good faith rests uneasily with the principle of freedom of contract, ie a party’s right to negotiate the most favourable bargain provided he does not contravene certain well-established rules which constitute grounds to have the contract set aside.  
[...]

4.35  

It is well recognised that an apparent contract may be null or annulable because the consent of the parties or one of the
parties was vitiated or flawed as result of error. The theoretical basis of the doctrine of error and its scope have been the matter of much academic controversy. It is not proposed in this introductory text to discuss the historical development of the doctrine of error or engage in a critical analysis of the literature on the subject. Instead, an attempt will be made to give as simple an account of the current law as the state of the authorities will allow.

Because an uninduced error must be in transaction and in substantialibus, the scope of the doctrine of error as a ground of annulment is kept within the narrowest limits. However, if an error is induced by a misrepresentation, the contract can be reduced even although the error is in motive and does not go to the root of the contract, ie it is not in substantialibus.

In exceptional situations, however, an external event may occur which will relieve the parties of their obligation to perform what they have contractually undertaken. In these circumstances, the contract is said to be frustrated. At the outset it is important to grasp what happens when a contract is frustrated. A contract has been formed. When a frustrating event occurs, it does not affect the contract. Instead, the parties are automatically freed from their obligation to perform any contractually agreed undertakings which were due to be performed after the frustrating event.

Before the courts will imply such a condition, they must be satisfied that the subsequent event does indeed render performance radically different. It is not sufficient that performance has become less profitable or, indeed, unprofitable for one of the parties: economic hardship per se is not frustration.

Scots law has a basically unified concept of breach as non-performance of the contract in some respect. This means that all breaches of contract potentially have the same effect in terms of the remedies to which they give rise. It does not generally matter whether the breach is by total or partial non-performance, delayed or late performance, defective performance or refusal to perform.

In this Scots law is like English law and the “Romanistic” systems of France and the Netherlands; but unlike German and South African law which distinguish sharply between the consequences of two types of breach, namely non-performance arising through delay (mora debitoris) or through impossibility. Scots law also has no requirement of fault or negligence on the part of the contract breaker before liability can arise (save in the case where the term broken is one requiring the party to take care or act without negligence). This again aligns Scots law with English law but distinguishes it from many of the continental Civilian systems.
5.8

Several ideas can be found within the concept of mutuality. A crucial one is that where both parties have rights and duties under the contract, these rights and duties are interdependent or reciprocal and the enforceability of one party’s rights is conditional upon the same party performing its own duties. This has two major consequences:

- if one party does not perform, the other need not perform;
- a party which has not performed or is not willing to perform its obligations cannot compel the other to perform.

[...]

5.28

The party wishing to rescind a contract for breach must show that the breach is material. What breaches are material for these purposes? The emphasis can fall either on the nature and consequences of the breach itself\(^{15}\) or upon the nature of the term broken. The classic definition of materiality highlights the latter:

'It is familiar law, and quite well settled by decision, that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are other which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken to an action of damages\(^{16}\).'

[...]

6.19

The amount of loss is in general to be determined by a comparison between the position in which the aggrieved party would have been had the contract been performed properly and its actual position as a result of the breach\(^{17}\). As a general principle loss is assessed as at the date of the breach but in exceptional circumstances account can be taken of events which occurred after that date, for example if the declaration of war after the date of the breach would have frustrated the contract or entitled the contract breaker lawfully to terminate the contract\(^{18}\). Interest may be payable on damages awards until they are paid.

[...]

6.33

The principle that loss arising from a breach of contract is only recoverable as damages if not too remote was well established in Scots law by the eighteenth century and has Civilian roots stretching back to the sixteenth century\(^{19}\). Nevertheless, all modern discussions of the subject in Scotland take the English case of \textit{Hadley v Baxendale}\(^{20}\) as their starting point. In \textit{Hadley}, Alderson B formulated the principle of remoteness in a test commonly divided into two ‘limbs’ or ‘legs’: loss is recoverable if it either rises in the usual course of things or was in the reasonable contemplation of the parties as the probable result of the breach.

[...]
6.40

A loss which could have reasonably been avoided by the aggrieved party is not recoverable. The aim is to encourage the aggrieved party to take action rather than sit back and let the breach earn profits for him, while at the same time not letting unreasonable action increase the loss for which the contract-breaker is liable.\textsuperscript{21}

6.52

In 2015, one hundred years on from Lord Dunedin's famous speech in the House of Lords, the UK Supreme Court took matters in hand, in what is now the leading decision on the subject, the conjoined cases of \textit{Cavendish Square Holding BV v El Makdessi}; \textit{ParkingEye Ltd v Beavis}\textsuperscript{22}. The law has been changed radically in a number of respects, although it remains the rule that the law on penalties applies only to terms in a contract taking effect upon its breach\textsuperscript{23}. The basis for the law's regulation is stated thus by Lord Hodge:

The rule against penalties is a rule of contract law based on public policy.... [T]he public policy is that the courts will not enforce a stipulation for punishment for breach of contract\textsuperscript{24}.

This rule is now general and no longer limited to provisions for the payment of a specified sum in the event of breach. It does not matter whether the stipulation is called a penalty, or liquidated damages, or something else. It is not confined to terms requiring that money be paid over by the contract-breaker; the rule also applies to clauses for withholding payments on breach, or requiring the party in breach to transfer property, if in substance that amounts to a penalty.

7.7

Over the centuries, certain contracts have been recognised by the courts as being illegal and unenforceable because they are considered to be contrary to public policy. As public policy changes, this will be reflected in the kinds of contracts which will be regarded as illegal so that certain contracts currently regarded as illegal may lose that status and vice versa.

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1 On essential terms and intentions to create legal relations, see further below, paras 2.4 and 2.64 ff respectively. Hogg \textit{Promises and Contract Law} (2011) argues that contracts are about promises rather than agreements.

2 \textit{Uniroyal v Miller & Co} 1985 SLT 101; \textit{Continental Tyre & Rubber Co Ltd v Trunk Co Ltd} 1987 SLT 58; \textit{Grafton Merchandising Gb Ltd t-a Buildbase v Sundial Properties (Gilmerton) Ltd} 2013 GWD 17-349. For England see \textit{Butler Machine Tool Co Ltd v Ex-Cell-O Corp} [1979] 1 WLR 401; \textit{Tekdata Interconnections Ltd v Amphenol Ltd} [2010] 2 All ER (Comm) 302 (CA).

3 See generally Anderson \textit{Assignment} (2008); 15 \textit{Stair Memorial Encyclopaedia} paras 853-864. Note also DCFR IIL.-5, section 1, on which see also Clive ‘The assignment provisions of the Draft Common Frame of Reference’ 2010 JR 275.

4 \textit{Strathlone Steamship Co v Baird & Sons} 1916 SC (HL) 134 per Lord Buckmaster at 136.

5 1995 SC 564.


7 \textit{clydesdale Bank v Black} 2002 SC 555 approving \textit{Braithwaite v Bank of Scotland} 1999 SLT 25 and \textit{Wright v Cotias Investments Inc} 2001 SLT 353. In \textit{Cooper v Bank of Scotland Plc} [2014] CSOH 16 the wife’s signature to the standard security over her one half pro indiviso share of the matrimonial home in favour of the bank had been obtained through her husband's misrepresentation as to the nature of the deed.

8 See above, para 1.57. For varying views see Forte (ed) \textit{Good Faith in Contract and Property} (1999), especially the contributions of the editor and the present authors; and note MacQueen ‘Good faith’ in MacQueen & Zimmermann (2006).

9 For these see McBryde ch 15; and the same author’s ‘A note on Sword v Sinclair and the law of error’ 1997 JR 281 and ‘Error’ in Reid & Zimmermann (2000). See also 15 \textit{Stair Memorial Encyclopaedia} paras 680-694; MacLeod ‘Before Bell:
11Ritchie v Glass 1936 SLT 591
12See generally McBryde ch 21;15 Stair Memorial Encyclopedia paras 880-889.


16Wade v Waldon 1909 SC 571 per LP Dunedin at 576.
17Houldsworth v Brand’s Trs (1877) 4 R 369 at 374 and 375; Govan Rope and Sail Co Ltd v Weir & Co (1897) 24 R 368 at 370-371.
18Golden Strait Corporation v Nippon Yusen Kabushika Kaisha [2007] 2 AC 353 (by a 3-2 majority). The decision is further explained as applicable to one-off sales as well as instalment deliveries in Bunge SA v Nidera BV [2015] UKSC 43, [2015] 3 All ER 1082. See also Radford v De Froberville [1977] 1 WLR 1262; Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 WLR 433; Douglas Shelf Seven Ltd v Co-operative Wholesale Soc Ltd [2007] CSOH 53, para 603 (Lord Reed); and Ageas (UK) Ltd v Kwik-Fil (GB) Ltd [2014] EWHC 2178 (QB).

20See The Heron II [1969] 1 AC 350, especially Lord Reid.
21The principe is recognised in DCFR III.-3:705 and PICC art 7.4.8. See further Rowan Remedies for Breach of Contract (2012) ch 3E.
23The High Court of Australia had previously taken the radical step of abandoning altogether the requirement that the clause operate only after breach of contract: Andrews v Australian and New Zealand Banking Group [2012] HCA 30, (2012) 290 ALR 595.

24Cavendish Square, Para 243.

Referring Principles:

I.1.1 - Good faith and fair dealing in international trade
I.2.2 - Trade usages
III.2 - Assignment of claim
IV.2.1 - Contractual consent
IV.2.6 - Modified Acceptance
IV.4.1 - Freedom of form
IV.5.1 - Intentions of the parties
IV.5.4 - Interpretation against the party that supplied the term
IV.5.2 - Context-oriented interpretation
IV.6.10 - Conditions
IV.7.1 - Invalidity of contract that violates good morals (“<em>boni mores”</em>)
IV.7.3 - Right to avoid the contract for mistake in fact or law
IV.7.4 - Right to avoid the contract for fraudulent misrepresentation
IV.8.1 - Principle of pre-contractual liability
V.1.4 - Principle of simultaneous performance; right to withhold performance
VI.1 - Termination of contract in case of fundamental non-performance
VI.3 - Force majeure
VI.4 - Promise to pay in case of non-performance
VII.1 - Damages in case of non-performance
VII.2 - Principle of foreseeability of loss
VII.4 - Duty to mitigate
VIII.1 - Definition