



Scottish Law Commission

promoting law reform

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

NOT FOR PUBLICATION OR BROADCAST

BEFORE 0001 HOURS 25 APRIL 2013

MAKING A CONTRACT: STILL "ONE FOR ALL AND ALL FOR ONE"?

When the deal has been struck and parties have recorded their agreement on paper – assuming for a moment that they are not going for an electronic contract, signed digitally – they can sometimes come up hard against a thorny question. Do they all have to sign the same piece of paper, perhaps meeting up to do so, or can each party sign its own copy, in whatever location is suitable, and swap them round so that they each have a version signed by each other?

Scots lawyers traditionally go for the first option, the "one for all" approach, with one contract being signed successively by all parties. The other option, where each party has its own copy, or "counterpart", of the contract, is much more common south of the border and elsewhere. The reason is simply that Scots law is thought not to allow parties to "sign in counterpart". This is damaging: it requires parties to meet up at a convenient location (which is often not at all convenient for some), it adds to the time, effort and expense needed to get the contract "live" (at a time when parties are often weary after negotiating what might be huge volumes of contractual documentation), and it bewilders those more used to doing business in jurisdictions where counterparts are common, thus making Scots law appear out of date.

Many practitioners have whole-heartedly supported our project to reform this area of the law and to allow parties to sign and exchange counterparts (but still to have a signing ceremony instead, if they prefer). With their assistance about what would work best in practice, we have come up with some solutions. But we have also gone further: there is demand for counterparts to be exchangeable electronically, for example by fax or, more typically, as an attachment to an email. Our recommendation is that, within certain limits designed to minimise the risk of mistake or fraud, this "e-enablement" should be recognised in law. The short draft bill attached to our report shows how the recommendations would look on the statute book.

A final part of our report discusses digital contracts, for which digital signatures are needed. The legislation needed in this area is already contained in Part 10 of the Land Registration etc. (Scotland) Act 2012. We understand that the Scottish Ministers intend to commence the relevant provisions by the end of this year or during the first part of 2014. We suggest the establishment of an official electronic document repository as likely to serve business needs (and perhaps others too) in the near future.

Professor Hector MacQueen, the lead Commissioner for this project, said: "It has been forcefully put to us that not being able to execute in counterpart and deliver signed documents electronically leads to unnecessary expense, effort and even loss of business. Our package of measures tackles these issues, and also "e-enables" the process, taking full advantage of modern technology. By providing a clear statutory framework – and, perhaps, an electronic repository for digitally signed documents – Scotland and Scots law should also become much more attractive for business."

The Report is published today and is available on our website at <http://www.scotlawcom.gov.uk/publications/>. Its full title is Review of Contract Law – Report on Formation of Contract: Execution in Counterpart (SLC No 231). It follows the publication in March 2012 of our Discussion Paper (DP No 154), which is available at http://www.scotlawcom.gov.uk/index.php/download_file/view/984/129/.

NOTES TO EDITORS

The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lady Clark of Calton, a Court of Session judge. The other Commissioners are Laura J Dunlop QC, Patrick Layden QC TD, Professor Hector L MacQueen, and Dr Andrew J M Steven. The Chief Executive is Malcolm McMillan.

2. Further information can be obtained by contacting Charles Garland, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, email: info@scotlawcom.gsi.gov.uk).

3. The paper may also be viewed on our website at <http://www.scotlawcom.gov.uk/> or purchased from TSO (<http://www.tsoshop.co.uk/>).