Scottish Law Commission

promoting law reform

(SCOT LAW COM No 231)

Review of Contract Law

Report on Formation of Contract: Execution in Counterpart

report

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Report on Formation of Contract: Execution in Counterpart

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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NOTES

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

SCOTTISH LAW COMMISSION

Item No 6 of our Eighth Programme of Law Reform

Review of Contract Law

Report on Formation of Contract: Execution in Counterpart

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Formation of Contract: Execution in Counterpart

(Signed) LYNDA CLARK, *Chairman*
LAURA J DUNLOP
PATRICK LAYDEN
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
9 April 2013

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Abbreviations

1995 Act,
: The Requirements of Writing (Scotland) Act 1995 (c 7)

2012 Act,
: The Land Registration etc. (Scotland) Act 2012 (asp 5)

Chitty on Contracts,
: Hugh Beale et al (eds), *Chitty on Contracts: Volume I: General Principles* (31st edn, 2012)

Discussion Paper *or* DP,
: Discussion Paper on Formation of Contract (DP No 154, March 2012), available at http://www.scotlawcom.gov.uk/index.php/download_file/view/984/129/

DCFR,
: Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (described in paragraphs 1.2-1.10 of the DP);
Full Edition: Christian von Bar, Eric Clive (eds), 6 vols (2009);
Outline Edition: Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds) (2009), available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf

Erskine, *Institute*,
: John Erskine, *An Institute of the Law of Scotland*, (8th edn, 1871), 2 vols

Gloag, *Contract*,
: William M Gloag, *Contract* (2nd edn, 1929)

Gloag & Henderson,
: Lord Eassie and Hector L MacQueen (general eds), *Gloag and Henderson: The Law of Scotland* (13th edn, 2012)

McBryde, *Contract*,
: William W McBryde, *The Law of Contract in Scotland* (3rd edn, 2007)

MacQueen & Thomson, *Contract*,
: Hector L MacQueen and Joe Thomson, *Contract Law in Scotland* (3rd edn, 2012)

RoS,
: Registers of Scotland (http://www.ros.gov.uk/), who hold and maintain a number of registers including the Land Register of Scotland and the Books of Council and Session

SME,
: *The Laws of Scotland (Stair Memorial Encyclopaedia),* 25 vols

Walker, *Contracts*,
: David M Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd edn, 1995)

Glossary

Please note that use of italics within an entry indicates that the term appears elsewhere in the Glossary.

Advanced electronic signature

> This is a secure method of applying a signature electronically. It guarantees both the identity of the signatory and also the integrity of the data to which it is attached. In other words, it is a guarantee that a certain person applied the signature and that the document to which the signature relates has not been subsequently altered. Electronic signatures can confer probativity under the Requirements of Writing (Scotland) Act 1995 as amended by *the Land Registration etc. (Scotland) Act 2012*.

Certification Service Provider

> A provider of digital certificates which allow parties to rely on each others' *advanced electronic signatures*.

Counterpart

> A copy (often a duplicate, but there may be more than two copies) of a contract. Historically, a contract was written out twice on a single piece of paper or other material which would then be divided into two parts, called counterparts, one of which would be held by each party to the contract. In modern times counterparts are simply created by printing out the document the required number of times.

Delivery

> Delivery is generally required under Scots law for a signed document to take effect and create obligations: see the general discussion beginning at paragraph 2.27. As a rule two elements are needed: the document must be handed over by (or on behalf of) the granter and the granter must intend to be bound by its terms. Thus there is both a physical and a mental element. As the physical element may, in common usage, be described as "delivery" we sometimes use the term "physical delivery" for the handing over of a document. This is to be distinguished from "legal delivery" which is the term we use when drawing a contrast with physical delivery. Unless the context demands otherwise, "delivery" in this Report should be understood as legal delivery, i.e. it should be given its normal meaning in Scots law.

Electronic document

> A document created in electronic form, which can be contrasted with one written on a tangible surface such as paper (which is called a *traditional document*). See section 9A of the Requirements of Writing (Scotland) Act 1995, to be inserted by *the Land Registration etc. (Scotland) Act 2012*.

Execution in counterpart

> This refers to the process by which a contract may be signed ("executed") by each party signing its own copy (*counterpart*) and then exchanging it with the other party

for that party's signed counterpart. This is a commonly used method for forming contracts subject to English law. See the discussion beginning at paragraph 1.8.

Probativity

A document is probative if, by visual inspection, it appears to be validly executed. Usually it must appear to have been subscribed by the granter and also by a witness. The witness' name and address must be stated too. Further detail is given in Chapter 3. The Requirements of Writing (Scotland) Act 1995 as amended by *the Land Registration etc. (Scotland) Act 2012* provides for probativity to be conferred upon any electronic document by the application to it of an *advanced electronic signature*.

Simple electronic signature

In contrast to an *advanced electronic signature*, a simple electronic signature is a signature created and/or transmitted electronically (e.g. a name typed at the end of an email or a signature sent on a fax) but without any guarantee that the person who appears to have signed did actually do so nor that the document has remained unaltered after signing. A simple electronic signature can be used to enter into a contract except one connected with land or one which is to be probative. It is possible under the Requirements of Writing (Scotland) Act 1995 as amended by *the Land Registration etc. (Scotland) Act 2012* for some forms of such an electronic signature to confer formal validity upon a contract written as an electronic document.

Subscription

A document is subscribed when it is signed at the end of its final page: see section 7(1) of the Requirements of Writing (Scotland) Act 1995.

Testing clause

A testing clause appears in certain formal *traditional documents* for which *probativity* is sought. Although less commonly used nowadays, the testing clause is a means of recording a witness' name and address. It may also contain other details about the signing process, such as where and when it took place. It generally appears just above the signatures at the end of the document. A testing clause or an equivalent (e.g. a handwritten note, close to the witness' signature, of his or her name and address such as in a signing block: see paragraph 3.7) is required in order for a *traditional document* to be probative.

The Land Registration etc. (Scotland) Act 2012

The main focus of this Act lies beyond the scope of the present Report – it is based on our earlier Report (SLC No 222, Feb 2010) – but its Part 10 is of relevance. It provides for electronic conveyancing and does so, in part, by amending the Requirements of Writing (Scotland) Act 1995. Those amendments are not yet in force but we expect them to take effect by or during 2014.

Traditional document

A document written on paper (or parchment or other similar tangible surface): see section 1A of the Requirements of Writing (Scotland) Act 1995, to be inserted by *the Land Registration etc. (Scotland) Act 2012*.

Chapter 1 Introduction

Execution in counterpart: the demand for law reform

1.1 We published a Discussion Paper on Formation of Contract in March 2012 as part of the general review of contract law in the light of the Draft Common Frame of Reference (DCFR) undertaken as part of our Eighth Programme of Law Reform.[1] As well as a detailed analysis of the long-established general rules on the subject, the Discussion Paper contained three Chapters on the topic of "execution in counterpart". In brief, the phrase describes the process by which parties to a formal document intended to have effect (e.g. as a contract) may be able to apply their respective signatures to it (execution) to make it binding without having to meet to do so or, indeed, having all to sign the same physical copy of the document. We explained that numerous commercial law practitioners had pressed the matter upon us for consideration in our review. The difficulties which it causes in relation to the completion of high-value commercial contracts are such that it is common practice to shift the law of the contract from Scots to English law, in order to take advantage of its better solutions to the problems.[2] Given that one objective of the contract law review is to identify and remove any difficulties which inhibit the use of Scots law by contracting parties as their governing law, we immediately accepted the task in relation to this particular subject.

1.2 The response of consultees to the Discussion Paper underlined the importance, indeed the urgency, of law reform in this area. For example, Burness Paull Williamson LLP observed: "We strongly believe that reform of the law of execution of documents is required to ensure that Scots law is fit for the purpose of businesses in the 21st century." Pinsent Masons LLP commented: "Modern commercial transactions need the flexibility provided by counterpart execution and we are aware of instances where English law was selected for documents instead of Scots law in order to facilitate counterpart signing."

1.3 This was echoed by Dundas & Wilson LLP who told us: "The widespread view that execution in counterpart is currently incompetent in Scotland undoubtedly means that many corporate deals are carried out under English law, even where all parties involved and all property and business are based in Scotland." That there is such a view is confirmed by one leading law firm's website stating that "signing in counterpart is not a valid method of signing under Scots law."[3] Another acknowledges that "in Scotland there is confusion surrounding this issue with many unsure as to whether or not this practice is appropriate."[4] As long ago as 2008, Rod MacLeod, then an associate in the Banking Department of Tods Murray, expressed[5] the view that "if I could make one change to Scots law, it would be to allow

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[1] DP No 154, to which we refer in this Report as the "**Discussion Paper**" or "**DP**". It is available at http://www.scotlawcom.gov.uk/index.php/download_file/view/984/129/.

[2] These are summarised later in this Chapter.

[3] See "Drafting Contracts – two key differences between Scots and English Law", available at http://www.lindsays.co.uk/news-and-features/bulletins/bulletin/corporate-and-technology-bulletin---november-2012/#Drafting.

[4] See the article at http://www.morton-fraser.com/publications/articles/3369_execution_in_counterpart-draft_bill?goback=%2Egde_4142482_member_209916414.

[5] http://www.firmmagazine.com/features/420/If_there_is_one_thing_that_really_annoys_me%E2%80%A6.html. Mr MacLeod has since confirmed to us that his opinion on this topic remains the same as in 2008.

counterpart execution of documents that require to be formally executed under the Requirements of Writing (Scotland) Act 1995."

1.4 We received around 20 responses to our Discussion Paper, which helped to shape our provisional thoughts and enabled us to instruct a draft Bill. We considered, however, that further consultation was needed, especially to give us a better understanding of the practical issues which need to be addressed if we are to come up with constructive and workable recommendations. Accordingly, we organised a seminar on the subject which we held on 29 November 2012 in conjunction with the Centres of Commercial and Private Law in the Edinburgh University Law School.[6] It was attended by about 60 persons, mainly commercial law practitioners, and we benefited greatly from the debate there over a first draft Bill which we had produced for the purpose.

1.5 The chairman of the seminar, Lord Hodge (the senior Commercial Judge in the Court of Session) summed up the mood of that meeting when he said at its conclusion:

> "I welcome this initiative very much. Our commercial law needs modernising, our law of contract needs to be reviewed and there are measures which will be taken which will make us more user friendly and will address the needs of business. I particularly welcome it at a time when Scots law is under pressure. I think the legal profession is changing – more and more cross border links give rise to firms which are UK firms rather than purely Scottish firms and I think if we are to keep our native law healthy then we have to keep it competitive in the sense that it provides mechanisms which people find useful."

1.6 It thus became abundantly clear that this was an area where reform was not merely desirable but necessary if significant damage to the use of Scots law in commercial transactions was to be avoided. We have been much helped in the development of the recommendations made in this Report by further discussion with practitioners and others following on from the seminar, including consideration of a further draft Bill which was posted on our website for comment on 21 January 2013 to accompany a helpful and supportive comment on the project written by Paul Hally of Shepherd & Wedderburn LLP and published in that month's issue of the *Journal of the Law Society of Scotland*.[7]

1.7 Accordingly, although our contract law review is in general seen as a longer-term project, we decided to give early focus to "execution in counterpart" as a subject calling for action sooner rather than later, and we have therefore produced this short Report with its accompanying draft Bill. There is also a Business and Regulatory Impact Assessment in which we analyse the economic effects likely to follow from the proposed legislation.[8] We think that as a non-controversial, strongly supported yet relatively short measure meeting what is seen as an urgent need, and having significant economic impact in smoothing the path of business in Scotland by enabling lawful deployment of current communications technology, the draft Bill is an excellent candidate for early enactment by the Scottish Parliament. Indeed, should the Scottish Parliament decide in due course to introduce a new

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[6] The seminar was conducted under the Chatham House rule; we have subsequently obtained permission from the relevant contributors for any quotations from the event which we use in this Report.

[7] See http://www.scotlawcom.gov.uk/news/execution-in-counterpart-final-chance-to-comment/ for our invitation to comment on a draft of the Bill; and Paul Hally, "Separate but legal" (2013) 58 JLSS 22-23 Jan, accessible at http://www.journalonline.co.uk/Magazine/58-1/1012099.aspx.

[8] See paras 1.37-1.38; the BRIA is available on our website.

process for law reform Bills in the Parliament, in our view the draft Bill would be one of the leading candidates for any such process.

Execution in counterpart

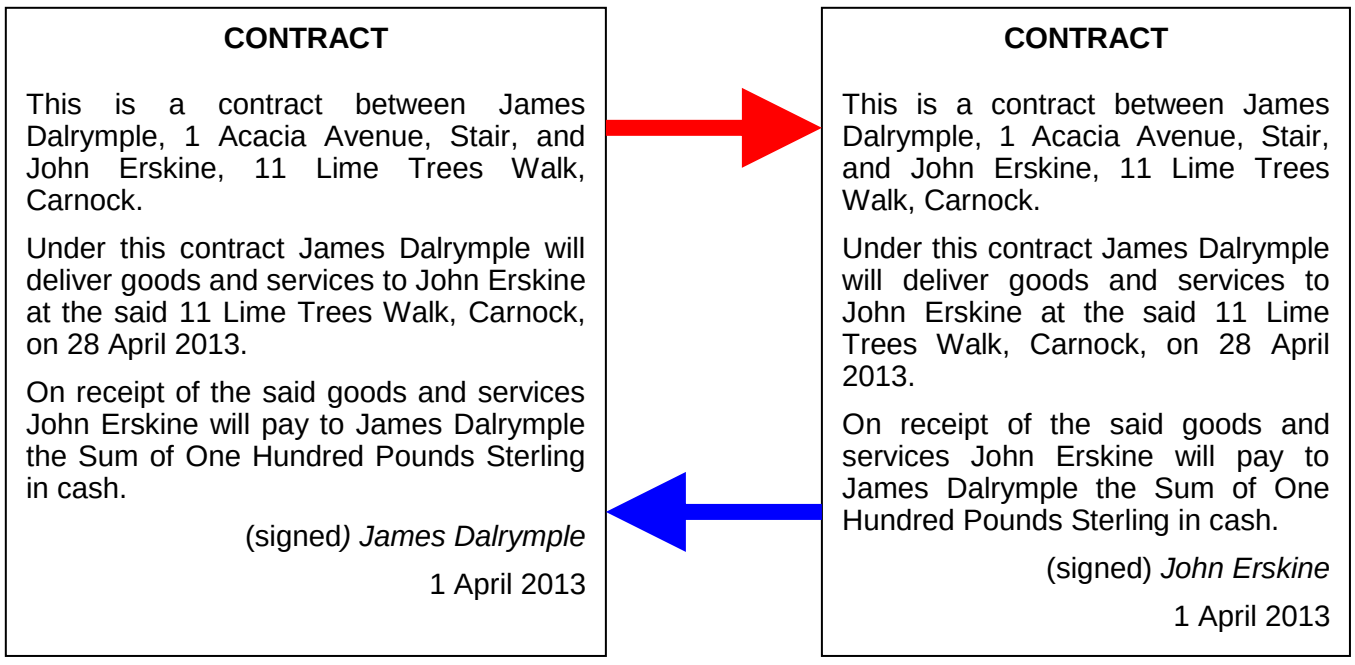
1.8 What is execution in counterpart? As we explained in our Discussion Paper, the process and the name are derived from English law.[9] It is essentially about ways of executing a document intended to have legal effects amongst two or more parties without the parties having to meet together for each to sign the document in question. We have found helpful the following summary from the Tokyo website of the well-known London commercial law firm, Clifford Chance:[10]

> "Signing in counterparts is when a party signs a separate physical copy of a document to the physical copy signed by the other party (or parties) to the contract. This is in contrast to where the same physical document is signed by all parties."

Once the parties have all signed their respective counterparts, these are exchanged between them, and the document takes effect from that point. The Clifford Chance website also notes:

> "Execution in counterparts however requires a counterparts clause to ensure that executing documents in this fashion is sufficient to create a binding contract between the parties."

1.9 The procedure may be graphically represented thus in its simplest form where only two parties are involved:



[9] See ch 6 and paras 6.5-6.20 in particular.

[10] The relevant document may be downloaded from the following web address: http://www.cliffordchance.com/publicationviews/publications/2012/09/boilerplate_clausesinenglishlawcontracts.html?utm_source=lexology&utm_medium=newsfeed&utm_campaign=lexology.

1.10 The practical benefit of the process is that parties do not have to gather together at one time or in one place in order to execute the same contractual document or documents. This suits the realities of modern commerce where, we have been told, "parties do not even meet to negotiate the contracts, never mind sign them".[11] Business transactions do not necessarily or even typically occur between persons in the same place or, indeed, in the same jurisdictions, especially with complex deals that are multi-partite in nature. For parties otherwise remote from each other in such dealings, execution in counterpart serves to reduce unwanted and (given the existence and use of reliable electronic communications technology) un-necessary burdens and costs in the process of signing documents to bring them into effect. The saved costs are those of travel, time, and accommodation for all the persons concerned, as well as those involved in the management and administration of the process. The process is much quicker, and can also be more definite as to the precise moment at which legal effectiveness of the document is achieved, than the alternative of a "round robin" procedure of circulating documents for signature using the postal system or courier services.[12]

English law and practice

1.11 The origins of the term "execution in counterpart" lie far back in English legal history. In English law a document may be made up of more than one part, each one containing the same text but one of which is regarded as the original one (the principal) and the other (or others) being a counterpart.[13] The word "counterpart" may in some senses be anachronistic in the context of the modern usage in commercial transactions:[14] *Halsbury's Laws of England* speaks instead of "execution in duplicate"[15] and others refer to "virtual signings or closings".[16] We use "execution in counterpart" because that is the term generally used by those who have alerted us to the difficulties in this area of the law but we do not believe or intend that anything turns on the name.

1.12 In certain respects, sales of land seem to have provided something of the model for the approach to execution in counterpart in England. Such sales are carried through by

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[11] Quotation from an email sent to this Commission on 4 August 2009 by Paul Hally, Shepherd & Wedderburn LLP, as a submission to our consultation on the Eighth Programme of Law Reform.

[12] Observe the comments of McBryde, *Contract*, para 4.09 (third bullet point).

[13] "When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy": *Munn v Godbold* 130 ER 526, (1825) 3 Bing 292 at 294 (Best CJ). For a general discussion see the Law Commission of England & Wales' Consultation Paper on The Execution of Deeds and Documents by or on behalf of Bodies Corporate (Law Com No 143, 1996), especially Pt II (the corresponding Report was published in 1998: Law Com No 253).

[14] One of the significant differences between a counterpart and the original document is in its evidential value. Best evidence as to the existence and terms of an agreement are found in the original; if it cannot be produced then the counterpart provides next best evidence. A party who signs the counterpart is thereby "estopped from objecting to its admissibility": *Paul, Clerk to Trs v Meek* 148 ER 855 at 856, (1828) 2 Y&J 116 at 119 (Alexander LCB). Drafts or other copies are only considered if all parts of the original document are unavailable: *Villiers v Villiers* 26 ER 444, (1740) 2 Atk 71 (Hardwicke LC). The parts would not necessarily be signed at the same time. A case from the 1820s involving the East India Company (*The East India Company v Lewis* 172 ER 455 at 456, (1828) 3 Car & P 358 at 360 (Lord Tenterden CJ)) illustrates what might happen when parties were in different parts of the world: "…the practice, when the party was abroad, was, for the Company to execute their part, and to send that, together with the unexecuted counterpart, to the governor of the place where the party was; and for the governor, on getting the counterpart executed, to deliver over the Company's deed to such party; and that upon this it was the duty of the governor to return the counterpart to the East India House."

[15] *Halsbury's Laws of England* (4th edn, 2007) reissue, vol 13, para 4.

[16] See the opening sentence of the Law Society of England and Wales' Practice Note, available at http://www.lawsociety.org.uk/advice/practice-notes/virtual-execution-of-documents/, to which we refer more fully at paras 1.18-1.28 below.

"exchange of contracts".[17] Each party to the sale produces and signs a document expressing the contract in identical terms, rather than the "offer" missive followed by the "acceptance" missive familiar to Scots lawyers. The parties then exchange their respective documents in order to conclude the contract.

1.13 "Wet ink" is not the only way in which a document may be validly signed in English law. For example, a printed signature may suffice so long as the party to be bound has shown a recognition of it as its signature; signature by pencil is also sufficient, as is signature on a telegraph form, or by mark, or by initials.[18] It has been suggested by the Law Commission that a facsimile signature can constitute a signature for legal purposes if it is clear that a party so intended.[19]

1.14 Traditionally the signed "contracts" take effect when "delivered" or physically exchanged by the parties to the contract and/or their solicitors at a meeting. But the manner of the exchange may be settled otherwise by the parties, and commonly is in modern practice. For example, exchange can take place by post, in which case the transaction is not finalised until the second document to be dispatched has been received or posted.[20] Exchange can also take place by telephone, in which case parties deposit their respective documents with the other party's solicitors in advance with the telephone call to confirm the exchange being the condition upon which these documents take full effect.[21] And, it seems, English law's broad view of what amounts to delivery of documents means that exchange may now be by way of appropriate electronic communication such as fax and email transmission.[22]

1.15 The traditional practice in commercial as distinct from conveyancing transactions was for the parties and/or their lawyers, acting as agents, to meet together in one place and apply their "wet ink" signatures to the transaction's documentation. For many commercial transactions involving multiple parties this could mean a gathering of a significant number of people to sign a large number of frequently bulky documents, preceded by a process of checking that the documents are in good order for the purpose. This checking process is often necessary in complex development and similar transactions because it is only upon the organising solicitor certifying that all the other contracts involved are fit for their purpose and validly executed that the project's funders will execute the funding agreements and release the necessary finance. These checks frequently reveal drafting and typographical errors

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[17] Law of Property (Miscellaneous Provisions) Act 1989, s 2(1). A useful statement of the law by Stuart-Smith LJ can be found in *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259 at 285 (CA).

[18] Chitty on Contracts (30th edn, 2008), para 4.034, citing a number of nineteenth-century decisions. The equivalent paragraph in the 31st edn of 2012 omits reference to signature by pencil, on a telegraph form, or by mark. We think, however, that only the telegraph may be safely regarded as obsolete for the purposes of legal documentation.

[19] See the Law Commission of England & Wales's Advice, *Electronic Commerce: Formal Requirements in Commercial Transactions* (Dec 2001, available at http://lawcommission.justice.gov.uk/publications/795.htm), paras 3.32-3.33. The matter has been expressed thus by Laddie J: "[I]t is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporate within it the author's signature which has been scanned into the computer and is stored in electronic form, and to send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only hard copy of the document. It seems to me that such a document has been 'signed' by the author." (*IR Commissioners v Conbeer* [1996] BCC 189 at 194.)

[20] Chitty on Contracts, para 2.120.

[21] *Domb v Isoz* [1980] Ch 548 (CA).

[22] Exchange by fax has been accepted by the New South Wales court: *Essington Investments v Regency Property Group* [2003] NSWSC 828.

needing last-minute correction. Arranging such a "signing ceremony" and carrying it through can thus be a time-consuming, expensive and complex process.

1.16 However, time and costs can now be saved by arranging a "virtual" rather than a physical signing ceremony. Each party signs the documents at its own chosen place and then transmits a copy of the signed documents electronically – by fax or by email attachment of a PDF for example – to a person who has been previously authorised to manage or coordinate the whole process. As will be explained in more detail below,[23] it is not unusual for the transmission to be of only a completed signature page for a particular document.

1.17 There is little or no account of this by that name in the standard works on English contract law that we have been able to consult.[24] Nor has there been much significant case law. Counterpart execution in commercial transactions seems to have developed as a matter of practice, drawing upon the interpretation of various strands of English law including a wide understanding of what may constitute a legally valid signature, the model provided by the sale of land, general rules on contract formation, the law of agency (in particular the authorisation of parties to sign on behalf of others) and on formalities in contract and the law of deeds.

1.18 Our understanding of the modern law and practice of execution in counterpart derives largely from a Practice Note issued by the Law Society of England & Wales early in 2010,[25] after possible difficulties surfaced in the case of *R (on the application of Mercury Tax Group Ltd) v HMRC*, decided in 2008.[26] We have also been told that this Practice Note is the basis of most Scottish practitioners' understanding of execution in counterpart. So far as we are aware, however, the validity of the Practice Note recommendations has yet to be tested in court, and we do not know how far the recommendations are actually followed in practice.

1.19 The Practice Note emphasises first the importance of ensuring that all parties' lawyers have agreed to the proposed arrangements for the virtual signing before the electronic process is to take place. One of the parties' lawyers will generally have to perform a co-ordinating role. It is also necessary for any party distant from the co-ordinating lawyer to ensure that an appropriately authorised person is available remotely (for example, online) in order to receive and approve transmitted documents, sign as required and perform any other requirements for completion.

1.20 While not precluding other possibilities, the Practice Note suggests three options for carrying out a virtual signing process. These are:

1. returning to the coordinator by e-mail the entire document with a signed signature page;

2. returning to the coordinator by e-mail only a signed signature page;

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[23] See paras 1.22-1.28.
[24] E.g. Chitty on Contracts; W E Peel, *Treitel: The Law of Contract* (13th edn, 2011); *Halsbury's Laws of England* (4th edn, 2007) reissue, vol 13 ("Deeds and other instruments").
[25] See "Execution of documents at virtual signings or closings", available at http://www.lawsociety.org.uk/productsandservices/practicenotes/executionofdocs/4447.article. The Practice Note followed the conclusions of a joint working party of the Law Society and the City of London Law Society (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=760&lID=0).
[26] [2008] EWHC 2721 (Admin), discussed at para 1.24.

3. creating a pre-signed signature page in advance of finalising the document.

1.21 The first option presupposes an initial sending of the document by the co-ordinating lawyer to the person who has thereafter to sign and return it. The document may already have been signed by the sender and sent either in electronic facsimile or hard copy.

1.22 The second and third options in the Practice Note, both of which involve sending only signature pages, reflect a perception that in English law attaching pre-signed signature pages to contract documents is a valid means of executing a document to show each signing party's intention to be bound by it. This perception is supported by reference to the decision of the Court of Appeal in *Koenigsblatt v Sweet*.[27] That case involved an exchange of contracts in a sale of land by D to P and his wife. At settlement, the latter's contract was signed only by P. Without authority D's solicitor thereupon altered the contract already signed by D to delete references to P's wife. D subsequently ratified the solicitor's actions and instructed him to proceed but later sought to withdraw. It was held that D's ratification of the altered but previously signed document bound him, and an order of specific performance was granted against him.

1.23 Although clearly rather special on its facts, the *Koenigsblatt* case has been taken to have a wider meaning: so long as a party's signature is applied to a more or less final version of a document, that party can authorise in advance or subsequently ratify its attachment to the final embodiment of the document. This practice also helps to meet a problem that is recurrent in practice, namely late discovery that the text of a document needs alteration or correction. Such alterations or corrections to the initial document can thus be made effective without any need for the addition of authenticating signatures to the alterations themselves.

1.24 This wider understanding of *Koenigsblatt v Sweet* was, however, thrown into some doubt by the first instance decision in *R (on the application of Mercury Tax Group Ltd) v HMRC*.[28] The problem in that case was the validity of attaching to the final version of a written agreement signatures made upon an earlier draft version of the document. Underhill J held that the transfer of a signature page from one document to another was invalid, and that where, as in the particular case, the document was intended to take effect as a deed,[29] the signature and attestation thereto had to form part of the same physical document. The judge pointed out that in the *Koenigsblatt* case there had only ever been one document, and commented:

> "The parties in the present case must be taken to have regarded signature as an essential element in the effectiveness of the documents: that is to be inferred from their form. In such a case I believe that the common understanding is that the document to be signed exists as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing. The significance of this is not entirely talismanic (though it would not affect my view even if it were): the requirement that a party sign an actual existing authoritative version of the

[27] [1923] 2 Ch 314 (CA).
[28] [2008] EWHC 2721 (Admin).
[29] A deed, for which see further para 1.26(1) below, is the English near-equivalent of a Scottish probative writing (which is the subject of ch 3).

contractual document gives some, albeit not total, protection against fraud or mistake."[30]

1.25 The concerns to which this judgment gave rise are summarised in the Practice Note as (1) the validity of using pre-signed signature pages; and (2) "virtual signings and closings where signature pages are exchanged by email".[31] In particular, was the use of email and scanned versions of signatures or signed documents precluded by the judge's insistence on signature of a physical contractual document?[32]

1.26 The Practice Note considers whether or not each of the previously described modes of execution in counterpart (returning by e-mail the entire document and the signed signature page, returning by e-mail only the signed signature page, or creating a pre-signed signature page in advance of finalising the document)[33] can be applied in four cases:

(1) *the execution of deeds* (formal writing manifesting the intention of its granter to make the document a deed and signed by its granter with attestation,[34] having various legal effects;[35] it may be further noted that again the requirement of signature here does not necessarily involve the application of a name to the deed,[36] and that the additional requirement of delivery by which a deed becomes effective is not limited to physical transfer of the signed document between the granter and the grantee);

(2) *"real estate" contracts* (that is, dealings with what Scots law would term real rights in land, e.g. a contract of sale for the transfer of ownership, where English law requires signed writing on each side, although not necessarily a deed[37]);

(3) *guarantees* (these are important in commercial transactions where a contracting party is a subsidiary, the guarantee being provided by the holding company; in English law, unlike Scots law,[38] guarantees must be in writing signed by or on behalf

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[30] [2008] EWHC 2721 (Admin) at para 39.
[31] Para 1.2 of the Practice Note.
[32] This has been considered in other cases, e.g. *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552 (estate agency contract held to have been validly concluded by email), *Immingham Storage Co Ltd v Clear Plc* [2011] EWCA Civ 89 (contract for oil storage validly concluded by electronic means, including scanned copy of signed document), and *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch) (heritable security not concluded, on the facts, by email exchange).
[33] See para 1.20 above.
[34] Law of Property (Miscellaneous Provisions) Act 1989, s 1. There are special rules for execution by companies incorporated under the Companies Acts, and for charities; deeds executed by other parties must be sealed (see Chitty on Contracts, para 1.106). The 1989 Act has been further amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906): see Chitty on Contracts, paras 1-110-1-121.
[35] Effects include the absence of a requirement of consideration in respect of any obligation undertaken in the deed; and a limitation period of 12 rather than the usual 6 years in respect of claims for breach of the obligation in the deed. See the Law Commission of England & Wales' Consultation Paper on The Execution of Deeds and Documents by or on behalf of Bodies Corporate (Law Com No 143, 1996), paras 2.8-2.11.
[36] See Law of Property (Miscellaneous Provisions) Act 1989, s 1(4) which provides that "sign", in relation to an instrument, includes making one's mark on the instrument and "signature" is to be construed accordingly. Note also s 1(1) abolishing any rule of law restricting the substances upon which a deed may be written.
[37] Ibid, s 2(1); cf 1995 Act, s 1(2)(a)(i).
[38] 1995 Act, s 1(2); in relation to gratuitous obligations in the course of business see *Royal Bank of Scotland Plc v Wilson* 2004 SC 153, 2003 SLT 910.

of the guarantor; this also applies to any memorandum or note of the guarantee[39]); and

(4) *simple contracts* (that is, those including neither the sale or disposition of a real right in land, nor a guarantee).

1.27 The Practice Note helpfully sets out in tabular form the extent to which the options may be applied in each of these cases, as follows:

Type of Document	**Option 1 – Return PDF/Word document plus signature page**	**Option 2 – Return signature page only**	**Option 3 – Advance pre-signed signature pages**
Deeds	Yes	No	No
Real estate contracts	Yes	No	No
Guarantees (stand-alone or contained in simple contracts)	Yes	Yes	Yes
Simple contracts (not incorporating any of the above)	Yes	Yes	Yes

The whole Note makes clear the value commercial practitioners in England place on the ability to complete transactions virtually; it also suggests that this is entirely justifiable. Technological development has provided tools of considerable power which may render transacting in business easier and less costly. That the deployment of these tools should not be inhibited by the law has, therefore, been a key policy goal of government for well over a decade.[40] On the other hand, as Underhill J pointed out in the *Mercury* case, the law must guard itself against becoming open to abuse as an instrument of fraud.[41]

1.28 The Practice Note envisages only the signing of documents by handwritten (or "wet ink") methods, albeit that in the overall process documents or parts of them signed in this way are electronically transmitted in facsimile between the parties, at least for a "simple contract", by either fax or email attachment. It seems that, for the purposes of execution in

[39] Statute of Frauds 1677, s 4. Reform of this area of the law has been mooted: see, e.g., the Financial Law Committee of the City of London Law Society's Discussion Paper on Secured Transactions Reform (Nov 2012), available at http://www.citysolicitors.org.uk/FileServer.aspx?oID=1290&lID=0.
[40] See our DP at para 6.3.
[41] See para 1.24 above.

counterpart under English law and apart from deeds, such an electronically transmitted facsimile signature can suffice if it is clear that by attaching it, or having it attached by an authorised person, to a version of a contract document a party intended to become bound by that contract. The only question is the extent to which the protection against fraud and mistake which has hitherto been provided by the process of "wet ink" signing by parties in each other's presence and, in the case of deeds, the presence of witnesses who also signed, can be provided in the electronic medium as well.

The law reform questions

1.29 In our Discussion Paper we posed the law reform questions to be addressed in Scotland as follows:

> "[T]o what extent may parties wishing to execute a contract in probative (or self-proving) form, i.e. requiring the subscription of all parties upon the contractual document plus the signatures of a witness or witnesses to these signatures along with a testing clause or its equivalent, be able to do so without having to meet in person (or through duly authorised representatives) in order to apply their subscriptions to the contractual document together before a witness or witnesses who also sign? If such a facility would be of value to contracting parties, but is not recognised in the law of Scotland at present, what reform of the law would make it possible?"[42]

We framed the questions in terms of the production of a probative document, since we had been told that in commercial practice it was common for the documents relating to high-value transactions to be in that form. The reasons for using probative form are various: its high formality impresses upon participants that what they are doing is of legal significance; the document may thereafter be registered in the Books of Council and Session (or, in the case of leases, in the Land Register) for preservation and execution, thus giving certain legal advantages in connection with enforcement; if necessary, the document proves itself in court, meaning that the onus of showing it not to be what it appears to be, in terms of its subscription by its granters at the dates and places (if any) also stated, falls upon the party claiming that to be so; and the relevant legislation (the Requirements of Writing (Scotland) Act 1995) lays down a clear, if somewhat cumbersome, procedure for amending a probative document should that become necessary in the course of its execution by multiple parties (as is not uncommon in practice). It should be emphasised, however, that no contract is required to be in probative form. Even where a contract must be in writing under the 1995 Act, that requirement is satisfied by the parties subscribing, i.e. applying their signatures at the end of the relevant document; there is no need for attestation or the appropriate equivalent.

1.30 Our Discussion Paper considered a number of questions of principle in Scots law – the concept of contract as agreement, typically formed by offer on the one side met by acceptance on the other; the requirement of "delivery" in relation to a document intended by the party signing it to have legal effects; the definition of a signature; and the nature of probativity – in identifying the following issues as possible obstacles to effective execution in counterpart in Scots law:

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[42] At para 6.2 (with footnote omitted).

(i) Can an exchange of identical documents between parties amount to the agreement that is the law's most basic requirement for a contract?

(ii) Does the law's requirement that a document intended to have a legal effect in relation to its grantor must be "delivered" to the other party or parties extend beyond a physical transfer of the actual document in question?

(iii) Does the law allow for the possibility of a party being bound by virtue of handing over a signature page to be attached to a master copy?

(iv) How may a set of counterpart documents be rendered probative as a whole?

1.31 Consultation showed that we had identified the correct legal issues to be addressed, and for the most part agreement with the reforms that we proposed. Some of the issues were, however, more difficult, notably the use of signature pages and, as emerged in the course of the consultation, the dating of documents. Consultees also drew our attention to a number of practical difficulties which should be addressed in the reform. At the same time, the consultation made clear that we should not put forward a prescriptive or directive scheme. As far as possible the reform should be facilitative and flexible, providing a legal foundation upon which practice could build in meeting the many different challenges that arise in complex commercial transactions, rather than setting up a series of hurdles to be jumped over or run around.

1.32 We have tried to fulfil this goal, having very much in mind Lord Guthrie's celebrated dictum from 1964 that the general policy of the law should be to facilitate commercial transactions, not to create obstacles or un-necessary pitfalls in the way of solving practical problems arising out of the circumstances confronting business people.[43]

Summary of recommendations

1.33 The main elements of the reform package which we recommend are:

- A document may be validly executed under Scots law by parties subscribing a counterpart of the document remotely from each other and then each delivering their subscribed counterpart to the other parties;
- Delivery may be to a person nominated for the purpose rather than to the other parties;
- Delivery of a traditional document may be effected by electronic means;
- A document takes effect either when each and every party has subscribed and delivered its counterpart, or at such later date as parties may agree;
- Where all parties sign their counterpart in self-proving form, the document as a whole is self-proving;

[43] *R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 at 332 (IH).

- If desired, a "registration copy" of a document may be compiled by making up a single version which includes the signing pages from each of the counterparts;

- The reforms will not affect any document executed before they come into statutory force.

1.34 All of these are explained in Chapters 2 and 3. Chapter 4 deals with a further matter, on which we canvassed views in our Discussion Paper. Towards the end of that Paper we addressed the possibility that a solution to the difficulties inherent in remote signings lies in still greater use of the technological facilities now available, namely the creation of purely electronic or digital versions of documents to be held in some mutually agreed location to which parties would have remote electronic access for the purposes of reviewing the documents and, when ready to do so, applying electronic or digital signatures. We drew attention to the Land Registration etc. (Scotland) Act 2012[44] and its new distinction between "traditional" – that is, simply put, paper – and "electronic" documents created and deployed only in their electronic form. The Act, which is expected to come fully into force by 2014, also enables electronic documents to be made probative by the application to them of the parties' advanced electronic signatures, while the requirements of writing for the validity of certain contracts – notably sales of land – will also be met in the case of electronic documents by the application of electronic signatures fulfilling certain standards of security, albeit possibly less than those required to make the electronic document probative.

1.35 We think that once the 2012 Act is in force there will be nothing to prevent the use of these provisions by parties to commercial transactions in which counterpart execution would currently be deployed for completion. We have therefore made no specific recommendations for legislative reform on this matter, although in the final Chapter of this Report we do encourage the Scottish Government, the Law Society of Scotland and others with an interest in this matter to support and pursue the fullest possible exploitation of the possibilities presented by the 2012 Act. We ourselves are engaging with Registers of Scotland in the development of the regulations which will define the levels of electronic signature needed for the purposes of the formal validity and probativity of electronic documents.

Legislative competence

1.36 Section 29 of the Scotland Act 1998 sets out the limits of the Scottish Parliament's legislative competence. We do not consider that any issues of any substance arise in this connection. We say this, in part, because the subject matter, the Scots law of contract, is generally devolved; in other words, it is a matter within the competence of the Scottish Parliament. There is no specific reservation relating to the execution of documents. In addition, we do not consider that there are any human rights implications in our recommendations. Nothing in our suggested reform is mandatory, so it will only affect a party if that party so chooses. And it is not retrospective,[45] so there is no danger of established rights being affected.

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[44] Which, at the stage of our DP's publication, was still a Bill before the Scottish Parliament; it received Royal Assent in July 2012. We refer to it as the "**2012 Act**".
[45] See paras 2.18-2.19 below.

Business and Regulatory Impact Assessment ("BRIA")

1.37 The Scottish Government introduced new requirements in 2010 aimed at achieving enhanced regulatory impact assessments of primary legislation, secondary legislation, codes of practice and guidance. In line with these we have prepared a BRIA in relation to our recommendations. This is published on our website, but our main conclusions are:

- There is widespread and well-established support, especially amongst Scots lawyers, for a clear, concise and certain means of executing documents in counterpart.
- This would allow business to be conducted more efficiently, especially as counterpart execution is a familiar part of English law and other legal systems, and a well-presented scheme may even prove attractive and influential for those other systems.
- Executing a document in counterpart is likely to be cheaper and quicker than doing so in other ways currently in common practice under Scots law
- There will be no obligation to execute a document in counterpart: any currently competent method will remain competent.

1.38 In our consultation and subsequent discussions we understand that the facility to execute documents in counterpart may be attractive in many different areas of legal practice. We have heard that transactions overseen by lawyers working in the fields of commercial property, banking and corporate law are likely to be ripe for making use of the proposed reforms. Equally, those working in many other fields, such as finance, projects, construction, energy, oil & gas, and renewables are likely to find the reforms valuable.

Acknowledgements

1.39 We are very grateful to the many practitioners and others who have generously assisted us in the course of this project. Perhaps unusually for a law reform project, we had to spend a relatively substantial amount of time identifying the problem to be addressed, largely because it lies in legal practice (and mainly in commercial practice) and is not much known elsewhere. We therefore realised early on that we needed to begin by speaking to a number of practitioners to establish what practices are used for executing documents, under Scots law and in other jurisdictions (which mainly meant under English law).[46] We also benefited at a later stage of the project from the interest shown by those who attended our seminar in November 2012,[47] and who commented on a draft Bill which we put on our website.[48] In addition, we had a number of productive discussions with several solicitors who helped us refine our draft recommendations in the closing stages of the project. We have

[46] We mentioned in para 6.1 of our DP that the initial suggestion for an examination of execution in counterpart came from Paul Hally of Shepherd & Wedderburn LLP as part of our consultation for our current Programme of Law Reform.
[47] See para 1.4.
[48] See para 1.6.

tried to list in Appendix B those who contributed at various stages of the project but we are aware that there are a number of others who also gave us assistance and advice during our work and we are very grateful to them too.

Chapter 2 Counterpart Execution

Introduction

2.1 In this Chapter we address each of the issues relating to execution in counterpart upon which we think law reform is needed to ensure that the procedure is clearly effective under Scots law. We will also attempt to show how these proposals may be linked to other existing rules to ensure that parties may end up with fully effective documents that conclude enforceable contracts and other juridical acts in as efficient and inexpensive a manner as possible, taking full advantage of current communications technology while recognising that not all will have complete access to that technology in all its forms.

Exchange of documents as agreement

2.2 As we explained in our Discussion Paper,[1] the master concept of contract in Scots law is 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".[2] Such agreement may be reached in various ways, including by way of an exchange between the parties of an offer and an acceptance thereof. Another possibility is where the parties agree to put their contract into a single document or set of documents. In such cases, the documents are usually subscribed, that is, signed at the end of the document's substantive text.

2.3 There is of course no need for remote contracting parties to use writing at all save in the case of those few contracts where the law requires it. They could, for example, speak to each other on the telephone or by a service such as Skype or FaceTime allowing users to communicate by video or messaging service over the internet, or other video or audio link. Commercial parties, and indeed parties to contracts of any substantial value, will however prefer to "get it in writing", and, if possible in a single document that all concerned have clearly identified as *the* contract to have effect between them. The main reason is the greater certainty thereby provided as to the period of negotiation being over and that of commitment begun, and also as to what the terms of the contract are. The need for "execution in counterpart" arises when the parties want such a document but are in different locations, albeit each with access to a print-out of the contract, and able to subscribe that copy and to transmit it electronically (typically, by fax or by email attachment of a scanned version) to emerge at the other end as an electronic facsimile of the signed copy itself capable of being printed by its recipient in a hard copy, albeit still only facsimile, form. Will this be enough for the parties to have a contract and, if the contract so provides, for each party's set of documents to have full contractual force?

2.4 Scots law in general has no difficulty in allowing contracts where formal writing is not required ("simple contracts", in the terminology of the 2010 Practice Note)[3] to be formed by

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[1] See its paras 2.6-2.12 in particular.
[2] See McBryde, *Contract*, para 1.03, citing H McGregor, *European Code of Contract*, (2004) 8(3) Supp (European Code of Contract) Edin LR, 1-89. See also DCFR, II.-1:101, II.-4:101-103, II.-4:211.
[3] See paras 1.18-1.28 for a discussion of the Practice Note.

way of electronic transmission of whatever writings (subscribed or otherwise) the parties have chosen to use.[4] Hence, for example, a commercial contract for the sale of goods has been held concluded by an exchange of emails, each clearly an electronic writing electronically transmitted.[5] There seems to be no doubt that an internet-based automated system for ordering goods or booking services (such as those offered by Amazon and Easyjet)[6] will provide a further instance of this should an appropriate case arise for decision under Scots law. Such transactions also illustrate the possibility of bringing into a contract a detailed set of terms by way of incorporation by reference, course of dealing or some signal of individual assent other than a signature of the parties concerned.

2.5 The exchange of writings involved in the transaction executed in counterpart is, however, not easily fitted into the structure of offer and acceptance. The mere fact that the writings signed and exchanged by the parties are expressed in identical terms is not enough. The offer and acceptance model requires a sequence of events, with the acceptance following and being made after communication to the acceptor of the terms of the offer. For this reason cross-offers have been held not to constitute a contract in *Tinn v Hoffmann*, an English case cited without adverse comment in most Scottish contract texts.[7]

2.6 It is significant in *Tinn v Hoffmann*, however, that each of the parties was unaware of the other's offer at the time its own was sent. This would not hold good in the scenario which we are considering, since (like the "exchange of contracts" recognised as constituting a contract for the sale of land in English law), normally this involves prior arrangements between the parties precisely for the purpose of completion of a contract between them. And, while it is not an orthodox mode of acceptance simply to communicate back to the offeror words identical to those of the offer, doing so certainly could not on any view be taken as a rejection of the offer. It might be possible to meet the communication requirement even more quickly than by use of electronic transmission of the documents, by parties being in contact with each other by way of telephone, video conference call or a service allowing users to communicate by video or messaging service over the internet as each signed its version of the contract.

2.7 The simplest point of all in favour of the outcome of such a process of "execution in counterpart" being a contract, however, is that it is un-necessary to force the formation of every contract into the offer and acceptance model. What is required is agreement between parties with the requisite intention to be bound, or for their agreement to have legal effect, as a contract. It is manifest that the parties to a transaction completed by way of an exchange of identical writings each signed by its sender are in such agreement.

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[4] See e.g. *Wyman-Gordon Ltd v Proclad International Ltd* 2011 SC 338 (IH); *George Wimpey West Scotland Ltd v Henderson* 2011 GWD 40-829 (Sh Ct).

[5] *Baillie Estates Ltd v Du Pont (UK) Ltd* 2010 SCLR 192 (IH). Indeed, as was shown in our DP (at paras 8.30-8.45), the emails can also be regarded as electronically signed, albeit most likely as a simple rather than as an advanced electronic signature. This question was also considered in English law, in relation to a purported loan agreement, in *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch).

[6] However, Amazon contracts under the law of Luxembourg and Easyjet under English law: see our response of 19 Nov 2010 to the MoJ's Call for Evidence and Views on the EC's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, available at http://www.scotlawcom.gov.uk/download_file/view/589/329/.

[7] *Tinn v Hoffmann & Co* (1873) 29 LT 271, cited in Walker, *Contracts*, para 7.43; McBryde, *Contract*, para 6.33; MacQueen & Thomson, *Contract*, para 2.18; SME, Vol 15, para 634. It is not referred to in Gloag on Contract.

2.8 This argument from principle can be reinforced with direct authority, albeit surprisingly old. The early eighteenth-century case of *Smith v Duke of Gordon* held that (in the words of a side note to the report) "if a mutual contract is executed by two counterparts, it is sufficient if each party subscribes the paper containing what is prestable on himself".[8] In 1684 the Duke engaged Robert Smith to serve him and his family "in chirurgery and physic, and also to supervise his buildings and architecture". The salary was 200 merks a year plus board when the Duke was at home and a daily subsistence allowance otherwise. Smith and the Duke had each signed a copy of their agreement, then exchanged these copies. Later Smith obtained decree from the Sheriff at Edinburgh against the Duke for non-payment of 2,823 pounds Scots due under the contract.[9] The Duke sought to suspend the decree on the basis that "by the contract produced by the charger himself, 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." An earlier decision said to be to the same effect, *Sinclair of Ossory in Caithness*,[10] was cited by the court, which "therefore sustained the marginal note, though not signed by the Duke, seeing it was contained in his own double uncancelled."

2.9 *Smith v Duke of Gordon* was followed in the much more recent Sheriff Court case of *Wilson v Fenton Bros (Glasgow) Ltd*.[11] This involved the exchange by the 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 sheriff-substitute (J C E Hay) 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 …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."[12]

2.10 Since the common law cannot fall into desuetude,[13] it is thus possible to argue that Scots law already recognises the possibility of counterpart execution, and therefore stands in no need of any legislative statement to that effect. But it is striking that there is nothing on this possibility in any of the standard works on contract law or, indeed, on conveyancing, or in the Institutional writings (which, given their relative closeness to *Smith v Duke of Gordon* in terms of time, might be expected to have noticed it).[14] So it is not surprising that, until recently, the idea of counterpart execution has been unfamiliar to practitioners in Scotland apart from its use in England.

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[8] *Smith v Duke of Gordon* (1701) Mor 16987. The case of *Cubbison v Cubbison* (1716) Mor 16988 also involves "doubles of a writ", and in that case there were three such doubles.
[9] A merk was worth 2/3 of a pound Scots, itself valued in 1707 at one-twelfth of a pound sterling.
[10] We have been unable to trace any report of this case.
[11] 1957 SLT (Sh Ct) 3.
[12] Ibid at 5.
[13] *McKendrick v Sinclair* 1972 SC (HL) 25.
[14] We have studied all the institutional writers from Stair to Bell, the standard contract works Gloag and McBryde, and works on conveyancing from Walter Ross to Gretton & Reid. We have also found no relevant material in the Green's or Stair Memorial Encyclopaedias, or in Gloag & Henderson, Walker's Principles of Scottish Private Law or T B Smith's Short Commentary.

2.11 We have accordingly decided that a legislative statement that Scots law does recognise execution in counterpart as a method of executing documents to make them legally effective as a single document embracing all the counterparts would be helpful in order to clarify the position and remove any possible doubt that may be thought to exist on the matter at common law. We have considered whether the question might be best addressed by way of a negative proposition – e.g. that nothing in Scots law prevents the use of counterpart execution in order to make documents legally effective – but have come to the view that a more positive statement is preferable for the achievement of certainty as to what the law is. This is all the more so as we do not think that *Smith v Duke of Gordon* answers all questions that arise from the possibility of execution in counterpart, especially (and obviously) in relation to the use of modern communications technology between the parties. Given that legislation is needed on these matters, it seems best to begin the statutory provisions with a clear statement of the basic proposition upon which the remainder will rest.

2.12 That statement, we think, should take the form of a provision recognising that in law counterpart execution creates what is to be deemed a single document. While the reality is at least two documents, they are (apart from their signature) identical in their content, and the intention of the parties is to be bound by that content as would be the case had there been indeed a single document to which all had applied their signatures. While there is an element of legal fiction in deeming there to be a single document, in substance that is the parties' desired outcome. In practice, as will be discussed further in Chapter 3, parties do often go on from the initial execution process to seek to create at least the appearance of a single fully subscribed document by attachment of the subscriptions to a master copy. This is usually linked to a wish to put the document in probative form, which is why full discussion of the issues involved is postponed until later in this Report.

2.13 We meantime recommend:

1. **There should be legislation enabling parties to execute a document by way of counterparts, with the result constituting a single document executed by all the parties.**

(Draft Bill, section 1(1) and (2))

2.14 We anticipate that this recommendation will chiefly affect the use of what the Land Registration etc. (Scotland) Act 2012 has dubbed "traditional" documents, that is to say, documents "written on paper, parchment or some similar tangible surface". The 2012 Act contrasts traditional with "electronic" documents that are "created in electronic form". It is difficult to imagine the circumstances in which parties might choose to use counterpart execution in respect of an electronic document since, as we explore further in Chapter 4 of this Report, there will be much more straightforward ways of executing such a document than a process of the parties exchanging digitally signed but otherwise identical versions. But we cannot anticipate how technology and concomitant practice may develop in future in this regard, and there seems to be no harm in simply recognising the effectiveness of counterpart execution for all documents, whether traditional or electronic, especially when in other respects to be developed more fully below we enable the use of electronic communications technology in the counterpart execution of traditional documents. It may also be useful if in a transaction one party can use and sign a traditional counterpart while the other uses and signs digitally an electronic counterpart.

2.15 We therefore recommend:

2. **The legislation enabling counterpart execution should embrace both "traditional" and "electronic" documents.**

(Draft Bill, section 4)

2.16 While counterpart execution will normally be about the creation of multi-party documents involving bilateral or multi-lateral obligations between parties, commercial transactions, and indeed transactions in general, may involve documents which create obligations for only one side of the deal. An example is the cautionary obligation or guarantee, under which the cautioner/guarantor becomes bound to pay a creditor whose principal debtor has defaulted. The possibility of counterpart execution may arise, however, even with such a document. If there are co-cautioners for the same principal debt, there will usually be an implied condition that all must be bound or none, even if the form of the obligation involves the cautioners being jointly and severally liable. If the cautionary obligation or guarantee is in writing (which it does not need to be), then the implied condition will mean that all the co-cautioners have to subscribe the document.[15] If they are in different places and cannot readily be brought together in one place and at one time in order to sign the document, then counterpart execution by these parties can provide a convenient way of proceeding. The same can apply wherever there is a document embodying a fundamentally unilateral obligation which is, however, undertaken jointly by a number of parties.[16]

2.17 We therefore recommend:

3. The legislation should not exclude the possibility of counterpart execution of documents embodying unilateral obligations undertaken jointly by two or more parties.

2.18 We do not think that it is necessary to make the legislation retrospective, however. The existence of common law on execution in counterpart means that, in the perhaps unlikely scenario of any questions arising for consideration by a court about pre-legislation exchanges of documents, the lawyers and judges involved should be able to avoid any conclusion that this method of execution is unknown to Scots law and that documents so executed cannot have legal effect. There may of course be questions beyond that, but in the absence of any certain knowledge about what such questions might be, we think it preferable not to give our proposals any retrospective effect (as is usually the case with Scottish Law Commission recommendations) the consequences of which cannot be readily foreseen. In particular we have no wish to cause unwittingly the retrospective invalidation of completed agreements still in the course of performance. Many of the major transactions completed in Scotland by way of counterpart execution in recent years had a contemplated lifetime of decades (for example, in PFI deals), and it would be highly undesirable to introduce any uncertainty as to the continuing validity of such arrangements by way of retrospective legislation. It may be that in formulating arguments and answers in any case involving pre-legislation facts the analysis of the common law and general policy in our

[15] See Gloag & Henderson, para 16.14, and also, more generally on co-debtors, its paras 3.13-3.18.

[16] Other examples might include a bond (Wilson on Debt, para 5.1), a declaration of trust (Gloag & Henderson para 41.05) and a unilateral promise (Gloag & Henderson, paras 5.01-5.03). For issues about delivery to the beneficiary of a unilateral obligation undertaken by more than one person, see para 2.46 below.

Discussion Paper and this Report will be of assistance to parties, their representatives and the courts, should any such transaction be subject to dispute in the future. In any event, however, if it is true that most counterpart execution of documents in Scotland has hitherto taken place under English law, not too many questions should arise involving the application of Scots law to these transactions.

2.19 We therefore recommend:

4. The legislation should not have retrospective effect.

(Draft Bill, section 5)

2.20 We think it un-necessary to provide that execution in counterpart may only be used when parties so agree. This seems to us to be self-evident: counterpart execution can only take place as a result of prior arrangements between the parties, and if it happens that two or more parties separately and by chance each subscribe a document, each of which bears the same text (which seems a very unlikely scenario), then probably without more the principle of *Tinn v Hoffmann* applies,[17] and whatever the legal effect of the individual documents may be, they do not together add up to a contract between parties neither of whom intended to be bound to each other as a result of their individual actions. In the commercial transactions which are our main concern, there will generally be a clause in the putative contract providing that the contract is to be, or may be, executed in counterpart. But to provide for such a clause as a *requirement* of the process would deprive parties of a flexibility that may be useful: for example, where the parties initially plan a traditional all-parties signing ceremony at a single location, but supervening events prevent one or more of them from attending at the planned time and place. It is sufficient therefore for the legislation to enable execution in counterpart without requiring that the document to be executed thus specifically provides for that.

2.21 We therefore recommend:

5. The legislation should not impose any requirement that the document so to be executed contain a clause setting out that execution is to be by way of counterparts.

2.22 We digress momentarily to observe that a question for analysis in many cases may be whether parties' unwritten or informal agreement prior to the drawing up of a formal document embodying the agreement, whether or not by counterpart execution, is itself a contract. A range of possibilities exists and here we mention only three.[18] It is possible for the parties to make explicitly clear that they have no intention to be legally bound until the completion and execution of a formal document. If so, there will be no contract between them, however much their informal agreement may meet contract law's general requirements of consensus on the essentials of the agreement in question.[19] An alternative

[17] See para 2.5.

[18] Consider further Gillian Black, "Formation of contract: the role of contractual intention and email disclaimers", 2011 *Juridical Review* 97, and *Aisling Developments Ltd v Persimmon Homes Ltd* 2009 SLT 494 (OH) (court found no intention to create legal relations in parties' informal arrangements).

[19] *Karoulias (WS) SA v The Drambuie Liqueur Co Ltd (No 2)* 2005 SLT 813 (OH); *McDougall v Heritage Hotels Ltd* 2008 SLT 494 (OH). Note also the Supreme Court decision, *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] 1 WLR 753, in which the parties were held to have impliedly waived their previous agreement that there would be no contract until the agreement was formally executed (in counterpart).

possibility is that the parties' informal agreement is a contract, but that its enforceability as such is subject to a suspensive condition of being put in more or less formal writing.[20] Thus the contract only becomes enforceable as such when the suspensive condition is fulfilled, although meantime the parties are obliged not to impede the condition's purification, for example by refusing to draw up a formal document of the kind required, or declining to sign it once it has been drawn up. A third possibility is for the parties to agree that an informal agreement amounting to a contract is enforceable as such but that it will be or is superseded by a subsequent formal document embodying the same agreement. It does not appear that the informal agreement will necessarily be void from uncertainty as a mere "agreement to agree". It seems to us that these questions might arise and the answers require at least some legislative guidance were we to provide that parties must agree to use counterpart execution. But this would be to make the legislation more complex and, perhaps, more controversial, and we think the topic, which also affects arrangements not necessarily involving counterpart execution at all, should be left for another occasion.[21]

When a document executed in counterpart becomes effective

2.23 Although our discussion of counterpart execution has arisen in the context of contract formation, it is important to be clear that the process is a method of making documents legally effective rather than one of making contracts. What precisely the legal effect of the *content* of a document or set of documents may be, is a secondary consideration. The commercial transactions in which the process has its most significant application may embrace a number of distinct juridical acts recorded in writing (whether or not required by law): not only the creation of a contract, but also the transfer of property, or the provision of security rights with proprietary effects as well as personal securities (guarantees, or cautionary obligations). While many such documents will be contractual in nature (in addition to any other legal effects they may have or be capable of having),[22] that is not the essence of what we seek to achieve in the present reform, and the legislation should confine itself to what is needed – that is, be couched in terms of the execution of a document so that it has legal effect as a document.

2.24 It should also be borne in mind that "effectiveness" is here a concept of limited meaning. There is a distinction between the effectiveness of a document in establishing a legal relationship between the parties to it, and the effectiveness, or enforceability, of the various obligations embodied in that document. In some cases, moreover, further steps beyond execution will be needed for the document to have its full intended effects. For example, a floating charge will have to be registered in the Register of Charges within 21 days of its execution or otherwise be void (which, however, has no effect in relation to any contract or obligation for the repayment of money secured by the charge).[23] But the charge otherwise takes effect from the date of its execution by the company granting the charge, with important consequences for creditor priority in the event of the company's subsequent

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[20] E.g. where parties agree "subject to contract": see *Stobo Ltd v Morrisons (Gowns) Ltd* 1949 SC 184 (IH) per Lord President Cooper at 192.

[21] Also to be considered in any examination of the law in this area would be so-called "Melville Monument" liability, stemming from the case of *Walker v Milne* (1823) 2 S 379, but recently placed in significant doubt by an Extra Division in *Khaliq v Londis (Holdings) Ltd* 2010 SC 432.

[22] The documentation underpinning proprietary rights in security (including floating charges) will generally also have effect as a contract (in the language of classical Roman-Scots law, as a "real contract", e.g. a pledge). Dispositions also commonly have contractual effects between the parties. See generally K G C Reid, *The Law of Property in Scotland* (1996), para 642 (p 517).

[23] Companies Act 2006, s 889.

insolvency.[24] In a contract, the parties to the document are bound, but not necessarily to immediate performance. A sale of land gives a date of entry upon which seller and purchaser must exchange disposition and payment of the price, or is subject to the purchaser obtaining satisfactory planning permission; construction work is to proceed in phases commencing on certain dates; a client will become obliged to pay for elements of construction work only upon an architect or engineer's certification of satisfactory completion; the contractor will not be obliged to provide materials until a certain stage of the works has been reached; a transfer of shares is to take place only upon the buyer's demand. The obligations are subject to conditions, in other words, which mean that they are not enforceable until a date well after the completion of the initial contract. It may also be possible for a document to have retrospective effects: for example, to bring within the scope of a contract performances rendered before its conclusion, as in construction projects in which work commonly begins before a formal contract is completed under which that work will be assessed, valued and paid for. In effect, at least where the work previously done was carried out under some informal contract, this is a form of novation, where the parties agree that a new set of obligations should replace those previously existing between them.[25]

2.25 The issue of when a document becomes effective in the narrow sense just explained has been pressed upon us by commercial practitioners as an important consideration to be addressed in our proposed legislation on counterpart execution. In some sectors, particularly those where Scottish aspects of a transaction are but one dimension of a complex cross-border transaction and all the documents involved in a counterpart execution process must become effective at the same time, this can be extremely problematic and another major reason for choosing not to contract under Scots law.[26] Stephen Hart (Legal Counsel, Braveheart Investment Group) has told us:

> "[I]t is ... common for parties not to sign until the last moment, when the transaction is certain but to the detriment of commercial expediency. In particular, where multiple investors are involved there is often a commercial sense of inter-conditionality whereby parties are reluctant to be bound to the document … until each investor, and the company, is ready to do so. It is my experience that the parties intend the effective date of the document to be a mutually agreed date on which all the commercial requirements are met, rather than the final date of signature. To this end signed pages are often sent to be held "undelivered", though complications arise where completion of the transaction rolls over into the next day."

2.26 The difficulty stems from practice under English law where a deed (and maybe also a simple contract or other document) typically has a sentence at the top of the first page to

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[24] Ibid, s 879(5). This position will change if and when the relevant parts of the Bankruptcy and Diligence etc. (Scotland) Act 2007 come into force: under s 38(3) the charge will become effective only upon registration in the new Register of Floating Charges. The position has in any event changed from 6 April 2013 when the Companies Act 2006 (Amendment of Part 25) Regulations 2013 (SI 2013/600) took effect. This affects the company charges regime across the UK: see further the discussion at para 2.41 below.

[25] Gloag & Henderson, para 3.37. It is not clear whether, where the previous work done was not carried out under any contract, so that any obligations stem from the involuntary obligations arising from unjustified enrichment or "Melville Monument" liability, these obligations can be novated by a subsequent contract.

[26] The importance is also underlined by what we understand to be a standard form of testing clause (known as a testimonium) for English law deeds: "This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it." We understand that a single date is always given, meaning that all of the counterparts are delivered and effective on the same date (the date of completion); against this background it is easy to see that the Scottish practice of narrating that a document is subscribed on, say, 1, 5 and 6 April 2013 (being the dates of the three parties' signatures) is alien and potentially confusing.

indicate when it has been delivered and takes effect.[27] Where a date is stated in a deed, there is a presumption that it was delivered on that date. This date tends to be the significant one in a document, while signatures, whether of granters or witnesses, need not be, and are not usually, dated.[28] This contrasts starkly with the Scottish practice, where generally it is the subscriptions that are dated rather than the document, and where as a result different dates may appear on its face.[29] There will also typically be no statement of when the document was delivered, even although that is probably the most important general requirement for the document's effectiveness in Scots law.

Delivery – general

2.27 The basic principle of delivery in Scots law was classically stated in the eighteenth century by the institutional writer, Erskine, as follows:

> "A writing, while it is in the granter's own custody, is not obligatory; for as long as it is in his own power, he cannot be said to have come to a final resolution of obliging himself by it."[30]

The Scottish rule thus stated is wider than the English rule requiring deeds to be delivered. The writing need only be obligatory, and there is no requirement of form or formality beyond its being a "writing". It may well have been the case in Erskine's time that most writings having legal effects would have been formal in some sense; but the requirement of delivery in the modern law is not specifically limited to such documents.

2.28 In other words, with written obligations, it is not enough even to communicate to the beneficiary of the writing that it has been made; there must also be such delivery of the writing to the beneficiary to put the document beyond the granter's control. The famous example is the seventeenth-century case of *Stamfield's Creditors v Scot's Children*,[31] where the granter of an assignation had intimated to the assignee that the document had been signed and awaited collection; but before that could take place the granter was found murdered with the signed document beside him. It was held that since the document had not been delivered it was ineffective. Intention to deliver did not meet the requirement of delivery. As McBryde puts it: "The intention to deliver and the fact of delivery must both exist."[32]

2.29 The guiding principle on when delivery takes place is whether or not the granter of the document has deliberately put the obligatory document beyond his or her further control

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[27] For the requirement of delivery in English law, see para 1.14 above.

[28] See further Chitty on Contracts, ch 4; The Law Commission of England & Wales' Report on the Execution of Deeds and Documents by or on behalf of Bodies Corporate, para. 6.6, (at http://lawcommission.justice.gov.uk/docs/lc253_Execution_of_Deeds_and_Documents.pdf); Olswang LLP, "Signing deeds and documents – the law clarified", Part 4, at http://www.olswang.com/pdfs/corp_sep05a.pdf; and "Execution of Deeds and Documents" on PLC's website (subscription required) at http://plc.practicallaw.com/0-380-8400.

[29] In particular, parties' signatures are commonly dated (although this is not essential for validity or the probativity of the document); witnesses' signatures need not be dated.

[30] Erskine, *Institute*, III, ii, 43. If the document contains a clause dispensing with delivery, and the granter dies without revoking the document, it then takes effect despite the lack of delivery. But such a clause has no other effects; it is not a means of over-riding the requirement of delivery generally.

[31] (1696) IV Bro Supp 344 (in which the assignation presumably contained no clause dispensing with delivery).

[32] McBryde, *Contract*, para 4.12.

with the intention of becoming bound by it.[33] There may be delivery to or by third parties such as a solicitor.[34] Registration of the writing, typically in the Books of Council and Session or sheriff court books, may suffice.[35] But the *Stamfield* case[36] makes it unlikely that telephone calls or other messages confirming that a document had been signed and could be collected by, or had been posted to, the beneficiary, would be treated as delivery. There has to be something more than mere intention to deliver.

2.30 But at the same time, where a document is physically transferred from one party to another without the intention to deliver to that party, there is no delivery. So the possession of a document may be transferred from one party to another for a purpose more limited than that of delivery.[37] The typical example is when a document is placed in the possession of an intermediary person, such as a solicitor. Gloag recognised that "[w]hen a deed is placed in the hands of a third party the question whether it is to be regarded as delivered is one of the granter's intentions."[38] Most of the cases are about when delivery to the third party is *not* to be regarded as legally effective delivery, and there have been said to be certain *negative* presumptions on that matter – for example, that no delivery is effected by the granter putting a document in the hands of its solicitor.[39] Gloag, however, seems to have accepted the view that "there is no presumption of importance, and that the question of delivery is one of intention to be decided on the whole circumstances of the case."[40]

2.31 McBryde on the other hand says that there is a *positive* presumption of delivery (rebuttable by parole evidence) if the grantee or an appropriate person connected with the grantee is in possession of the document. He adds, however, that these presumptions are not as strong as stated by Erskine.[41] McBryde further notes that in "well established" conveyancing practice when settling a transaction by post, the granter's solicitor will send the disposition to the grantee's solicitor on condition that the deed is to be held undelivered until the granter's agent receives the price.[42] There is a lack of judicial authority for this practice. It seems consistent, however, with the view that, although not enough in itself, it is intention that in the end governs when delivery takes place in law (or indeed when an act that might otherwise be seen as constituting delivery is ineffective, as the case may be).

2.32 The requirement of delivery, it may be noted, is not inconsistent with the Draft Common Frame of Reference (DCFR), which is in general the yardstick against which we are measuring the Scots law of contract in the project of which this Report is part. In terms of the DCFR, an obligatory document is a "juridical act", i.e. a statement intended to have legal effect as such, which is communicated as a notice to the other party and "becomes effective" when it "reaches" that party. "Reaching" is constituted by delivery to the other party in person, or to that party's place of business or habitual residence, as the case may

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[33] Gloag, *Contract*, p 71: "delivery means more than physical transfer; it imports that the granter has consented to place the deed beyond his own control."
[34] McBryde, *Contract*, paras 4.15-4.18.
[35] Ibid, paras 4.22-4.29.
[36] See para 2.28 above.
[37] *Scott's Trs v Scott* (1902) 40 SLR 133, 134 ("in any view [the document] was signed and left in the father's hands not as a delivered document, but in view of a proposed transaction").
[38] Gloag, *Contract*, p 72.
[39] A relatively recent example is *Henderson v McManus* 1981 SC 233 where it was held that where a deed was held by the agent of the grantor in circumstances in which it remained within the power of the grantor to destroy it, delivery to the grantee could not be deemed to have taken place.
[40] Gloag, *Contract*, p 72.
[41] McBryde, *Contract*, para 4.11.
[42] Ibid, para 4.13.

be.[43] It should be noted, however, that the DCFR also allows a notice to provide for delayed effectiveness, that is, effectiveness after it has reached its addressee.[44] This supports the idea that an obligatory document may be in the possession of its intended beneficiary without it necessarily having taken effect from the moment of physical hand-over. The intention of the party making the hand-over is the key to when the document becomes effective

2.33 Returning to Scots law, a final critical point is that not all written contracts require delivery. There is an important distinction in this regard between unilateral contracts and mutual ones: where a mutual contract has been reduced to writing in a single document signed by all parties to it, there is no need for physical delivery of the document between the parties.[45] The underlying principle was again well stated by Erskine:

> "Mutual obligations or contracts signed by two or more parties for their different interests require no delivery … because every such deed, the moment it is executed, becomes a common right to all the contractors. The bare subscription of the several parties proves the delivery of the deed by the other subscribers to him in whose hands it appears; and if that party can use it as a deed effectual to himself it must also be effectual to the rest."[46]

In mutual documents the date of the last subscription will be, absent any other relevant factor such as a statement in the document itself, the date upon which the document becomes effective.

Delivery – counterparts

2.34 The foregoing paragraph means that the requirement of delivery has its greatest practical impact on written unilateral obligations.[47] But mutual obligations which are set out in multiple copies of the contract each of which is subscribed only by its granter before being exchanged between the parties (as distinct from mutual obligations which are executed by all parties subscribing a single document – what we term an "all parties signing ceremony") are more problematic. Even given that the common law recognises counterpart execution, there is uncertainty as to whether or not it also requires the delivery of the individual counterpart to the other counterparty (or counterparties, as the case may be) before the parties' document can come into effect. Much may depend on the exact status of a single counterpart immediately after it has been executed: is it then an obligatory document in relation to the granter, or not?

2.35 We think, in the absence of any direct authority, that to become effective at least in the sense of binding the parties subscribing the counterparts as if to a single overall document, some form of delivery of each counterpart to the other counterparties is in principle required. On its own an executed counterpart is no more than the declaration of the party (or parties) who have subscribed that particular document. It might be possible to argue that communication to the other parties of the existence of the counterpart and the fact of its having been subscribed is enough, as in the case of ordinary offers and acceptances.

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[43] DCFR, I.-1:109.
[44] DCFR, I.-1:109(3).
[45] McBryde, *Contract*, paras 4.44-4.69.
[46] Erskine, *Institute*, III, ii, 44. See also *Robertson's Trustees v Lindsay* (1873) 1 R 323 (IH).
[47] We return to this below: see para 2.46.

But neither offers or acceptances are *in themselves* obligatory documents, whereas a counterpart is intended to have obligatory effect, albeit one the legal effectiveness of which may be suspended until after all other remaining counterparts are themselves executed and delivered.[48]

2.36 Our understanding is that in practice delivery of the subscribed counterpart to the other counterparty or counterparties is commonly required before any document executed in counterpart may become effective as a single document. This leads us to think that this should also be the basic position stated in any legislation on the subject. The underpinning idea is that the acts of delivery – whatever they may be[49] – carried out by the parties with the intention of putting their own counterparts beyond their control in order to become bound by them have this effect. We accordingly recommend that:

6. A document executed in counterpart becomes effective at the earliest when the subscribed counterparts are delivered to the other parties.

(Draft Bill, section 1(4) – (6))

Counterparts held as undelivered

2.37 We have already mentioned the importance in practice of parties being able to control the date and time at which their document takes effect.[50] One way in which this might be done, we believe, is by use of a technique which is already common in some areas of practice, for example residential conveyancing. It involves an executed document being physically transferred to the possession of the person to whom it must be delivered in order to be effective, but on condition that it be "held as undelivered" either until a specified time or until a specified event occurs. One advantage of this is that it allows the recipient time to check that the document is in order and to prepare for any further use which will be made of it (such as is true of a disposition, which must be recorded or registered). Another advantage, however, lies in the sender's ability to trigger delivery (in the legal sense of the term) at a precisely determined time and in a convenient manner. It is the desirability of securing this second advantage which has been raised with us in the context of counterpart execution.

2.38 As a legal proposition, acts that would otherwise constitute delivery may be carried out without the necessary intention to be bound and, if so, under the existing law (and also consistently with the DCFR), these acts do not constitute legally effective delivery.[51] We see great benefit in removing any doubt that the same is true for counterparts, as they are an unfamiliar form of document in Scots law. In other words, it would be advantageous to have a clear statutory statement that the parties may agree that a counterpart which has been delivered as a matter of fact does not become effective (i.e. is not delivered as a matter of law) until a later date, whether that be a specified date or a date upon which some specified condition is fulfilled. That agreement, we consider, might be embedded in the counterpart itself or made in some other way. This would meet the case figured by Stephen Hart where

[48] Note, however, the view that, at any rate in contracts requiring formal writing such as sales of land, the missive acceptance must be delivered (as distinct from communicated) to the offeror. How this relates to other rules, such as the postal acceptance rule, is unclear.
[49] See paras 2.61-2.71 on electronic delivery.
[50] See para 2.25.
[51] See paras 2.31-2.32.

the counterparts are sent to be held undelivered and then "activated" by the parties as a document when all are ready to have it so.[52]

2.39 Two policy dimensions underpin this approach. One is that in general parties should be free to order their own affairs, especially in commercial transactions. That argues for the date of effectiveness of a document being whatever date the parties to it agree to choose. The other dimension, however, is that this freedom should not become an instrument of fraud, so that a document is made to appear effective before it was actually executed. This argues for the law's need to put in place such controls as may be necessary to limit the possibility of fraud: here, that the date of the document's effectiveness cannot be prior to some event such as the parties' completion of the process of executing it and/or its physical transfer or transmission to the other party or parties.[53]

2.40 It may be useful to set out here how we envisage the proposed rules operating in relation to the creation of a mutual document by way of counterpart execution. The first step will be the execution and delivery (but in a factual sense only, and not in the legal sense) as required of each of the counterparts. The parties, when (physically) delivering each other their executed counterparts, may provide that they are then to be held as (legally) undelivered, with legal delivery only being completed when the parties indicate that they intend it to be so. The mutual document will take effect only when legal delivery of the counterparts is completed. The power to defer legal delivery of the counterparts beyond the date of their physical delivery will enable parties to have control over, and to be certain about, the precise time at which the mutual document takes effect. Uncertainty might otherwise exist, for example where the parties are executing their counterparts in different parts of the world and at different times.

2.41 One area in which we have been told that it will be particularly important to know the precise point in time at which a document takes effect is that of company charges, not least in the light of changes to the rules on registration of such charges.[54] One scenario covered by the new rules is that in which the charge document is a "deed", which is defined for non-English/Northern Irish purposes as an instrument which requires delivery in order to take effect.[55] It is thought that counterparts will therefore be classified as deeds. But the document executed in counterpart will itself not necessarily be a deed in this sense. If it is a mutual document, for example, no further delivery is required after execution is completed by way of the subscription and exchange of counterparts. In turn, this means that in many cases it will be the date upon which *execution* is so completed which is the relevant one for determining the date by which the charge must be registered in order to be effective. For this reason, we consider that the ability to hold counterparts as undelivered will usefully allow parties to take control of when documents which incorporate a charge need to be registered under the new regime.

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[52] See para 2.25.
[53] But this should not prevent the possibility, discussed at para 2.24, that the document may make provision in relation to matters that were already extant before it was executed.
[54] See s 859E of the Companies Act 2006, as inserted by the Companies Act 2006 (Amendment of Part 25) Regulations 2013 (SI 2013/600) (in effect from 6 April 2013), and Dr Hamish Patrick's article in the Journal of the Law Society of Scotland (Feb 2013), available at http://www.journalonline.co.uk/Magazine/58-2/1012220.aspx. Parallel rules for charges by LLPs are contained in the Limited Liability Partnerships (Application of Companies Act 2006) (Amendment) Regulations 2013 (SI 2013/618), also effective from 6 April 2013.
[55] See s 859E(5) of the Companies Act 2006.

2.42 As a final point, we have deliberated as to whether the status of a counterpart being held as undelivered is something in the unilateral control of the subscribing party or whether it has to be a matter of agreement between that party and the recipient. As this issue has arisen late in our deliberations it is not something on which we have consulted. It would, in our view, be useful to collect information about current practice in respect of documents other than counterparts which are to be held as undelivered (e.g. dispositions). For the moment we have couched the draft Bill appended to this Report in terms of the sender *instructing* that the counterpart be held as undelivered but we have an open mind as to whether this is the most appropriate formulation.

2.43 We therefore recommend:

7. Parties may provide that their executed counterparts, despite physical delivery or transmission, are to be held as undelivered until an agreed future time or event, whether specified in the document to be executed in counterpart, or in some other way.

(Draft Bill, section 1(7) – (10))

2.44 Our view is that rules framed in this manner give the parties considerable freedom and flexibility to determine the date upon which their documents become effective while also providing some protection against fraud or other possible misuses of that freedom, in that there can only be delivery of subscribed counterparts, but that the date upon which delivery has effect must be either contemporaneous with or subsequent to that of the last of the subscriptions. For maximum efficiency it will probably be necessary to arrange the process of execution in such a way that all subscriptions have the same date; but it is possible to deal with the situation where that is not, or cannot be, the case.

2.45 One concern which we have had is whether there should be any limit on the length of time for which a counterpart may be held as undelivered. It has not been pressed upon us as an issue by consultees, probably because in the vast majority of commercial transactions the concern is indeed to conclude the legal formalities of the transaction as soon as possible and it is likely that, where a counterpart (or, more typically, a suite of counterparts) is to be held as undelivered, legal delivery will be effected at an early and mutually agreed time or event. But there may be questions about the latency of an undelivered document, capable of being transformed into the source of legally binding obligations as and when the parties find it useful, and the possibility that this might create opportunities for fraud. The dangers may be thought to exist in the present law, yet not in fact to have given rise to any difficulties so far as we are aware. We have decided, therefore, not to try to deal with this more general question in the context of an exercise dealing only with counterpart execution. We are comforted by the thought that generally documents by themselves will normally give rise only to personal and not to real rights, which will therefore be of limited significance in the context of insolvencies where concerns about latent rights and fraud are at their greatest.

Delivery – unilateral documents

2.46 Before leaving the topic of delivery, there is an aspect of the current law on delivery in relation to unilateral documents which needs a brief mention. At present, it is well-known

that such documents, for instance bonds of caution, guarantees or dispositions, are only effective when delivered to the party who may rely on them.[56] A notorious example is in the *Stamfield's Creditors* case mentioned earlier.[57] Where there are two (or more) granters of a unilateral document we envisage that, if desired, it may be executed in counterpart.[58] However, we intend no departure from the current requirement that the unilateral document so executed cannot be effective until delivered to the party who is to be the creditor under it. (This is additional to the requirement already discussed that the counterparts of any document executed in counterpart must all be delivered between each of the subscribing parties before the document can come into effect.) To make the position clear, a general statement should be included in the legislation to the effect that the document executed in counterpart and delivered between the various subscribers must also meet any other requirement of the law (such as delivery to its creditor) for such a document to become effective. We therefore recommend:

8. A document executed in counterpart must, in addition to the counterparts being delivered between the subscribing parties, meet any other requirement of the law before it can become effective.

(Draft Bill, section 1(6)(b))

Further operational issues

2.47 Given that a party that has signed its counterpart must deliver it to all the other parties before the document can take effect, how may this be done? This very practical question arises most acutely when, as is common, there are numerous parties to the document. From what we have been told by practitioners, the two main issues are whether and, if so, how parties may appoint a person to oversee the sending and receiving of counterparts and, secondly, how delivery can be facilitated by the use of electronic means. We now deal with these issues in turn.

Nominees to take delivery

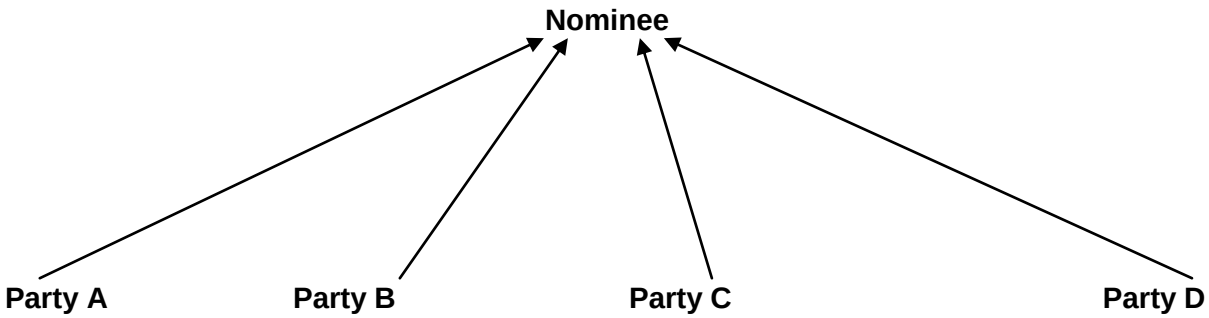
2.48 The first issue, which is particularly acute where there are many counterparts to be executed and delivered, is that the requirement for a party to deliver its counterpart to each other party may impose a considerable burden upon them. In the electronic communication context, email provides one answer in that a single email can be sent to a number of different addressees at the same time.[59] Similar possibilities exist with fax: while usually a fax is sent to only one person at a time, it is possible to "broadcast" one fax to multiple recipients if one has available the appropriate technology. But in the law as it stands it is highly uncertain whether such electronic transmission of a traditional document can

[56] Another example may be the floating charge document under which only the security is granted, the charge-creditor's relevant obligations (e.g. to lend or extend other financial facilities to the granter of the charge) being embodied in another, independent document.
[57] See para 2.28.
[58] There is no need for a specific recommendation to this effect as recommendation 1 (in para 2.13) embraces all documents, whether unilateral or otherwise. We note that a floating charge of the type mentioned above at footnote 56 above will normally require only a single subscription (of a director, secretary or authorised person for a company, or a member in the case of an LLP) along with that of a witness, and hence cannot be executed in counterpart. However, probativity may also be conferred under the 1995 Act if the document is subscribed by two directors (or members) with no witness, and in this case counterparts may be used.
[59] This, however, raises other issues which we address below: see paras 2.87-2.94.

constitute delivery. We deal further with that issue below, recommending that the uncertainty be removed by a provision that, if certain other requirements are met, such transmissions can be delivery.[60] Even if this recommendation is accepted, however, the potential for confusion and error is high if each party to the transaction needs to email or fax every other party in order to achieve electronic delivery of its executed counterpart, while no one party can be completely certain that all the other parties have effected all the deliveries required to make their document effective.

2.49 In the hard copy world, on the other hand, a document can only meaningfully be transferred to one other person at a time. It might be possible to imagine a person making a contract with a number of other parties signing the number of counterparts necessary to effect delivery of one copy to each of those others; but this seems a massively over-cumbersome way of doing business, especially when all the other parties are having to do the same thing. We therefore need to find a mechanism that will allow legally effective yet also practicable and easily accomplished delivery of documents to take place in both electronic and hard copy mediums.

2.50 The answer seems to lie in enabling parties to agree that for the purposes of counterpart execution delivery, whether of hard copy documents or by electronic means, may be made to an agreed nominee (who may or may not be one of the parties to the transaction, or an agent of one of the parties in other aspects of the transaction, e.g. its solicitor), with the delivery required for the counterparts to become effective as a single document being achieved when the nominee has received all the counterparts. The structure of the transaction's completion may be represented like this, with the arrowed lines from the parties showing the delivery of their executed counterparts:



We therefore recommend:

9. Parties executing a document in counterpart may agree to appoint a nominee to take delivery of all the relevant counterparts on their behalf.

(Draft Bill, section 2(1))

2.51 We have considered whether the nominee should have to inform all the parties once all deliveries have been received as a further necessary step before the document can

[60] See paras 2.61-2.66.

become effective. This is what would normally be required in practice, by agreement between the parties and the nominee. On due reflection, however, we have decided that this is another matter which can be left to the parties in making their arrangements rather than needing to be put into statute and, perhaps, requiring definition of what will constitute notification and provision on the effect of failures of communication technology affecting one or more of the parties and/or the nominee. This is better left to the parties to sort out in their own particular circumstances. We note in passing that a possible advantage of a rule requiring only the completion of all the necessary deliveries is that the document can become effective as early as possible, which may be in the interest of the parties. If for example the document is a contract for the sale of land, then its coming into effect upon all deliveries being completed will defeat any subsequent inhibition rather than being dependent upon when the nominee chooses to inform the parties.[61] Equally, of course, as already discussed, parties may wish to delay the effect of delivery of the counterparts until a point later in time than the physical transfer to the nominee, in order to create certainty for themselves as to the date their document becomes effective.[62]

2.52 We do not think that there is anything in this proposal which is inconsistent with the general law on delivery of documents. It seems to us that where parties seeking to enter a legally effective transaction in writing set up a mechanism like the one we propose to meet the requirement of delivery, there is no reason why it should not itself be legally effective. Further, the proposal is consistent with existing legal practice as we understand it, where in principle parties may agree that delivery to a third party is to be the means of giving the document so transferred legal effectiveness.[63]

Status of nominee

2.53 We do not think it necessary to place the nominee in any legal category such as agent, depositary or custodian, although the person nominated may be acting in one or other of these capacities elsewhere in the transaction, for example as solicitor for one of the parties. But we do not wish to bring in any additional legal baggage along with the creation of a mechanism designed entirely for the convenience of parties in multi-party transactions, the documentation for which is being executed in counterpart. Instead we think that the legislation itself should spell out the minimum duties of the nominee while leaving it open to the parties to vary, add to, or replace these as they see fit. These duties should be, we think, to receive and then to hold and preserve the various counterparts. The additional duties which the parties might choose to impose could include the creation of a docquet for addition to the final document giving the date and, if necessary, the time when delivery was completed.

2.54 The duty to receive is self-evident – what otherwise is the point of having a nominee? – and probably does not need specific legislative provision. But we think that the nominee should, subject to any alternative agreement which the parties may put in place, have a duty to the parties to hold and preserve the documents in the form in which they were received, since this will be important evidence that the document has taken effect and about when it

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[61] Compare *Park, Petrs* 2009 SLT 871 (OH), where the faxing of an acceptance missive on the day before an inhibition took effect in relation to the heritable property to be sold under the contract was held not to have completed the contract so that the inhibition prevented the implementation of the contract formed when the hard copy of the acceptance for the sale of land with its wet ink subscription was delivered to the seller.

[62] See paras 2.37-2.43.

[63] See paras 2.29-2.31.

did so. But the nominee's failure to comply with the duty should not affect the validity of what has been done previously. The document takes effect by virtue of the deliveries having been completed, and the nominee's failure to hold and preserve what was received merely makes evidencing that completion more difficult from a practical point of view. We do not think that the legislation should give any sanction for failures by the nominee to fulfil its duties, this again being a matter for the parties.

2.55 The parties' arrangements as to the nominee's duties need not be expressed in the counterpart documents or in some separate agreement, we think, as that again might be to place an excessive burden upon them. The legislation should be clear, however, that agreement may be implied in the usual ways: for example, from custom in the particular business sector in which the transaction is taking place; from established courses of dealing between the parties; or from their conduct in the specific transaction being completed in this manner. We think that, while express arrangements may well be made as part of setting up the use of the nominee, there should be no obstacle to parties making agreed arrangements as to the nominee's duties in respect of the delivered counterparts after full delivery has been achieved. It would also be in accordance with principle for such subsequent agreements to be capable of displacing any earlier ones on the matter.

2.56 We accordingly recommend:

10. The duties of the nominee should be to receive and then to hold and preserve the delivered counterparts in the form in which they were received. The parties may vary, add to, or replace these duties by agreement, which agreement may be express or implied. The agreement may be reached before or after the nominee has taken delivery of the counterparts.

(Draft Bill, section 2(3))

11. A nominee's failure to fulfil the relevant duties will not deprive the document of the legal effects it would otherwise have.

(Draft Bill, section 2(4))

Appointment of one of the parties or their agent as nominee

2.57 As has already been said, we have been told by practitioners that it is common for counterpart execution to be administered by the solicitor to one of the parties. This has clear practical advantages, especially where the document has largely been negotiated and drafted with the assistance of firms of advisers. There may be other advantages too: for example, the rules on execution and related matters are not always obvious or intuitive, and legal advice about them may be welcome. That said, there is no reason why parties should not decide to nominate one of their number as the document administrator. We consider that there is a benefit in making this clear in the legislation and we therefore recommend that:

12. The legislation should state that parties may nominate either one of their number or an agent of a party to take delivery of the counterparts.

(Draft Bill, section 2(2))

2.58 Before leaving this subject, we must deal with a consequential issue which arises when parties choose to nominate one of their number to take delivery of the counterparts. It relates to the requirement of delivery which we have discussed earlier in this Chapter.[64] Suppose that a document is to be signed in counterpart by five parties, A to E, and that A is nominated to take delivery of the counterparts. For parties B, C, D and E the requirement of mutual delivery is met by each of them delivering their executed counterpart to A. But what of A's counterpart? Two points need to be borne in mind. First, it is not possible for A to deliver the counterpart to itself: the essence of delivery is the putting of the document beyond one's control.[65] This is true even though delivery might be thought to be between A as a party and A as a person nominated by the parties. However, although A wears two hats, the extra hat does not create a new person for these purposes. The second point is that it is not within parties' power to decide to do away with A's need to deliver its counterpart, as one cannot contract out of the delivery requirement.

2.59 We therefore consider that, in this situation, A is obliged to deliver an executed counterpart to B, C, D and E. That, then, is the problem. In keeping with our overriding aim of offering a permissive and flexible framework within which parties may operate as they think fit, we have decided not to prescribe a solution. There are, though, a number of options. Perhaps the simplest is for A to send to each of B, C, D and E a subscribed counterpart (which can be done electronically, as we explain below)[66] along with the counterpart which each of them is to subscribe and return to A. Or it may be enough for A to send its subscribed counterpart alone: this would clearly constitute delivery by A, and the document could also function as the one to be executed and returned to A.[67] Slightly more cumbersome – but maybe attractive where there are many parties – would be for parties to nominate two of their number: thus B could be appointed to act as the nominee for the (sole) purpose of taking delivery of A's counterpart and A could, as before, be appointed to act as the nominee for the other parties' counterparts. This would mean that every party need only deliver its executed counterpart to one person: either B (in the case of A's counterpart) or A (for all other counterparts). Other options are also feasible, and in view of our preference for allowing parties to come up with an appropriate solution for their own situation we do not recommend any legislative provision on this issue.

Nominee sending documents

2.60 The use of a nominee may also be attractive, not only in the context of receiving delivery of documents, but also in the context of *sending* a traditional document which has more than one signatory.[68] Which of the signatories is to effect the delivery required to make the document effective? Could the document be delivered by a third party instructed or authorised by the parties to the document? McBryde states:

> "There is no reason why a deed may not be delivered by one person on behalf of another. This may occur although the transferor is not in a contractual sense the agent of the granter. [*McBryde goes on to instance cases from the law of ius*

[64] See para 2.27 onwards.
[65] See, e.g., Erskine's statement quoted at para 2.27 above.
[66] See para 2.61 onwards.
[67] For a variation on this example, but one which does not involve a nominated person, see para 2.93.
[68] See the example of the co-cautioners discussed at para 2.16.

quaesitum tertio] … Where there are several parties it is almost inevitable that one may deliver the deed to the grantee on behalf of the others."[69]

We accordingly think it un-necessary to make specific provision enabling the use of nominees to effect as well as to receive delivery, since this is already sufficiently clear and is in any event not a problem commonly arising in transactions where the documentation is to be executed in counterpart.[70]

Electronic delivery of traditional documents

2.61 We now turn to a separate, and arguably more wide-ranging and important topic which will affect, not just the execution of documents in counterpart, but the sending of any document where delivery of a "wet ink" signature is required. We are well aware that, as set out in our Discussion Paper and again above,[71] the law of delivery is in other respects in a far from clear or satisfactory state. Above all, in relation to modern execution in counterpart, the authorities on whether electronic transmission of obligatory writings recorded in a traditional document amounts to delivery are not consistent or clear.[72] Without reference to any authority, McBryde suggests that "[t]ransmission of a copy of the [document] could be intimation that the [document] is to be regarded as delivered",[73] so long as there is sufficient evidence of intention to treat the document as thereby delivered. That would not include the case where the document is to be treated as a draft or as a communication for information only, since then there is a lack of the necessary intention to deliver.[74] But in the case of contracts relating to land, where the current law requires formal (i.e. subscribed) writing in "wet ink" to the exclusion of digital or electronic writing, there are conflicting decisions on whether transmission of a copy by way of fax is delivery of the document.[75] The position probably is that the "wet ink" writing must be delivered physically in such cases, and that transmission by fax or email attachment is not enough.

2.62 In this unsatisfactory state of the law, it will clearly not be enough to say in our proposed legislation that to be effective a counterpart must be delivered to the other party or parties, or some nominee of theirs, and then leave it at that. We can, however, take some inspiration from an amendment to the 1995 Act which, when it comes into force, will recognise for the first time that delivery may be by electronic means.[76] This will be a welcome step forward. But that amendment extends only to the delivery of documents that are themselves electronic, i.e. documents "created in electronic form", in contrast with "traditional" documents "written on paper, parchment or some similar tangible surface".[77]

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[69] McBryde, *Contract*, paras 4.15 and 4.16.
[70] McBryde, *Contract*, para 4.16, discusses the problem of the multi-party unilateral deed which has not been fully executed by all parties but where there has been delivery by one party who has executed the document and has an obligation under it to the party to whom delivery has been effected. But this is not our case here.
[71] See paras 7.2-7.15 of our DP and the discussion earlier in this Chapter.
[72] The position of land contracts is discussed in our Report on Land Registration, vol 1 (Scot Law Com No 222, 2010), paras 34.55-34.57.
[73] McBryde, *Contract*, para 4.12.
[74] Ibid.
[75] *EAE (RT) Ltd v EAE Property Ltd* 1994 SLT 627 (OH); *Merrick Homes Ltd v Duff* 1996 SC 497 (IH); *Signet Group Plc v C&J Clark Retail Properties Ltd* 1996 SC 444 (IH); *McIntosh v Alam* 1998 SLT (Sh Ct) 19; *Park, Petrs* 2009 SLT 871 (OH).
[76] See new s 9F of the 1995 Act, to be inserted by s 97 of the 2012 Act. It is quoted at para 2.68 (and fn) below.
[77] The definitions of "electronic" and "traditional" documents are to be inserted into the 1995 Act by the 2012 Act: see, respectively, s 97 of the 2012 Act, inserting new s 9A of the 1995 Act, and para 2 of sch 3 to the 2102 Act, inserting new s 1A of the 1995 Act. The full definition of electronic documents in new s 9A is "documents which, rather than being written on paper, parchment or some similar tangible surface are created in electronic form".

This will leave open still the question of whether "traditional" documents may be delivered by electronic means.[78] This is highly relevant for our present purposes as we think that, however it may have been created (and typically today it will have been by way of an electronic or digital word-processing system), the counterpart which has been printed out on paper to enable the application to it of the "wet ink" signature of a counterparty is at that point a "traditional" document.

2.63 Our view is that delivery of a traditional document, making that document legally effective, should be possible by electronic means. Not so to provide is simply to place an obstacle in the path of commerce, and indeed ordinary ways of conducting business now possible thanks to communications technology, contrary to the general policies already stated above. Blackadders LLP told us:

> "It is more common now to complete transactions without a traditional completion meeting and, while most practitioners accept the practice of e-mailing scanned copies of signed documents on the basis that the principal copies will be delivered in due course, some do not. Clients view this as the law impeding efficient business practice for no good reason."

2.64 The Law Society of Scotland was to similar effect:

> "[We] consider that there will be a significant commercial advantage in the approach suggested in the new Section 9F of the Requirements of Writing (Scotland) Act 1995 to be expanded to all documents. In the committee's experience, there is a mixed approach in practice to this in the profession. Implementation of this proposal would lead to greater certainty which is clearly commercially advantageous."

2.65 These comments encourage us to suppose that the possibility of delivery by electronic means should not be confined to traditional documents being deployed for purposes of counterpart execution. Some safeguards are needed. The traditional document will remain with its sender after the electronic transmission, and what is transmitted will in actuality be an electronic version of that traditional document. What we are proposing is a rule that enables such a transmission to be taken in law as delivery of the traditional document. But we need to deal clearly with the position of the traditional document still in the hands of the sender, and the status of the electronic version that has been transmitted and is thereafter in the hands of the recipient. We propose rules for these matters later in this Chapter.[79]

2.66 Subject to these safeguards, we recommend that:

13. A traditional document may be delivered by electronic means.

(Draft Bill, section 3(1))

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[78] We have summarised the present position in the preceding paragraph and its footnotes. As we recommend (at paras 2.18-19) that our draft Bill should not affect any document executed before it comes into force, the current law will continue to apply to such documents. It is still open question to decision by a court of authority whether, in any future cases the current law will be developed in the direction we now recommend.

[79] See further paras 2.87-2.94.

Electronic means of delivery

2.67 We also think that "electronic means" should be understood widely for this purpose. The obvious examples already mentioned are transmission of a facsimile of the traditional document by way of fax or as an email attachment in the form of a word-processed file with a copy of the subscription pasted in at the appropriate place or, more typically, as a PDF of the whole document produced by a scanning process. But other possibilities exist. For example, a party may place a copy of the PDF on a compact disc or a memory stick, and hand that carrier over to the other party. This should, we think, be regarded as an electronic means of delivering the traditional document. Other means of creating electronic versions of traditional documents no doubt exist, or will come into existence in the future. Our legislation should be "future-proofed" as far as possible as well as clearly applicable to the possibilities of which we are already aware. The key idea for electronic delivery is that the traditional document has been transmitted to the recipient in a form which requires the use of an electronically operated device to render it "human-readable".[80] We therefore recommend:

14. "Electronic means" should be defined to include (but not be limited to) a fax, an attachment to an email, and upon a carrier such as a compact disc or a memory stick.

(Draft Bill, section 3(3)(a)-(c))

15. The definition should extend to all forms of the traditional document that require the use of electronic devices to render what has been transmitted readable by its recipient.

(Draft Bill, section 3(3)(d))

When electronic delivery possible

2.68 In addition to enabling the electronic delivery of electronic documents, new section 9F(2) of the 1995 Act goes on to provide:

> "But such a document must be in a form, and such delivery must be by a means –
>
> (a) the intended recipient has agreed to accept, or
>
> (b) which it is reasonable in all the circumstances for the intended recipient to accept."[81]

2.69 We think that a provision along similar lines would also serve a useful purpose in our proposed legislation on electronic delivery of traditional documents. In the context of counterpart execution it would underline the vital point already discussed, that the process requires the prior consent of the recipient (although that consent need not appear or be expressed in the counterpart documents themselves). Given the various possible forms in which a traditional document might be delivered electronically, it seems essential that parties

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[80] For this reason delivery cannot be by reading the document to the other party over the telephone, for example. If a subscribed document has been transmitted on the basis that it be held as undelivered until some condition is fulfilled, we see no reason why – if parties so agree – the condition should not be the making of a telephone call as in the English case *Domb v Isoz* [1980] Ch 548 (CA) (see para 1.14 above).

[81] As already mentioned s 9F is to be inserted into the 1995 Act by s 97 of the 2012 Act. Subsection (1) provides: "An electronic document may be delivered electronically or by such other means as are reasonably practicable."

should be clear in advance which of them may be, or is to be, used in the particular transaction to take place. What constitutes delivery by electronic means may be proposed by the sender and then accepted by the recipient; or the recipient may indicate in advance that it is prepared to accept a particular form of delivery or some other action to be taken as delivery.

2.70 On the other hand, to require specific agreement in every case may be productive of delay or waste of time. It should be quite enough for the recipient to indicate in advance what it is prepared to accept without requiring the parties then to agree the matter, which may again be to impose an un-necessary burden upon parties doing business with each other. If for example parties have an established practice of electronic communication between themselves in their dealings, it may be otiose to require them to agree that it be used in each specific transaction. An even more basic example may be the breakdown of a fax transmission of a lengthy document: it would generally be reasonable in all the circumstances to allow the sending party to begin retransmission, not at the start of the document once again, but rather from the point in it where the previous transmission failed, without having first to seek the consent of the intended recipient. Or it may be that a party which has agreed to transmit its executed counterpart by email attachment finds that the email system has broken down or that the addressee's inbox has become inaccessible. In that case that party should not give up in despair but seek alternatives which it would be reasonable in all the circumstances for the addressee to accept: for example, use fax instead should it be available.

2.71 We therefore recommend that:

16. Electronic delivery must be by a means that the recipient has previously expressed willingness to accept or what it is reasonable in all the circumstances for the recipient to accept; the same applies to the form of what is delivered.

(Draft Bill, section 3(4))

Electronic delivery of part of a traditional document: signature pages

2.72 The next problem which we think requires to be addressed is also at root a practical one that arises where delivery by electronic means is deployed for what were to begin with massive traditional (or paper) documents. Do all counterparties have to spend time scanning their own subscribed documents, or faxing them, in order to set up and complete an electronic delivery process? Where the document is one of many tens or even hundreds of pages, the process of scanning and faxing will take a significant period of time, with various possibilities for mechanical and other misadventures, when what is wanted is a speedy and efficient way of concluding formally recorded transactions. Pinsent Masons LLP told us of "energy and corporate transactions where there are multiple documents each of which can run to hundreds of pages, making it difficult (if not impossible) to email copies of the entire agreement."

2.73 The current practice, also recognised in the English Practice Note of 2010,[82] accepts that in many cases electronic transmission of the signature page of the document duly

[82] See paras 1.18-1.28 above.

signed by the sending party is enough. Consultees and participants in our Edinburgh University seminar urged us not to propose legislation that would prevent this practice from being effective delivery.[83] At the seminar Paul Hally of Shepherd & Wedderburn said:

> "If you send me a document for my client to execute, and I agree that's the final copy of the document, I'll print off that document… The client will sign it, and I can guarantee you that, at the moment, even without this in the law, and certainly in England, that there will be solicitors who simply sign the last page, send that back, and that is all that happens. The main document is never sent back. And we then have situations where people are collating the signed pages into a document and treating that as the main document. You will have a situation where the principal pages may be collated by one solicitor and he will provide a certified copy of that agreement."

2.74 Angus Shearer of the Royal Bank of Scotland also observed at the same event:

> "My experience is that the parties would agree the terms of the contract electronically. Both the parties would then hold their own copy electronically, and when it came to signing in many cases what would be exchanged would simply be the signing pages… Those would be exchanged and nothing else would be delivered."

2.75 We should emphasise that at this point we are concerned only with what may constitute delivery of a subscribed counterpart to the other counterparties or their nominee. We are not concerned here with what we see as the quite distinct question of whether a signature page transmitted or delivered can subsequently be attached by the recipient to a master copy (in traditional form) of the document in question so that the latter appears to have been subscribed by the party whose signature appears on that page. That question undoubtedly raises a number of difficult policy issues, but these relate entirely to whether a document so assembled can be regarded as valid or, indeed, where the parties so wish, self-proving. We address this question in detail in Chapter 3 below. But here we are looking only at the transmission or delivery stage that will render the document effective absent any requirement of writing for formal validity and ahead of any attempt to make that document also probative (it being understood that probativity is generally not required by the law to make a document effective).

2.76 Acceptance of the transmission of a signature page alone as an equivalent to delivery of the document to which it was appended is widespread in current legal and commercial practice. To at least some extent, of course, this is because such transmissions typically take place between people who have been negotiating and dealing with each other for some time and who therefore know and trust each other enough to have confidence that the signature page, or its electronically transmitted facsimile, will be applied to a text that has been agreed between them, and will not be misused. Their mutual consent and the context of their relationship as well, perhaps, as general professional custom, make the practice a not unreasonable one in the achievement of legally binding arrangements between them.

2.77 We have already recommended above that delivery of a traditional document by electronic means and the form of what is so delivered should be either what the recipient has

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[83] See para 1.4 for details of the seminar.

indicated it will accept or what it is reasonable in all the circumstances for the recipient to accept.[84] We gave some examples of the possible application of such a rule and justified it as, first, giving primacy to what the recipient indicated should constitute delivery, and second, making it un-necessary for parties to agree expressly on every occasion what would constitute delivery if what was done was reasonable in all the circumstances.

2.78 There seems no reason why this rule should not also allow a recipient to indicate that electronic delivery of a traditional document should be constituted by the transmission of that document's signature page alone, or for such a form of delivery to be seen as reasonable in all the circumstances of the particular case. If the recipient is willing to take such a transmission as being delivery, why should the law prevent that being effective, so long as the signature page in question was indeed part of the traditional document to be taken as delivered? Equally, transmission by fax of no more than a signed signature page by a party who at the critical moment lacked access to scanning or email or Internet facilities might be seen as providing circumstances in which it was reasonable for the recipient to accept the transmission as delivery of the whole document even if that had not been previously arranged between the parties.

2.79 We do not think, however, that we can simply leave this question to the application of the general rule already proposed. It should be clear on the face of the legislation that the recipient of an electronic transmission of a traditional document may express a willingness that transmission of part of such a document be enough to effect delivery of the whole document so long as what is transmitted is indeed part of that whole document. That part should include at least a duly executed signature page (or pages, as the case may be).[85] It is signature that is generally accepted as the indication of intention to be bound by a document, and the inclusion of the signature as an element of what is sent seems essential for the transmission to be seen as equivalent to delivery. The need to be able to show also the expressed willingness of the recipient and the fact that the signature page transmitted was part of the subscribed traditional document to be taken as delivered should generally be sufficient protection against the possibility of fraudulent misuse of the signature page.

2.80 It should also be made clear, however, that it may be reasonable in all the circumstances for transmission of such a signature page by electronic means to be accepted by the recipient as delivery of the traditional document. This would be to cover the cases where the recipient had expressed no view on the matter, or there was uncertainty as to what that person was willing to accept, or that which the person had expressed willingness to accept was from the beginning impracticable or subsequently became so. Although in such cases we suspect that the reasonable prospective sender would generally seek guidance from the intended recipient before acting, there may be circumstances in which that will be unreasonably difficult or impossible; for example, as a result of technical breakdowns somewhere in the communication system between the parties. The reasonableness test here is thus not a way of over-riding that which the intended recipient has indicated a willingness to accept, but rather a means of supplementing that general requirement in cases where it may be necessary to look beyond it.

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[84] See paras 2.68-2.71.

[85] A counterpart might have been executed on more than one page where, e.g., it is granted by various group companies which share a common director and whose signing blocks occupy more than one page.

2.81 To couch a rule in terms of "signature pages" may be to beg certain questions of definition better avoided. We therefore think that the legislation should instead be expressed in terms of the recipient being able to agree that delivery may be constituted by electronic delivery of part of a document which includes at least the page on which the sender has subscribed the document. Showing that on the balance of probabilities the transmitted part was indeed part of the document actually subscribed by the sender must depend on all the circumstances: it may need as little as the fact that the signing party is designed in the document as one of the parties to it. It may also be by such means as the continuity of pagination between the master text and the sent part, or other uses of the header and footer sections of the whole document.[86] Doubtless the ingenuity of the legal profession and the development of technology will come up with further means of showing the necessary link between the part transmitted and the rest of the document. We certainly do not wish to place anything restrictive in the proposed legislation.

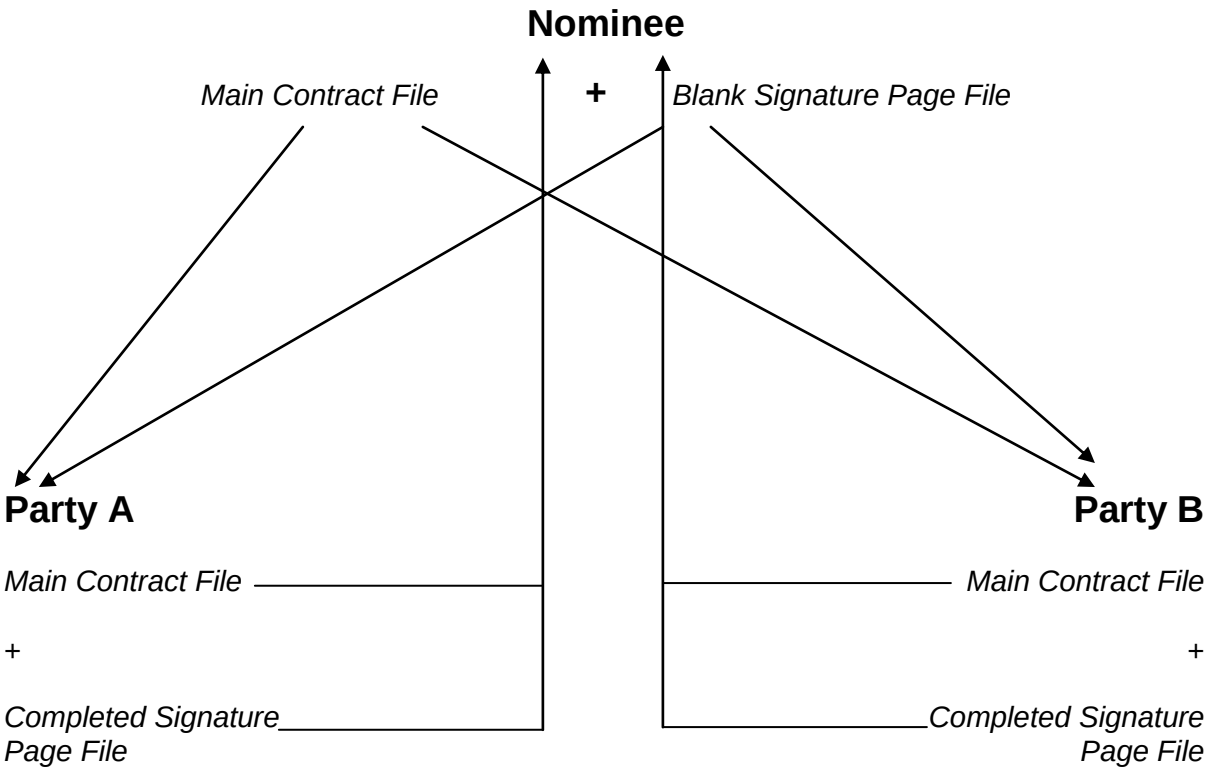
2.82 We therefore recommend:

17. Parties may agree (or it may be found reasonable in all the circumstances) that delivery of a document by electronic means may be effected by sending only part of the document provided that it includes at least the page on which the sender signed the document which can be shown in all the circumstances to have been part of the document.

(Draft Bill, section 3(5))

2.83 Framing the rule in this way will also enable further alternatives to be used to meet the basic difficulty involved in electronic transmission of entire documents. For example, parties might agree to initial transmission of the document in two or more files – in the simplest case, one being the entire concluded document apart from the signature page (or pages), which page forms the other file. A signing party therefore has only to scan that signature page and transmit it along with the file embodying the remainder of the document to the other party or parties. Alternatively, if the whole process is being administered centrally by a nominee in the manner already proposed, two files containing, respectively, the main substance of the document and a signature page appropriate for execution may be created at the beginning and sent out to the parties for return, the senders having only to print the signature page, sign it, then scan and return it that along with the same main contract file as sent out by the administrator. This will leave an electronic audit trail demonstrating the link between signature page and main document. The process may be represented graphically thus:

[86] In general it makes better sense for transmissions to be of PDFs rather than simple word-processed files, since the latter may well print out differently on different printing systems, thereby creating discrepancies in pagination and other problems with different counterparts in their hard copy forms. PDFs are also less susceptible to tampering and fraud.



2.84 It will be noted that the proposed rule applies only to *electronic* transmission of executed signature pages and *not* to delivery of hard copies of such pages, for example through the post. We are not persuaded that there is any need to propose rules for that latter situation in legislation dealing with execution of documents in counterpart. The rather different question which arises with the hard copy signature page is whether, once signed, it can be attached to a master copy of the parties' document which can then appear to be a single mutual document signed by all the parties. If so, then no question about delivery of that document arises, since delivery is not required to make it effective.[87] The question is rather, has the document been subscribed by the parties whose signature pages have been attached to it? The policy issues are in many respects similar to those already discussed in connection with the attachment of signature pages to documents. The topic is also closely related to the question of whether the document so assembled can be probative. We therefore deal with these questions further in the next Chapter.

2.85 A final point is that the same considerations arise in the world of electronic transmission which we have been discussing as in its hard-copy equivalent to mean that parties should be able to agree that the effect of delivery will arise at some point *after* the transmission of a counterpart (in whole or in part) is completed.[88]

2.86 It may be helpful at this stage to summarise our overall policy thinking on the difficult topic of delivery, traditional and electronic. It is that once it is established that delivery is required for a counterpart to be at least potentially legally effective, and that delivery can be

[87] See paras 2.27-2.33.
[88] See paras 2.37-2.45.

constituted by electronic transmission of a document, parties should be thereafter be given as much control as possible over their position. Thus, for instance, parties should be able to agree to whom delivery should be made (for example, to one of the parties only where there are several parties, or to some person nominated for the purpose). They should be able to agree that delivery is constituted by receipt by the intended addressee of an executed signature page of a counterpart, or that the legal effect of delivery may be delayed beyond the point at which transfer or electronic transmission of the counterpart actually occurs as a matter of fact to another point of time agreed by the parties. Giving the parties this degree of flexibility and control appears to be the best means of overcoming the defects of a law of delivery essentially laid down in an age where even postal communication between remote parties was unknown.

Position of sender; legal status of electronic copy received

2.87 We have already adverted to the need for some provisions on the position of the person who has transmitted an electronic version of a traditional document to effect delivery of that document which nonetheless that person still holds, and the status of that electronic version as it is received by the person to whom it has been transmitted. We now consider each of these matters in turn.

Position of sender holding executed and electronically delivered traditional document

2.88 Having transmitted to its intended recipient an electronic version of an executed counterpart in the form of a traditional document, counterparty (A) is still in possession of the subscribed traditional counterpart document. What if any obligations should A have in respect of that document?

2.89 Above all we think that this is a matter for the parties to determine, and that if the law has any role it should be the very minimal one of providing a simple default rule which once again the parties can vary, add to or replace as they see fit. In our view this simple default rule should be limited to the holding of the document, i.e. maintenance of the status quo immediately after the document has been electronically transmitted, in accordance with any arrangements which the parties may make on the matter. We understand that in practice something else much more active is likely to follow, ranging from physical transmission to the central party in the transaction to destruction of the document. The former will be particularly important where (as will normally be the case in commercial legal practice) the parties wish to give their document probative, or self-proving, status. We discuss that scenario in the next Chapter. But against a varied background of practice, for the default rule to impose any requirement of activity other than a need to make arrangements would be inappropriate.

2.90 The parties' agreement to displace or elaborate the default rule in whole or in part would normally be part of the arrangements made at the time the execution in counterpart process is being set up. It should be possible for the agreement to be implied from custom, course of dealing or other relevant conduct of the parties. It should also be possible, however, for the parties to determine the fate of the traditional documents being so held at any time *after* delivery has been accomplished.

2.91 The rule will also serve as a useful indicator to parties using counterpart execution without the benefit of professional advice that it would be sensible (and in at least some

cases essential), to make arrangements for what is to happen to subscribed counterparts once each of them has been electronically transmitted to the other parties or the nominated administrator of the transaction. We therefore recommend:

> **18. The party who delivers a counterpart traditional document by electronic means should thereafter hold that traditional document in accordance with any arrangements made in relation thereto by the parties. The arrangements may be made before or after the electronic delivery of the document.**
>
> (Draft Bill, section 3(7))

Legal status of electronic copy as received

2.92 A further problem arising in the electronic context is the position of the electronic copy of the traditional document that is in the hands – more accurately, in the computer or other electronic file carrier – of the recipient to whom delivery has been made by electronic means. Our primary purpose in enabling delivery of traditional documents by electronic means is to remove un-necessary barriers to making business arrangements legally effective. We have no wish at this stage to go further with the law on electronic documents than the 2012 Act has already done. The only legally significant function of the transmitted electronic copy of the traditional document will be evidential: that a traditional document existed and was signed by a particular person, and that it was transmitted to a recipient in electronic form in a manner satisfying the requirement for delivery. It may be that the electronic copy will also carry data showing when it was created and received. But this evidential function should be its only function in law, we think.

2.93 In particular, even where registration of electronic documents is or becomes possible, the electronic facsimile of a traditional document should not be allowed to become capable of being so registered. Often the relevant law on registration will prevent this because the facsimile signature or signatures on the electronic copy will not meet the usual requirement of being either a "wet ink" or an "advanced" electronic signature. *A fortiori* if all that has been transmitted is a signature page, which, standing alone, will be incapable of registration anywhere. But a provision that the electronic copy of a traditional document received when delivery is by electronic means is not to be treated as being the traditional document for any other purpose would be a useful safeguard against any other possible mis-uses of the copy. Equally, if the electronic copy is printed out, for example where a PDF document is printed or a fax removed from the facsimile machine, it is not to be confused with the traditional document of which it is a copy. The original remains in the hands of the sender. This is not to say, though, that the printed version of the PDF or the fax is without further use. For example, it could be used by the recipient as its own version of the agreement, for execution as a counterpart. To give an illustration, suppose that A and B agree a document by email and wish to execute it remotely in counterpart. Suppose that A then prints and subscribes the document before scanning it as a PDF and attaching it to an email to B. On receipt of the PDF, B has evidence of A's delivered document. But that same PDF, when printed, may also form B's version of the agreed document for its own subscription and delivery to A.

2.94 In order to make this clear, we therefore recommend that:

19. The copy of a traditional document that is received when it is delivered by electronic means is not to be treated as the traditional document itself for any purpose other than delivery.

(Draft Bill, section 3(6))

Chapter 3 Probativity and the single document

Probativity

3.1 Our discussion of execution in counterpart in the Discussion Paper contained a lengthy discussion of the law on probative or self-proving documents, both as it stands at present and as it will be after the amendments to the relevant parts of the 1995 Act made by and under the 2012 Act have come into force. We did not propose any reforms to the law, asking only whether it should be made clear by legislative provision that an exchange of counterpart documents can produce a probative document if each counterpart is appropriately executed by its counterparty.

3.2 A significant majority of consultees supported legislation allowing documents executed in counterpart to be considered probative. The Law Society of Scotland commented: "[We] consider there would be a commercial advantage in bringing in such a legislative provision to make it clear that the exchange of contractual documents can satisfy the requirements of formal validity and probativity if each document is appropriately executed by the respective parties to the exchange." Pinsent Masons LLP went further: "It would be extremely helpful to make it clear by legislative provision that execution by counterpart can satisfy the requirements of formal validity and probativity under Scots law."

3.3 The analysis of this topic in our Discussion Paper proceeded on the basis that the question was more one of the formation of a contract than of the execution of a document. We drew an analogy with the rule in the 1995 Act spelling out that the requirements for a contract's formal validity are met by having a formally valid offer followed by a formally valid acceptance.[1] Should the offer and acceptance be also in probative form, then the resultant contract will be in probative form too. Our thinking was that it might follow from this that in counterpart execution of a transaction which required formal writing (typically one in relation to land) or where the parties wanted the benefits of probative form, it might be provided that each counterpart should be executed in accordance with the requirements for formal validity or probativity.

3.4 We are now clear, however, that our proposal for the legislative recognition of counterpart execution is for a valid way to execute documents rather than to form contracts as such. The execution and exchange of counterparts produces what is deemed to be a single document expressed in the terms found in all of them. The question of when a document becomes effective for its general legal purpose – forming a contract, providing a guarantee, creating a floating charge – is generally distinct from what is required to make that document probative. It is not generally a requirement of any document's effectiveness as a juridical act that it be probative.[2] Probativity therefore need not be conferred upon a

[1] 1995 Act, s 2(2) (formal validity only).
[2] A disposition cannot take effect as a transfer of ownership until it is recorded or registered in the Register of Sasines or the Land Register of Scotland, and cannot be so recorded or registered unless it is probative. But an

document at its creation or initial execution but can be conferred later on. With formal validity, however, the writing that constitutes the contract, with the wet ink subscriptions at the end, must be there; otherwise there is no contract.[3]

Traditional documents

3.5 In current law both formal validity and probativity can only be achieved by way of wet-ink subscriptions to traditional documents.[4] "Subscription" means that the subscribing party signs at the end of the last page document in question, excluding any annexation.[5] In the case of a company, the signature of a director, secretary or authorised person will suffice.[6] Where a document is to bind more than one person, the subscriptions may extend beyond the last page of the document, adding as many further pages to it as may be required to accommodate all the signatures required.[7] Only the first of such multiple subscriptions need appear on a page containing the end of the document's substantive text.[8]

3.6 We note first that no changes are needed to the rules on annexations to documents to facilitate counterpart execution of documents. The relevant rules are in section 8 of the 1995 Act and state that where annexations describe or show all or any part of land to which the document relates, they must be signed by the parties on every page in the case of a plan, drawing, photograph or other representation of the land, or on the last page in the case of an inventory, appendix, schedule or other writing. This might seem to present difficulties for counterpart execution of documents with such annexations.[9] Some practitioners overcome the difficulty by including what might usually be seen as annexation material in the document to be executed. It should also be noted, however, that the signing of the annexations can take place at any time before the document is – (i) founded on in legal proceedings; (ii) registered for preservation in the Books of Council and Session or in sheriff court books; (iii) recorded in the Register of Sasines; (iv) registered in the Land Register of Scotland.[10] So the signing of annexations need not be contemporaneous with the counterpart execution of the document.

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improbative disposition may still have some contractual or promissory force between the parties: see fn 22 to para 2.23.

[3] As previously mentioned, writing is only a legal requirement for certain specific contracts (see s 1 of the 1995 Act) but parties to other documents may choose to reduce them to writing.

[4] An exception is the documents submitted under the Automated Registration of Title to Land ("ARTL") system of registration run by the Registers of Scotland, which requires digital rather than wet-ink signatures. ARTL allows for the registration of the majority of transfer, charge and discharge transactions over registered titles electronically; it is essentially an electronic conveyancing system.

[5] 1995 Act, s 7(1). We discuss annexations in para 3.6.

[6] For a document signed by a company to be probative either the signature must be witnessed or else two signatures (director and secretary, two directors or two authorised signatories) are required: see para 3 of Sch 2 to the 1995 Act for details. Sch 2 also sets out the signing requirements for partnerships, limited liability partnerships, local authorities, etc.

[7] 1995 Act, s 7(3).

[8] Ibid.

[9] A further difficulty, to which we have been alerted by Dr Patrick of Tods Murray LLP, is that annexations may contain information which is either most conveniently presented in electronic format (such as large data sets, e.g. lists of assigned book debts for debt factoring) or is by its nature in electronic format (such as references to live computer systems or to data flagged in a certain way in such systems at given times). We understand that, in respect of the latter, practitioners in England & Wales and France may include such references in a paper document but that there is reluctance to do so under Scots law. It lies beyond the scope of this project to examine the legal issues which these "hybrid documents" may raise but clearly one solution would be to create a wholly electronic document and to sign it digitally, as discussed in ch 4.

[10] 1995 Act, s 8(5).

3.7 In the case of the probative document the subscription must be accompanied by the wet-ink signature of a witness who has seen the subscriber sign or to whom the subscriber has acknowledged its signature, accompanied by a testing clause or equivalent narrating the circumstances of this process of authentication. While testing clauses remain in use in transactions involving land, we understand that in commercial transactions practitioners prefer to use equivalents such as the signature boxes or "blocks" of which we gave an illustrative example in our Discussion Paper.[11] It may be helpful to reproduce it here:

> In WITNESS WHEREOF this Agreement comprising of this and one preceding page is executed as follows:
>
> | For and on behalf of the Transferor: | In the presence of this witness: |
> |---|---|
> | ……. | …….. |
> | (Director) | (Signature) |
> | ……. | ……. |
> | (Print Name) | (Print Name) |
> | ……. | ……. |
> | (Address) | (Address) |
> | ……. | ……. |
> | Date…… | Date…… |
> | At: …… | At: …… |

Such signature blocks not only provide a designated place for the subscriber to sign but also one for the signing witness and a statement of the date and place of the subscription.

Electronic documents

3.8 When the e-enabling amendments made to the 1995 Act by the 2012 Act come into force, probativity will be achievable for electronic documents by the application to them of "advanced" digital signatures as defined in regulations to be made by Scottish Ministers.[12] The precise details of the nature of the digital signatures required will be spelled out in subordinate legislation currently in preparation. We do not need to address this aspect of probativity further here, as our present concern is with traditional documents only. We return to the probativity of electronic documents, however, in Chapter 4.

Signature pages: the issues

3.9 In current practice where a traditional document is executed in counterpart and probativity is sought for its subscriptions, the last page is subscribed with appropriate attestation by at least (in all probability, only) one of the parties. Each of the other parties and their respective witnesses signs a signature page.[13] After being electronically

[11] At para 7.18 (p 102). We are grateful to Dr Ross G Anderson for the style.
[12] See para 1.34 above and ch 4 below.
[13] Where signing blocks are used there may often be more than one on each page. We are told that, whereas it is in theory possible for each party to be supplied with a counterpart which has their own signing block on the last page of the document, this would be unacceptable in practice. One reason is that it would place a great

transmitted to the person co-ordinating the counterpart execution process, these signature pages are then sent in hard copy form to the co-ordinator who, having gathered a complete set, then assembles them in order and attaches them to the master hard copy of the document. The whole assembly can then be presented for registration as a single probative document. The co-ordinator may go on to make certified or conformed copies of that single document, for circulation back to the other parties and such other purposes as may be relevant.[14]

3.10 The practice raises important policy issues, however. For, we hope, obvious reasons, we have been concerned about the potential misuse of a signature page detached from whatever document to which it was originally appended, or changes to a subscribed document made after a subscription has been applied. "Identity theft" could be all too easily achieved and fraudulently exploited if the mere application of such a page, whether in hard copy or electronic form, to a different document was by itself capable of giving that document legal effect against the party whose signature had been so used.

3.11 In our Discussion Paper we expressed the view (which we continue to hold) that a signature page which had been signed when attached to one document could not without more be detached from that document and attached to another so as to be a valid subscription or signature of the second document. As Professor George Gretton observed: "The pre-signed signature page is a form of misrepresentation. It is saying "I Jimmy signed this document" even though that is a false statement." We think this covers the situation in the *Mercury Tax Group* case, where one document was signed and that signature page was then attached to another, different document.[15] It also covers the situation where after a party has subscribed a document there are found to be typographical or other errors in it and a page or pages of the main text are then substituted for those in which the errors were found. We see no need for change to these basic rules.

3.12 But others take a different view. For example, Pinsent Masons LLP argued that "More than confirming the existence of the possibility, we think that Scots law should *allow* for the application of a pre-signed signature page to a contractual document. This would be a good opportunity to make Scots law appropriate for modern business needs by removing any doubts about whether a contract has been validly concluded." We ourselves did also say in our Discussion Paper that it is possible, applying principles of agency and mandate, for an intending signatory to authorise another to perform an act that, by manifesting the signatory's intention to authenticate a particular document, can be treated as that party's signature of that document.[16] The familiar example is the "for and on behalf of" signature of a missive letter by an agent (such as a solicitor) on a client's behalf.

3.13 The properly authorised attachment to a document of a duly signed signature page can, on one view, also meet this requirement and give the document its intended legal effect, provided that the document is the one to which the signing party intended its signature to be

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administrative burden on the person who prepares the counterparts and would pose an unjustifiable risk of error at the final stage of a deal. For that reason we say no more about this option.

[14] A conformed copy is a version which contains all of the elements of the original but not necessarily exactly as they appear there: e.g., signatures may be replaced by the typed name of the subscriber and manuscript amendments may be typed. A certified copy is a copy (which may be a conformed copy or a "true copy", such as a photocopy) which is certified as such by a qualified professional.

[15] See para 1.24 above.

[16] See the discussion at paras 7.57-7.61 of our DP.

applied. That is to say, the document to which the signature page is attached is not one which, by comparison with the document actually signed, has had pages substituted or is a later version of the one intended to be signed. It may be, however, that an unauthorised attachment of a signature page can later be ratified by the signatory, as in *Koenigsblatt v Sweet*.[17] Proper advance authorisation or, as the case may be, clear ratification are crucial, however. We agree with the advice given on this matter in the English Practice Note of 2010:

> "[F]or the use of pre-signed signature pages, you should have clear evidence, such as an exchange of emails, that the signatories, their lawyers or someone else authorised by the signatory have authorised the attachment of their signatures to the final version of the relevant contract. This will avoid any evidential concerns and show an intention to be legally bound, as well as ensuring the certainty of contractual terms."[18]

3.14 Commenting further on this question, and considering the possibility of signature pages being attached to amended versions of the document originally signed, Brodies LLP said: "The default (absent any other process being agreed) should probably be that each of the parties has to confirm by email (or other means) to their signature page being affixed to the final amended version (and that such final version should have been circulated so that the consent is in respect of that version and can be said to have been made aware of the changes)." We agree with this approach. If there has been appropriate authorisation from the relevant parties for the process, and the attachment of the signature pages is indeed to an otherwise identical version of the document subscribed by each party, there seems no good reason to deny the resultant assembled document its intended legal effects.

Signature pages: a suggested solution

3.15 The main purpose for making a document probative will generally be to register it in the Books of Council and Session for preservation and execution (this last word having a different meaning, i.e. summary diligence[19], from that in which we have used it previously in this Report). Only documents that are probative may be so registered. We understand that such registration is not universally sought even if the document is in probative form (as, for example, in many commercial transactions this would make publicly available information which the parties would regard as commercially sensitive if not confidential).[20] But registration is widespread with regard to commercial leases and various forms of banking transaction where the possibility of summary diligence may be useful later on to a party such as a landlord or a funder. It is therefore important that the documentary end result of a counterpart execution process should be capable of registration.

3.16 Based on section 6(2)(b) of the 1995 Act, our view is that an assembly of signature pages at the end of a document does not form any ground of objection to registration so long

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[17] See para 1.22 above.
[18] See paras 1.18-1.28 above for a discussion of the Practice Note.
[19] Summary diligence is a procedure by which a creditor attaches the property of its debtor in implementation of, inter alia, a debt or obligation embodied in a registered document without having first to obtain a court decree, the registration being equivalent to the decree. See Gloag & Henderson, para 48.01.
[20] A document might be rendered into self-proving form in case of need in later litigation or other processes such as arbitration, or simply because its additional formality has a useful function in making clear to parties that a contract or other juridical act is being concluded.

as it is apparent on the face of the document that at least one of the subscribing granters can be presumed under section 3 of the 1995 Act to have subscribed it. Thus the duly attested subscription at the end of the document's last page is capable of making that document probative so long as there is nothing on the face of the document to suggest that there was anything wrong with the granter's subscription or the attestation process – for example, that they were not continuous, or not made on the date or at the place indicated by the document. We quote, as we did in our Discussion Paper on this subject, a leading textbook on the matter:

> "Whether a document is probative is determined by visual inspection. Either it looks valid or does not. For probativity, looks are everything. Recourse to extrinsic evidence is not permitted. The judgment must be made by looking at the deed alone. And the judgment must be made. No sitting on the fence is permissible. There is no such thing as (as is often suggested in exam answers) a document which is presumed to be probative. Either it is probative or it is not. …
>
> This means that if a fault in executing or witnessing cannot be determined by visual inspection, the document is still probative. A forged deed will be probative, unless the forgery is apparent, which is unlikely … If the subscription and witnessing are not one continuous process, the document will still be probative, unless the gap in time is revealed on the face of the deed. … [T]he document is probative if it *bears* to have been validly subscribed and witnessed."[21]

3.17 We have discussed with Registers of Scotland ("RoS") the registration of documents with assembled signature pages (which clearly exists under the present law even if the document has not been executed in counterpart), and established with them that no such documents appear to have been identified by their staff amongst those submitted for registration in recent years. This does not mean, however, that no such documents have ever been registered.

3.18 We have also discussed with RoS ways in which such assembles might be identified by registering clerks. One example is where the signature pages were printed on different kinds of paper, which might be open to visual detection if the pages were of slightly different colours. On the other hand, that problem could arise with a traditionally executed document where a printer ran out of paper half-way through the production of the document's signature pages and a ream of paper of different manufacture was then inserted into the printer to complete the job. We think that this is not a serious objection to the document's registration. Indeed, if the document bears on its face that it has been executed in counterpart, this could well be seen as a complete explanation of the situation in itself, overcoming any objection there could otherwise be.

3.19 More serious questions may arise from the practice of setting out signature pages in "blocks", enabling two or more signatures to be placed upon each page. In a counterpart execution, each party can only sign at the block designated for it. The resulting assembly of signature pages can thus appear rather odd, with one signature in its place on each page the other "blocks" of which are uncompleted. This might be reinforced if the document (including its signature pages) was continuously paginated. Thus if a signature page with

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[21] Gretton & Steven, *Property Trusts and Succession* (2009), paras 30.32-30.33, quoted at para 7.20 of our DP.

three signing blocks on it was, say, page 25 of the document as first produced, the document as presented for registration might have three page 25s, each one having one completed signature block.[22] That might not give the usual appearance of a single document. On the other hand, once again, if the document contained a counterpart execution clause, and the law in general recognised, as we propose, that such execution was a valid way of creating legally effective documents, then the clause would provide on the face of the document a complete explanation of the unorthodox or non-traditional aspects of its appearance.[23]

3.20 Another possible issue which has been put to us is when the various subscriptions bear different dates. It is no objection to the self-proving status of multiple subscriptions that they bear to have been applied at different dates and in different places.[24] But the position if some or all of the dates in the signature pages are earlier than those going with the subscription(s) on the last page of the document is unclear. Does the 1995 Act imply that the last-page subscription(s) must be of even date with those on the additional signature pages, or indeed ante-date them?

3.21 The argument for an affirmative response to this question is that the execution of the signature pages alone cannot be taken as related to a document then lacking the last-page self-proving subscription which is a *sine qua non*. Section 3 of the 1995 Act provides for "a document that bears to have been subscribed", which cannot be for a document without its last-page subscription. Further, given that the signature pages are expressly stated in section 7(3) of the 1995 Act to be "additional", the subscriptions on them cannot be given a status in relation to the document that they did not enjoy before a subsequent last-page subscription.

3.22 Another view might be, however, that it is the subscriptions and any accompanying information about date and place of subscription that have probative status, not the document itself. Once all the subscriptions are in place, the document does indeed "bear to have been subscribed". The chronological sequence of the subscriptions thus cannot affect the eventual appearance of the document once execution is complete. The 1995 Act does not state that the subscription of the signature pages must be after the last-page subscription chronologically, and there is nothing to suggest that the word "additional" carries any substantive effect beyond describing the appearance of a document with signature pages appended to it. Further, since there is no requirement that a subscription must be dated to have probative status, *a fortiori* there can be no requirement of any particular sequence of subscription where there is more than one granter.

3.23 We take no concluded view on these arguments but think it worthwhile setting them out. We return below to possible practical implications for counterpart execution if the point is left open.[25]

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[22] It might, of course, be that the same signatories can sign all of the blocks on page 25 (e.g. if the granters are group companies with a common director) in which case only one counterpart need be used for those granters.

[23] An alternative would be to use only one signature block per page but practitioners have told us that they do not favour this. In any event, we think that matters such as this are essentially to be determined by practice and in the individual circumstances of a transaction rather than by general legislation.

[24] This will commonly be the case when, e.g., a probative document is executed by way of a round robin process involving each of the parties sequentially.

[25] See para 3.33.

3.24 Is then leaving the matter to practice enough to meet all the difficulties? Having consulted with RoS, and considered the difficulties with care, we are inclined to think not. While section 6(2)(b) of the 1995 Act covers the most immediately important matter for parties to a transaction the documentation of which is being executed in counterpart – i.e. registration – it does not give the assembled document self-proving status for any other purpose, for example in court. But we have nonetheless come to the conclusion that there is no need to amend the 1995 Act to deal with this matter. Any amendment to the Act would carry the risk of unsettling present understandings of the law (which as it stands seems not to give rise to great difficulties in practice in general). We do not consider that such amendment is required in order to achieve our goals. One such goal is to allow a document executed in counterpart to be self-proving and, therefore, capable of registration.

3.25 Section 3 of the 1995 Act requires that all of the subscriptions to a multi-party document must be executed in self-proving form for the document to enjoy probativity.[26] There are some ameliorations of the rigour of this requirement. Where a person grants a document in more than one capacity, one subscription of that document by that person is sufficient to bind the person in all such capacities.[27] It is also possible for there to be only one signing witness where that witness has either seen all parties subscribe or had them acknowledge their subscriptions to him or her.[28] But that process of subscription, seeing or acknowledging, and witness signing, must be continuous,[29] a requirement which will be hard if not impossible to meet in the case of counterpart execution where the subscribing parties are in different places and quite possibly subscribing at different times.[30]

3.26 In general, therefore, it seems that each counterparty's subscription will need to be properly attested in its own right, and the page containing that attested subscription in its wet ink form attached to the document, if it is to have probative form for all purposes.

3.27 On the other hand, the practice of using signature blocks for documents being executed in counterpart makes it comparatively simple to achieve these elements of full probativity for each subscription, since each block can contain all that is needed to produce that effect, namely, the witness signature;[31] and the subscriptions can then be assembled with the document's principal copy and its other signature pages to form, or at least give the necessary appearance of, one continuous and probatively subscribed whole. There is accordingly no need to await the completion of the process of subscription and attestation and then insert a probably long and laborious testing clause at the end of the document and above its first subscription. The only issue is that already discussed, whether such an assembly of subscriptions is allowed in law. While for the reasons already outlined, and in the right circumstances, above all appropriate authorisation from the parties, we think that it is, some form of additional legislative comfort on the topic will probably be useful.

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[26] It is possible for a multi-party document to be partly probative if only some parties subscribe in due form while others simply sign without having their signatures duly witnessed.

[27] 1995 Act, s 7(4). This is often important in company group transactions where a director of different companies in the group may sign for them all.

[28] Ibid, s 3(6).

[29] Ibid, s 3(4)(e) and (6).

[30] Although s 3(6) does say that (putting the matter in the positive rather than the section's double negative) there may still be continuity in the process if the witness signs only after some or all of the subscriptions have been made.

[31] The date and place of subscription may also be inserted in a self-proving manner under s 3(10) of the 1995 Act. But it is not necessary to have these pieces of information, although generally they are included in documents to be rendered probative.

3.28 The best approach lies, we think, in making an addition to the provisions already proposed, which enable counterpart execution and deem the result of that process to be a single document as already recommended.[32] The effect of the addition to this which we now further propose would be to make it plain that the deemed single document may be made up of *either* the sum of the relevant counterparts *or* a collated version of them which contains but a single version of the agreed documentary text up to and including the page ("the last page") on which the first subscribing party's signature appears and which is followed by a page, or pages, containing the signatures of those parties who have not subscribed on the last page. Any appendices or schedules or similar which appear after the parties' subscriptions should also be included, either once or (as appropriate) in as many copies as there are signed counterparts.[33]

3.29 This will make clear that one of the parties, or a nominated person, may take the entire counterpart signed by the party whose subscription first appears and may then replace any blank signing pages which appear in that counterpart with appropriate subscription pages from the other counterparts. This permits, in effect, a single, collated version of the document to be made up. The main practical benefit is that any doubt about whether this version may be registered (rather than having to register all of the counterparts) is removed.

3.30 So far as concerns the requirement of a party's authorisation for the attachment of its subscription to an assembled document, discussed above when setting out the issues needing to be addressed on this whole topic,[34] our recommendation may be thought to carry with it at least an implied authorisation of the attachment, with the whole trail of communications and instructions between the parties setting up the counterpart execution process providing supporting evidence of their intention to act in this way. It may also happen, however, that during the execution process errors typographical and other are discovered in the text of the document such that they must be corrected.[35] If in this situation parties do not want to begin the whole execution process again, but rather simply to substitute new versions of the relevant pages, then it will be necessary to have a clear audit trail in place by which those who have already subscribed ratify what will be effectively the continuing attachment of their subscriptions to the assembled document, and those who had yet to subscribe when the correction was made clearly authorise the attachment of their subscriptions to the assembled document in its new form. It should be noted, however, that all this assumes that the subscriptions are ones originally applied to a version of the document executed in counterpart. We say nothing here about signature pages which were signed quite independently of any version of the document.

3.31 Those who feel unease at the possibility of a document gaining probative status by virtue of such attachment to it of appropriately executed signature pages may be reassured by the consideration that probativity does not confer conclusive status upon the document. The law merely gives the subscriptions the benefit of certain rather limited presumptions: in sum, that any subscription is indeed the subscription of the granter concerned, and that, if the document, or its testing clause or equivalent, bears to state the date or place of the subscription, the document was indeed subscribed on the date or at the place stated. It is possible for these presumptions to be displaced by contrary evidence; but the burden of

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[32] See paras 2.11-2.13.
[33] See para 3.6 for a brief discussion of appendices and the like.
[34] See paras 3.12-3.14.
[35] This situation was discussed in our DP at paras 7.46-7.61.

proof is upon the person who would do the displacing. But there is room for that person to come forward to show, on the balance of probabilities, that the attachment of its subscription page was to a document other than the one authorised for the purpose (whether because it is a later or an earlier version,[36] or one which has had a page or pages substituted), or that no authorisation at all was given, or that the subscription was forged, or that the supposed witness neither saw the subscription being made nor heard it being acknowledged, or that the subscription was not made on the date or at the place appearing on the document. The door to unlimited possibilities of fraud is not being opened by this recommendation. In our approach, we have in mind again Lord Guthrie's warning against the law creating obstacles or un-necessary pitfalls in the way of solving practical problems arising out of the circumstances confronting business people.[37]

3.32 We therefore recommend:

> **20. The result of counterpart execution of a document should be deemed a single document, which may be made up of *either* (a) the sum of the relevant counterparts *or* (b) a collated version of them which contains a single version of the agreed text up to and including the page on which the first subscribing party's signature appears, and which is followed by a page, or pages, containing the signatures of the parties who have not subscribed on the last page.**
>
> (Draft Bill, section 1(3))

Conclusion

3.33 It may be helpful if we conclude this Chapter with a summary of its effects and implications. The objective is to enable the single document which is the legal result of the counterpart execution process as provided in our proposed Bill to have probative status. We think it un-necessary to amend the 1995 Act to achieve this end. Instead, we propose that the single document may take the form of an assembly of its agreed text, subscribed in probative form by at least one of the granters on its last page, together with a set of signature pages containing the subscriptions, also in probative form, of the remaining granters of the document. So long as the subscriptions on the signature pages were made on a counterpart version of the document's text, and the process of attachment was duly authorised in advance or ratified after the event, we do not think that our proposal involves any departure from established principles or practice in relation to making the subscription of documents self-proving. Rather it provides a means of solving a practical problem for business people who find it difficult or even impossible to gather together in one place and at one time in order to execute documents. The document might usefully include a statement that it is or was to be executed in counterpart, as that will provide an internal explanation of any unorthodox or unconventional aspects of its appearance. It may also be sensible, in the light of the possible questions discussed above,[38] to ensure that the last-page subscription either ante-dates, or is of even date with, those on the additional signature pages.

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[36] This is what happened in the *Mercury Tax* case, discussed at para 1.24 above.
[37] *R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 at 332 (IH).
[38] See paras 3.20-3.22.

3.34 Our work on this Chapter has involved us in careful consideration of the 1995 Act. We have been reluctant to come forward with any amendments to the Act simply because it operates in many contexts beyond those upon which we have consulted in the course of this exercise on execution in counterpart, and the most recent amendments, made by the 2012 Act, have yet to come into force, never mind bed in with practitioners. In the end we have proposed no changes to the Act. But this should not be read as meaning that the Act should be left alone for the foreseeable future. We will keep its operation in relation to counterpart execution under review in our project on Contract Law, and it may also be that a full-scale review could be considered for inclusion in our next programme of law reform.

Chapter 4 Electronic Document Repositories

Introduction

4.1 We now turn to a topic which we included towards the end of our Discussion Paper,[1] namely the ways in which electronically signed documents might be useful and what facilities might be needed to allow them to be most conveniently used. We have, of course, been dealing up to now with paper documents and "wet ink" signatures, but we have recommended that electronic means be recognised as suitable for delivery of such documents. We see the use of electronic signatures as being, in a sense, a natural progression. For reasons which we develop below, though, we do not consider that the time is yet ripe for us to put forward legislative proposals in this area. We do, however, make a number of non-legislative recommendations in this Chapter.

4.2 The amendments to the 1995 Act by the 2012 Act will go a considerable way to enabling the use of electronic documents and electronic transmission thereof for the formal constitution of a written contract and other juridical acts, as well as providing the means by which such electronic documents may be made probative.[2] The use of electronic documents will in turn, we think, greatly facilitate the completion of the execution of a document by remote parties so as to give that document probative status. The basic procedure will involve first the preparation (and, perhaps, the negotiation) of the document in electronic form (which is what already happens in almost all cases). The next step will be making the final version of the document available for remote and advanced electronic signing. This could be in a secure space managed by one of the parties or, probably more likely, the solicitors responsible for the final version of the document, but to which the other parties could be granted remote access. It would then be possible for the signing parties to apply their respective electronic signatures to the electronic document. If the signatures were advanced ones, the document would gain probative status for all parties once their signatures had been fully applied. From that point on, the system would enable each party to download an electronic copy of the fully signed document, to be held as its fully authenticated and probative version of the document. Alternatively, there may be a central administrator of the signing process who oversees the application of the advanced electronic signatures and the eventual transmission to all parties of electronic copies of the fully signed documents. If an electronic document contains appropriate consents, it may also be possible to register it in an electronic Books of Council and Session, the creation of which is enabled by section 100 of the 2012 Act.[3]

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[1] In ch 8.
[2] See in particular Part 10 of the 2012 Act.
[3] Under s 100 the Scottish Ministers may make regulations to enable the recording or registration of electronic documents in any register under the management and control of the Keeper. However, registration in an electronic Books of Council and Session would not retain confidentiality for the document as it is a public register and any documents registered there – whether for preservation or preservation and execution – would be available to the public from the point of registration.

Two practical hurdles

4.3 All this is technically feasible and will be legally effective once the relevant amendments to the 1995 Act under the provisions of the 2012 Act come into force. We noted two potential practical obstacles in the Discussion Paper. One was the availability and security of advanced electronic signatures[4]: the market for these signatures has not developed very far and the private sector Certification Service Provider which issues the signature is exposed to the risks inherent in any market-based operation. The other difficulty raised in the Discussion Paper was whether parties and their advisers have the computing facilities that will enable them to provide the necessary secure space to which only they will have access. We have considered these hurdles and do not believe that they constitute insurmountable barriers to the introduction of an electronic document repository.

Overcoming the first hurdle

4.4 We have found that the solution to the problem of the availability of advanced electronic signatures lies very close to hand in Scotland, where we understand that the Law Society of Scotland proposes to issue advanced electronic signatures to all its members and to all those qualifying as solicitors in future.[5] These developments will support the use of advanced electronic signatures in the electronic missives which will become possible once the 2012 Act's amendments of the 1995 Act come into force. We submit that there seems no reason why the use of these or other similar advanced electronic signatures might not extend to the formation and constitution of other kinds of document. Indeed, since the rules will not be linked to the processes of land registration as such, the necessary implementing regulations could be introduced sooner than those bringing into force those parts of the 2012 Act which *are* bound up with registration. We are assisting the Registers of Scotland (RoS) with the development of these non-registration-related regulations in the hope of such early implementation.

4.5 RoS have already developed a system of advanced electronic signatures for solicitors using the Automated Registration of Title to Land (ARTL) process. The ARTL process currently applies to electronic dispositions, assignations of long leases, standard securities and their assignation or discharge, with the expectation being that its scope will expand once the amendments to the 1995 Act come into force, in particular to include the conclusion of electronic missives. As a result of the existence of ARTL, many conveyancers already have advanced electronic signatures. The use of a solicitor's ARTL electronic signature on behalf of a client requires written authority from the latter in the form of a mandate in a style provided by the Law Society of Scotland.[6] Something similar will be required in the commercial transaction where, as will probably be the usual case, a commercial client does not have an advanced electronic signature to apply to a document in electronic form and therefore the solicitor's one will be necessary if the execution is to be

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[4] See para 7.37 of our DP.

[5] See Scottish Parliament Official Report Debate Contributions, Economy, Energy and Tourism Committee, 11 January 2012, for evidence of Ross MacKay (Law Society of Scotland) on the Land Registration etc. (Scotland) Bill. This initiative was foreshadowed in an article by Stewart Brymer in the Journal of the Law Society of Scotland in April 2010, available at http://www.journalonline.co.uk/Magazine/55-4/1007921.aspx We understand from discussions with Prof Brymer and with James Ness of the Law Society of Scotland that the plans to issue all solicitors with a "smart card" incorporating a high quality digital signature are well advanced.

[6] See Law Society of Scotland, Solicitors (Scotland) (ARTL Mandates) Rules 2006, available at http://www.lawscot.org.uk/media/50508/artl_rules.pdf. See also Gretton and Reid, *Conveyancing* (4th edn, 2011), para 8.23; Report on Land Registration: vol 1 (Scot Law Com No 222, 2010), paras 34.62-34.64.

completed to full effect. There appears to be nothing in the present law to prevent the creation and use of such mandates. There is, however, an issue about the usually very limited scope of these mandates. Clients cannot be well advised to give general mandates to their solicitors to sign documents on their behalf. Thus a specific mandate tends to be required for every transaction, indeed every document needing signature, including documents that have to be amended in the course of execution. This is usually impracticable.

Overcoming the second hurdle

4.6 With regard to the second problem – the computing facilities needed to operate a system in the way outlined above – we believe that this should be possible for most commercial law firms of any size in Scotland. However, we are also of the opinion that the ability to take advantage of technology in this way should not be restricted to those with the resources to purchase and maintain the facilities themselves. We suspect that in at least some situations, contracting parties may have concerns about the capacity of one of them, or of the managing advisers, to carry the process through satisfactorily, and contracting parties may also have issues of trust in relation to the preservation of the integrity of documents, although this did not appear to be a strong concern of consultees.

4.7 This background leads us to think that some alternative facility for electronic completion of commercial transactions as formal and, indeed, probative documents may be useful. We expressed doubts in the Discussion Paper as to the suitability of a private sector supplier for this task,[7] though in the course of the further work which we have done for this Report we have observed that a number of commercial companies offer document signing and storage services which could be used.[8]

A new scheme: an electronic document repository

4.8 Having regard to these considerations, we asked RoS during the preparation of our Discussion Paper whether it might be interested in providing an electronic facility in which the electronic execution of electronic documents might be carried out by the parties, and whether it saw any technological obstacles to developing such a facility. RoS is a body highly unlikely to fall victim to the market due to its crucial public role and established technical infrastructure. It is also very well-known to the Scottish legal profession. We received a positive and encouraging reply, the initial fruits of which appeared in the Discussion Paper. We have had a number of very helpful meetings with the RoS management team on the subject since the closure of the consultation period for the Discussion Paper, which have helped us greatly in the preparation of this Report.

4.9 RoS remain interested in developing a facility that would meet the need identified by us, provided that it is reasonably clear that there would be sufficient interest in using it and that revenue would be generated in sufficient quantity to meet the costs of setting up the facility and running it thereafter. We are confident that there would be no issue about the *vires* of setting up a repository for electronic documents for the purpose of enabling their execution as formal contracts with full probativity. As we explained in the Discussion Paper,[9] it would

[7] See its para 7.37.
[8] E.g. DocuShare (offered by Xerox Corp), Protiva (Gemalto NV) and SIGNificant (xyzmo Software GmbH).
[9] See its para. 8.7.

not be necessary either for the document to be subject to Scots law apart from its execution, or for the parties to be Scottish.

4.10 The system that we envisage could work in various ways but the basic example is that negotiating parties would reach a stage at which a final electronic version of their contract appeared to have been concluded. This negotiation could take place in the usual manner to which parties are accustomed, or could, at least in relation to the development of drafts, be facilitated centrally by the repository. Either way, a solicitor for one of the parties would be appointed by them as the coordinator of the execution process. The coordinator would upload the electronic document to the repository provided by RoS. Each of the parties would be given access to the document, initially, to check that the uploaded document reflected the agreed text (whether this document was negotiated prior to uploading or dynamically within the facility provided by the repository). At the stage of approving the agreed text, any alterations could be made by the coordinator. The process of execution by the parties' application of their respective advanced electronic signatures could then begin, again under the supervision of the coordinating solicitor. If alterations to the text became necessary during the execution of the document, the reapplication of previously applied advanced electronic signatures to the now altered text could also take place. The process would be capable of extending to a collection of related documents all forming part of a single transaction, or indeed of multiple transactions. Once the process of execution was complete, each of the parties would be able to download to its own systems the fully executed document or documents. It would be for the parties to decide whether also to leave a version in the repository for preservation purposes, and they could also, if they wished, register the document for preservation and/or execution in any electronic Books of Council and Session introduced under the powers conferred on RoS by the 2012 Act.

4.11 After our preliminary discussions with RoS, it is clear to us that it is possible to set up a repository along the lines set out above that would enable parties to make effective use of the new rules on electronic documents introduced by the 2012 Act. Our perception of the potential advantages of such a system is shared by those who would be expected to use it – a strong majority of consultees expressed enthusiasm for the idea. Dundas & Wilson commented: "Such a repository and mechanism to electronically sign contracts would be useful." Professor George Gretton of the Edinburgh Law School said that he thought "this idea is a promising one." Pinsent Masons LLP observed:

> "We can see advantages in such a system. We do not think that it would be used for negotiating documents but it would be useful for electronic execution and storage of executed documents. Whilst we have the technology to do this ourselves there are often situations where one party does not want to rely on another party's secure extranet and an independent option would be preferred. It would also be useful for smaller firms who do not have their own facilities."

The Faculty of Advocates thought it "likely that if an electronic document repository were to be set up by RoS it would be of use to contracting parties wishing to execute formal contracts remotely." Finally Shepherd & Wedderburn LLP said that, while they had not considered the repository idea in detail, they were "in principle … attracted by the idea", and also believed that "such a system may have significant benefits to the Scottish legal profession and/or RoS selling such a service globally."

4.12 An important issue will be the charges for the service. We understand that the charging structure for a document repository would not be designed for profit but only to meet the costs of setting up and running such a facility. Although it is not possible to provide figures for the charges to be applied for use of a document repository without knowing the likely volume of users and who will be the digital certificate provider, the cost of setting up and running the document repository would most likely be spread between the issuing of certificates and the transactional costs. It would be very difficult to base any charge upon the value of the document or documents being placed in the repository, since that value would frequently – if not invariably – be extremely difficult to calculate in advance of performance, and at any rate this option was not popular amongst consultees. At present, RoS only charge on the value of the transaction for transfers of title etc in the Land Register of Scotland and the General Register of Sasines. Registration of standard securities in these two registers and registration of deeds (including leases) in the Books of Council and Session is subject to a single fixed fee.[10] Those who responded to the consultation on the issue of fees generally preferred a fixed fee per document approach, although one respondent suggested that a subscription model might be preferable. Having regard to all these factors, we would suggest that:

21. The charging system for the electronic document repository system should be based on a fixed fee per document approach.

4.13 We do not envisage that any system set up by RoS in implementation of the ideas canvassed here would enjoy any monopoly or exclusivity. Parties would be free to use their own systems for the purpose, and nothing would preclude the entry into the market of private providers in competition with RoS for the business. It should be acknowledged, however, that the majority of consultees felt that RoS was best placed to provide an electronic document repository service. The Law Society of Scotland saliently commented that:

> "Whilst other providers could no doubt offer this service, the other registers under the care of RoS have endured for five hundred years. That experience and history may provide users with a comfort and confidence that a private provider cannot."

Specifications for an electronic document repository

4.14 The specifications for the repository that we have considered in discussion with RoS include the following: it must be (i) completely confidential, (ii) secure, (iii) designed in such a way that all documents relating to a particular transaction are clearly linked and marked, and (iv) durable for the long term yet capable of allowing parties to remove a document if they so wish. We deal with each of these below.

(i) Confidentiality

4.15 It is clear that, unlike the registers maintained by the Keeper, there can be no question of the contents of the proposed repository being open and accessible to the public other than to the contracting parties themselves. All consultees who commented on the issue concurred that any legislation implementing a proposal for an electronic repository system should expressly exclude any disclosure of a document contained therein. There is legislative precedent for the Keeper to hold documents confidentially, albeit in a provision of

[10] But if ARTL is used, the fee is lower. (See fn 4 to para 3.5 for brief details of ARTL.)

the Administration of Justice Act 1982 that was never brought into force.[11] Subject to what we say below, the Keeper and the RoS staff should have no access to the content of the documents in the repository. RoS inform us that it is possible to create a repository for electronic documents in which RoS would be able to guarantee at any point that a given document exists in the repository and that its content is as supplied to the repository but, provided that the document is appropriately encrypted, RoS would have no access to the contents of the document in question.

4.16 The inability of RoS to disclose the contents of the repository to anyone other than the parties to particular documents must however be subject to an exception for the power of the court to order disclosure on any ground on which a contracting party could be compelled to disclose information.[12] There are a number of such powers. Section 1(1) of the Administration of Justice (Scotland) Act 1972 provides that the Court of Session and the sheriff courts have the power to order the inspection, photographing, preservation, custody and detention of documents which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought[13]. Additionally, these courts have the inherent power at common law to grant commission and diligence for the recovery of documents[14], and in commercial actions, commercial judges in the Court of Session have wide powers at preliminary hearings to make orders requiring inter alia the recovery or production of documents, under the Act of Sederunt (Rules of the Court of Session 1994 Amendment No. 1) (Commercial Actions) 1994 rule 47.11(1)(b)(iv) and (v), and. The courts should be able to use these powers to order the disclosure of a document held in the repository. We think, however, that the repository facility would not be open to freedom of information requests where the contracting parties were not public bodies;[15] but if any legislation establishing the repository were to provide expressly that disclosure of its content was forbidden subject only to court order made on specified grounds, the absolute exemption from disclosure under section 26(a) of the Freedom of Information (Scotland) Act 2002 would apply.[16]

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[11] Administration of Justice Act 1982, s 23(1)(b), which would have enabled the Keeper to provide a repository for the wills of living persons. See also its s 25 which would have enabled the making of regulations on the conditions for the deposit of a will, and as to the manner of and procedure for deposit and registration of a will, the withdrawal of a deposited will and the cancellation of a registration. Section 26 is in force and makes provision for fee-charging.

[12] There may be difficulties here if the document has been encrypted and the Keeper has no means of unlocking it. The issue might be solved if the forms of encryption allowed were all in some way subject to the use of a 'master' or 'skeleton' key which could be used by the Keeper only with the authorisation of a court.

[13] For further discussion, see Lord Macfadyen (ed), *Court of Session Practice,* Tottel, 2005, paras 501-507.

[14] Ibid, paras 528-540.

[15] Section 3(2)(a)(i) of the Freedom of Information (Scotland) Act 2002 provides that information is not held by the public authority (and therefore not disclosable by that public authority) if it is held on behalf of another person; arguably this is the very nature of a repository. This argument would not assist parties to contracts involving publicly-owned companies as defined in s 6 of the 2002 Act and local authorities detailed in para 21 of sch 1 to that Act: see Kevin Dunion, *Freedom of Information in Scotland in Practice* (2011), paras 1.46-1.47. Note that there is no equivalent provision in the Environmental Information (Scotland) Regulations 2004 (SI 2004/520). The Freedom of Information (Amendment) (Scotland) Act 2013 will, when it comes fully into force, extend the power of Scottish Ministers to designate bodies as public authorities for FoI purposes, but this does not seem to include private sector bodies that do work for public authorities unless they are "arms-length" organisations that have been "spun out" of the public sector, such as the sports, culture and leisure organisations that have been set up by several local authorities in recent years.

[16] In relevant part the section, which is headed "Prohibitions on disclosure", reads: "Information is exempt information [ie not disclosable by a public authority] if its disclosure by a Scottish public authority (otherwise than under this Act) – (a) is prohibited by or under an enactment ...". See further Dunion, *Freedom of Information in Scotland in Practice* (2011), paras 1.216-1.224 for the case law on this provision. Note that there is no equivalent provision in the Environmental Information (Scotland) Regulations 2004 (SI 2004/520).

4.17 We recommend:

22. The contents of any electronic document repository set up by Registers of Scotland should be completely confidential, even from the Keeper and her staff, subject to an exception for the powers of the court to order disclosure.

(ii) Security

4.18 RoS confirmed that it would be possible to set up an automated system which could be operated only by a central administrator appointed by the parties (probably from amongst their professional advisers). Steps would be taken to ensure that this system was user-friendly. The administrator would upload the draft electronic document, specify permissions for access, downloading, and (where appropriate) editing, and oversee all other administrative steps, including opening for the application of electronic signatures, carrying out alterations, and closing the document once the signature process was complete. Having regard to these points, we recommend that:

23. Any electronic document repository should provide for operation of the system only by an administrator appointed by the parties to the electronic document. Parties would be free to specify the authority to be enjoyed by the administrator.

(iii) Linkage

4.19 Many commercial transactions and projects involve multiple contracts which must all be executed before the prospective funder will conclude the contract under which the funding for the project will begin to be released. It is therefore important that the repository be capable of establishing a portfolio of prospective contracts relating to such contracts. RoS confirmed to us that this kind of linkage is possible and that administrator permissions could be set to control either a single document or a series of related documents. It does not seem to us that this is necessarily a matter for provision in primary legislation, and this view was reflected in the comments of a number of consultees. Pinsent Masons LLP, the Faculty of Advocates and the Judges of the Court of Session all remarked that the matter should be dealt with by the administrator of the transaction.

(iv) Permanence

4.20 It may be necessary to refer to documents that were created many years before. While there should be no barrier to parties withdrawing their document from the repository at any time before or after execution has been completed, it may be an additional attraction of the suggested system that RoS can provide a very high degree of certainty as to its own continuity, and may be more secure in that way than any other form of custody available to the parties and their advisers. We do not know the extent to which post-execution formal documents are in fact referred to apart from when disputes or litigation arise, and whether parties would value a secure repository as a place to keep documents for preservation and also for reference purposes. We recommend that:

24. The system must be capable of holding documents for indefinite periods of time, although parties should be free to withdraw their document(s) if they wish to.

Conclusion

4.21 In conclusion of this Chapter of the Report, we recommend that:

25. An electronic document repository would be a highly useful development in the practice of Scots law, and Registers of Scotland, the Law Society of Scotland and other interested parties should pursue this, subject to the above specifications. The Scottish Government should facilitate development of the repository.

Chapter 5 List of Recommendations

1. There should be legislation enabling parties to execute a document by way of counterparts, with the result constituting a single document executed by all the parties.

(Paragraph 2.13; Draft Bill, section 1(1) and (2))

2. The legislation enabling counterpart execution should embrace both "traditional" and "electronic" documents.

(Paragraph 2.15; Draft Bill, section 4)

3. The legislation should not exclude the possibility of counterpart execution of documents embodying unilateral obligations undertaken jointly by two or more parties.

(Paragraph 2.17)

4. The legislation should not have retrospective effect.

(Paragraph 2.19; Draft Bill, section 5)

5. The legislation should not impose any requirement that the document so to be executed contain a clause setting out that execution is to be by way of counterparts.

(Paragraph 2.21)

6. A document executed in counterpart becomes effective at the earliest when the subscribed counterparts are delivered to the other parties.

(Paragraph 2.36; Draft Bill, section 1(4) – (6))

7. Parties may provide that their executed counterparts, despite physical delivery or transmission, are to be held as undelivered until an agreed future time or event, whether specified in the document to be executed in counterpart, or in some other way.

(Paragraph 2.43; Draft Bill, section 1(7) – (10))

8. A document executed in counterpart must, in addition to the counterparts being delivered between the subscribing parties, meet any other requirement of the law before it can become effective.

(Paragraph 2.46; Draft Bill, section 1(6)(b))

9. Parties executing a document in counterpart may agree to appoint a nominee to take delivery of all the relevant counterparts on their behalf.

(Paragraph 2.50; Draft Bill, section 2(1))

10. The duties of the nominee should be to receive and then to hold and preserve the delivered counterparts in the form in which they were received. The parties may vary, add to, or replace these duties by agreement, which agreement may be express or implied. The agreement may be reached before or after the nominee has taken delivery of the counterparts.

(Paragraph 2.56; Draft Bill, section 2(3))

11. A nominee's failure to fulfil the relevant duties will not deprive the document of the legal effects it would otherwise have.

(Paragraph 2.56; Draft Bill, section 2(4))

12. The legislation should state that parties may nominate either one of their number or an agent of a party to take delivery of the counterparts.

(Paragraph 2.57; Draft Bill, section 2(2))

13. A traditional document may be delivered by electronic means.

(Paragraph 2.66; Draft Bill, section 3(1))

14. "Electronic means" should be defined to include (but not be limited to) a fax, an attachment to an email, and upon a carrier such as a compact disc or a memory stick.

(Paragraph 2.67; Draft Bill, section 3(3)(a)-(c))

15. The definition should extend to all forms of the traditional document that require the use of electronic devices to render what has been transmitted readable by its recipient.

(Paragraph 2.67; Draft Bill, section 3(3)(d))

16. Electronic delivery must be by a means that the recipient has previously expressed willingness to accept or what it is reasonable in all the circumstances for the recipient to accept; the same applies to the form of what is delivered.

(Paragraph 2.71; Draft Bill, section 3(4))

17. Parties may agree (or it may be found reasonable in all the circumstances) that delivery of a document by electronic means may be effected by sending only part of the document provided that it includes at least the page on which the sender signed the document which can be shown in all the circumstances to have been part of the document.

(Paragraph 2.82; Draft Bill, section 3(5))

18. The party who delivers a counterpart traditional document by electronic means should thereafter hold that traditional document in accordance with any arrangements made in relation thereto by the parties. The arrangements may be made before or after the electronic delivery of the document.

(Paragraph 2.91; Draft Bill, section 3(7))

19. The copy of a traditional document that is received when it is delivered by electronic means is not to be treated as the traditional document itself for any purpose other than delivery.

(Paragraph 2.94; Draft Bill, section 3(6))

20. The result of counterpart execution of a document should be deemed a single document, which may be made up of either (a) the sum of the relevant counterparts or (b) a collated version of them which contains a single version of the agreed text up to and including the page on which the first subscribing party's signature appears, and which is followed by a page, or pages, containing the signatures of the parties who have not subscribed on the last page.

(Paragraph 3.32; Draft Bill, section 1(3))

21. The charging system for the electronic document repository system should be based on a fixed fee per document approach.

(Paragraph 4.12)

22. The contents of any electronic document repository set up by Registers of Scotland should be completely confidential, even from the Keeper and her staff, subject to an exception for the powers of the court to order disclosure.

(Paragraph 4.17)

23. Any electronic document repository should provide for operation of the system only by an administrator appointed by the parties to the electronic document. Parties would be free to specify the authority to be enjoyed by the administrator.

(Paragraph 4.18)

24. The system must be capable of holding documents for indefinite periods of time, although parties should be free to withdraw their document(s) if they wish to.

(Paragraph 4.20)

25. An electronic document repository would be a highly useful development in the practice of Scots law, and Registers of Scotland, the Law Society of Scotland and other interested parties should pursue this, subject to the above specifications. The Scottish Government should facilitate development of the repository.

(Paragraph 4.21)

Appendix A

Execution in Counterpart etc. (Scotland) Bill 2013

[DRAFT]

CONTENTS

Execution in Counterpart etc. (Scotland) Bill 2013

[DRAFT]

An Act of the Scottish Parliament to make provision as regards execution in counterpart and the delivery by electronic means of traditional documents; and for connected purposes

1 Execution in two or more counterparts

(1) A document may be executed in two or more counterparts, that is to say in two or more duplicate, interchangeable, parts where no part is subscribed by both or all parties.

(2) On such execution as is mentioned in subsection (1), the counterparts are deemed a single document.

(3) That single document may be constituted either—

(a) by both or all the counterparts in their entirety, or

(b) by one of the counterparts in its entirety, collated with the page or pages on which the other counterpart has, or other counterparts have, been subscribed.

(4) Each counterpart is to be delivered to the party or parties who did not subscribe the counterpart in question unless it is a counterpart which falls to be delivered under subsection (5).

(5) If a party has, under section 2(1), nominated a person to take delivery of one or more counterparts, the counterpart in question is (or counterparts in question are) to be delivered to that person.

(6) A document executed in two or more counterparts becomes effective on—

(a) both or all the counterparts having been delivered in accordance with subsections (4) and (5), and

(b) any other step required by an enactment or rule of law for the document to become effective having been taken.

(7) But subsection (6) is subject to subsections (8) to (10).

(8) Subsection (9) applies where a counterpart is received—

(a) in circumstances which, but for this subsection, would constitute delivery in accordance with subsections (4) and (5), but

(b) with an instruction that it be held by the recipient as undelivered.

(9) The counterpart is not to be treated as delivered for the purposes of subsection (6)(a) until such time as the person from whom it is received indicates to the holder that it is to be so treated.

(10) The time mentioned in subsection (9) may, but need not be, specified in the instruction.

NOTE

Subsection (1) provides that, where a document is to be signed by more than one party, it will be valid under Scots law if one party subscribes (i.e. signs in the appropriate place) its own copy – or counterpart – of the document and the second party subscribes another counterpart (and so on), provided that each counterpart is in identical terms. They may be signed in different locations and at different times, though they will typically be signed close in time to each other. Together, they form a single document (by subsection (2)). This method of executing (i.e. signing) a document is optional and any existing alternative method, such as gathering the parties together to sign a single version of the document, remains wholly valid. Subsections (1) and (2) implement recommendation 1.

Subsection (3), which implements recommendation 20, is principally to clarify that the single document which is formed by the sum of the counterparts may be represented equally by a collated version. This has advantages for registration or recording, as explained in Chapter 3 of the Report. To give an example of what a "collated version" is, suppose that a document is to be executed by 5 parties, each of which subscribes its own counterpart. Parties wish to register the document in the Books of Council and Session and, instead of submitting all 5 counterparts, which is cumbersome both to register and for anyone subsequently doing a search, a collated version may be made. This is done by taking one of the counterparts and then extracting from the other 4 counterparts the page which has been subscribed and adding each of them to it.

By subsections (4) and (5), which partially implement recommendation 6, where a document is executed in counterpart, the counterparts must be delivered. As explained below, subsection (6) provides that the document cannot take effect until this has been done. Depending on the arrangements which parties have made, each counterpart must be delivered either to each party who has not subscribed it (section 1(4)) or to a nominated person, as discussed in section 2 (section 1(5)). Thus the new method of creating a valid document, i.e. by execution in counterpart, adopts the general requirement of Scots law that a written document must be delivered before it can become obligatory. Equally, the existing rules on delivery are not altered in any way, but an additional class of writing is brought within their scope.

Subsection (6), which implements recommendation 6, regulates when a document executed in counterpart takes effect. It provides, in essence, that it becomes effective when the delivery requirements under subsections (4) and/or (5) are complete, but subsections (7) to (10), which are discussed below, allow parties to choose a later time if they wish. This is in keeping with the general policy in the Bill of allowing parties the greatest amount of freedom to make their own arrangements as is consistent with the minimum requirements of the law.

Subsection (6)(b), which implements recommendation 8, is included to remove any doubt that all of the current requirements for a particular class of document to become effective continue to apply. For example, a document containing a guarantee must be delivered to the beneficiary before it is effective. So, if two co-guarantors execute a document in counterpart, it cannot take effect until each party delivers its counterpart to the other and, by subsection (6)(b), the counterparts are also delivered to the beneficiary.

Subsections (7) to (10) provide a mechanism by which parties may regulate the date and time at which their counterpart takes effect. They do this by means of an instruction that a counterpart, when received, is to be held as undelivered. It is then treated as being delivered when, and only when, the sender has indicated that this is to be done. Importantly, the requirements of delivery must be observed (so that, for example, if electronic means are used then the terms of section 3 must be followed), even though delivery is delayed. Subsections (7) to (10), which implement recommendation 7, only apply to counterparts, so if another document (e.g. a disposition in the context of a residential property transaction) is sent with an instruction that it be held as undelivered the current law will apply.

2 Nomination of person to take delivery of a document executed in two or more counterparts

(1) Parties to a document executed in two or more counterparts may nominate a person to take delivery of one or more of the counterparts.

(2) Without prejudice to the generality of subsection (1), one of the parties, or an agent of one or more of the parties, may be so nominated.

(3) A person so nominated is, after taking delivery of a counterpart by virtue of that subsection, to hold and preserve it for the benefit of the parties except in so far as the parties may, whether before or after the document has effect, come to, or be taken to have come to, an alternative arrangement.

(4) A document's having effect is not dependent on compliance with subsection (3).

NOTE

Section 2 recognises that, particularly where a document is to be signed by a large number of parties and where it has been negotiated with the input of legal advisers, it is common for the adviser to one of the parties to act as administrator for the signing process. That person will send out the agreed documentation and collect back the subscribed counterparts. In order to remove any doubt as to the efficacy of such an arrangement, subsection (1) makes it plain that parties are free to nominate a person to take delivery of the counterparts (or, if desired, of just certain counterparts). This implements recommendation 9.

Subsection (2), in implementation of recommendation 12, says that it is no obstacle to a person being nominated if they are either a party to the document or an agent (eg solicitor) acting on behalf of a party.

Subsection (3), which implements recommendation 10, sets out the minimum duties of a person who is nominated to take delivery of counterparts. The nominee must hold and preserve what has been delivered for the benefit of the parties involved. This is subject to any alternative arrangement made by parties (who might, for example, agree that the nominee is to advise parties of the successful delivery of all required counterparts, or to transmit what has been delivered to one of their number). In this way parties are able to make whatever arrangements they consider most suitable but can be sure that, as a minimum, what they deliver, whether it is in paper or electronic form, will be held safely. If what is delivered is a wet ink signature, then there is an obvious utility in the recipient (who may not be a party to the document) being obliged to hold it pending further instruction, and if (as may be more typical) what is delivered is an electronic copy of the signed original, in the form, say, of a PDF file or a fax, then that too will be valuable, for instance because the time of its delivery may determine the point at which the document takes legal effect (as explained in the note to section 1(6)).

Subsection (4) clarifies that a nominee's failure to meet its obligations under subsection (3) does not affect the effectiveness of the document (though of course it may have other consequences, both under the contract and otherwise). It implements recommendation 11.

3 Delivery by electronic means of a traditional document (1) A traditional document (whether or not a document executed in two or more counterparts) may be delivered by electronic means.

(2) Subsection (1)—

(a) is subject to subsections (4) and (5), and

(b) is without prejudice to the use of any means other than electronic to effect the delivery of a traditional document.

(3) Without prejudice to the generality of subsection (1), in that subsection "by electronic means" includes—

(a) by means of an electronic communications network (for example as an attachment to an e-mail),

(b) as a facsimile transmission (that is to say, as a fax),

(c) stored electronically on a device such as a compact disc or a memory stick, or

(d) by other means but in a form which requires the use of electronic apparatus by the recipient to render it intelligible.

(4) The delivery must be by a means, and what is delivered by that means must be in a form—

(a) which the recipient expresses a willingness to accept, or

(b) (if there is no such expression, if there is uncertainty as to what the recipient has expressed a willingness to accept or if what the recipient has expressed a willingness to accept is impracticable) which it is reasonable in all the circumstances for the recipient to accept.

(5) Subject to subsection (4), it is competent for what is delivered by that means to consist of part only of the traditional document provided that the part—

(a) is sufficient in all the circumstances to show that it is part of that document, and

(b) includes, or is, the page on which the sender (or the person on whose behalf the sender has effected the delivery) has subscribed that document.

(6) Although delivery by electronic means constitutes effective delivery of a traditional document, what is received by that means is not otherwise to be treated as being the traditional document itself.

(7) A traditional document which has been delivered by electronic means is to be held by the sender in accordance with whatever arrangements have been made by the sender and the recipient (or, if there is a number of recipients, have been made by the sender and the recipients as a group).

(8) Any reference in subsection (7) to a recipient is to be construed, in a case where a person takes delivery by virtue of section 2(1), as a reference not to that person but to the parties who nominated that person.

(9) In this section "traditional document" is to be construed in accordance with section 1A of the Requirements of Writing (Scotland) Act 1995 (c.7).

NOTE

Section 3 provides a new way by which a "traditional document" (i.e. one on paper and not in electronic form) may be delivered, namely by electronic means.

Subsection (1) implements recommendation 13, making clear that the rule applies whether the document is executed in counterpart or not. This means, for example, that missives (which will not be amenable to counterpart execution) will be deliverable by fax or email; this will put to rest an issue which has been contentious and uncertain in recent years. It should also be noted, by way of background, that when changes to the Requirements of Writing (Scotland) Act 1995 have come into force electronic documents may be delivered electronically. (See the note to section 4 for brief detail on this.)

Subsection (2)(b) makes it clear that the existing Scots law rules on delivery are unaffected and that what is provided in section 3 is an addition to them. It follows, therefore, that the present requirement for delivery still stands but the ways in which that can be achieved are expanded by the addition of email delivery, fax and the like.

Subsection (3) lists a number of methods of delivery which will count as "electronic means". The list is not exhaustive but is designed to cover the main methods available using current technology. This implements recommendations 14 and 15.

Subsections (4) and (5), which implement recommendations 16 and 17, permit parties to come to an arrangement between themselves both as to the electronic means of delivery (for example, by fax or by PDF file attached to an email) and also as to whether the whole or just a part of the document is to be delivered. Where no such arrangement has been made, or where the arrangement is uncertain or impracticable, then the means of delivery and the question of what is to be delivered will be whatever is reasonable for the recipient to receive, viewed objectively. Importantly, if only part of the document is delivered electronically then subsection (5) imposes two conditions: first, it must be clear from what is delivered that it is part of the subscribed document and, secondly, it must contain, as a minimum, the page with the subscription.

Subsection (6) is included to remove any doubt as to the status of what the recipient receives following electronic delivery. In implementation of recommendation 19, the provision makes clear that what is received (eg a fax or a PDF file) is not the executed document and so cannot, for example, be recorded or registered.

Subsection (7) implements recommendation 18. It states that, once a person has sent a counterpart or other document by electronic means (and therefore still retains the original), that person holds the wet ink version in accordance with whatever arrangements parties have made. We trust that, by including this provision, parties will be prompted to think about, and agree, appropriate arrangements. For example, if the document is to be registered then it is likely that parties will agree that the wet ink signatures are to be ingathered for that purpose. In other cases parties may be content that the sender simply holds the wet ink version for a time and then disposes of it if no call has been made for it. The Bill is not prescriptive on this: it is up to parties to decide what is best for their needs.

Subsection (8) modifies the previous subsection to take account of the situation where parties have nominated a person under section 2 to take delivery of counterparts. That subsection is to be read as if the "recipients" were those who made the nomination.

Subsection (9) refers to the definition of "traditional document" which will be inserted into the 1995 Act by paragraph 2 of schedule 3 to the Land Registration etc. (Scotland) Act 2012 when it comes in force. Such documents are those "written on paper, parchment or some similar tangible surface".

4 Authentication of electronic document

(1) In sections 1 and 2, any reference to execution of a document includes a reference to authentication of an electronic document.

(2) In subsection (1), "electronic document" is to be construed in accordance with section 9A of the Requirements of Writing (Scotland) Act 1995 (c.7).

NOTE

Section 4, which implements recommendation 2, extends sections 1 and 2 to electronic documents. Thus it will be competent to execute an electronic document (by means of an electronic signature) in counterpart and to nominate a person to take delivery of the counterparts. It will also be competent for a document to be signed in various counterparts some of which are signed digitally and some in "wet ink". However, given the possibilities of digital execution of electronic documents, which are discussed in Chapter 4 of the Report, it is not thought likely that electronic counterparts will be used at all frequently.

"Electronic documents" are defined in section 9A of the 1995 Act, which will be inserted by section 97 of the Land Registration etc. (Scotland) Act 2012 when it comes in force, as "documents which, rather than being written on paper, parchment or some similar tangible surface are created in electronic form". (This is in contrast to "traditional" documents, mentioned at the end of section 3.)

5 Saving

Nothing in this Act affects a document the execution of which is completed before this section comes into force.

NOTE

Section 5 implements recommendation 4. By providing that the Bill does not affect documents whose execution has been completed before the section comes into force, this section makes clear that the current law continues to apply to such documents. This will be of relevance, for example, to questions which arise after the new legislation is in force about the formation or delivery of a document which was executed before that time. Section 5 provides that any such question is to be answered by reference to the existing common law and statute and not by reference to the Bill.

6 Commencement

(1) This section and section 7 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force at the end of the period of 2 months beginning with that day.

NOTE

This section provides that the Bill will take full effect 2 months after the granting of Royal Assent. This gives clear notice of the date on which the law will change. It also means that the Bill will take effect automatically rather than requiring – as is more typical – a commencement order to be made by the Scottish Ministers.

7 Short title

The short title of this Act is the Execution in Counterpart etc. (Scotland) Act 2013.

Appendix B

List of those who responded to the Discussion Paper (DP No 154):

Dr Ross Anderson, University of Glasgow

Anderson Strathern LLP

Dr Gillian Black, University of Edinburgh

Blackadders LLP

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List of those who responded to our request for views on a draft of the Bill following our seminar in November 2012:

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