

Business and Regulatory Impact Assessment

Title of Proposal

Draft Execution in Counterpart etc. (Scotland) Bill 2013 ("the Bill")

Purpose and intended effect

- **Background**

Execution in counterpart is the name given in English law to the process by which each party to an agreement enters into it by signing a separate physical copy of it and typically does so in a different place and at a different time from the other party or parties, who do likewise. This allows for execution of a document intended to have legal effect amongst two or more parties without the parties having to meet together for each to sign the document in questions. The process is well recognised in English law as well as in many other common law jurisdictions including New Zealand, Australia and the United States of America.

There is currently a great deal of uncertainty amongst Scots law practitioners on the question of whether or not documents can be validly executed in counterpart under Scots law.¹ Parties to a contract are, under the Rome I Regulation², able to exercise a choice as to the law which will govern their transaction and due to the convenience and efficiency of execution in counterpart, this has led to a significant proportion of practitioners opting to choose English law rather than Scots to carry out transactions which are otherwise Scottish in nature. For example, Dundas & Wilson LLP 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.*" The effects of this are that fewer contracts are subject to Scots law and therefore fewer contracts result in litigation in the Scottish courts or arbitration under Scots law.

The need for reform allowing for expedient remote signing in Scots law is summarised in a practical example offered to us by an in-house lawyer for a large multinational transport company: "*I expect to agree verbally a document tomorrow, which is being drafted by lawyers overnight, which everyone would like to implement tomorrow. However it will need to be signed in Germany, couriered to the English division of the German company for their signature then sent to Scotland (unless we fly someone to London) for our signature and then back to London for the final party to sign. All of which could have been done in about 20 mins by either emailing pdf documents or fax if it were an English contract. It is going to be hard to make them believe that doing business in Scots Law is a good idea in future unless we can change this.*" We have every reason to

¹ See, for example, a news item (dated November 2012) on law firm Lindsays' website, in which the author states: "Most importantly, you should note that signing in counterpart is not a valid method of signing under Scots law. If the relevant agreement is subject to Scots law ... then all parties must sign the same copy of the agreement in order for it to be validly signed." <http://www.lindsays.co.uk/news-and-features/bulletins/bulletin/corporate-and-technology-bulletin---november-2012/>. Please note that there are varying views on the matter, and Lindsays' certainty of the invalidity of execution in counterpart is not reflected by all other law firms.

² See, in particular, Article 3(1): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>

suppose that similar cases arise daily in commercial practices across Scotland.

It is thus clear to us that this is an area where reform is not merely desirable but necessary, in order to remove a practical barrier to the use of Scots law in commercial transactions and to keep Scots law fit for purpose.

- **Objective**

The passage and implementation of the Bill would implement the recommendations contained in the Scottish Law Commission's Report Formation of Contract: Execution in Counterpart.

The main provisions of the Bill are as follows:

- Execution in counterpart will be an optional process for validly executing documents.
- Where execution in counterpart is used, the counterparts will be deemed a single document.
- Parties may either deliver their counterpart to each other party to the transaction, or nominate a person to take delivery of all the counterparts.
- Delivery of a counterpart need not be constituted by delivery of the whole counterpart: part of the document may be delivered, providing this is sufficient on its own terms to show that it is part of the document, and comprises at a minimum the page on which the sender has subscribed the document.
- Traditional documents (whether or not executed in two or more counterparts) may be delivered by electronic means such as email or fax.

Documents executed in counterpart would be capable of probativity i.e. being self-proving (and hence registration in, for example the Books of Council and Session).

As the Bill is intended to provide that documents can be validly executed in counterpart in Scots law, rather than introduce new laws, the Bill will not have a retroactive effect jeopardising the validity of contracts which may have been executed in counterpart prior to the Bill's passing.

We are of the opinion that as a non-controversial, strongly supported yet relatively short measure meeting what is seen as an urgent need, the draft Bill is an excellent candidate for early enactment by the Scottish Parliament.

Main Scottish Policy Objectives

The Bill clearly meets various Scottish policy objectives: expediency of business, keeping Scots law fit for modern commerce, clarity and accessibility of the law, enabling electronic communication of documents in line with the Digital Scotland agenda, environmental protection, enabling easier participation in commerce for those affected by physical disabilities, and providing businesses and individuals living in less accessible areas of the country effective means of concluding transactions remotely. This Bill is in line with Lord Guthrie's celebrated comment in a case from 1964, that the general policy of the law should be to facilitate commercial transactions, not to create obstacles or unnecessary pitfalls in the

way of solving practical problems arising out of the circumstances confronting business people,³ as it aids business expediency and removes barriers to efficient economic activity.

Policy for the Global Economy

The Bill would further the policy objective of efficiency of cross border transactions, as parties in different countries would have the ability to complete Scots law transactions remotely in an efficient manner. Mr Rod MacLeod of Tods Murray LLP has said that execution in counterpart would “give Scots law documents a greater degree of ‘compatibility’ with documents from other legal jurisdictions.”⁴ This could reduce the incidence of situations brought to our attention by Tods Murray LLP in their response to the Discussion Paper, in which the Scottish aspects of a multi-jurisdiction transactions are, on occasion, excluded because of the complexities caused by the lack of recognition of execution in counterpart in Scots law. Consequently, if the Bill was passed and Scottish law aspects of transactions were retained, this could provide a boost to Scotland’s economy.

A significant number of Scottish law firms are involved with global networks of law firms, or have offices abroad – for example Morton Fraser LLP⁵, Burness Paull and Williamsons LLP⁶, DWF LLP⁷, Maclay Murray Spens LLP⁸, MacRoberts LLP⁹ and Shepherd + Wedderburn LLP¹⁰ – and the Bill would assist in minimising practical differences between executing documents in Scotland and other jurisdictions.

• **Rationale for Government intervention**

The objectives outlined above can only be achieved through legislation by the Scottish Parliament. Additionally, the proposals in the Bill and Report are very much in line with two of the Scottish Government’s National Outcomes¹¹, which form part of the Government’s National Performance Framework¹². These are:

- “We live in a Scotland that is the most attractive place for doing business in Europe”¹³: As outlined above, the Bill will allow Scots law documents a greater degree of compatibility with documents from other jurisdictions. The benefits of the Bill would be shared throughout Scotland, as it offers a means of completing transactions remotely which would be of particular benefit to those in remote communities.
- “We reduce the local and global environmental impact of our consumption and productions”¹⁴: Implementation of the Bill would result in a reduction of the volume of paper used per transaction, and of the number of journeys made for the purpose of signing ceremonies. This is discussed

³ *R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 at 332 (IH).

⁴ ‘If there is one thing that really annoys me...’, Firm Magazine, 18 November 2008
http://www.firmmagazine.com/features/420/If_there_is_one_thing_that_really_annoy_me%E2%80%A6.html

⁵ <http://www.morton-fraser.com/about/interlaw>

⁶ http://www.burnesspaull.com/about/international?full_site=1

⁷ <http://www.dwf.co.uk/international>

⁸ <http://www.mms.co.uk/VerySmartPeople/WeareVSP/LexMundi.aspx>

⁹ http://www.macroberts.com/content/content_479.html

¹⁰ <http://www.shepwedd.co.uk/about-us/world-services-group.html>

¹¹ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome>

¹² <http://www.scotland.gov.uk/About/Performance/scotPerforms/NPFChanges>

¹³ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/business>

¹⁴ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/envImpact>

further below under 'Benefits'.

Importance of the proposals to legal practitioners

Prior to the release of our Discussion Paper No. 154 in March 2012, numerous commercial law practitioners had pressed the matter upon us for consideration in our review. The difficulties which it caused in relation to the completion of high-value commercial contracts were such that it was 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, and responses to the Discussion Paper were overwhelmingly in favour of legislation. The objectives of the Bill are firmly supported by Scots law practitioners. Pinsent Masons LLP commented in response to Discussion Paper No. 154 that "*Modern commercial transactions need the flexibility provided by counterpart execution ... This would be particularly useful for things like oil and gas transactions when often there are multiple parties (sometimes as many as 8 or 10) located all around the world,*" and Blackadders LLP have stated in their response that "*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. It would be helpful to have certainty about this practice, which would reduce time and money spent on practices that are not adding value in either a legal or commercial sense.*" In addition, recent changes to the UK wide rules on registering company charges should mean that execution in counterpart brings additional advantages, particularly where the charge document is a mutual one (i.e. signed by more than one party), because it will allow greater control as to when the 21 day period for registration will begin.

Importance of the proposals to the legal sector as a whole

The legal sector is extremely important to Scotland's financial climate, providing around 20,000 jobs (including 10,400 solicitors) and contributing approximately £1.2 billion per year to the Scottish economy.¹⁵ The Bill would make Scots law not only more certain, but more attractive to businesses, and would help ensure that these figures either remain the same or are boosted. Scottish law firms are instrumental in the completion of a multitude of high value commercial transactions every year, often measured in billions of pounds, for example the £1.7 billion Forth Replacement Crossing infrastructure project.¹⁶ Crucially, we believe that the Bill if passed would attract business and economic activity into Scotland, and execution and delivery under Scots law would be efficient and barriers to such activity would be removed.

As Scottish law firms have clients in a wide variety of business sectors, the Bill has the potential to aid in creating a more efficient commercial environment for the benefit of a diverse range of sectors in Scotland.

In conclusion on this section we quote from Dundas & Wilson:¹⁷

"It is not difficult to think of the benefits to commercial transactions if this Bill comes into force. The biggest and most obvious benefit is the speed with which a contract could be executed. Second to this is the likelihood that execution by

¹⁵ 'Law Society backs scheme to bring legal outsourcing to Scotland', 7 August 2012
http://www.lawscot.org.uk/news/press-releases/2012/august/news_070812sdi

¹⁶ Lawyers 2012, The Herald Newspaper Supplement, 2 November 2012, page 29

¹⁷ <http://www.public-aye.com/> (under "contract law", then "coming soon to Scots law: contracts executed in counterpart")

counterpart will save the parties money. In a commercial transaction, signing the contract often involves getting a large number of extremely busy people in the same room to sign one document. This can be slow and costly, especially if parties are from different parts of the world."

Consultation

Consultation was carried out in accordance with the SLC's established practice in conducting law reform projects.

- **Within Government**

The Contract Law team, accompanied by the Chief Executive of the Scottish Law Commission, Mr Malcolm McMillan, also met with Mr Simon Stockwell and Ms Jill Clark of the Scottish Government. Mr Stockwell supported the notion of presenting the Bill as furthering Digital Scotland policy.

We have consulted with the Registers of Scotland, who are not part of the Scottish Government but are included here as a public body. We have been in touch with various members of the Registers of Scotland throughout the project, most recently at a meeting at the offices of the Registers of Scotland in January 2013, during which they confirmed their support for the Bill.

- **Public Consultation**

We published a Discussion Paper on Formation of Contract (Discussion Paper 145) 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, which contained three chapters on the topic of execution in counterpart. Responses to this were overwhelmingly in favour of statutory clarification of the validity of documents executed in counterpart in Scots law.

The Scottish Law Commission hosted, together with the University of Edinburgh Centres for Private and Commercial Law, a seminar on execution in counterpart on 29 November 2012,¹⁸ and we published a draft of the Bill for discussion at the seminar on the Scottish Law Commission's website¹⁹. The event attracted around 60 legal practitioners and academics. Views expressed in the seminar were very much in favour of the Bill's initiatives; for example the Chair of the event, Lord Hodge, Senator of the College of Justice and senior commercial judge, stated: "*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.*" We received a number of written comments on the Bill following the seminar, and these all expressed support for the Bill.

¹⁸ 'Seminar on Execution in Counterpart', 7 November 2012, Scottish Law Commission Website News Item, <http://www.scotlawcom.gov.uk/news/seminar-on-execution-in-counterpart/>

¹⁹ 'Draft Execution in Counterpart (Scotland) Bill', 14 November 2012, Scottish Law Commission Website News Item, <http://www.scotlawcom.gov.uk/news/draft-execution-in-counterpart-scotland-bill/>

²⁰ 'Execution in counterpart: final chance to comment', 21 January 2013, Scottish Law Commission Website News Item, <http://www.scotlawcom.gov.uk/news/execution-in-counterpart-final-chance-to-comment/>

Following the seminar, the team released a further draft of the Bill for further comments in January 2013,²⁰ which coincided with an article published in the Journal of the Law Society of Scotland written by Mr Paul Hally of Shepherd + Wedderburn LLP.²¹ This draft did not generate as significant a volume of comments the previous draft, but responses again focussed on drafting issues whilst expressing support for the overall concept of the Bill.

The final draft of the Bill is thus the product of consultation beginning initially with Discussion Paper 154 followed by two 'mini consultations' and a seminar. At each stage of this process, members of the public were able to comment on the proposals, and we actively encouraged a number of legal practitioners to comment on the draft Bill. We have not at any stage of the consultations received comments to the effect that statutory provision on execution in counterpart would have adverse effects in Scots law.

- **Business**

From the outset of the project, we have greatly benefited from the comments and advice offered to us by those with whom we have met to discuss the matter. Prior to the commencement of the drafting process of the Bill, we were encouraged by the comments of representatives from Shepherd + Wedderburn LLP, Burness LLP, the Law Society of Scotland, Dundas & Wilson LLP, and Brymer Legal Limited.

We also discussed various matters pertaining to the execution in counterpart project at our Advisory Group meeting in 2010. These meetings involved discussion with relevant practitioners, academics and judges.

In January 2013, the Contract Law team visited the Edinburgh offices of several leading law firms (Dickson Minto WS, McClure Naismith LLP, Pinsent Masons LLP and Tods Murray LLP) in order to discuss the proposals. Each practitioner with whom we spoke stressed that the enactment of the Bill would be highly beneficial in terms of modernising the law and making available in Scotland a method of executing documents which was effective in terms of time, money and accessibility for remote parties.

We have also visited the Edinburgh offices of Shepherd + Wedderburn LLP in December 2012 in order to speak with Mr Paul Hally and Mr Stephen Trombala. Mr Hally has been instrumental in bringing the issue of execution in counterpart to our attention. Both practitioners offered advice on the practical issues affected by the Bill, and made clear their continuing support for the project.

We have also had frequent contact with the above mentioned firms by email and, in some cases, telephone. Caroline Wilson of Dundas & Wilson offered detailed comments on the Bill via telephone, and we have also benefited from email correspondence with various representatives from law firms, as well as with Mr Stephen Hart, Legal Counsel for Braveheart Investment Group and several other in-house lawyers.

²¹ 'Separate but Legal', Mr Paul Hally, The Journal Online, 21 January 2013
<http://www.journalonline.co.uk/Magazine/58-1/1012099.aspx>

Options

Option 1 – Do nothing

Under this option the draft Bill would not be introduced. The current perception amongst legal practitioners in Scotland that Scots law is not fit for purpose in respect of the execution of documents in today's commercial world would persist and the benefits we detail below would not be realised.

Option 2 – Introduce the draft Bill

Under this option the recommendations outlined in the Report and implemented through the draft Bill would be introduced, realising the changes to the law listed under "Objectives" above.

- **Sectors and groups affected**

The Bill affects the general law of execution and delivery of documents. As any member of the public may wish to execute a document, the Bill is capable of impacting upon anyone in Scotland. We anticipate, however, that the Bill's effects would most greatly be felt by the legal profession. Legal practitioners' work is currently adversely affected by the perceived invalidity of documents executed in counterpart, and so the Bill could have an immediate positive impact within the legal profession.

We have concluded that the Bill will not impact upon any person by virtue of their particular religion, belief, age, sexual orientation, gender, race or ethnicity.

- **Benefits**

Option 1

We see no benefits of Option 1. The law in Scotland on execution in counterpart will remain uncertain and will continue to constitute an unnecessary hindrance to business, perhaps even resulting in a loss of business and economic activity in Scotland. Mr Rod MacLeod of Tods Murray LLP, summarised the practical difficulties associated with execution in counterparts in an article in *The Firm Magazine*: "*Although there are different tactics for coping with signatories executing in different locations -for example, converting the agreement into a unilateral document that takes effect by notice and acknowledgement, or having the document executed under power of attorney, or sending trainees off to far-flung corners of the world to track down the elusive signatory- these options aren't always available depending on the nature of the agreement or practical in the circumstances of the transaction.*" This situation will remain unless the Bill is passed.

Option 2

Remote Signing

The crucial practical benefit of execution in counterpart 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, as parties typically do not wish to meet to negotiate or sign contracts. The availability of a process in Scots law allowing parties to validly execute

documents remotely is of particular use to those operating in cross-border contexts. Business transactions do not necessarily occur between persons in the same place or, indeed, in the same jurisdictions, especially with complex deals that are multi-partite in nature.

Savings in time and money; commercial expediency

Execution in counterpart serves to reduce unwanted and (given the existence and use of reliable electronic communications technology) unnecessary 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 also 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. Time is often a matter of urgency in commercial matters.

Reflection of Current Practice

The Bill also reflects current commercial practice: as an attendee at our seminar representing the Royal Bank of Scotland explained, "*My experience would be 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 what would be exchanged would simply be the signing pages... those would be exchanged and nothing else would be delivered.*" Dickson Minto W.S. have made similar comments: "*Whilst signing ceremonies do still take place, with all parties present in one room, this is the exception rather than the rule. More often than not, the consequence of the inability of documents to be validly executed in counterpart under Scots law is that the governing law of a document is changed to English law.*"

Promotion of Scots law

A crucial issue which we have identified as key to the need for reform in this area is that English law is currently often chosen over Scots for transactions for the sole reason of the perceived unavailability of execution in counterpart in Scots law. In their response to our consultation on execution in counterpart, Tods Murray LLP told us "*The demands of existing Scots law are cumbersome and... lead to transactions being structured around English law (sometimes even with Scots law assets being dropped from the transaction entirely).*" Option 2 would remove the perception that Scots law is not suitable for modern commerce and thus protect and increase the use of Scots law in commercial transactions.

Public Procurement Sector

We understand that, as a matter of practice, public procurement contracts in Scotland obtained through the public procurement portal are completed according to Scots law. This includes the contracts pertaining to the running of the Commonwealth Games 2014. The Bill would offer commercial efficiency to those operating in the public procurement sector.

Contracts relating to immoveable property

As mentioned above, parties are generally able to choose the law to which they wish their transaction to be subject. However, the choice of law provisions of the Rome I Regulations do not generally apply contracts relating to rights *in rem* in immoveable property or tenancies of such property unless the contract relates to the right to use immoveable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October

1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immoveable properties on a timeshare basis.²² Thus, contracts and documents relating to immoveable property in Scotland must be completed according to Scots law, resulting in added burdens in the property sector which are avoided in other sectors through the use of execution in counterpart under English law.

Benefits to those with Physical Disabilities

Additionally, the process will greatly assist those who are afflicted by physical disabilities which affect their ability to travel to signing ceremonies. For those who suffer from these types of difficulties, the only option Scots law is currently seen to present which avoids travel is the 'round robin' procedure. Execution in counterpart would allow them to execute documents in the convenience of their own homes and workplaces.

Positive Environmental Impact

We also believe that the bill, if passed, would have a positive environmental impact. Provision that traditional documents can be delivered electronically will result in a reduced consumption of paper, as parties may choose to deliver documents electronically rather than print them out and send them by post. Additionally, there is likely to be a reduction in rail and air travel made solely for the purposes of signing documents.

- **Costs**

Option 1

There are no immediately foreseeable cost implications of Option 1. Additionally, the cost savings to parties wishing to execute documents in counterpart which could be achieved through Option 2 would not be realised, and there could be a reputational cost to the Scottish Government should the recommendations of the Scottish Law Commission be ignored.

Option 2

No significant cost implications are anticipated to result from the introduction of Option 2, other than the costs which will be borne by law firms in making their staff aware of the changes to the law affected by the Bill. This will also be required of others operating in the legal profession, for example Registers of Scotland staff. However, these types of cost result from any reform of the law. In the case of the Bill, we believe that these costs would be very small and would be massively offset by the financial benefits outlined above.

Scottish Firms Impact Test

No Impact Test was carried out. The Bill simply provides that documents executed in counterpart are valid in Scots law, and is of general effect. It is therefore anticipated that the Bill will bring benefits to all parties who wish to execute documents - both members of the public and businesses - as opposed to one particular sector, market or industry. The legal sector, we anticipate, would enjoy the greatest immediate benefit from the passage of the Bill, but this is not to the exclusion of any other sector. Further, it is not anticipated that the proposals will have any significant cost implications for any markets or industries. On the contrary, the Bill has the potential to reduce costs per transaction for parties, as outlined above.

²² Rome Regulation I Introductory Note 27

In terms of the Bill's overall impact on Scottish businesses, we have received only positive comments from industry representatives.

- **Competition Assessment**

It is not anticipated that the Bill would have an impact on competition within Scotland. The proposals within the Bill do not create a competitive advantage for any particular sector or individual; they simply offer benefits which can be reaped by businesses and individuals alike.

- As discussed below, the legal sector will be positively affected by the Bill. We do not anticipate an impact upon any other particular markets or products.
- The Bill will not result in any restrictions on competition in the legal services market. The number and range of suppliers in the legal sector will not be affected, nor will it limit the ability of legal practitioners to compete. We do not consider that the proposal will reduce practitioners' incentive to compete vigorously.

The Bill has the potential to bolster the competitiveness of Scots law. Currently, transactions are often subject to English law instead of Scots for the sole reason of the perceived unavailability of execution in counterpart in Scots law. If the Bill removed this hurdle to the use of Scots law for transactions, this would allow practitioners versed purely in Scots law equal access to transactions which the parties wish to be executed in counterpart. Additionally, in cross border contexts, parties in different countries may feel more comfortable using Scots law if the Bill was passed as this would allow Scots law documents a greater degree of similarity with those of other jurisdictions.²³

In addition, the law on execution in counterpart in England following the Mercury Tax case²⁴ has been left in a somewhat uncertain state. If Scots law were to clarify that execution in counterpart is a valid process of execution, this could offer Scots law a competitive edge.

- **Test run of business forms**

The Bill prescribes no new business forms. Therefore there is no requirement to carry out a test run.

Legal Aid Impact Test

Whilst it is possible that issues arising from the Bill might be such as to require advice and assistance in terms of the legal aid scheme, the parties whom we expect to use the Bill will not in the majority of cases be eligible for legal aid. Additionally, nothing in the proposals will trigger an eligibility for legal aid, and the proposals are not anticipated to have any impact on the legal aid fund. The Access to Justice team are content that the Bill will adversely affect neither the legal aid scheme nor the legal aid fund.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement and imposes no sanctions. The Bill provides for optional methods of executing valid documents under Scots law, and disputes

²³ See the comments made by Mr Rod MacLeod of Tods Murray LLP above under the section headed 'Objective'.

²⁴ R (on the application of Mercury Tax Group Ltd) v HMRC [2008] EWHC 2721 (Admin)

concerning the rules in the Bill would be resolved by means of litigation by the affected parties.

Implementation and delivery plan

If passed by the Scottish Parliament, the Bill will come into force 2 months from the date of Royal Assent.

As mentioned above, we feel that as a non-controversial, strongly supported yet relatively short measure meeting what is seen as an urgent need, should the Scottish Parliament decide in due course to introduce a new 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.

- **Post-implementation review**

In accordance with the Law Commissions Act 1965 section 3(1), the Scottish Law Commission has a duty to “keep under review” the laws with which it is concerned, and will endeavour to stay informed of the Bill’s reception by the legal profession and wider business community. The proposals form part of a long term-project which will likely provide opportunities for review within the next ten years, and we expect that the Scottish Ministers will also review the legislation within the next 10 years. It is hoped that, in light of the high demand for the Bill, the operation of the reformed law will be uncontroversial.

Summary and recommendation

Dismiss Option 1

This Option would maintain the status quo and introduce no new legislation. Option 1 thus leaves the current law in a state of uncertainty, as outlined above, and it is submitted that this outcome is not desirable.

Recommend Option 2

It is recommended that Option 2, introduction of the new Execution in Counterpart etc. (Scotland) Bill, be adopted, for the various reasons outlined above.

- **Summary costs and benefits table**

	Option 1	Option 2
Costs	Potential future costs in the form of litigation required to resolve disputes resulting from the current uncertainties in the law.	There could potentially be a small initial training cost.
Savings: time	No foreseeable savings	Parties will save time which is currently spent arranging and travelling to signing ceremonies, or administering a ‘round robin’ signing.

Savings: costs	No foreseeable savings	Costs would be saved in terms of travel, accommodation, administrative charges associated with arranging signing ceremonies, and postage costs.
Business efficiency	If Option 1 is adopted and the status quo remains, business efficiency will continue to be impeded unnecessarily.	Those conducting commercial transactions would be able to execute documents in a shorter period time, with less administrative burdens, and would have greater control over the time at which the execution of transaction was complete.
Protection of Scots law	No foreseeable impact	If Option 2 is implemented, the certainty amongst Scots legal practitioners will mean that transactions are no longer carried out under English law rather than Scots for the sole reason that execution in counterpart is viewed as incompetent in Scotland.
Legal certainty	The law will remain unsatisfactory.	If the bill is implemented, the law in Scotland pertaining to execution in counterpart will be clear and unambiguous.
Benefits to those with physical disabilities affecting ability to travel	No foreseeable benefits	Execution in counterpart would allow those affected by physical disabilities to execute documents remotely in the convenience and safety of their own homes and workplaces.

Positive environmental impact	No foreseeable benefits	Execution in counterpart benefits the environment in that it results in reduced use of paper, transport and postage.
The Scottish Islands	No foreseeable benefits.	Businesses and individuals in remoter parts of the country would be able to execute documents without the need for difficult and costly travel.

Example transaction of a multi-party agreement, with 3 parties based in Edinburgh, 2 in Glasgow and 3 in London (8 parties in total, with each party occupying separate offices in their respective cities)

Aspects of Transaction	Round Robin	Execution in Counterpart
Expediency	If none of the parties are able to meet in person, the minimum amount of time between the completion of preparation of the document and execution is a minimum of 2-3 working days, so that the document can be posted between the cities. This is assuming that the document can be couriered between the various offices in each city; if not there will be a further delay.	Once all documents are arranged and ready to be signed, the time between the documents being ready for signing and being signed can be more or less instantaneous, if delivered electronically, or one working day if parties all deliver their documents to a nominated person by post.
Postage costs	Courier prices could amount to an approximate total of £150, at £30/ journey. (Prices taken from Same Day Dispatch Services Ltd) ²⁵ . Additional postage for next-day delivery between cities would be £11.80 ²⁶ (for two journeys) giving a total of £161.80.	Zero if documents are delivered electronically. If the parties each sent a copy of the document to a nominee who was one of the parties, postage costs for next day delivery would be £41.30 (7 x £5.90). ²⁷

For this transaction, the postage saving which could be made by choosing to execute documents in counterpart would be £161.80, if documents were delivered electronically, or £120.50 if documents were delivered by post.

Aspects of Transaction	Signing Ceremony	Execution in Counterpart
Expediency	Once the documents are arranged and ready to be signed, there will be a delay at least as long as it takes for the party furthest from the place of signing to travel to the ceremony. In this transaction, it is unlikely that a trip from London will be immediately convenient, meaning that the need for signature in person could delay execution of the document by days or even weeks.	Once all documents are arranged and ready to be signed, the time between the documents being ready for signing and being signed can be more or less instantaneous, if delivered electronically, or one working day if parties all deliver their documents to a nominated person by post.
Costs	<p>It is difficult to calculate an exact total cost of arranging a signing ceremony, however, an approximation is offered here. If the parties arranged the ceremony a week in advance, and decided to hold the ceremony in Edinburgh, the costs could be as follows:</p> <p>Return flights from London to Edinburgh: approx. £221 (economy class) / £948 (business class)</p> <p>OR Return train tickets from London to Edinburgh: min. £378</p> <p>Train tickets from Glasgow to Edinburgh (peak day return): £43.60</p> <p>Hotel room for parties from London, if needed: min. £105</p> <p>Total: £264.60 - £1096.60</p>	As above, delivery of documents executed in counterpart to a nominated person would cost £0 if delivered electronically, and approximately £41.30 if delivered by post.

The maximum difference in cost in the example transaction is £1096.60 minus £0 = £1096.60.

The minimum difference in cost in the example transaction is £264.60 minus £41.30 = £223.30.

Choosing to execute documents in counterpart instead of holding a signing ceremony could thus save £1096.60 in such a transaction. In this example, if the parties shared the costs equally, this would amount to a saving each of £137.10.

Assuming a saving of £1096.60 per transaction, a mid-sized law firm involved in the completion of 18 deals (for example, Stronachs completed 18 deals in 2011) in a year could save £19,738.80 if the cost of the signing ceremony is borne by one firm only.

The benefits of these savings would doubtless most keenly be felt by smaller companies and sole traders – the smaller the value of the transaction, the greater the costs of a signing ceremony will be as a proportion of the overall profit.

The calculation of costs for the signing ceremony does not take into account extras costs such as taxis costs to and from airports/ train stations, potential expenses for witnesses to the signatures, meals, lost working hours spent travelling and organising travel, increased administrative costs due to staff members organising the ceremony etc.

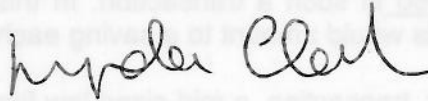
In terms of costs to a client who must meet the costs of his or her representative travelling to a signing ceremony, this would be significantly higher, as wages and expenses must also be met.

Additionally, costs would greatly increase if any of the parties was required to fly in from a foreign country. This situation could occur if either one of the parties was based out with Scotland, or the signing ceremony was a matter of urgency and one of the parties was required to cut short a trip abroad to ensure completion of the transaction.

Declaration and publication:

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland

Signed:



Chairman, Scottish Law Commission

Date: 8/4/2013