SPICe
The Information Centre

SPICe Briefing
Legal Writings (Counterparts and Delivery) (Scotland) Bill

25 September 2014

14/64

Angus Evans

The Legal Writings (Counterparts and Delivery) (Scotland) Bill (the Bill) proposes changes to Scots law to allow legal documents: (1) to be signed in counterpart, in other words by each party signing separate identical copies of the documents rather than the same physical document; and (2) to allow paper documents to be delivered for legal purposes electronically.

The broad aim is to modernise the law to make it easier for parties to enter into commercial transactions.

The Scottish Parliament
Pàrlamaid na h-Alba

CONTENTS

EXECUTIVE SUMMARY

The Legal Writings (Counterparts and Delivery) (Scotland) Bill (the Bill) was introduced in the Scottish Parliament on 14 May 2014. It is based on the work of the Scottish Law Commission (SLC) which, in 2013, recommended a number of changes to the way in which legal documents can be signed and brought into legal effect in Scotland.

The SLC identified two main problems with the current law, that is:

- It is not clear whether legal documents can be brought into legal effect by being signed in "counterpart", in other words by each party signing separate identical copies of the documents (the counterparts) rather than the same physical document.

- It is not clear whether paper documents can be legally "delivered" if copies of them are sent electronically, for example by being scanned and e-mailed. Normally signed documents need to be delivered to take effect under Scots law. Delivery is a legal concept which involves some form of transfer of possession by the person signing up to the obligation **and** the intention that this will make the document binding.

The SLC was of the view that the current law was not fit for purpose in a modern electronic age since it makes it more difficult for parties who are in different locations to enter into commercial transactions. The SLC also found that businesses sometimes choose English law as the law governing agreements since counterparts are allowed under English law. The SLC's view was that this has the potential to damage the development of Scots law and the attractiveness of Scotland as a place for business. The SLC therefore recommended that the law be changed.

The Bill largely follows the SLC's recommendations. It puts in place a framework which will allow legal documents to be signed in counterpart and then delivered electronically, if necessary to a nominee such as a solicitor. The Bill also provides that, if all the parties sign counterparts in "probative" form, the whole document will be probative. Probative basically means that if a document is signed in the correct form there is a presumption that the person who bears to have signed it did in fact do so. This presumption can be of importance in a contractual dispute. Making a document probative also allows it to be registered in official registers such as the Books of Council and Session.

The Bill's focus is on counterparts and electronic delivery. It does not change the general law of contract or the rules on fraudulent signatures or proof in relation to non-probative signatures. It also does not change the rules in the Requirements of Writing (Scotland) Act 1995 (1995 Act) which require certain legal documents, including contracts for the sale of land and wills, to be signed and in writing. The Bill also works on the assumption that most commercial agreements will involve traditional wet ink signatures and does not mandate the use of electronic signatures.

INTRODUCTION

In English law and many other legal systems (e.g. New Zealand, Australia, USA), legal documents such as contracts, guarantees etc. can be brought into legal effect (i.e. "executed") if signed in "counterpart". In other words each party signs separate identical copies of the documents (the counterparts) rather than the same physical document. In Scots law, however, it is not clear whether this is a legal option.

In Scots law it is also not clear whether traditional paper documents can be considered to be legally "delivered" if copies of them are sent electronically, for example by e-mail. Delivery is normally required for signed documents to take effect in Scotland (for further details on the meaning of "delivery" see below).

The Scottish Law Commission (SLC) examined these rules in 2013.[1] It concluded in a report entitled 'Review of Contract Law – Report on Formation of Contract: Execution in Counterpart' (SLC Report) that they are no longer fit for purpose in an electronic age. The SLC highlighted a number of advantages of allowing legal documents to be signed in counterpart and delivered electronically including: savings in time, travel and accommodation costs; and making Scotland a more attractive place for international business. Therefore, it recommended a change in the law and proposed a draft Bill (SLC 2013, page 67). The Bill largely follows this approach.

To comprehend what the Bill does, it is important to understand how the current law works. This briefing therefore starts with an overview of the current system of signing and delivery. This is followed by an outline of: what the Bill will and will not do to change the current system; what the perceived advantages are of changing the law; and what issues have been raised by stakeholders.

HOW DOES THE CURRENT SYSTEM OF SIGNING WORK?

General

Although there are limited exceptions (see below), Scots law does **not** require legal documents (i.e. agreements which have legal effect) to be in writing. They can be oral. Equally, if they are in writing, there is no requirement (subject again to limited exceptions) for them to be signed in a particular way (Stair Memorial Encyclopaedia, Volume 16, 667).[2] A verbal arrangement can therefore be binding if that is the intention of the party or parties (MacQueen and Thomson 2009, page 72; Black 2010, page 14). A good example is someone buying something in a shop.

Even if writing is used, formal legal documents are often not needed. For example, contracts can be formed by an exchange of e-mails or by clicking on a computer screen when buying goods or services on the internet. Often these will involve the parties agreeing to more detailed terms and conditions referred to elsewhere – e.g. the standard terms which apply when booking a flight or hiring a car on the internet (SLC 2013, para. 2.4).

However, sometimes the law does require writing (see below). And in many situations writing will be preferable to reduce the risk of ambiguities, particularly where something of value is involved (for example in a commercial contract).

---

[1] The SLC is an independent body whose task is to recommend reforms to improve, simplify and update the law of Scotland

[2] The Stair Memorial Encyclopaedia is a referenced encyclopaedia of Scots law which covers both statute law and common law – i.e. the case-law made by judges. It is a key legal source

It is normal for written documents to be signed at the end as this provides an indication that the person signing (the signatory) has read and agreed to the obligations. However, if there is a dispute, the person relying on the signature still has to prove that the signature is authentic, which may or may not be straightforward. For this reason, the law provides formal signing methods which can be used to make a document what is known as "probative". Basically this means that if a document is signed in the correct form there is a presumption that the person who bears to have signed it did in fact do so (see below).

Formalities – formal validity and probativity

Formal validity

The Requirements of Writing (Scotland) Act 1995 (1995 Act) is the main piece of legislation.

It provides that a limited number of legal documents, including contracts for the sale of land and wills, are only valid if they are:

1. in writing; **and**

2. "subscribed"[3] by the party/parties; that is, signed at the foot of a document's final page.

This is known as "formal validity" (for details see sections 1, 2 and 7 of the 1995 Act and SLC 2014a).

Probativity

The 1995 Act also lays down an optional way of signing which parties can apply to **any** legal document to make it probative (section 3 of the 1995 Act) with the result that there is a presumption that the person who bears to have signed it did in fact do so.

This presumption can be of importance in a contractual dispute. It can be challenged, but in contrast to non-probative signatures, the burden of proof is on the person making the challenge. Although they do not have to be, documents which require to be formally valid are normally also made probative.

Perhaps more importantly, making a document probative also allows it to be registered in the Books of Council and Session. Equally, to be registered in the land registers[4] documents must also be probative.

The Books of Council and Session is a register of deeds maintained by Registers of Scotland (RoS), a non-ministerial Scottish Government department (see RoS 2014a). Registering a legal document with the Books of Council and Session has two advantages. First it allows for the preservation of the document (that is it provides a form of safekeeping). Second, if the legal document contains a clause consenting to registration "for preservation and execution" it becomes the equivalent of a court decree. This means that a creditor can "attach" (that is seize) a debtor's property without first needing to get a court decree (SLC 2012, para. 7.21).

According to RoS, the most common types of deeds registered in the Books of Council and Session are wills, leases, and minutes of agreement[5] (see RoS 2014a). The SLC indicates that

[3] The definition of subscription goes beyond the traditional signature and would even cover the use of names, descriptions, initials or marks where these are the person's usual method of signing (see section 7)

[4] There are two land registers in Scotland – the Registers of Sasines (a register of deeds) and the Land Register (a register of title based on maps). The Registers of Sasines is being phased out and replaced by the Land Register

many commercial transactions are registered in this way, e.g. banking transactions, as this allows financial institutions to quickly take action against a debtor in the event of a default (SLC 2013 para. 3.15).

Making a document probative only affects the evidential status of a legal document – in other words, that it was signed by the person in question. No legal document needs to be in probative form to be binding.[6]

For documents signed by individuals the correct probative form involves:

1. a signature by a witness; **and**

2. the inclusion of a "testing clause" or equivalent on the last page, including the witness's name and address (section 3 of the 1995 Act).

Testing clauses begin with the words "IN WITNESS WHEREOF" and are followed by a space (in which details of the signing process are later added), below which the signatures and the name and address of the witness appear. According to the SLC, although testing clauses are still common in land transactions, in most other cases signature boxes/blocks are now the norm. The SLC Report (page 47) gives the following example of a signature block for use where a legal entity such as a company is executing the document:

> 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: ……. |

Electronic signatures

General

Traditionally, the law worked on the basis that legal documents were drawn up on paper, and that any signature was a standard wet ink one. However, there have always been exceptions to this and for many years telegrams and telexes have been accepted as a valid way of entering into contracts (McBryde 2007, para. 5-80). In addition, the financial services sector has for some time used electronic signatures to validate financial transactions (for example the BACS[7] payment system). The main methods involved in electronic signatures are:

---

[5] Minutes of agreement are documents drawn up by the parties in the presence of solicitors which are used to settle legal disputes. They are often used in family law matters

[6] However, a disposition, which is the document transferring ownership in land, cannot take full effect until it is recorded or registered in the relevant Scottish land register (Register of Sasines or the Land Register of Scotland). See SLC 2013 para. 3.4

[7] BACS stands for Bankers' Automated Clearing Services and is a scheme for the electronic processing of financial transactions within the United Kingdom

- Cryptographic technology – this involves two keys, a private key and a public key, which are both encrypted. The private key is used to send an encrypted version of the message. The public key allows the receiving party to verify that the message was signed by someone with access to the private key and that the message has not been altered or tampered with.

- Certification – this involves a certification authority verifying the identity of the sender, for example through checking passport details, corporate information etc., and issuing a digital certificate which confirms that the sender is who they claim to be. This can then be attached to the document to verify the identity of the sender (see Sumroy and Sherrard 2012, page 2–3).

Normally, these types of electronic signature systems involve a whole network of certification authorities, hardware, software etc. which are used to ensure the security of the system. This is known as Public Key Infrastructure (PKI) (for more details on electronic signatures and PKI see SLC 2012 paras 7.30–7.35 and Microsoft 2014).

EU law

The advent of the internet has also forced more general changes in the law, mostly emanating from the EU. There are now EU rules in the E-Commerce Directive[8] which require Member States to allow contracts to be concluded online (i.e. by using standard internet "tickboxes"). These rules are implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002.

Directive 1999/93/EC on a Community Framework for electronic signatures (the E-Signatures Directive) also lays down common EU rules for electronic signatures and certification services. There are two main provisions:

1. Article 5(1)(a) – this confirms that a so-called advanced electronic signature[9] based on a qualified certificate,[10] and created by a secure signature creation device[11] (for example a smart card) satisfies the same legal requirements of a signature as a handwritten signature. In essence this means that a certified digital signature becomes a means of establishing the authenticity and/or the integrity of the document with which it is connected, rather than just being admissible in evidence.

2. Article 5(2) – this confirms that all types of electronic signatures are admissible in evidence, i.e. both simple electronic signatures such as tickbox declarations/scanned written signatures and also advanced ones which use certification.

In the UK, the rules on electronic signatures are contained in the Electronic Communications Act 2000 (the 2000 Act) and the Electronic Signatures Regulations 2002 (2002 Regulations). These largely follow the approach in the E-Signatures Directive meaning that simple and advanced electronic signatures are admissible in evidence in the UK (section 7(1) of the 2000 Act). However, section 7(3) of the 2000 Act also provides that certification by a third party certification service provider will be a, "valid means of establishing the authenticity of the

[8] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

[9] An advanced electronic signature is defined as one which is: (a) uniquely linked to the signatory; (b) capable of identifying the signatory; (c) created using means that the signatory can maintain under his sole control; and (d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable. (Article 2(2))

[10] The E-Signatures Directive lays down the requirements which these and the providers of such services must meet (Article 2(10))

[11] Article 2(6) of the E-Signatures Directive defines this

communication or data, the integrity of the communication or data, or both". This means that, if such certification is used, the evidential value of the electronic signature increases, potentially giving it the same weight as a probative written signature (see SLC 2012, paras 7.34—7.35 and BIS 2014).

Automated Registration of Title to Land (ARTL)

Although the 2000 Act made some important changes to the law, it did not make electronic signatures legally effective where the law already required a traditional method of signing. So, existing laws on signing (e.g. the 1995 Act) remained unchanged. However, the 2000 Act did give Ministers the power to modify existing legislation to, "facilitate electronic communications or electronic storage" (section 8). In Scotland, this power was used to amend the 1995 Act so that a number of land transactions could be registered electronically with RoS. These included dispositions which are the documents which transfer ownership to property when registered in the land registers.[12] The system is known as the Automated Registration of Title to Land (ARTL). It involves solicitors and other licensed parties using digital signatures under mandate from their clients. The digital signatures are supplied by RoS (see RoS 2014b for details).

The ARTL system did not, however, include missives. These are the legal letters sent between lawyers on behalf of their clients which form a binding contract when agreed on (ownership is only transferred when the disposition is registered). Since case law suggested that the original missives had to be delivered for there to be a binding contract, doubts therefore remained as to whether missives could be validly delivered in electronic form or by fax (Law Society of Scotland 2009).

The rules on formal validity and probativity now apply to electronic documents

With the exception of ARTL, until recently the above rules on formal validity and probativity only applied to paper documents (see Economy Energy and Tourism Committee 2014).

However, as a result of the coming into force of parts of the Land Registration etc. (Scotland) Act 2012 (2012 Act) and the Electronic Documents (Scotland) Regulations 2014 on 11 May 2014,[13] most of the documents which require to be formally valid under the 1995 Act can now be drawn up in electronic form. However, wills and associated documents remain an exception. To be formally valid an advanced electronic signature as defined the 2002 Regulations is needed. This means that scans of paper documents are not sufficient (see RoS 2014c).[14]

Electronic documents are defined as, "documents which, rather than being written on paper, parchment or some similar tangible surface are created in electronic form" (section 9A of the 1995 Act). In contrast, traditional documents are those, "written on paper, parchment or some similar tangible surface" (section 1A of the 1995 Act).

In addition, from 11 May 2014 an electronic document can also be made probative. The main requirements are that the electronic document must have an advanced electronic signature as defined in the 2002 Regulations **and** must be certified by a qualified certificate as defined in regulation 2 of the 2002 Regulations.[15] This provides an additional layer of security for probative documents.

As indicated, the legislation only came into force on 11 May 2014. It therefore remains to be seen how it will be used in practice.

[12] See the Automated Registration of Title to Land Electronic Communications (Scotland) Order 2006
[13] Part 10 and Schedule 3 of the 2012 Act)
[14] See Regulation 2 of the Electronic Documents (Scotland) Regulations 2014
[15] See Regulation 3 of the Electronic Documents (Scotland) Regulations 2014

Commercial contracts and counterparts

Commercial contracts

As shown above, in Scots law there are various ways of signing a legal document. How parties sign depends on factors such as what the law requires (for example whether a document needs be in writing), what the circumstances are (for example whether the parties live nearby or whether the arrangement is made online), and, crucially, how much risk the parties wish to take. A number of options therefore exist ranging from a simple contract to a detailed written document drawn up and signed in probative form (and perhaps also registered).

How a commercial contract is signed also depends on a range of factors. Many sales agreements will simply be dealt with by an exchange of e-mails between the parties, perhaps with reference to standard terms and conditions. More complicated arrangements may involve signed written contracts, but these will not necessarily be drawn up with input from lawyers. However, for more high value contracts (for example mergers and acquisitions, asset purchases, banking agreements etc.) each party will normally be represented by their own lawyer who will negotiate the drawing up of written agreements on their behalf. These will normally be in probative form.

As indicated, commercial contracts can already be executed using electronic signatures. However, in practice, they are almost always signed in traditional form by using wet ink signatures (see SLC 2014b).

English law on counterparts

In England and Wales the law allows the parties to conclude a contract by signing copies of the final versions of these written agreements (the counterparts) and by sending these to each other, usually by e-mail attachment. The law is a mixture of practice, case-law and statute and is summarised in the Law Society of England's Practice Note for solicitors entitled, "Execution of documents by virtual means" (see Law Society of England and Wales 2010).

The Practice Note was drawn up following a case[16] which brought into question the validity of adding pre-signed signature pages, i.e. pages signed in advance, to a legal document finalised later (see Law Society of England and Wales 2010 and SLC 2013 paras 1.11–1.28). As outlined in the SLC Report (SLC 2013, para. 1.23), the advantage of pre-signed signature pages is that that legal documents can be amended without the need for a new round of formal signatures. The Practice Note's solution is to provide a series of options which prudent English solicitors should follow. Its specific advice on pre-signed signature pages is that these should only be used if there is clear evidence (e.g. an e-mail exchange) authorising their use (para. 3.4). The general aim is to reduce the risk of fraud and/or errors. As an additional safeguard, it may be advisable for the signature page (or the first of them, if they extend across more than one page) to contain the last words or lines of the text of the agreement; in other words, that the page does not simply contain the testing clause or equivalent.[17]

Although it seems that this is not strictly necessary, in England the parties will almost always include an express clause allowing for counterparts. This makes it more difficult for one party to claim that there is no agreement as there is no single signed original. Under English law an original signed document still has greater evidential value than a counterpart (see SLC 2013 page 4, footnote 14 and Lindsays 2012).

[16] Mercury Tax Group and another v HMRC [2008] EWHC 2721

[17] This safeguard is also built into the Bill for documents delivered by electronic means (see s 4(3)). A recent English case – Gopaul v Naidoo [2014] EWHC 2684 (QB) – illustrates that signatures pages containing nothing other than the testing clause are not unknown, and that they can give rise to practical difficulties

Scots law – counterparts

In Scotland, although there are a small number of old cases which suggest otherwise, the general assumption is that counterparts are not a legal way of executing a legal document (SLC 2013 paras 2.2–2.10)

According to the SLC, the result is that, in commercial contexts, parties either have to:

- meet up to sign legal documents (the so-called "signing ceremony"); or
- sign them and send them from party to party by post or courier until everyone has signed (known as the "round robin" method); or
- change the law governing the legal document from Scots law to one allowing for counterparts, normally English law (for more on choice of law see below).

HOW DOES DELIVERY WORK?

General

In Scots law, the general rule is that legal documents have to be delivered to be effective (McBryde 2007, para. 4-02). So, in itself, signing is often not enough to make a legal document binding.

The legal concept of delivery is not the same as the main literal meaning of the word. It does not simply mean "handed over". According to the SLC, the guiding principle is:

> "whether or not the granter of the document has deliberately put the obligatory document beyond his or her further control with the intention of being bound by it" (SLC 2013, para. 2.29).

In other words, there needs to be some form of transfer of possession by the person signing up to the obligation **and** the intention that this will make the document binding. As intention is needed, a document will therefore not be validly delivered if it is clear that the delivery was for another purpose. Conveyancing practice provides a good example. Here, a seller's solicitor will normally send the signed and witnessed disposition (i.e. the document transferring ownership) to the purchaser on condition that it is to be treated as undelivered until the price is paid (McBryde 2007, para. 4-13).

Delivery does not necessarily have to be made to the other party to an agreement. Depending on the circumstances, a legal document can be validly delivered if sent to a third party such a solicitor or registered in a public register, such as the Books of Council and Session or, in the case of leases, the Land Register (SLC 2013, paras 1.29 and 2.29).

There are exceptions to the general rule outlined above. An important one is that mutual obligations, such as contracts signed by more than two parties, do not need to be delivered to be effective. Normally, these become effective on the date of the last signing (SLC 2013 para. 2.33).

Electronic delivery

According to the SLC, the general law on the electronic delivery of legal documents is not coherent (SLC 2013, para. 2.61). There are some suggestions in legal literature that the delivery of copies of documents is sufficient (McBryde 2007, para. 4-12), but there appears to be little precedent. It is also not clear if contracts which must be in writing and signed to be formally

valid (for example land contracts) can be legally delivered by e-mail or fax (SLC 2013, para. 2.61).

The SLC indicates that the amendments to the 1995 Act mentioned above will solve this problem for electronic documents as these can now be delivered electronically.[18] However, these amendments do not cover traditional paper documents which are then delivered electronically, for example by being faxed or scanned and attached to an e-mail (SLC 2013, para. 2.62). A question mark, therefore, remains as to whether traditional paper documents can be delivered electronically (SLC 2013, para. 2.62). The SLC Report indicates that this provides an, "obstacle in the path of commerce" which also affects counterparts since commercial parties normally use wet ink signatures and exchange them by way of e-mail or fax (SLC 2013, paras 2.62–2.63). The SLC, therefore, recommends a rule allowing traditional documents to be delivered electronically.

OTHER RECOMMENDATIONS MADE BY THE SLC

As indicated above, the SLC's main recommendation was that the law should be changed to allow parties to execute legal documents by signing them in counterpart and delivering them, if necessary, electronically. Other connected recommendations included:

- **Nominees** – allowing for the delivery of counterparts to a person nominated by the parties (e.g. a law firm), with the aim of making transactions with multiple parties more straightforward.

- **Postponed delivery** – allowing the parties to agree to postpone the legal effect of delivery of a counterpart to an agreed future time/event. The aim of this is to give the parties control over the time when a legal document enters into effect.

- **Registration copies** – allowing for a single registration copy of a legal document to be drawn up which includes the signing pages from each counterpart. Currently it is unclear whether this is a valid way to register a document.

- **Probativity** – providing that, if all the parties sign counterparts in self-proving form, the document as a whole will be self-proving.

Although not included in its Draft Bill, the SLC also recommended the setting up of a so-called electronic document repository run by RoS. The aim would be to allow for all electronic documents to be executed and stored in a safe place (SLC 2013 Chapter 4). According to the SLC Report, although many large law firms have the capacity to set up repositories for their clients, parties represented by other lawyers may not feel comfortable with using these as there may be a feeling that they are not independent. The SLC therefore argued that an independent repository run by RoS would get round this problem as well as being accessible to those who may not have the resources to employ larger law firms.

It is also worth noting that the SLC's recommendations were focussed on traditional paper documents signed with wet ink signatures. In particular, it did not mandate the use of electronic signatures. The SLC's rationale is as follows:

> "The ultimate solution to the difficulties of commercial parties unable to meet for a traditional signing ceremony would be an all-electronic one in which parties, wherever they happened to be, applied electronic signatures to a file or files held in some repository of the central administrator; but, although there is now nothing in the present law to prevent this happening, it lies some way in the future as a regular business practice. For the moment,

[18] 1995 Act, section 9F

> we operate in a mixed world of paper and digital communication, and the proposals in the Bill reflect these realities: full-blown e-signatures remain a relative rarity, and parties still sign with wet ink on paper to authenticate documents in business and elsewhere. The commercial context, in particular, is one where parties prefer to put high-value transactions in signed writing on paper even although the law does not require that for the transaction in question (SLC 2014b, para. 19).

For a summary of the recommendations see para. 1.33 of the SLC Report. For the full list of recommendations see pages 64–66.

WHAT DOES THE BILL DO?

The Bill follows the approach recommended by the SLC and has the same rationale. That is, the need to clarify the current uncertainty as to whether counterparts can be used to execute legal documents (see Explanatory Notes, para. 5). The Policy Memorandum indicates that this uncertainty is, "hugely unsatisfactory for practitioners and others". It also notes that:

> "Even if the uncertainty were to be resolved by an authoritative court decision … there is no guarantee that it would be resolved in favour of permitting delivery by electronic means." (para. 12)

The main provisions in the Bill are as follows:

Section 1

This section confirms that execution in counterpart is a legal, but optional process for signing documents and that the counterparts are to be treated as a single legal document (sections 1(1–3)). The aim here is to remove the main problem that in Scotland each counterpart is seen as a separate legal document, thus making questionable their validity as a single document binding on all parties.

The single document can be made up of both or all the counterparts, or one entire counterpart together with all the signature pages (section 1(4)). The aim is to make it easier for a collated version of all the documents to be drawn up which can then be registered in the Books of Council and Session (SLC 2014b, para. 22). Such a version would only need to include one entire counterpart plus the signature pages of the other counterparts.

Section 1 also confirms that a document executed in counterpart becomes effective when both or all the counterparts are delivered (section 1(5)(a)). Delivery must be made to every other party to the document whose signature is not on the counterpart (section 1(6)) or to a nominee (section 1(7)). Any additional requirements under the common law or statute also have to be complied with (section 1(5)(b)). An example of such an additional requirement is a guarantee agreed on by two "co-guarantors", which would not take effect until each party delivers its counterpart to the other and also to the beneficiary of the guarantee (Explanatory Note, para. 9).

Section 1(9) also allows for the parties to set a time at which counterparts will be deemed to be delivered, thus allowing them to control when the legal documents come into effect.

The method of delivery is not spelled out. So, as long as the provisions in the Bill are complied with, the parties can choose the method of delivery within the existing law on the subject (Explanatory Notes, para. 8).

No clause specifically permitting counterparts is required as the argument is that this would reduce the flexibility needed in commercial contracts (SLC 2013, para 2.20). The Bill does not, however, stop parties including such a clause in their legal documents if they so wish; for

example, it may be useful for registration purposes to show that a collated document was executed in counterpart initially.

Section 2

This section allows the parties to deliver the counterparts to a nominee as an alternative to delivery to a party to the transaction (section 2(1)). The nominee can either be one of the parties or an agent (section 2(2)). In practice it seems most likely that agents, specifically solicitors, will act as nominees as they already draw up, take delivery of, and register legal documents on behalf of their clients (Explanatory Notes, para. 12). The provision is likely to be of particular relevance where a number of parties need to sign, where legal documentation is voluminous, or where the parties are situated in different locations.

Section 2(3) lays down the duties of nominees and provides that they are to, "hold and preserve the counterpart(s) for the benefit of the parties". The parties can, however, agree that nominees should have other duties (section 2(4)). For example, the parties might agree that the nominee is to advise them on the successful delivery of the counterparts or to forward what has been delivered to one of the parties (Explanatory Notes, para. 13).

Section 3

This section confirms that the rules on counterparts also apply to electronic documents as defined in the 1995 Act, thus allowing for electronic documents to be executed in counterpart (section 3(1)). The Bill, however, recognises that this provision is unlikely to be used in practice. This is because the changes made to the 1995 Act[19] mean that electronic documents can now be delivered and hence executed electronically (Explanatory Notes, para. 15). Parties can therefore simply attach their electronic signature to an electronic document wherever they are.

Section 4

This section provides that traditional documents as defined in the 1995 Act can be delivered by electronic means. The methods of delivery include e-mail, e-mail attachment, fax, disc and memory stick (for the full list see section 4(9)). It adds to the existing law on delivery.

It applies, "where there is a requirement for delivery of a traditional document (whether or not a document is executed in counterpart)" (section 4(1)). Importantly, this means that the change in the law will affect **all** legal documents where delivery is needed and not just those drawn up in counterpart. One effect of this is that paper missives can be delivered by e-mail or fax thus providing a solution to the uncertainty mentioned above as to whether this is a legally valid way of concluding a contract for the transfer of land.

Section 4(2) indicates that delivery by electronic means can cover the delivery of (i) a copy of the whole document **or** (ii) part of a copy of the document. If only part of the document is delivered, two further conditions must be met: first, it must be clear from what is delivered that it is part of the document signed and second, it must contain the signature page (section 4(3)).

Section 4(4) permits the parties to agree between themselves how they want delivery to be made. This means, for example, that the parties could decide themselves that delivery should only be made by e-mail, or fax.

The Bill also lays down rules on the delivery method where there is no agreement between the parties, or where the accepted method is uncertain or impracticable. In these circumstances the Bill provides that delivery shall be by, "such means (and such form) as is reasonable in all the circumstances" (section 4(5)). The Explanatory Notes expand on this and explain that:

[19] 1995 Act, section 9F

"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 in all the circumstances. This provision is drafted from the perspective of the party about to effect delivery so what matters is what is practicable at the time of delivery, not what was practicable when an arrangement was made. An example might be where it has been agreed that delivery will be by email but the recipient is left by supervening events such as travel delay or computer system failure in a place with access to a fax but not email. In this way, priority will be given to whatever arrangements parties reach amongst themselves with the possibility of fall-back arrangements should the need arise" (para. 22).

WHAT DOES THE BILL NOT DO?

To properly understand the Bill, it is worth noting that its main focus is on counterparts and electronic delivery and that a number of areas of law/policy remain unchanged. These include:

- **Fraud**

  The general civil law rule is that a forged signature has no legal effect, with the result that the legal document is not binding.[20] This rule also covers fraudulent alterations to genuine signatures.[21] In addition, forging a signature can also lead to a criminal charge. Both the civil and criminal law rules will continue to apply. The SLC's position is, therefore, that the changes in the law will not impact on the existing rules on fraud.

- **Proof**

  The general rules on whether a person claiming to have signed has actually signed remain the same. These are summarised in a leading textbook as follows:

  > "A document which is not self-proving … may be proved to be authentic by means of any competent evidence available and acceptable to the court. Such evidence may well be that of the person who made the document or someone who saw it being compiled. Equally a document that is not self-proving may be challenged as to its authenticity by any admissible means available to the party challenging it …" (Raitt 2001, page 196)

  So, in other words, if a document is not drawn up in probative form and is signed in counterpart and delivered electronically, the party signing it may still have to prove that the signature is genuine.

- **Probativity**

  The existing rules in the 1995 Act which allow legal documents to be made self-proving will not change. The Bill will, however, make it possible to execute probative documents by using counterparts (Explanatory Notes, para. 6).

- **Formal validity**

  The requirements in the 1995 Act (including the most recent amendments) requiring certain legal documents to be in writing (including electronic writing) will not change.

[20] McLeod v Kerr 1965 SC 253
[21] Royal Bank of Scotland v Watt 1991 SC 48

- **Pre-signed signature pages**

  As outlined above, pre-signed signature pages have been the subject of some controversy under English law. The Bill does not deal with this issue directly on the basis that it is clear that the general law, "does not allow the attachment of signature pages to a document which, in however minor a respect, is not the document actually signed by the party" (Policy Memorandum para. 19). The Policy Memorandum does, however, note that a pre-signed signature page can be used if it can be, "shown that the party concerned clearly authorised or mandated this in advance, or subsequently ratified what had been done with full knowledge of the content of the new document" (para. 19). This is a similar position to the law in England and Wales.

- **Delivery**

  Although the Bill allows for electronic delivery, it does not affect the general rules on delivery outlined above which are based on case law (see also section 1(5(b))). It is for the parties to determine whether or not to deliver electronically. Therefore, a document which has been transmitted electronically could be found not to have been legally delivered.[22]

- **General contract law**

  The Bill also does not affect other matters linked to general contract law such as: whether a contract has been formed, whether terms are incorporated into a contract, the rules on breach of contract, damages, choice of law etc.

- **Electronic repository**

  The Bill does not take up the SLC's recommendation to set up an electronic document repository. The Policy Memorandum indicates that legislation would not be needed and that the recommendation, "will be considered in due course by the Scottish Government" (Policy Memorandum, footnote 1). During oral evidence a representative of the Scottish Government's Bill team explained further that its plans were as follows:

  > "In line with the SLC's recommendation, we are keen to get involved, and we are certainly happy to look at the matter further. I expect that that will happen after the bill has gone through, but I cannot give you a firm timescale. Our understanding is that Registers of Scotland, which would have a big part in the electronic document repository, is still very interested in the whole issue. I am sure that Registers of Scotland will provide the committee with more information. We will be a willing participant when we are ready, but there has been no input from the Scottish Government up to this point."[23]

WHAT ARE THE PERCEIVED ADVANTAGES?

General

The SLC Report and the Policy Memorandum (see paras 21-25) highlight a number of advantages of allowing legal documents to be signed in counterpart and delivered electronically, including:

- increased speed of transactions

[22] For an example of this scenario see W S Karoulias SA v The Drambuie Liqueur Co Ltd 2005 SLT 813
[23] Scottish Parliament, Official Report, 17 June 2014, 1514

- potential savings in time, travel costs and accommodation costs (particularly since many companies have a limited number of signatories who are permitted to sign on a company's behalf)

- increased certainty as to the precise moment when a document becomes legally effective upon delivery (i.e. in comparison to the round robin approach of using couriers/the postal service where delivery can be unpredictable)

- increasing the attractiveness of Scotland as a place for business (since commercial transactions often take place between parties in different locations)

- the likelihood that more Scottish businesses will choose Scots law as the law of their contracts (for details see below)

Choice of law

Choice of law in contracts is something which occurs in many parts of the world. For example, in the USA, many large commercial and financial transactions designate New York law as the law governing the contract (McKenna Long and Aldridge 2013).

In the EU, choice of law is governed by the EU legislation known as the Rome I Regulation.[24] This is implemented in Scotland by the Law Applicable to Contractual Obligations (Scotland) Regulations 2009. Although exceptions exist, the general rule is that parties can choose the law of a country which should apply to the contract, or part of the contract (Article 3(1)).[25] The main legal jurisdictions which make up the UK – that is Scotland, England and Wales, and Northern Ireland – are treated as if they are different countries (Article 22). This means that parties in the UK can apply the law of different UK legal systems to their contracts.

The choice has to be, "expressly or clearly demonstrated by the terms of the contract or the circumstances of the case" (Article 3(1)). In practice, commercial parties will normally include a clause at the end of a legal document stating which law the document is governed by. Normally this will also be accompanied by a clause stating which courts or arbitration bodies have jurisdiction to deal with disputes (that is a "jurisdiction clause").

A jurisdiction clause is different from a choice of law clause as it is simply aimed at deciding in advance how disputes will be dealt with and does not define which law applies to the contract. However, in many instances it will be sensible to nominate the same country in the choice of law clause and jurisdiction clause. For example, if commercial parties choose English law as the law of the contract they will often want the English courts to deal with any disputes as English judges will be comfortable working with English law rules. Also, if the law chosen is not the same as the jurisdiction, the parties will have to submit expert evidence to the court, which increases the cost of litigation and the chance that the court misapplies the law (see Ashursts). In the EU the main rules on choice of jurisdiction can be found in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). A new regulation (Regulation 1215/2012) will, however, come into force on 10 January 2015.

The SLC Report and the Policy Memorandum (paras 7 and 25) indicate that currently Scottish businesses sometimes chose English law to govern their transactions so that legal documents can be executed in counterpart. The Policy Memorandum argues that this damages the reputation of Scots law by limiting its use (para. 25). The Policy Memorandum also indicates that, in certain instances, the option of changing the law of the contract is not permitted under

[24] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

[25] Specific rules apply if no choice is made

the above rules,[26] for example where it relates to heritable property (that is land and buildings). The Policy Memorandum indicates that, for these contracts, there is currently no practical solution which would allow counterparts to be used (para. 23).

There appears to be non-anecdotal evidence that English law is popular in commercial transactions. For example, in a 2010 international arbitration survey carried out by Queen Mary University of London and the law firm White & Case it was found that 40% of companies' general counsel contacted would normally choose English law as the law of the contract (White & Case 2010). Factors which governed the choice of law included: the perceived neutrality and impartiality of the legal system, the appropriateness of the law for the type of contract and familiarity with the law. The Law Society of England and Wales appears to share the view that English law is popular amongst businesses and stresses the economic advantages which follow from this (Law Society of England and Wales 2014). The Scottish Government is also of the view that English law is attractive to commercial parties (Scottish Government 2014).

OTHER ISSUES - CALL FOR EVIDENCE

The Law Reform and Delegated Powers Committee (the Committee) launched a call for evidence on the Bill on 28 May 2014, which closed on 14 July 2014. Ten written submissions were received which broadly expressed a positive view on the Bill's proposals. However, certain technical drafting comments were made in the submissions by Freshfields Bruckhaus Deringer and the Faculty of Advocates (the Faculty) The Faculty also commented that the proposals could perhaps potentially lead to a risk of parties executing different versions of documents either due to error or fraud (Faculty of Advocates 2014, page 1). The Faculty also indicated that it was sceptical that the proposals will, in themselves, attract businesses to Scotland which do not otherwise have a connection with Scotland (Faculty of Advocates 2014, page 2).

[26] Articles 4(1)(c) and 3(3) of the Rome I Regulation

SOURCES

Ashurts. *Governing law clauses*. Available at: www.ashurst.com/doc.aspx?id_Resource=4640

Black G. (2010). *Woolman on Contract*. Fourth Edition Edinburgh: W Green & Son Ltd.

Department for Business Innovation and Skills (BIS) (2014). *Electronic Signatures – Guide*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351322/bis-14-1072-electronic-signatures-guide.pdf

Economy Energy and Tourism Committee 8th Meeting, 2014 (Session 4), 19 March 2014. *EET/S4/14/8/4 SSI cover note Annexe A – Policy Note*. Available at: http://www.scottish.parliament.uk/S4_EconomyEnergyandTourismCommittee/Meeting%20Papers/Papers_20140319.pdf

Faculty of Advocates (2014). *Submission from the Faculty of Advocates*. Available at: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/The_Faculty_of_Advocates.pdf

Law Society of Scotland (2009). *Faxed missives held not binding*. Available at: http://www.journalonline.co.uk/News/1006941.aspx

Law Society of England and Wales (2010). *Execution of documents by virtual means*. Available at: http://www.lawsociety.org.uk/advice/practice-notes/virtual-execution-of-documents/

Law Society of England and Wales (2014). *A global advantage, English law and lawyers in England*. Available at: http://www.google.co.uk/url?url=http://www.lawsociety.org.uk/representation/the-city/documents/law-in-the-city-of-london/&rct=j&frm=1&q=&esrc=s&sa=U&ei=fvEaVK75CeqB7Qbyh4CQAQ&ved=0CBQQFjAA&sig2=H3p-9XSbgEl51vWpyeeSbA&usg=AFQjCNEB76Crbe4oDoF2Blo9qt3WdaeO6A

Lindsays (2012). *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/

MacQueen H. and Thomson J (2009). *Contract Law in Scotland*. Second Edition. Edinburgh: Tottel Publishing Limited

McBryde, W. (2007). *The Law of Contract in Scotland.* Third Edition. Edinburgh: W Green & Son Ltd.

McKenna Long and Aldridge LLP (2013). *NY Choice of Law: You get what you bargain for.* Available at: http://www.mckennalong.com/publications-advisories-3226.html

McLean J (2014), Harper Macleod. *Electronic Conveyancing – a new chapter for Scottish Property Law*. Available at: http://www.harpermacleod.co.uk/News-Blogs-/real-estate-a-construction-news/electronic-conveyancing-a-new-chapter-for-scottish-property-law

Microsoft (2014). *Public Key Infrastructure*. Available at: http://msdn.microsoft.com/en-gb/library/windows/desktop/bb427432(v=vs.85).aspx

Raitt F (2001). *Evidence*. 3rd edition

Registers of Scotland (Ros) 2014a. *Books of Council and Session FAQs*. Available at: http://www.ros.gov.uk/professional/registration/books_council_session_faqs.html

Registers of Scotland (RoS) 2014b. *Artl: Frequently Asked Questions*. Available at: http://www.ros.gov.uk/artl/faqs.html

Registers of Scotland (RoS) 2014b. *Electronic Documents (Scotland) Regulations 2014*. Available at: http://ezine.ros.gov.uk/ezine/articles/The_Electronic_Documents_Scotland_Regulations_2014

Rennie R. and Brymer S. *E-missives: what now?* Available at: http://www.journalonline.co.uk/Magazine/59-1/1013511.aspx

Scottish Government (2014). *Personal communication with Bill Team*

Scottish Parliament. *Legal Writings (Counterparts and Delivery) (Scotland) Bill – Explanatory Notes (and Other Accompanying Documents)*. Available at: http://www.scottish.parliament.uk/S4_Bills/Legal%20Writings%20(Counterparts%20and%20Delivery)%20(Scotland)%20Bill/b50s4-introd-en.pdf

Scottish Law Commission (2012) – *Review of Contract Law – Discussion Paper on Formation of Contract.* Available at: http://www.scotlawcom.gov.uk/law-reform-projects/contract-law-in-light-of-the-draft-common-frame-of-reference-dcf/

Scottish Law Commission (2013). *Review of Contract Law – Report on Formation of Contract: Execution in Counterpart*. Available at: http://www.scotlawcom.gov.uk/news/new-ways-to-sign-and-deliver-contracts-and-other-documents/

Scottish Law Commission (2014a). *Signatures in Scots Law: Form, Effect, and Proof*. Available at: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Signatures_in_Scots_Law.pdf

Scottish Law Commission (2014b). *Written evidence from the Scottish Law Commission to The Delegated Powers and Law Reform Committee on the Legal Writings (Counterparts and Delivery) (Scotland) Bill.* Available at: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/20140617Papers-WEB.pdf

Sumroy R. and Sherrard B. (2012). *Electronic signatures: are we getting there?* Available at: www.slaughterandmay.com/media/1772936/electronic-signatures-are-we-getting-there.pdf

Stacey C. *Electronic Signatures: not yet a substitute for the 'wet' signature in corporate transactions.* Available at: http://www.shoosmiths.co.uk/client-resources/legal-updates/Electronic-signatures-not-yet-a-substitute-6354.aspx

The Laws of Scotland: Stair Memorial Encyclopaedia. Edinburgh: Butterworths, 2014

White & Case (2010). *2010 International Arbitration Survey: Choices in International Arbitration*. Available at: http://www.whitecase.com/files/Publication/839d2762-bf8e-4daa-b40a-1b643081b801/Presentation/PublicationAttachment/3c346b83-27ba-4ed1-a99e-e1811e47b997/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf

SPICe
The Information Centre

RELATED BRIEFINGS

SB 14-15 The Scottish Civil Courts System 649KB pdf

Published by the Scottish Parliament Information Centre (SPICe), The Scottish Parliament, Edinburgh, EH 99 1SP

www.scottish.parliament.uk