



COUNTERPART SIGNING IN SCOTLAND

June 2015

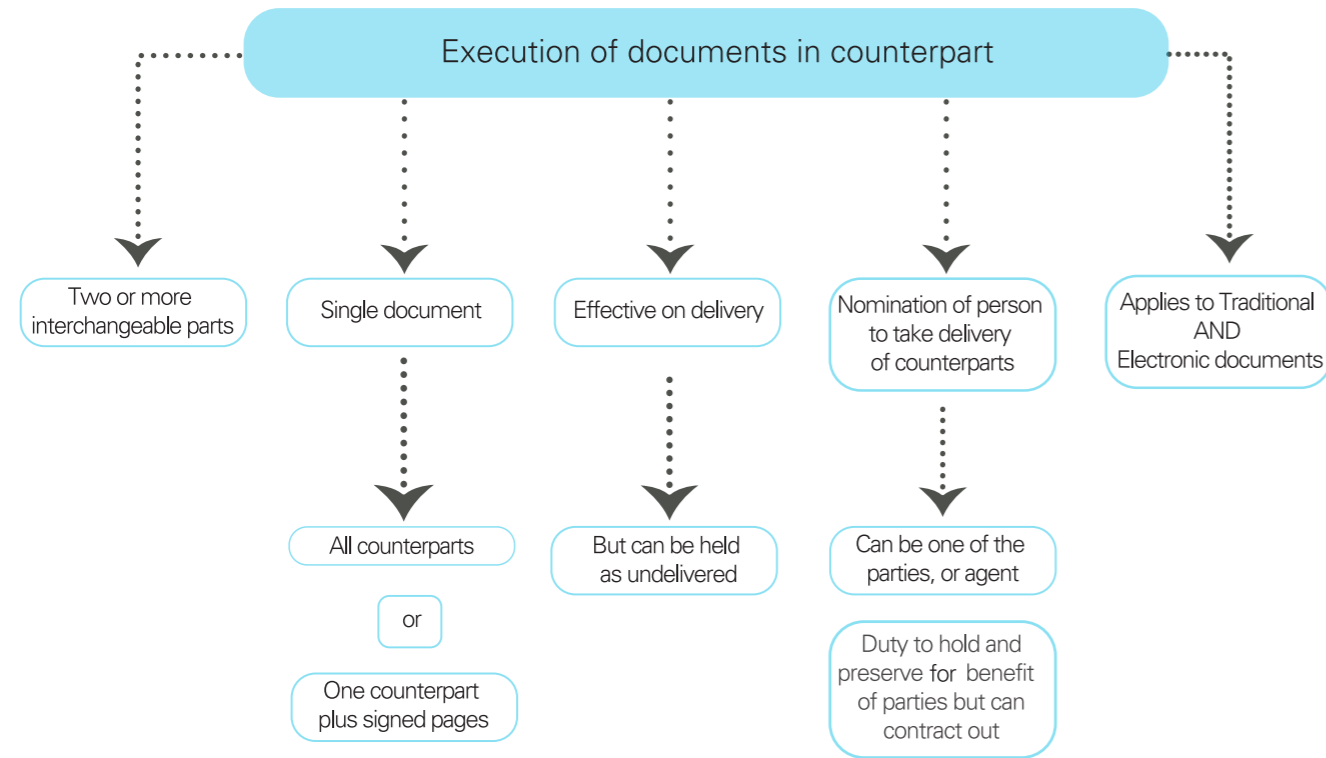


Contents

Execution	2
Delivery	3
When to use counterpart execution	5
The Simple Swap	6
Nominated person	6
Multi Execution and delivery	7
Differences between Counterpart execution in Scotland and England?	8
Key points to remember	8

"The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 provides a secure basis in Scots law for counterpart execution. Based on our 2013 Report, the difficulties it resolves were first raised by Paul Hally of Shepherd & Wedderburn; we worked with him and other practitioners in compiling our Report and the draft Bill. In the year of our Golden Jubilee we are delighted to welcome this Guide, which so clearly explains the new opportunities opened up by the Act."

Scottish Law Commission



EXECUTION

The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 makes execution in counterpart competent under Scots Law. A document is executed in counterpart when it is executed in two or more duplicate, interchangeable, parts. No single part is subscribed by both or all parties, but each party must sign either:

- as many copies of the document as there are parties, or
- one complete copy of the document.

Whichever option is chosen will depend on the transaction type, the requirements of the parties and option chosen for delivery.

Once executed, the counterparts are treated as a single document, made up of:

- both or all of the counterparts in their entirety, or
- the whole of one of the counterparts, plus the pages on which the other counterparts have been signed.

Delivery

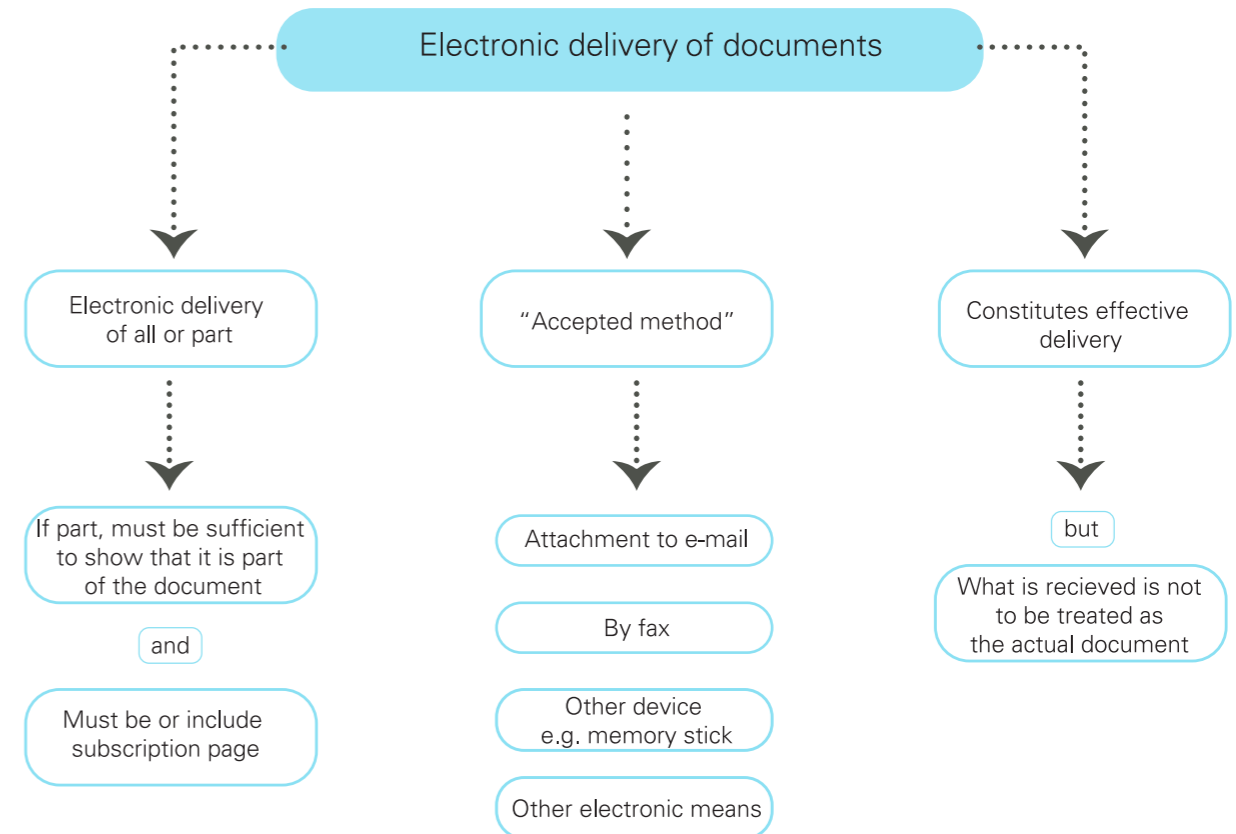
There are two options for effective delivery of a document executed in counterpart:

Either:

- each party to the document delivers a subscribed copy to each of the other parties to the document or
- one (or more than one) person is nominated to take delivery of one or more counterparts, and each party delivers their signed counterparts to that person or those persons.

Effectiveness

A counterpart document becomes effective on delivery. However, if the parties have agreed that a document is to be held as undelivered, pending their authority that it may be delivered, or pending the satisfaction of certain conditions, the document is not to be treated as delivered (for effectiveness) until authority is given, or the conditions are satisfied.



DELIVERY

A document executed in counterpart becomes effective when both or all counterparts have been delivered. But the parties can agree that the counterparts are to be held as undelivered, until either, (i) such time as the party who signed the counterpart copy agrees that it is to be treated as delivered, and/or, (ii) where a condition requires to be satisfied before delivery takes place, on satisfaction of that condition.

Traditional delivery

Nothing in the 2015 Act alters the ability to deliver executed counterpart documents by traditional (i.e. actual physical delivery) means.

Electronic delivery

However, the 2015 Act also enables effective delivery of traditional documents that have been traditionally signed, by electronic means. Delivery by electronic means is achieved by delivery of either:

- an electronic copy of the whole of the document or
- a part of an electronic copy of the document, provided that the part includes the page on which the sender has subscribed the document, and is sufficient to show that it is part of the document.

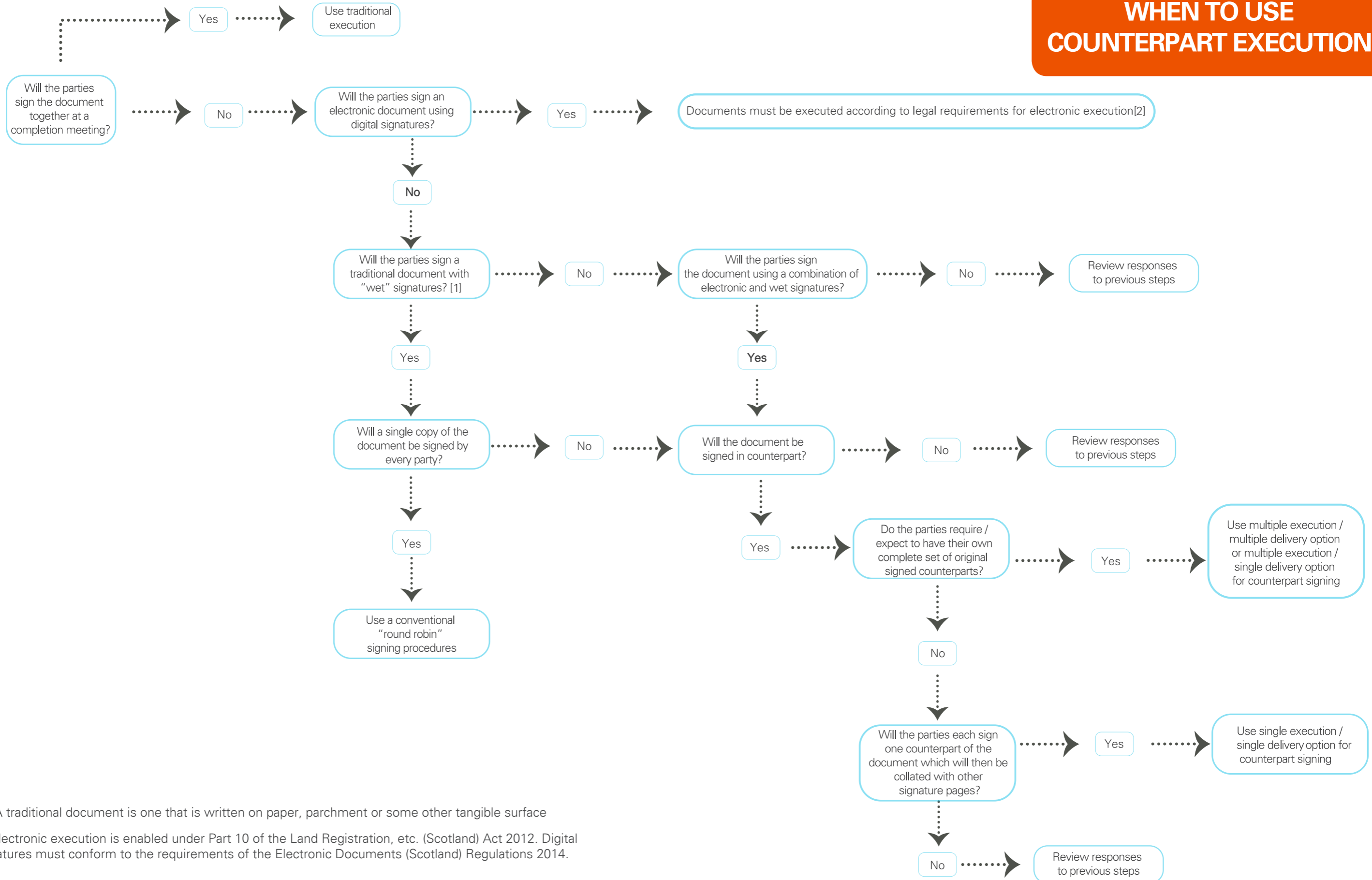
In practice this will usually mean that it will be at least

the signing page of the document, duly signed that will be returned, particularly where large documents are involved. If there are several documents, it would be prudent for the signatory to also scan the front cover of the document, so that it is easy to identify to which document the signing page relates.

Important distinction: while a traditional document may be effectively "delivered" electronically, what is delivered is not the traditional document itself. So, where the principal traditional document is needed, for example to enable registration at the Land Register, Books of Council and Session, or Companies House, physical delivery of the original "wet ink" signed document or counterpart must follow electronic delivery.



WHEN TO USE COUNTERPART EXECUTION



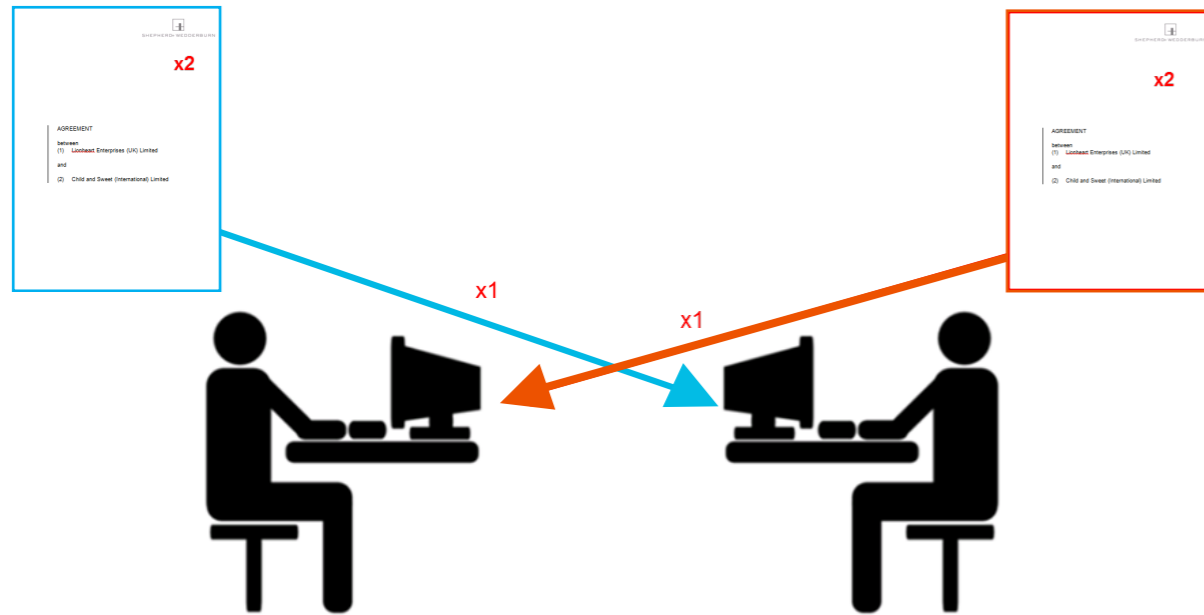
[1] A traditional document is one that is written on paper, parchment or some other tangible surface

[2] Electronic execution is enabled under Part 10 of the Land Registration, etc. (Scotland) Act 2012. Digital signatures must conform to the requirements of the Electronic Documents (Scotland) Regulations 2014.



THE SIMPLE SWAP

The Multiple execution/Multiple delivery option is the appropriate option where there are only two parties to the document. There is no need to nominate someone to take delivery of the executed counterparts as delivery takes place by way of simple exchange.

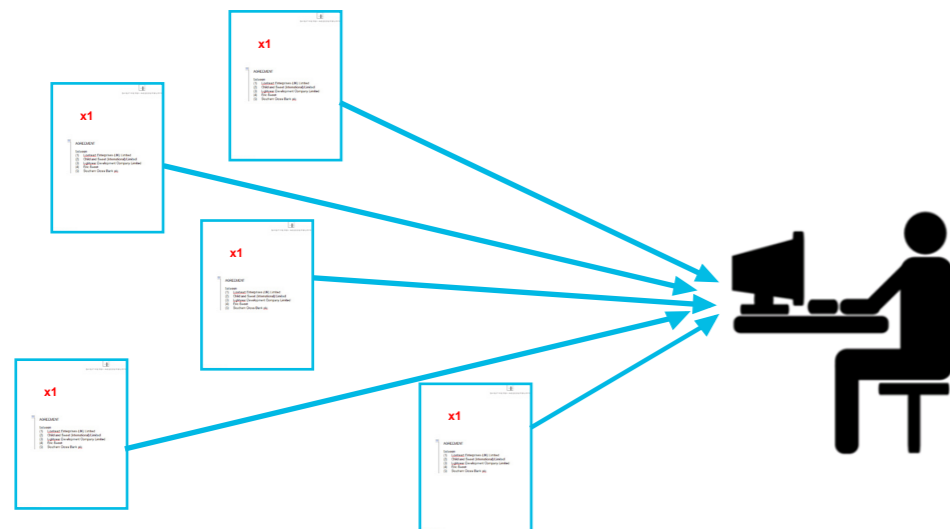


NOMINATED PERSON

The Single execution/Single delivery Option has much to recommend it:

- Less effort on the part of the signatories, (each party signs one copy only of the document)
- Less risk of signing incomplete or out of date copies of the document
- Easier to produce a final collated copy of the deed
- One person responsible for collating the final executed version of the document
- Where this Option is used, each party to the document receives one full copy only of the document for signing.

A person is nominated to take delivery of one or more of the signed counterparts, and that person is responsible for holding and preserving the counterparts for the benefit of the parties. This will usually mean that, where the parties have agreed that signed documents are to be held as undelivered, the Nominated Person holds the signed documents until the parties agree (by way of e-mail around each other in most cases) the effective date for delivery, and that the documents are to be held as delivered as at that date.

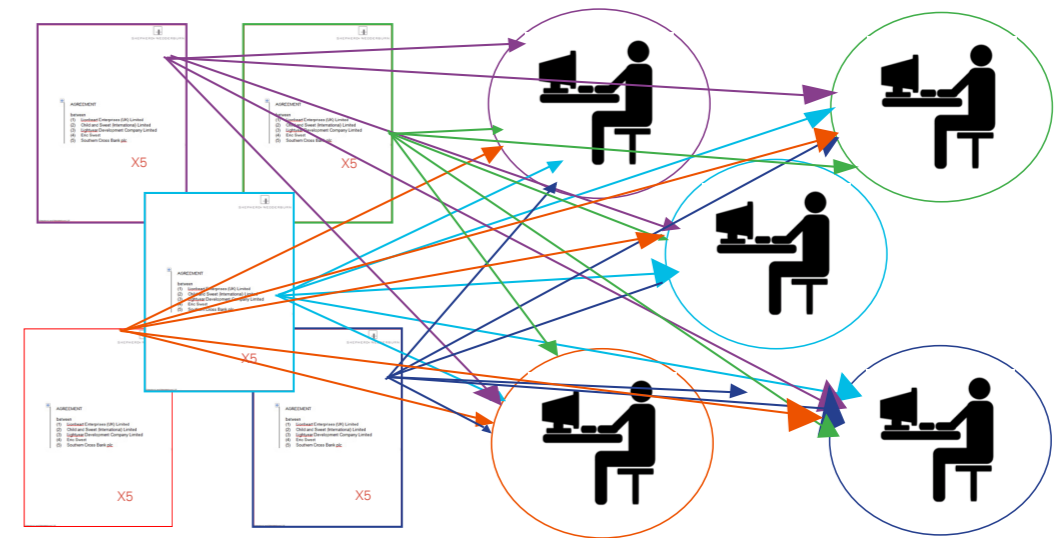


MULTI EXECUTION AND DELIVERY

Where each signatory has to sign multiple copies of a document, so that each party receives several copies of the same document, one signed by each party to the document, there is considerable scope for error and confusion in this method. This option should be used where all parties want or require to have a signed copy of each counterpart. But the administration of this form of execution is much simplified if the services of a nominated person are used.

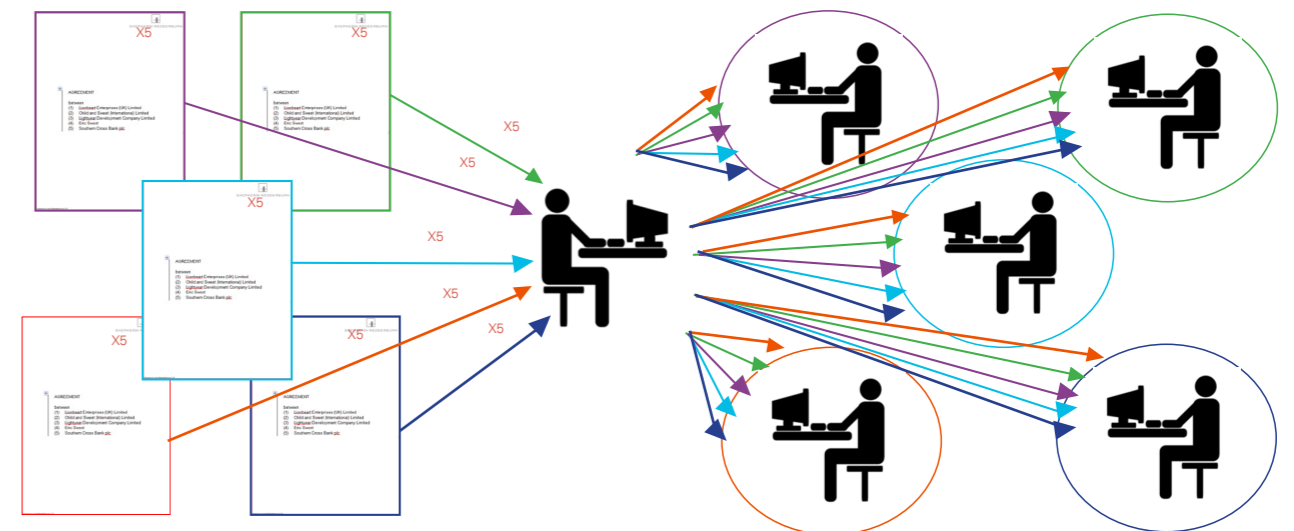
Each signatory must execute as many copies of the document as there are parties to it.

Unless using a nominated person to receive the signed copies, each signatory must then deliver to each other signatory a copy of the document with their subscription, and each signatory must receive from each other signatory a copy of the document subscribed by that other signatory.



Where there are multiple signing copies of multi-party counterpart documents, there is a compelling argument for using the Nominated Person facility, to better coordinate receipt, checking and delivery of all signed copies from and to each of the parties.

Each signatory receives and executes as many copies of the document as there are parties to it, and then delivers all of its signed copies to the Nominated Person, who then compiles sets of the signed documents, consisting of one of each copy subscribed by each signatory, and delivers to each signatory, a full set of copies containing all parties' signatures.



**WHAT ARE THE DIFFERENCES (AND SIMILARITIES) BETWEEN COUNTERPART EXECUTION ?**

SCOTLAND	ENGLAND
<p>Statutory basis for counterpart execution (Legal Writings (Counterparts and Delivery) (Scotland) Act 2015).</p>	<p>No statutory basis – counterpart execution based on custom and practice.</p>
<p>No formal validity for execution of separate single signing page only.</p>	<p>Single signing page, printed, signed and returned accepted as sufficient for delivery of executed counterpart for certain types of document.</p>
<p>No standard procedural format or LSS guidance.</p>	<p>Law Society of E&W protocols.</p>
<p>“Counterparts clause” not legally required under Scots law (although useful for setting out basis for execution and delivery of document).</p>	<p>“Counterparts clause” generally used in any document which is being executed in counterpart.</p>
<p>Electronic execution (i.e. by a suitable digital signature) of an electronic counterpart is permissible (enabled by Part 10 of the Land Registration etc. (Scotland) Act 2012).</p>	<p>No authority for electronic execution of legal documents in electronic format.</p>
<p>Electronic delivery of part only of a traditional document (including at least the signing page) is authorised by statute.</p>	<p>Electronic delivery of part only of a traditional document (including at least the signing page) relies on custom and practice.</p>

KEY POINTS TO REMEMBER

- ✓ Parties to a document should agree as early as possible if counterpart execution is to be used, and on the procedures and protocols for execution, delivery, and date of effectiveness.
- ✓ For a counterpart document to be probative (self-proving), the whole document should be printed and signed.
- ✓ In all cases, it is essential that a record of what was agreed between the parties, what was sent for signing, and what was returned, should be carefully preserved.
- ✓ Electronic delivery of a signed document, or part (including the signing page) of it, will constitute effective delivery of the document, but the electronic version is not to be treated as the traditional document.
- ✓ A “counterparts clause” (that is a clause in the document which confirms the document can be executed in counterpart) is not legally required in Scotland. But it will generally be useful to incorporate one in the document, as it can set out the basis for execution, confirm when the document should take effect, and indicate when the signed counterparts are to be delivered.
- ✓ The underlying legal requirements for execution of documents under Scots law are unchanged. So, signatories should still add their name, and the date and place of signing, and documents that need to be self-proving will have to be counter-signed in the normal way (i.e. by a witness, or by a second director/ authorised signatory etc.).
- ✓ The new notion of a separate “date of delivery” of each signed counterpart introduced by the 2015 Act means that there could be different dates for execution of the document, and its delivery.
- ✓ To distinguish between different dates of execution and delivery of each counterpart, it is recommended (although not essential) that the date agreed by the parties as the effective date of delivery of the document is noted somewhere prominent in the document itself. This can appear in the testing clause, or at the top of the first page of the document, and will usually be inserted after all parties have signed their counterparts.
- ✓ Some traditionally executed documents that become effective on signing or delivery cannot be held as undelivered. For those documents, it is only when counterpart execution is used, that the statutory provision allowing “holding as undelivered” can be applied.