The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 7 October 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
28th Meeting 2014, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*Stuart McMillan (West Scotland) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Margaret McCulloch (Central Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Ross Anderson (University of Glasgow)
Dr Gillian Black (University of Edinburgh)
Catherine Corr (Scottish Enterprise)
Kenny Crawford (Registers of Scotland)
Professor George Gretton (University of Edinburgh)
Stephen Hart (Braveheart Investment Group)
Christopher Kerr (Registers of Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 7 October 2014

[The Convener opened the meeting at 10:03]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 28th meeting in 2014 of the Delegated Powers and Law Reform Committee. As always, I ask members to turn off their mobile phones.

Item 1 is a decision on whether to take business in private. It is proposed that we take items 7 and 8 in private. Item 7 is consideration of the delegated powers provisions in the Mental Health (Scotland) Bill at stage 1. It is also suggested that we take further stage 1 consideration of the bill in private. Item 8 is consideration of a draft report on the Welfare Funds (Scotland) Bill. Does the committee agree to take items 7 and 8 in private?

Members *indicated agreement.*

The Convener: Does the committee also agree to take further consideration of the Mental Health (Scotland) Bill at stage 1 in private?

Members *indicated agreement.*

The Convener: Members will also note that, in line with previous decisions of the committee, items 9 and 10 will also be in private.

Legal Writings (Counterparts and Delivery) (Scotland) Bill: Stage 1

10:04

The Convener: Item 2 is the Legal Writings (Counterparts and Delivery) (Scotland) Bill. We are in a position to take further oral evidence on the bill, and today we hear from representatives from the academic and business sectors, as well as from Registers of Scotland. I welcome our first panel. Professor George Gretton is the Lord President Reid professor of law at the University of Edinburgh; Dr Gillian Black is a senior lecturer in law, also from the University of Edinburgh, and Dr Ross Anderson is an advocate and honorary research fellow at the University of Glasgow. Good morning, one and all, and thank you for coming along.

I open our questioning by asking you for examples of the practical difficulties of the inability to sign contracts in counterpart, at the moment.

Dr Gillian Black (University of Edinburgh): I can speak only from my experience in practice, which was 10 years ago, when I spent three and a half years in commercial practice. I would repeat the evidence that you have already heard from people such as Paul Hally from Shepherd and Wedderburn. I can confirm that there have been occasions on which contracts that had been progressing under Scots law have been changed at the 11th hour to English law to enable execution in counterpart. Whether that is strictly legal or not, it happens, and I have experience of it.

Dr Ross Anderson (University of Glasgow): That reflects my experience and it is commonly done, particularly in relation to areas of law in which the substance of the law is essentially the same in the two jurisdictions. In the case of a share purchase agreement, company law is essentially the same in Scotland and England and there is UK companies legislation, but the governing law has to be either that of Scotland or of England.

If all the parties are Scottish, if the company is Scottish and if everything to do with the transaction is Scottish, the parties may want to execute under Scots law. However, as Gillian Black has said, when the 11th hour approaches it can become clear that some of the parties will not be available so that they can all come to one room to sign on the dotted line, so the view is taken that the easiest thing to do is simply to change the governing law clause and execute under English law.

There is an issue about whether that is already competent in common law in Scotland, but the law

is not clear. The view is taken that it gives more certainty to change the governing law clause and to execute under English law. It is a real issue.

The Convener: We understand that giving certainty is precisely what the bill is about.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to pick up on what Dr Anderson said precisely. He said, "it is commonly done". Can you give the committee a sense of how frequently it happens? We may have individual views on what the word "commonly" might mean, but I want to test what you meant.

Dr Anderson: That is a good question and one that is difficult to answer. The phrase that I have used is, to some extent, deliberately vague. Let me explain what I mean by that. In my daily practice as an advocate, I am not involved in any concluding transactions, at all. My experience is from when I was a solicitor. In particular in the corporate world, if there was a real possibility that a signatory could not be present from the beginning of a transaction, that would support the choice to use English law on a matter on which English law is roughly identical anyway. One can put it no more strongly than that; it always depends on the circumstances. However, everyone who has been involved in such transactions will have had occasions when that was done, and it is not infrequent. Beyond that, I am afraid, "commonly" is a deliberately vague and general term. I do not have statistics.

Stewart Stevenson: I accept that. However, you have now brought into play another question by making reference to such a change happening at the outset of a transaction, whereas Dr Black referred to her experience of changes at the 11th hour. I wonder whether concerns at the outset account for the greater part of such occurrences, or whether it is those that arise at the 11th hour. Although I am addressing my questions to you, Dr Anderson, it may be that the experience of other witnesses should be brought to bear.

Dr Anderson: To answer that point briefly, I say that it always depends on the facts. We may know from the outset that parties are based in Vancouver, Berlin and Capetown—they may all be Scots who just happen to be living there—or it may come to light only at the 11th hour.

Stewart Stevenson: I am content with that answer.

The Convener: Does Margaret McCulloch want to come in?

Margaret McCulloch (Central Scotland) (Lab): No. Stewart Stevenson has asked my question.

The Convener: Could you also comment on the suggestion that we heard last week, which was that parties will choose a legal system because of the characteristics of that legal system? I must confess that my perception is that Scots law and English law are essentially the same in many commercial areas, for reasons that we are aware of. To what extent does the choice of law affect how things operate?

Professor George Gretton (University of Edinburgh): In commerce, people have a tendency to choose English law. To some extent, it is a matter of prejudice. It is so standard. Internationally, English law and New York law are constantly chosen. I sometimes think that, even if the law of Scotland were dictated to us by God himself, and was therefore the perfect legal system, people would continue to choose English law regardless, because of tradition and prejudice. People do what they are used to doing.

If the reform were made, it would not suddenly make a huge change, but it would cause some change. Obviously, there are some cases in which a situation such as we are discussing is the particular factor that makes people opt for English law. There are other situations that might cause that. The reform would be a useful step. It will not absolutely transform the situation, but it seems to me to be sensible.

Stuart McMillan (West Scotland) (SNP): I was struck by your use of the word, "prejudice". Why did you choose that word?

Professor Gretton: People tend to assume that English law is good law or the best law, without really examining other legal systems. Scots law is not the only legal system that gets squeezed in this way in favour of English law and, on a global scale, New York law. Every legal system in Europe is getting squeezed.

In a sense, there are transaction costs involved in people finding out about different legal systems. They know about English law and New York law, but it takes time and trouble to find out about Dutch law, Scots law or whatever. To that extent, their behaviour is rational. Beyond that, however, there is a certain irrationality involved. People tend to think that English law is good law when—in my view, and subject to qualifications—on the whole, Scots law is better.

Stewart Stevenson: I would like to test that, if I may. As a lay person, it seems to me that Scots law has two parts to it. There is what is defined as being the law, but there is also the process that is associated with it. When you make your remark, are you perhaps pointing to superior process and, perhaps, the quality of the practitioners in Scotland, rather than what is actually on the page as law, which is, as was acknowledged earlier, essentially the same as English law—in effect, if not in words?

Professor Gretton: I would be reluctant to comment on the comparative abilities of leading practitioners in Scotland and England. All I can say is that, in my lifetime's experience, I have come across many superb practitioners in Edinburgh and Glasgow—there are others, no doubt, elsewhere in Scotland—and have been really impressed by them. I have come across numerous practitioners in London and elsewhere, and I do not think that they are any better. However, I am an academic, so I am not sure that I can give a full answer to that question.

The Convener: We will leave that discussion there, if we may. I will move us hastily on to John Scott.

John Scott (Ayr) (Con): What might the practical and economic benefits of a new system be for businesses in Scotland? If I understood him correctly, Professor Gretton suggested that the change would not necessarily be transformative in terms of a sudden rush of business to Scotland. Do all our witnesses share that view?

Dr Anderson: In general terms, I share that view. We are a small system; business from around the world will not flock to Scotland just because of how one can sign a document. What is crucial is that Scotland stops exporting transactions that are carried out by the ordinary people of Scotland and by Scottish businesses and companies, and which relate to assets in Scotland. If we cannot persuade our own citizenry to use our law, that reflects poorly on the content of our law.

As Professor Gretton has already touched upon, to some extent the practice in that area of law is not entirely rational; in 100 years sociologists may wonder what we were doing by scanning pages. However, that is what the market is comfortable with and the empirical evidence suggests that without the bill, many contracts that would otherwise be governed by Scots law will be governed by English law, although there is no great connection with England.

10:15

Professor Gretton: I agree with that.

Dr Black: I do not know whether the change will attract business to Scotland, but I hope that it will prevent some contracts being governed by English law where the only reason for that choice is the execution and counterpart advantage.

John Scott: Would you like to talk about the risks that are attached to the proposal, in terms of small towns and smaller legal practices? I presume that small local businesses are confined to Scots law. Do you see benefits for them?

Dr Anderson: Yes, is the short answer. The geography of Scotland suggests that counterpart execution may be of particular relevance to so-called small-town cases for businesses in the Highlands and Islands, the Hebrides and so on. Trying to get people on a cold November evening to take trains and ferries—even to Inverness—is not easy. One could see, in Scotland in particular, considerable benefit for small-town practices that want to avail themselves of the option. It is not an obligatory provision—it is merely facilitative.

John Scott: Previous panels have suggested that the new law could be of use beyond large commercial contracts because it would allow businesses to set up new ways of signing electronically, hence stimulating innovation. As academics, do you see an opportunity for new and innovative ways of signing being developed on the back of the legislation?

Professor Gretton: I am sorry, but I do not have any comment to make on that, although my colleagues might have.

Dr Anderson: No.

Dr Black: No.

John Scott: Thank you. You have answered all my questions.

Margaret McCulloch: We have heard evidence from various groups of people about the possible increase of fraud or error that could happen with the introduction of electronic signatures. Are you aware of any examples of fraud or error that have occurred under the English system?

Professor Gretton: I am not aware of such occurrences in England, although no doubt they happen. Fraud can happen in our system now. For example, a few years ago a solicitor in Aberdeen substituted earlier unsigned pages in deeds transferring property so as to insert his own name rather than that of his client, and then registered that version. He did that more than once. There is risk in such things; I do not think that the bill will decrease risk, but I do not think that it will significantly increase risk, either.

Dr Black: I have read the evidence from other witnesses and I agree that if people are interested in committing fraud or are out to do so, there is already potential for them to do that now. I agree that the bill will not necessarily increase the risk, even if it does not head it off at the pass.

Dr Anderson: I agree with that. I do not agree with the view that there is a danger of fraud lurking in the bill. That danger is inherent in our present hard-copy, wet-ink system: as George Gretton mentioned, if one has a pile of paper and only the last page is signed, another 250 pages can be swapped at will.

We are talking about a document that is generated as a PDF as the master copy, and there is no doubt that it may be possible to interfere with the copy in some way. However, it is now a little more difficult to do so, and there would, one hopes, be some sort of digital trail for litigators such as me to follow up if there was a dispute.

The Convener: I wonder whether I can bring in Stewart Stevenson, because this might be a good point at which to discuss electronic signatures.

Stewart Stevenson: Indeed. I just make the observation that I have software—which I use for quite legitimate purposes—that enables me to edit PDFs as a matter of normal practice. There is no fee for that advice; I am merely saying that you should not rely for security on the fact that you have stuffed something in a PDF.

I will move to a matter of more substance and weight. Given that the whole point of an electronic signature is that the technology preserves the unique single possible source of the signature, which is similar to a written signature—with all the caveats that one might attribute to either of those statements—and ensures that the signature reflects the totality of the document's content, why has there been substantial reluctance thus far to adopt electronic signatures? Furthermore, why has there been a reluctance to adopt the ability to sign at a distance, which is part of the issue?

Professor Gretton: That is an excellent question.

Stewart Stevenson: Which means that it is not an easy question to answer—is that correct?

Professor Gretton: Exactly. When a student asks me a question that I cannot answer, I always say, "That's a very good question."

The possibility of completely electronic documents that are electronically signed with an advance signature finally arrived earlier this year—in May, I think. Those documents are sometimes called pure electronic documents with pure electronic signatures. Your question is why that system has not—or not significantly—been adopted. Harking back to when I said that it is a good question, I do not know the answer.

One issue is availability: advance electronic signatures are not sufficiently widely available. Another issue is that the technology is still a bit science-fiction for many people, including sophisticated commercial practitioners. They are familiar with paper and wet ink, and with scanning and PDFs, but they are not very familiar with the idea of pure electronic documents. Perhaps that will be different—and the bill will look pretty old-fashioned—in 10 years' time. Things will move on, and we may be in a pure electronic world. Pure electronic documents are more secure—or at least so the techies tell me—so why are they not used more widely?

Those are the two reasons: the questions around the wider availability of advance electronic signatures and the fact that people are simply not used to the idea yet, as it is too advanced for them. However, I am just guessing. I am an academic and I do not know, as I have not been out there and asked people, "Why aren't you doing that?"

The technology is very new, because it came in only in May and these things take time. To some extent, it is a generational issue.

Stewart Stevenson: I make the observation that Mary Queen of Scots was born in 1542, and she used the process of having single keys that no one shared in order to correspond with her lovers. It is exactly that process that we are looking at here, albeit that the key is electronic. In fact, the concepts involved in this technology are at least 450 years old. In the electronic world, electronic signatures have been in legally enforceable use for more than 30 years.

That advice is also free.

Professor Gretton: Maybe the committee should amend in the word "lovers" to the bill. It would certainly have a bigger impact.

Stewart Stevenson: I feel the convener's discomfort at where we are going with this.

The Convener: Perhaps I could drag us back to the bill with questions from Margaret McCulloch.

Margaret McCulloch: What are your views on the suggestion from the Faculty of Advocates in its oral evidence on 30 September that risk could be reduced if the parties are required to deliver an entire document in counterpart and not just the signature pages? Would that suggestion be commercially realistic?

Dr Black: We have discussed the current potential for fraud. If you have a hard-copy document, it is easy enough to sub in new pages, whether it is the whole document or particular pages. That would remain even if you deliver the entire document that has been signed.

I also have concerns about the number of documents that would be floating about. If you have four parties to a transaction, that would involve the exchange of 12 counterparts. It is manageable and feasible to exchange 12 signature pages, but I would have thought that it would become incredibly uncommercial to exchange 12 counterparts of a 200-page contract.

Dr Anderson: When I first looked at this area of the law a number of years ago, it was as a result of receiving emails, as the junior lawyer, of signed signature pages, and questioning what we were

doing. At the time, I shared to some extent the concern about whether that was really enough. My views on that have changed, because the essence of counterpart execution is to avoid the delivery, whether in hard copy or electronic form, of the whole document. If the committee was minded to recommend that the whole document should be transmitted, one might as well put a line through the first section of the bill.

Gillian Black gave a good example, which one can multiply easily. I was trying to do such a sum last night. If one has a fairly short form share purchase agreement that is 100 pages long—to which, conceivably, there could be 50 signatories, if there are 50 shareholders—that would be a document of 149 pages. If one started thinking that every party must send the whole document, one would be in the situation of requiring about 7,500 pages to be exchanged for just one document.

Many transactions will have literally hundreds of documents. It is pertinent to ask, "Why just the signature pages?", but that goes to the very heart of what counterpart execution is. If the committee is satisfied with the policy or idea of counterpart execution, as done in England and much of the world, adding the additional requirement of delivering whole copies of the document would not take us much further on from where we already are.

Professor Gretton: I agree.

Richard Baker (North East Scotland) (Lab): My question is on pre-signed signature pages. The policy memorandum states that those may be used if

"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."

First, do you think that that offers sufficient protection? Secondly, to what extent is it an issue anyway? The law firms that gave evidence on 30 September said that they do not use pre-signed signature pages. It would be helpful to know whether you have experience of how widely they are used.

Dr Anderson: As a solicitor, I would never use them. Actually, one questions what is being done here. It seems to me that the authorisation that has been given by client in that situation is essentially a power of attorney to the solicitor to sign the document, once the solicitor has seen the full document on behalf of the client. I confess that I find the use of pre-signed signature pages odd.

The basic principle that is contained in the policy memorandum is probably right when it says that it might be competent if one had authorisation. From my point of view, I do not think that many solicitors would be willing to risk it.

Richard Baker: Why do you think that it is in the bill then? Is it because it is expected that pre-signed pages will be used more in future, or is it a guarantee that all bases are covered in legislation? Why is it there?

Dr Anderson: It is a good question. It may be simply to reflect some of the practices that are going on in England and, again, to be facilitative for cases that may arise.

Richard Baker: But, at this point, you do not see what cases would arise.

Dr Anderson: One of the difficulties with transactional practice lies in trying to see the future for every factual eventuality. One needs an element of flexibility with that.

Dr Black: I agree. If the client wishes to give authority to the solicitor to sign on their behalf, the existing doctrine of agency would allow the client to do that and the solicitor to sign on their behalf. I therefore do not know that the provisions add anything: there is existing provision for someone to appoint an agent to sign on their behalf if they wish to do so.

10:30

Stuart McMillan: What are your views on the likely benefits for business of the setting up of an electronic document repository maintained by the Registers of Scotland?

Professor Gretton: That is not in the bill, of course, because the view has been taken that those arrangements do not need legislation. It seems to me to be a good idea. I would imagine that it would not be too difficult to set up.

The fact that the repository would be run by Registers of Scotland gives it a credibility that might not exist if it was offered to the private sector. I imagine that that will go ahead when Registers of Scotland has the capacity. At the moment, it is doing the transition to the new provisions of the Land Registration etc (Scotland) Act 2012, and I imagine that it is all hands on deck for that. Once that act comes into force—on 8 December, I think—and once things have settled down, I imagine that Registers of Scotland will turn its attention to the repository.

Your question was about business benefits. I am an academic, and I am entirely reluctant to comment on that, but I would imagine that there is very strong potential.

Dr Anderson: It is always difficult to know what the future holds. Mention was made earlier of technology in the 16th century. Paper and ink has been around for a long time and has generally proved itself to be a pretty useful, durable technology. At the moment, we have a register

called the books of council and session, which has kept original documents for literally hundreds of years. The idea behind the repository, which I certainly support in general terms, is to have some digital archive with state backing, which would ensure that electronic documents are archived in such a way that they will continue to be accessible.

I am not a technical person, but I speak from my experience of trying to open up old documents—sometimes they will not open. One difficulty with software is that it moves on, and there is a real issue of retaining, for example, an old Betamax machine to watch Betamax tapes.

I can certainly see that there may be some major benefits to having an archive that keeps electronic documents in such a form that they will still be readable in 100 years' time.

John Scott: Would you make that point to Registers of Scotland? Surely it would keep all its documents in an accessible form, rather than allowing them to become redundant because of technology to access them no longer existing. It would have to update them as time went on.

Dr Anderson: I fear that we are straying into an area where I lack the technical knowledge to comment further. I merely highlight the issue; others might have more to say.

Professor Gretton: To some extent, Registers of Scotland is already doing that: pure electronic documents are already registrable in the land register of Scotland and in the books of council and session. I believe that the resident techies at Registers of Scotland have addressed the issue so that material can remain accessible even as the technology moves on. I do not know how they do that—I am a cybermoron—but I think that they have tackled the issue and that we are already there. There are already purely electronic documents registered. Those who apply for official copies can get them. Apparently, it will be a stable situation—so I am told.

Stewart Stevenson: I am not a cybermoron, for a variety of reasons. I thought that it would be useful to put it on record that an essential feature of any electronic repository of information of any kind that is going to endure is that the full details of how the data is organised, and the algorithms that are used to access it, must also be stored in perpetuity and must be publicly available, free from any commercial restrictions.

If those tests are met, electronic repositories that endure for the long term are sustainable. For example, PDFs are a commercial product, which can be changed by the manufacturer over time. We need to exercise care. Without getting involved in the technology itself, we should be clear that, if we end up using electronic repositories, we must also deposit the means by which the material can be accessed in perpetuity—not the programmes, because the platforms that the programmes run on will quickly become obsolete, but the algorithms. It is useful to express that point for the record.

The Convener: We are now in Mike MacKenzie's hands.

Mike MacKenzie (Highlands and Islands) (SNP): Thank you, convener.

Are there any other comments on the bill and—possibly the most difficult question of the lot—is there anything that should be in the bill but is missing?

Dr Black: I agree with Ross Anderson that it is unclear in Scots law as to whether the bill is needed. My view is that it is not required as it is already open to parties to execute documents in the way provided if they wish to do so. I accept that there is a lot of commercial concern about that approach, so the certainty that the bill provides is welcome. However, as I think that the bill is not, strictly speaking, essential to allow the parties to execute documents in such a way, I also think that it is important that it has a light touch.

I have two queries about the bill as drafted. First, what is the position when a contract does not need to be executed in this way? Most commercial contracts do not need to be executed formally in writing at all, let alone executed in counterpart. If the parties choose to use this method but fail to comply with the provisions of the act—so they opt to use the scheme available in the act but then fail to do so for some reason—does that mean that the contract is not properly concluded or enforceable, even though there is no need for them to opt in? If they choose to opt in, what is the position if they then fail to comply? I would welcome some clarity on that.

My other concern is with section 1(3), which states:

"On such execution, the counterparts are to be treated as a single document."

My interpretation would be that it creates a legal fiction that two or three documents become one—the holy trinity of contract law, perhaps. Instead of saying that two or three documents become one document, it would be adequate and create less of a fiction to say that, regardless of how many parts a document is executed in, it is still a valid contract. Instead of deeming several parts to be one, we should accept that it does not invalidate a contract to be executed in multiple parts. Those are my two observations on the bill.

Professor Gretton: I have one or two points on the delivery of traditional documents via electronic means, rather than on the counterpart issue,

which I should probably put in writing for clarity's sake. The provisions in section 4 are drafted with contracts in mind, and that makes sense, but the wording covers documents other than contractual documents. I will try to be brief.

I will begin with section 4(6), which states:

"Although delivery by electronic means constitutes effective delivery in relation to a traditional document, what is received by that means is not to be treated as being the traditional document itself."

It is not immediately obvious what that means—it certainly was not obvious to me. I looked back at the Scottish Law Commission report and saw that one thing that it is supposed to mean is that a document as an electronic deliverable—a PDF—is not itself to be registrable in, for example, the land register or books of council and session.

As a drafting point, I thought that that section could be amended to make the point quite clear. It was not clear to me reading the bill cold; I am a pretty good reader of statutes with a good background knowledge of the law, but it did not come home to me. It would be good if subsection (6) could be amended to make the point that such documents are not registrable.

I have another point to make. If we turn away from contractual documents and look instead at, say, a conveyance of land, we see that it is on two pages. I have an example of a conveyance of land with me today and, as you can see, there are signatures on page 2. Section 4 says that a document can be delivered if just part of it is delivered, so if one page was faxed it would constitute delivery of the disposition, but that would be no use to a buyer because most of the deed is not there, and even if they got the whole deed they still could not register it because of section 4(6).

The project is being driven by contracts, and I fully understand that. As I have said, I support the bill, but I think that an amendment would be appropriate to cover the point that I have made. I can put that in writing for you.

The Convener: That would be extremely helpful.

Professor Gretton: I will fax it to you in portable document format.

The Convener: Indeed. It would be helpful to get a response on that point from the Law Commission, which has probably thought about that at some stage, although I do not remember everything that it wrote down.

Thank you for those interesting observations. Dr Anderson, do you want to add anything?

Dr Anderson: My observations are linked to both of the prior observations. We should try to keep in view some of the different subjects that the bill will deal with. George Gretton has given the example of a unilateral deed that may have to be registered and therefore has to be delivered in order to be effectual in terms of section 4. Section 1 of the bill is directed, as has been discussed, mainly at commercial contracts, and that takes us to the issue that Gillian Black has raised—what if a mistake is made and the contract is not executed in accordance with the bill? There are a couple of observations to be made about that.

First, most commercial contracts do not have to be in writing at all. It would be perfectly competent for the parties just to meet over a cup of tea or a strong drink to work out what they want to agree and for money to change hands on that basis. Of course, if the parties have gone to the trouble of spending money on their lawyers to negotiate detailed terms for many months, they will want to ensure that they do not have issues about those terms forming part of their contract. That is why they then seek to execute the document in such a way as to benefit from the presumptions that the Requirements of Writing (Scotland) Act 1995 will confer upon them—namely that, if it has been signed at the end of the last page, it is presumed to have been signed by the granter, and that all the terms are so incorporated.

If a contract is not required to be in writing, however, a mere failure in that procedure, or any other procedure under the 1995 act, does not necessarily invalidate the contract. It just means that one will have greater difficulties in proving either whether the contract was concluded at all or, if so, what the terms of that contract are.

That is a simple point to make, but when I listened to some of the other evidence I was not sure whether that point always came out. The bill must always be looked at in the context of the Requirements of Writing (Scotland) Act 1995, and the document that George Gretton referred to is one that must be in writing and is normally unilateral and therefore requires delivery. That is a slightly different situation from the commercial contracts, and it is why, for contracts that do not need to be in writing, delivery of the signature pages alone is usually sufficient, because there is a master copy of the document somewhere else and it is not going to be registered anywhere.

There are different issues relating to different documents, and I am not sure that that has always been made fully clear.

Mike MacKenzie: That takes me on to my next question. Do you agree with the general approach of the bill being facilitative rather than prescriptive?

Dr Black: Absolutely.

Professor Gretton: Yes.

Dr Anderson: Yes.

Mike MacKenzie: Those are succinct and useful answers. Thank you.

The Convener: That brings us—all of a sudden, it seems—to the end of our questions. If the witnesses would like to add any further thoughts in writing, that would be appreciated, and I recognise that people sometimes prefer to put them in writing so that they can make their thinking clear on a complicated subject.

Thank you for your evidence.

10:44

Meeting suspended.

10:49

On resuming—

The Convener: I welcome to the meeting Stephen Hart, legal counsel, Braveheart Investment Group plc, and Catherine Corr, principal solicitor, Scottish Enterprise. We are just going to run through the same script, as the questions are relatively obvious and we would like some consistency in what we are hearing.

Are there any difficulties with the current state of Scots law? Answers on a postcard, please.

Catherine Corr (Scottish Enterprise): Yes, absolutely.

Stephen Hart (Braveheart Investment Group): I agree. There are a number of practical difficulties, and I also see a number of legal or situational difficulties arising.

On the practical side, the committee has heard a weight of evidence suggesting that transactions sometimes outrun the lawyers who are managing them and that consideration of the location and availability of signatories can change as the transaction progresses. In some deals, people consider at the outset which law needs to be applied, while in others, there is a last-minute decision based on availability.

The number of parties can present a great difficulty. Dr Anderson referred to share-purchase agreements, in which I have great experience in relation to corporate and investment agreements. In such agreements, there are many parties, some of whom are only subsidiary actors—that is, if they are actors at all; they are just shareholders of the company. That situation creates delays and great uncertainty in the transaction process.

Other legal difficulties or situational conflicts can arise. People become wary of being bound to a contract before they want to be. Theoretically, if all parties sign a round-robin document rather than hold a completion meeting, the document becomes binding when the last person signs it, but the parties might not intend for that to be the case, as the document might be interconditional with other documents.

Interconditionality raises a number of issues in larger corporate transactions, and having documents seemingly become effective at different times, with different signatures, can raise issues. I have seen people use probative signatures under the Requirements of Writing (Scotland) Act 1995, but, bizarrely, leave them undated because it was, say, 7 October and they knew that the document had to go around the parties and that the deal itself would not be done until 10 October. Such practical and legal uncertainties can arise.

The Convener: I suspect that most of us have signed something without dating it. After all, that is the average way to buy a house.

John Scott: Given Scottish Enterprise's knowledge of big deals, Ms Corr, do you have any practical examples of the current law's impact?

Catherine Corr: I would echo the evidence that you have already heard. The lack of clarity on counterpart execution poses a practical difficulty for Scots lawyers with regard to not only large commercial firms and contracts but smaller firms.

One example that recently came across my desk related to a licence agreement with a US company. The US is one of our biggest export markets. A lot of business is done there not only by Scottish Enterprise but by Scottish businesses, and we want to encourage that. In that case, we had to make the usual apology for Scots law to the US company and say, "I'm really sorry, but you'll have to print out the document there. We can't sign it in counterpart and take the deal as done. You'll need to courier it back from the US to Glasgow and we'll need to have it signed." That is a practical example of what is happening every day in Scotland, and I am sure that Stephen Hart has had experience of similar conversations. The bill aims to address that in a positive way.

The Convener: Do you have any comments on the previous evidence that we have heard that the choice of law has something to do with its nature and content, or do you agree with the earlier comment that people are perhaps more familiar with English law, know what it means and go with what they are used to?

Stephen Hart: I would say, primarily from my experience of private practice, that choice of law can be a very early consideration with regard to the document. We look at choice of law in a positive way. A number of things might affect that decision, an obvious one being the location of the

counterparty or counterparties. To be perfectly honest, I think that, if the counterparties are English or if there are multiple counterparties, there is a draw towards English law as a common standard, so to speak.

Commercial practice dictates that a number of types of contract—for example, international shipping contracts and such things—are more prone to being governed by English law, which reflects its international standing. However, in other situations—where, say, the convenience of execution plays a part in the choice of law—Scots law is the natural forum. That could be determined at the outset, or it could be a late call.

Aside from the absurdity of having Scottish parties executing under English law a document in relation to Scottish assets so that they do not have to meet up, complications arise if there is a late switch from a Scots law to an English law document. Scottish lawyers, particularly company lawyers, are relatively adept at using English law.

It was pointed out in earlier evidence that it is easier and more pragmatic for a Scots lawyer to draft an English law document than it is to ask an English company to instruct Scots solicitors. The latter course might increase risks or the likelihood of error. Obviously, there are differences in terminology, one of which relates to joint and several liability and several liability, and sometimes oddities emerge when you change the choice of law but keep the jurisdiction of the courts the same, so you have Scottish courts opining on English law. It is, in general, messy.

Margaret McCulloch: I have a question for Catherine Corr from Scottish Enterprise. Scottish Enterprise is a big company that deals with organisations nationwide and throughout the world. Is English law its first option because of the ease of getting signatories on the final document?

Catherine Corr: I should clarify a couple of things. Scottish Enterprise might enter into a lot of contracts but it does not transact in the same way as a commercial business; we do not trade as such. We always use Scots law because we are a non-departmental public body and take great pride in the Scottish legal system, and we always seek to promote it in the business that we do.

With regard to Margaret McCulloch's question and indeed Mr Don's question about whether the decision that people make is dictated by the substantive content of the law or whether it is just habit, I would say from my experience that English law is more universally recognised because of habit and perception. It is a bit more practical, and because of its historic legacy it has tended to be used as the law of commerce. I do not think that the change being made in the bill will necessarily make people who are not otherwise connected to Scotland suddenly flock to Scotland to use Scots law, but it will certainly make the messaging around Scots law and the utilisation of Scots law for commerce easier.

11:00

At the moment, a Scottish Enterprise workstream is seeking to promote the Scots legal profession abroad. One of the UK's key strengths is professional services, and there is an appetite at the UK and Scottish Government level to promote professional and legal services. A good message in that promotion is that arrangements are practical and workable for business, which makes Scotland a good jurisdiction to do business in.

The Convener: That answer brings us comfortably to where John Scott was going to go.

John Scott: Indeed, convener. At the risk of asking the witnesses to say the same thing twice, I think that opinions seem to vary on the benefits of the proposals for Scottish legal practitioners. Last week, corporate lawyers told us, "This is great. Bring it on." Most recently—today, in fact—others have said that the provisions would not be transformative with regard to the business that they would bring to Scotland. What are your views on the likely economic benefits of the proposed legislation?

Catherine Corr: It is difficult to crystal-ball-gaze with any certainty, but I think that the bill will stop the drift of contractual business from Scotland. It is fairly common for parties, either at the outset of a transaction or at the 11th hour, to seek to utilise the practicalities of English law around execution.

That is what I guess we are focusing on at the moment: the practicalities of execution in relation to the bill. What I have referred to is a very real occurrence and, if we can stop that drift, it will benefit the profession with regard to the work that is done in Scotland and give Scottish businesses a level playing field in relation to businesses from England and worldwide. They will be able to put a better message across to their customers and assure them that they can operate in a practical way and accommodate their customers' needs. I hesitate to say that the bill will suddenly bring a lot of business to Scotland, as I am not sure that it actually will, but it will certainly stop the movement of business from Scotland in relation to legal commercial contracts.

Stephen Hart: I will deal first with the issue of attracting business and the economic benefit before I turn to some of the bill's more generic benefits. I echo the view that the bill will not make Scots law the top choice for international parties to transact under. However, the bill clearly stops exporting, which is a refrain that you have heard

from many witnesses, and it will allow the most appropriate forum to apply to contracts.

Looking ahead, I guess that possibilities will arise as, with the move towards internet-based transactions, we start to consider more novel ways of entering into agreements or purchasing goods. In that respect, I should also mention the conclusion of click-through agreements and giving consent through electronic media.

I will be honest: I have not read—and I never intend to read—the user agreements that people always have to agree to before they can buy things online. I hope that Scottish companies that are selling businesses online use Scots law for their online transactions, because it would be a bit daft to get all the way to the bottom of an online agreement, only to find that it said that English law applied, just because the companies involved were not sure. Bringing things home is the fundamental question.

For me, the benefit of the bill will be certainty. People are doing this anyway; they have been working out ways of getting around the strict requirements of Scots law, and notwithstanding the current law, we are currently undertaking transactions in counterpart with electronic delivery. I think that commercial practice is already there, and the bill is all about catching up.

John Scott: So you think that the law is just catching up with what is already happening. That is an interesting observation.

A moment ago, you suggested that there might be opportunities to use the forthcoming legislation in an innovative way. Last week, it was suggested that, beyond large commercial contracts, the bill would allow businesses to set up new ways of signing electronically. However, you seem to be saying that they are already doing that.

Stephen Hart: I am not necessarily advocating the view that the bill will allow Scottish companies to become world leaders in a new way of transacting documents. In much of our content, we have been moving from wet ink to a PDF copy of that wet-ink document to electronic signatures. The more our agreements are made online, the more the issue becomes about having a law that allows those contracts to be concluded online with certainty. It is not necessarily a question of technological innovation.

John Scott: Does Scottish Enterprise see any opportunities for innovation under the bill?

Catherine Corr: I do not feel particularly qualified to comment on that. As such a change beds in, businesses will inevitably work out that things move on and evolve. Indeed, we are seeing that in the approach that Stephen Hart has referred to of having an entirely electronic document that has been signed electronically and which exists in a virtual space. That sort of innovation is happening all the time, and I think that businesses will develop innovative solutions. However, I cannot presume to predict what they might be.

John Scott: I might have asked you this question already, but can you confirm that you do not think that the bill is likely to attract business to Scotland that does not otherwise have a connection with Scotland? The same view was expressed last week. If you think that it will attract business to Scotland, we would like to know, because we would be happier if it did. Even if you think that, in the real world, it will not, we would still prefer to know.

Catherine Corr: As I have said, I do not think that the legislation will necessarily attract businesses to Scotland that would not otherwise have an interest in doing business in Scotland or have some connection with Scotland. I think, however, that it will stop the drift of business from Scotland and will make parties who already have that connection or the desire to do business in Scotland feel more comfortable about the idea of Scots law.

In my former life as a private practice lawyer and since moving in-house with Scottish Enterprise, I have come across the general perception that there is something a bit different about Scots law—that it is a bit archaic and cumbersome. Even though people do not really know the detail of it, they are somehow put off. I have come across that pervading attitude before, and it is just a matter of pointing out that the Companies Acts are UK-wide and that there is very little difference in the commercial sphere. Enacting the bill would remove one of the more practical differences that exists with the lack of counterpart execution certainty, and that positive message will make people feel more comfortable around Scots law. However, I do not think that it will suddenly make Scotland a key jurisdiction over any other place.

John Scott: Are you happy with that response, Mr Hart?

Stephen Hart: Yes.

Margaret McCulloch: Are you aware of countries that use English law because of the ease of getting signatories?

Stephen Hart: If you mean countries that choose to use English law purely because of counterpart execution, no. Different parties in different jurisdictions choose English law for reasons that we have touched on; counterpart execution is not necessarily one of those reasons. The issue is most acute between Scotland and

England because the same law applies to the rest of the transaction.

Stuart McMillan: From what we have heard from this panel and the previous one, it sounds as though there is a reputational issue that the bill seeks to address. It will stop the drift towards businesses using English law, and by doing so it presents an opportunity to enhance and promote Scots law for transactions further down the line. There could be a positive outcome in five or 10 years' time for the promotion of Scots law and its reputation.

Catherine Corr: Certainly. We would argue that Scots law already has a superb reputation and that we should be doing more to promote it, because it has many strengths.

Our lawyers have exposure to many areas and transactions in which they develop expertise that is exportable. For example, lawyers in our oil and gas industry in Aberdeen are getting experiences that many lawyers across the world do not get—everything is on their doorstep—and the renewables projects that are springing up all over Scotland mean that our lawyers are sometimes among the first to encounter and overcome particular issues. Skills, experience and knowledge are already present in the profession and we must do more to enhance them. Practical steps such as the bill can only enhance that message and promote Scots law.

Stuart McMillan: Forgive me, but only a few moments ago you used the word "archaic" in the context of Scots law. That is why I asked about reputation.

Catherine Corr: Yes. The answer that I just gave you was about changing such perceptions. We can do that now, and the bill will help in the process. There is a misconceived idea about Scots law being somehow very different because it is a separate system; we have to explain that, in commercial terms, the law is not very different throughout the UK. That is a dialogue that Scots lawyers in Scotland probably have with international clients every day at some point. The bill is a practical step that can help in that discussion.

Stephen Hart: A variety of factors contribute to the perception of a legal system as strong and positive, or weak, or archaic. The institutions, the effectiveness of the judges and the courts, and the rule of law are all great factors that contribute to people relying on Scots law as a forum in which to get decisions. The decision-making process is a solid foundation on which they can conduct their commercial activities.

11:15

Other things contribute to a feeling that Scots law might be a bit behind the times. Execution in counterpart might be one small part of that. Other aspects might be the way in which we plead our litigation hearings, where Latin is used, and the way in which some property transactions have historically been done. It is not too long since property lawyers abandoned travelling drafts with coloured ink, which I am sure could still be found in various places. The bill deals with one small part of how the legal system is presented.

The Convener: We will move on to fraud and error.

Margaret McCulloch: You said that you use the proposed system with some clients. How do they feel initially when asked to sign a sheet and trust the lawyers to ensure that all the other pages—there could be 100 or 150 pages—are accurate? I have asked witnesses about fraud, but do businesspeople happily sign the sheet of paper and feel confident that what they are signing is what they will get?

Stephen Hart: There is a question about trust in lawyers and a client's trust in their own lawyers.

Margaret McCulloch: My question is also about accuracy. Clients trust that the paperwork is correct, but human error is a possibility.

Stephen Hart: Error and human error exist and will continue to exist. Throughout a paper document, it is still probable that manuscript amendments will be found, with little initials by them. We already produce paper documents that have in them typographical errors or address changes. I would like to think that an employer should be able to take confidence in its in-house counsel to put on the table the bits of paper that reflect the institution's will.

Margaret McCulloch: What about fraud? Have you come across or heard of examples of fraud?

Catherine Corr: I have not. I echo the evidence that the committee has already heard. The potential for fraud and error exists at the moment; the bill will not eliminate that or open the door further to it. If people wish to be fraudulent, they will find ways to do that.

The English system has operated on the proposed basis for a number of years and I am not aware of any particular problems there. Trust between clients and their lawyers is an issue. Solicitors are regulated by a host of professional duties, and there are engagement letters and so on. When a client is asked to sign a signature page, they therefore think just of the convenience and are usually happy, because they trust that the proper document will be executed.

Margaret McCulloch: I asked earlier whether risk could be reduced if the parties were required to deliver the entire document in counterpart, not just the signature pages. What are your views on that from a practical, commercial point of view?

Stephen Hart: As Catherine Corr said, a number of things can mitigate risk. Professional advisers, ethics codes, technology and good practice that the Law Society of Scotland may promote can all reduce fraud.

On the suggestion by the Faculty of Advocates that principal copies of documents should be delivered by one party to the other, it is no longer as common to find a bound engrossment as it was a number of years ago, because the first thing that we do is take off the binding and put the document through the scanning machine. Documents are primarily circulated unbound.

As earlier evidence indicated, if dozens of parties to a transaction each send 100 pages to each other, and the nominee—as the bill suggests—can collate all the signature pages and put 99 pages into the shredder, that would seem to be a bit of an environmental waste and a practical inconvenience.

Catherine Corr: I echo that. If we are looking to enhance the practical application of the law, in terms of the conclusion of contracts and the ease with which that is done, it would not make sense to say that someone has to send back an entire document.

Following the Mercury case, the Law Society of England and Wales suggests that an option—which is not obligatory—is that a solicitor could send a PDF of the final document along with a separate PDF of the signature page. The recipient would only have to print and sign the signature page. When they returned the signature page, they would just ping it back in an email with the PDF of the final document that was attached to the email that was sent to them that included the signature page. The Law Society of England and Wales suggests that way of matching up the signature page with the final document. I do not think that that is particularly convenient for clients and I think that it strays from what we are trying to do with this bill, which is to enhance the speed and ease with which contracts can be concluded.

Stephen Hart: Earlier, I alluded to the fact that parties already use English law mechanisms to transact under Scots law. The Mercury format of replying to an email and including the execution form of the document—the signature page—and the document to which it relates has become more commonplace.

Richard Baker: The bill has provision for pre-signed signature pages, but they seem not to be very widely used, from what we can gather. Do you have any views on their use and on whether provision for them in the bill is appropriate? Mr Hart, that question might best be directed to you.

Stephen Hart: What you have commonly heard, which is that the use of pre-signed signature pages is best avoided, is probably the default scenario. I do not want to obtain pre-signed signature pages way in advance of a transaction.

However, commercial organisations can be affected by the availability of signatories or the timing of the transaction. It may be that, once the terms of a document have been negotiated and broadly agreed, the engrossment version is not quite ready yet because, for example, we are still arguing about a point or waiting to hear back from a third party or, with time progressing, my board is unavailable or will shortly become unavailable. There is an implicit trust that the document that I approve for signature will be the document that we as an organisation may wish to enter into. There are times when I may take the opportunity to benefit from that provision to obtain a pre-signed signature page.

The Convener: It is worth making the point that the bill does not specifically allow that; nonetheless, it is effectively allowed in law if it becomes the practice. That is why we were discussing the issue.

Catherine Corr: I do not think that that practice is widely used in Scotland. I do not use it; indeed, it is certainly not something that I feel comfortable with. The view that it is somewhere that we do not go is probably prevalent across the profession, because it is one step too far in terms of flexibility.

The Convener: We have probably covered that issue, so we will move on to Stuart McMillan.

Stuart McMillan: What are the likely benefits for business of the setting up of an electronic document repository maintained by Registers of Scotland?

Catherine Corr: I can see the attractiveness of that suggestion, because having a central documents repository would give a sense of security to the parties in a situation where charging one solicitor or the other in a particular transaction to retain documents might not give that same level of security to the other party. There are also questions of practicalities for individual solicitors firms in terms of the size of the storage required and the length of time for which the documents would have to be retained.

I can see the merit in the suggestion, but questions would need to be answered about the independence, the funding and the staffing of the repository and about who would be responsible for it. Some of the commentary suggests that Registers of Scotland could take that on. That

could be explored. Registers of Scotland is primarily a land register that is linked to Scotland. If we were looking to create a repository for international contracts, for example, we would need to work out how that fits with Registers of Scotland's role and remit as a Scottish registry for property transactions and how that would morph into a wider role if it were to take on that responsibility. Such questions would need to be answered, but I can see the merit in the concept.

Stephen Hart: I see a superficial attraction to setting up such a depository, but it is a potentially expensive technological solution to a problem that does not really exist.

Stuart McMillan: Are there any major examples of a legal firm misusing legal documentation that it had saved and stored? There is a suggestion that an independent organisation should act as the repository. Stephen Hart said that the idea had a superficial attraction, but are there any examples of the misappropriation or misuse of documents under the current system?

11:30

Catherine Corr: I am not aware of any. In previous evidence to the committee, the key point was made that the bill refers to the parties instructing a nominated person to retain the relevant document. Even if party A instructed party A's solicitor to destroy a document or to do something with the document, the solicitor could not do that, because he has been charged by both parties to retain it for their benefit and on their behalf. The bill anticipates that issue and seeks to head it off. In reality, it is something that I have never come across.

Stuart McMillan: What about Mr Hart?

Stephen Hart: No. I am not aware of any such situation.

Margaret McCulloch: What if the legal firm goes out of business?

Stephen Hart: That is a shocking suggestion.

Margaret McCulloch: Yes, but these things happen. What would happen if a firm that held all these documents electronically went out of business? How could people access the documents at a later date? Could they get hard copies?

Stephen Hart: The answer is that I do not know. I would have to defer to the Law Society.

Margaret McCulloch: Could having a central point where the electronic documents are stored independently therefore be an option?

Catherine Corr: I can see some merit in the suggestion. However, quite a lot of issues would have to be worked through in relation to funding for the body, its staffing and responsibility for it. Another issue is the need to update the documents. If someone registers a document in 2010 or whenever and in 2018 the parties change it, how would the process whereby the copy is updated be managed? That would be quite labour intensive and so on. All those issues would have to be worked through, but I can certainly see merit in the idea, for the reasons that you have touched on.

The Convener: I thank Margaret McCulloch for introducing that idea. The committee perhaps ought to take the advice of the Law Society about how the situation that she envisages would be handled.

Stuart McMillan: I have a follow-up question. If a small firm that was tasked with storing the records decided to stop trading—as opposed to going into receivership—because the people who ran it wanted to retire, what would happen to the documents?

The Convener: I will stop you there, because I think that we will take some specific advice on that. To be honest, I do not think that it is fair to ask this panel that question, unless either of the panel members has a particular comment to make, which I do not think they do.

I will pursue something about which I have no idea. For how long does the contract for the average commercial transaction need to be held on to? To put my question in context, it is clear that if somebody buys some land, they hold it for ever until ownership changes. One can see that as being open-ended. However, does the average commercial contract or even the long commercial contract ever extend beyond 50 years, or even beyond 20 or perhaps 25 years?

Catherine Corr: It depends.

The Convener: Is there a real need for the document to be around for a very long time?

Stephen Hart: I think that Mr Stevenson might want to comment.

The Convener: I ask the witnesses to comment first.

Stephen Hart: It would clearly depend on the type of transaction. For example, a drug patent licence will exist for the duration of the patent. In an investment agreement, the principal terms of the investment will be concluded straight away, but the way in which the shareholders' arrangements are governed will continue until the shareholders change.

The Convener: So there are genuine contracts other than those for the purchase of land that could be seen as going on for a very long time,

which means that holding on to the original document might be fair in some cases in which people do not want to change it.

Catherine Corr: Yes.

Stephen Hart: Correct. One of the issues is whether an electronic repository and the digitisation of the document would allow for the destruction of the original, because otherwise we would be doing two things: we would be holding an original in a safe for 25 years and keeping an electronic version.

The Convener: So duplication is an issue. We have a panel from Registers of Scotland to come, so some of these matters can be dealt with then. Stewart, do you still want to comment?

Stewart Stevenson: I will just make the rather obvious point, which is topical in light of what the Parliament will be debating this afternoon, that if the documents that related to the insurance of various properties were not available in perpetuity, the position would be difficult in relation to claims that are now being made for mesothelioma.

Many commercial operations, in particular the railways, depend on legislation and contracts that, in the oldest cases, are approaching 200 years old, so I think that it is beyond peradventure that we need to keep such documents for ever.

The Convener: I think that makes the point.

We will move on to electronic signatures. Stewart, is there anything that you want to say on that subject?

Stewart Stevenson: I will just make the observation that I pay Mr Google £1.68 a month for my 100 gigabytes in the cloud—all my documents live there and the electronic keys will be available to people after I am deid, so it can be done for £1.68 a month. We will see where we get to with that.

On electronic signatures, does the bill that is before us—and the form that it is likely to have at the end of our deliberations—help or hinder the adoption of electronic signatures instead of paper and ink?

Stephen Hart: My view is that the initial impact of the bill will be reflective of current practice—the wet-ink signature of a paper document, which is then scanned and used to conclude the transaction. Like Mr Stevenson, I have experimented with digital certificates on PDFs. Currently, the greatest barrier is common adoption or the fact that you can lead as much as you want, but if nobody else is using a key, it becomes relatively pointless.

The other thing about electronic signatures is whether we are talking about the conducting practitioner who is overseeing the transaction or each individual signatory to a document. In company law terms, it is a question of whether each director and the company secretary are all using their different keys.

The Convener: I do not think that we need to push on this issue too far.

Stewart Stevenson: I will push on it, because the whole business of a key involves a key pair—a public key that anyone can use to verify the signature and the private key, which is available only to the person who signed the document. In that context, would it be useful if the public key, which is available to everyone to verify, were to be part of what is held in an electronic repository such as might be provided by ROS? That way, although the ability to sign anew might be lost if the private key was mislaid, at least the public key would be available enduringly to verify the electronic signatures—that would be protected.

Stephen Hart: I cannot comment on that.

The Convener: We have probably gone as far as we are going to with that.

Mike MacKenzie: Do the witnesses have any other comments on the bill? Do you feel that anything has been missed out of the scope of the bill that could usefully be included?

Catherine Corr: I do not think so, at this stage. The aims of the bill are admirable in the sense that they are trying to address a specific problem and to achieve a specific outcome within a relatively short time. That is an admirable ambition.

In due course, other areas of Scots law might be looked at—that was referred to in earlier evidence to the committee in relation to electronic signatures, delivery and those sorts of concepts. There is nothing missing from the bill, which seeks to achieve a practical and useful outcome. To contemplate bringing in anything else would overcomplicate it at this stage.

Stephen Hart: I have three points to make in relation to the bill and possible omissions.

First, the bill allows for counterpart documents to be held undelivered until the parties agree that they be delivered. It would be helpful if traditional documents, signed by all the parties, could be held undelivered until it is agreed by the parties that they be delivered. It would seem a little odd that if Catherine Corr and I have signed counterparts of documents, we can agree to postpone delivery, but if we sign the same document, it is deemed to be delivered at the time.

Secondly, although I applaud the use of the nominee structure, the more implicit it is, the better. If parties adopt formal appointment-of-a-nominee letters, it is just another piece of paper and another formality, which is perhaps

unwelcome. Whether law firms would introduce them into standard terms and conditions is a separate question, but when agreeing to that nominee, a relatively informal appointment should suffice—indeed, lawyers acting on behalf of parties might be deemed to be nominees.

My third point relates to a completed counterpart. Once a counterpart has been executed and exchanged and the transaction has been concluded, there is sometimes a natural abhorrence of empty spaces on the page. Under English law and practice, it might not be uncommon for the recipient to complete the counterpart. They might do that for a couple of reasons—so that they had one whole copy of the document or so that, if they needed to adduce it in evidence in court, they would at least have a copy that signified that they were bound to the document.

On the use of probative signatures, a counterpart, by definition in the bill, is not executed by all the parties, so the process would presumably assume that the counterparties sign. They may sign in a probative manner: "I have signed this on 7 October. We intend it to be delivered on 10 October. We exchange." Catherine Corr may arrange for SE to put its signature on things so that it has its own version; that might be done on 17 October. Although the transaction date would already be past, I suppose that I would find it important to assume that the counterpart was effective at the time that it was delivered and that the recipient putting a signature to it did not somehow not make it a counterpart.

The Convener: Thank you for those detailed observations, which I am sure that others will address.

Mike MacKenzie: The general approach of the bill is to be facilitative rather than prescriptive. Do you agree with that general approach?

Stephen Hart: I do.

Catherine Corr: Yes.

The Convener: We have heard some interesting, detailed suggestions this morning, which we will have to get other people to consider. I am looking at my colleagues, who seem to be finished—[*Interruption*.] Sorry, John.

John Scott: As I am sure the convener meant to say—I am not suggesting that he should have—if you have any further observations, or if you want to outline your proposals as just expressed, it would be helpful to do that in writing.

The Convener: Thank you very much for your evidence to us.

11:45

Meeting suspended.

11:50

On resuming—

The Convener: It is now my pleasure to welcome two witnesses from Registers of Scotland: Christopher Kerr, who is the head of legislation and legal policy; and Kenny Crawford, who is the commercial services director. Thank you for waiting, gentlemen. The fact that you heard much of the previous evidence will probably help the process that follows.

Mike MacKenzie: My question is probably best answered by Mr Crawford. Could you outline how the books of council and session operate in practice, what benefit the register offers to commercial parties and what type of documents are commonly registered?

Kenny Crawford (Registers of Scotland): I think that it would be best if I handed that question straight to Chris Kerr, who is our legal expert.

Christopher Kerr (Registers of Scotland): At the moment, the books of council and session are a paper-based register. You can record in that register all sorts of deeds: minutes of agreement, which normally relate to family law matters; leases; standard securities, which are also recorded in the property registers; and all manner of other deeds. The reasons for recording such deeds in the books of council and session are twofold. The first is the preservation of the deed—it is, simply, a safe repository from which you can achieve an extract that has the evidential status of the original. The second is execution. That means that, where the deed includes some sort of obligation—typically a monetary obligation—an extract from the books of council and session has the effect of a court decree, and it allows you to do summary diligence based on the deed without having to go to court.

Mike MacKenzie: Section 1(3) of the bill allows counterparts to be treated as a single document. Counterparts can be signed in probative form and, if necessary, the document can then be registered in the books of council and session as a collated version of one counterpart, plus the various signature pages. In her written submission in response to the call for evidence, the keeper indicates that dealing with those new collated documents would involve only a small amount of staff retraining. Could you confirm that that would be the only requirement on Registers of Scotland?

Christopher Kerr: Yes, I think that that is right. The books of council and session are a fairly straightforward register to run. They are not like

the property register or the land register in particular, where the keeper has to take some sort of view on the effect of the documents. All that the keeper, or her staff, would typically check would be whether the document has been executed in an appropriate manner. There would, therefore, be some retraining to ensure that staff understood the new rules of execution or that this was a valid way of executing a probative writ, and then they would record it in the usual manner.

Stuart McMillan: With regard to the electronic document repository, in her written submission, the keeper states:

"I understand that the Scottish Government intend to turn to this aspect of the Scottish Law Commission's Report in due course. I will be happy to come back to the Committee with further detail on what RoS may provide once we have looked at the detail of any system and sought further views from colleagues in Scottish Government and our customers".

Can you give us any further detail on that comment? Can you expand on the current state of play with the electronic document repository?

Kenny Crawford: Our focus has very much been on getting our systems ready to implement the Land Registration etc (Scotland) Act 2012. The designated date is 8 December, so we have spent most of our time on information technology development for that. The next phase, beyond that date, will involve looking at our digital strategy, which will include replacing our systems with new ones to improve the conveyancing process. Our intention is to look at the systems that we have and consider what we might be able to introduce.

Stuart McMillan: Mr Kerr, do you have anything to add to that?

Christopher Kerr: Not really, other than to say that we have had no more detailed discussions with colleagues in the Scottish Government, as the witnesses on the previous panel demonstrated. There is not a clear view among the profession on whether such a system would be useful and, if so, whether Registers of Scotland would be the appropriate body to run it. At present, we have no clarity on that.

Stuart McMillan: Would there be any benefits from setting up an electronic repository for legal documents rather than using the current paper-based system?

Kenny Crawford: The only real evidence that we have for that is based on the automated registration of title to land system that we currently use. It is an electronic system that allows simple transactions to be made online using a digital signature. Although the uptake has not been as high as we anticipated, the system has dealt with more than 90,000 transactions securely, so we see some evidence that there is a desire to move in that direction.

Conversations are going on with the Law Society of Scotland on the use of smartcards in conveyancing in the future. We can see the benefits of having a repository that people can use. If it were to be run by Registers of Scotland, it would be independent and held by the keeper, so it would be trusted. The resilience of Registers of Scotland is a factor, as we are not likely to go out of business. We have been doing our job for almost 400 years, so we have a track record.

Stuart McMillan: Some of the evidence that we have received raised the issue of the scope of any type of repository. In particular, the Scottish Law Commission suggested in its report that a repository could be used for the negotiation and the registration of legal documents, not just for preservation but for execution. It also suggested that such a system could potentially be used globally by non-Scottish parties. Do you have any thoughts on what the likely scope of a repository could or should be?

Christopher Kerr: For an electronic repository to be used for execution as well as preservation would require an amendment to the underpinning legislation for the books of council and session. That would involve creating an electronic aspect for the books rather than simply a stand-alone electronic repository. If a repository was to be used purely for preservation, we could potentially create one without the need for underpinning legislation. We do not have a view on whether a repository would be just for Scottish parties or whether it could be more international. We would hold an entry and register it if the market, and our customers, wanted it.

Stuart McMillan: The issue of specifications for a repository has also been considered, and we heard from witnesses on the previous panels about some of the issues. The Scottish Law Commission report indicated that any repository

"must be (i) completely confidential, (ii) secure, (iii) designed in such a way that all documents relating to a ... transaction are clearly linked and marked, and (iv) durable for the long term".

In other words, a repository must be future proofed, including the software. Do you have any comments on those points?

Kenny Crawford: It is not something that we have explored yet. The 17 registers that the keeper currently holds are open registers, so that would be a departure for us. We would have to do a lot of research to understand what people were looking for and what would be required to put that together. So far, we have not investigated that.

12:00

Stuart McMillan: I am not a technical boffin by any manner of means, but I am quite sure that the software issue will be sorted out—the software is already out there—and the repository will be future proofed so that any documents can be examined in 50 or 60 years' time.

Kenny Crawford: We are aware that there are exchange repositories available at the moment, which are confidential. I agree that that is something that technology can already provide.

Stewart Stevenson: Is Registers of Scotland working with the National Library of Scotland, which seems to be a little bit ahead in terms of electronic storage and long-term preservation of documents? Superficially, there might be overlap at technical and practical levels, albeit that the jobs that you do are quite different. Are you collaborating with the NLS?

Kenny Crawford: Not that I am aware. We work with the National Records Office and, as I said earlier, we are exploring the digitisation of the end-to-end conveyancing process. That is something that we would like to explore in the future.

Stuart McMillan: Another issue that was raised in evidence and by the SLC is the fees and charging structure for a repository. The SLC suggests that if a repository were to be set up, it should not be set up to make a profit and that the charging structure should cover only the costs of setting up and running the facility. The SLC also suggests that charges should be based on a fixed fee per document and not, for example, on the value of the documents. Do you have any thoughts on the SLC's suggestions and on any evidence that you have heard and read?

Kenny Crawford: As I said earlier, we have not explored that. ROS is a trading fund and is funded through the fees that we charge for the various services that we provide. We would have to consider the various business models. We provide statutory and semi-statutory products that recover the costs of what we do. We would need to consider that in coming up with a pricing model.

The Convener: We have dealt with that aspect relatively swiftly. Thank you for attending the committee and for the evidence that you have been able to provide for us. Clearly, this is an issue for future consideration and, as we are all aware, not imminent in the bill.

12:03

Meeting suspended.

12:04

On resuming—

Instrument subject to Affirmative Procedure

Road Traffic Act 1988 (Prescribed Limit) (Scotland) Regulations 2014 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments subject to Negative Procedure

South Arran Marine Conservation Order 2014 (SSI 2014/260)

12:05

The Convener: There has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument was commenced the day after it was laid, meaning that the requirement to leave a minimum of 28 days between laying and coming into force has not been complied with. However, the committee may wish to find the Scottish Government's explanation for breach of the requirements to be acceptable.

Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (j) as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Does the committee agree to report that it finds the Scottish Government's explanation for the breach acceptable?

Members *indicated agreement.*

Town and Country Planning (Control of Advertisements) (Scotland) Amendment (No 2) Regulations 2014 (SSI 2014/249)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Legal Aid and Assistance By Way of Representation (Fees for Time at Court and Travelling) (Scotland) Regulations 2014 (SSI 2014/257)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

Children and Young People (Scotland) Act 2014 (Commencement No 3) Order 2014 (SSI 2014/251)

12:06

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Courts Reform (Scotland) Bill: After Stage 2

12:06

The Convener: The next item of business is consideration of the delegated powers provisions in the bill after stage 2. Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and will have seen the briefing paper. Stage 3 consideration of the bill is due to take place this afternoon and the committee must therefore agree its conclusions today.

Does the committee agree to report that it is content with the provisions in the bill, which have been amended at stage 2 to insert or substantially alter provisions conferring powers to make subordinate legislation and other delegated powers?

Members *indicated agreement.*

12:07

Meeting continued in private until 12:43.

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