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THE COUNTERPARTS CLAUSE: WHAT EVERY STAKEHOLDER IN THE BUSINESS COMMUNITY SHOULD KNOW

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Introduction

- Suppose you've signed a contract, whether as a business owner, executive, or have reviewed the contents of a contract as a lawyer, company secretary or even as a Judicial officer. In that case, you've probably seen this familiar-sounding boilerplate:

"Counterparts:

This Agreement may be executed in any number of counterparts and by the parties hereto in separate counterparts, each of which, when so executed, shall be deemed to be an original and all of which taken together shall constitute one and the same agreement."

This clause may seem like another block of legal jargon buried in the "boilerplate" section of an agreement. But behind this clause lies a centuries-old solution to a problem humans faced long before email or PDF contracts existed: how to prove that multiple signed documents belong together as one.

The practice of execution of contracts in counterparts is rooted in English legal history, particularly from the old English indenture practice.¹ Back then, contracts were often written in duplicate or even triplicate on the same parchment, which would then be torn into two or more parts along a jagged, wavy edge.² The pieces, otherwise known as "indents, when reunited together, confirm the authenticity of the contract. The matching edge or "indent" proved the fragments once formed a single agreement, a clever method of guarding against forgery or fraud³. There was also a practical reason for counterparts. In those days, it was not easy to have parties present at the same time to sign a contract due to travel challenges. So, a party signs a part of the indenture and delivers it to the other party, usually by post, and the other party signs the other part and delivers it by post. Each then has an identical part of the indenture. It is for this reason that the signature acknowledges that the indenture was "signed, sealed and delivered."

This practice is arguably the direct ancestor of today's counterpart clause. Nowadays, the clause allows parties to sign separate but identical copies, whether on paper or via scanned PDF, and still have each one treated as a binding, original agreement. This article explores what the counterpart clause means, why it matters, how it is treated under Nigerian law, and

¹ Kym Livelsly "Boilerplate Clause in Resource Contracts: Counterparts and Governing Law Clauses"
<https://www7.austlii.edu.au/au/journals/AUMPLawAYbk/2007/11.pdf> accessed on August 3, 2025

² Elspeth Healey, 'Counterparts and Crossed-out Prohibitions against Fornication; or, Adventures in Indentures' (Inside Spencer: The KSRL Blog, 26 September 2013) <<https://blogs.lib.ku.edu/spencer/counterparts-and-crossed-out-prohibitions-against-fornication-or-the-wonderful-world-of-indentures/>> accessed 11 August 2025

³ Hampton Smith, 'History Bytes: Bond and Indenture Agreements' (Newport Historical Society, 15 June 2021)
<<https://newporthistory.org/history-bytes-bond-and-indenture-agreements/>> accessed 11 August 2025

the practical steps businesses can take to maximize its benefits while avoiding costly legal pitfalls.

Meaning of the Counterpart Clause

- According to Black's Law Dictionary, a "counterpart" in conveyancing is defined as "a corresponding part of an instrument."

In practical terms, signing in counterparts occurs when each party signs a separate physical copy of the same document, rather than all parties signing the same single sheet of paper.⁴

A counterpart clause in a contract usually provides that:

- a. Multiple copies of the same agreement or deed, known as counterparts, may be executed by the parties
- b. Each signed copy will be treated as an original.
- c. Together, the counterparts comprise a single, binding instrument⁵

The effect of this is that, once the contract is exchanged, each party's copy is legally valid as if it were the only original. Also, it is important to distinguish this from executing multiple originals of the same agreement.⁶ In the case of multiple originals, each party signs all copies of the agreement so that every party retains a fully executed original containing all signatures.

By contrast, executing in counterparts means that each party signs their own identical copy of the agreement, rather than all parties signing the same physical document. These individually signed copies are then brought together to form one binding contract. Importantly, a counterpart does not need to contain the signatures of all the parties; it is sufficient if it bears the signature of the other party, provided that the exchange or delivery of the counterparts has taken place.

Purpose of the Counterpart Clause

The key benefit of the Counterpart clause is certainty. It prevents a party from later claiming that the agreement is invalid simply because everyone did not sign the same sheet of paper at the same time or place. It also makes transactions more efficient, especially in cross-border and multi-jurisdictional transactions, where gathering all signatories in one location would be impractical. It is a way to prove the delivery and bindingness of a contract.

In summary, the clause provides both certainty and flexibility in contract execution, whether

⁴ Clifford Chance LLP, 'Boilerplate Clauses in English Law Contracts' (Clifford Chance, September 2012), accessed 11 August 2025 <https://www.cliffordchance.com/publicationviews/publications/2012/09/boilerplate_clausesinenglishlawcontracts.html>

⁵ PwC, '*Counterparts Boilerplate Clause*' (Investing in Infrastructure Guide, PwC Australia, January 2016)

<<https://www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-26-counterparts-boilerplate-clause-feb16-2.pdf>> accessed 6 August 2025

⁶ Curtis Mallet-Prevost Colt & Mosle LLP, 'Counterpart clauses' (Lexology, 28 February 2012)

the signing is done in person with physical documents or remotely through digital platforms. In today's global business environment, this is a critical feature, and the counterpart clause makes it possible.

Legal Implications of Executing a Contract in Counterparts

➤ There is no law requiring parties to include a counterpart clause in their Agreement or execute a contract in counterpart. The decision to do so is often driven by risk management considerations, aimed at ensuring the smooth and effective completion of commercial transactions.

Nevertheless, the law still recognizes and attaches evidentiary value to documents or contract executed in counterpart. Section 86(3) of the Evidence Act 2011 provides that; *"where a document has been executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart shall be primary evidence as against the parties executing it."*

This provision implies that each signed counterpart is treated as an original document (not a copy) for evidentiary purposes, but only against the party who signed it. In practice, this means that if Party A signs one counterpart and Party B signs another, each signed counterpart is admissible in court as primary evidence against the party that executed and exchanged it.

This principle was illustrated in the case of *Huawei Technologies Company (Nigeria) Ltd v. Swift Networks Ltd* (Unreported Suit No: LD/3805CMW/2018). A key issue raised in the suit, was whether the Claimant could rely on a counterpart of a contract that was not signed by the Claimant but bore the Respondent's signature, to enforce the agreement against the Respondent, and whether it was necessary for the Claimant to exhibit a version of the contract signed by both parties or the Claimant alone to enforce the agreement since the Respondent had the counterpart signed by the Claimant and has refused to produce it. The High Court ruled in favour of the Claimant, holding that a counterpart signed by the Respondent but unsigned by the Claimant was nonetheless enforceable against the Respondent, because it was for the Respondent to produce the counterpart signed by the Claimant following its delivery, which the Respondent failed to do and the Respondent's signed counterpart was proof of exchange of the contract.⁷

This decision underscores the principle that a counterpart signed by one party can constitute a valid and binding instrument against that party, provided there is sufficient evidence that both parties assented to the same contractual terms and exchanged the contract by delivery. To establish the existence of a binding contract in such circumstances, the

⁷ The matter is on appeal at the Court of Appeal, Lagos.

counterparts must collectively demonstrate that the parties agreed to identical terms, even if their signatures appear on separate physical copies.

The absence of a counterpart clause will not render a contract executed in counterparts invalid. Nonetheless, including such a clause is prudent, as it can help prevent disputes over enforceability, particularly in cross-border transactions or multi-party agreements where staggered execution is standard.⁸

Instances where Counterpart clauses may be omitted in a Contract

A counterpart clause may be unnecessary where

- a. All the parties are present at a signing, with each party executing as many original copies of the agreement as required, i.e., executing in duplicate.
- b. Original copies of the agreement are signed at different times by the parties; for example, all originals are circulated to each party for signature in turn, with the agreement to be dated and take effect on the date of the final signature.
- c. Only one original copy of the agreement is produced, and certified copies are subsequently made and distributed to all parties.⁹

Practical Tips for Businesses

For business owners, managers, and other stakeholders, a counterpart clause might seem like a minor technicality, but in practice, it can prevent costly disputes and delays. Here are some practical considerations to keep in mind:

1. **Know when to insist on a Counterpart Clause:** If parties are in different locations, signing at various times, or relying on electronic means to execute an agreement, a counterpart clause should be included. This is especially important for cross-border transactions or multi-party contracts where gathering everyone to sign a single physical copy is impractical.
2. **Exchange Signed Counterparts Properly:** It is a hornbook principle of law that for a contract to be binding on parties, there must be an exchange of contract. Signing a counterpart is not enough. Ensure there is an actual exchange, either physically or by email, so that each party has a copy signed by the other. Without exchange, there is a risk that the agreement will not be considered fully executed. However, there is a presumption of delivery and

⁸ Aaron Hall, 'Legal Lifesaver: The Counterparts Clause Explained' (Aaron Hall Attorney, published 1.1 years ago, accessed 11 August 2025) <<https://aaronhall.com/legal-lifesaver-the-counterparts-clause-explained/>>

⁹ Curtis Mallet-Prevost Colt & Mosle LLP, 'Counterpart clauses' (Lexology, 28 February 2012)

<<https://www.lexology.com/library/detail.aspx?g=600cc03f-3e40-4f5e-a50a-9252c5209154&utm=>> accessed 11 August 2025

exchange when the other party has the counterpart with the signature of the disputing party.¹⁰

3. **Review the wording of the Counterpart Clause:** It is important to review the wording of a counterpart clause in an agreement to ensure it does not undermine the effectiveness of the contract. Let us consider a counterpart clause drafted as follows:

"This Contract may be executed in any number of counterparts, provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other."¹¹

The above clause was the centre of the dispute in *RTS Flexible Systems Ltd v. Muller*.¹² In that case, RTS and Müller entered into a Letter of Intent to commence a project under which RTS would design and install machinery for Müller's yogurt packaging. The LOI later expired, but the parties continued negotiations to finalise a formal contract, which contained a counterpart clause stating that no contract would come into existence until each party had executed and exchanged counterparts. The English court, treated the clause as a "subject to contract" provision and held that parties' conduct can waive such a conditional clause. On the facts, the court found that a binding contract did exist between the parties despite the clause because both parties had unequivocally waived the need for a finalized contract by performing according to the terms of the draft contract.

4. Keep proper records of the counterpart you signed before delivery to the other party, and, particularly, the counterpart signed by the other party and delivered to you.

Conclusion

Although the practice of executing contracts in counterpart is pretty ancient, the problems it helped resolve remain today in different forms. By following the steps enumerated above, businesses can use the counterpart clause to streamline contract execution while safeguarding the enforceability of their agreements.

¹⁰ *ECCLES v. BRYANT AND POLLOCK*. (C.A.) <https://uniset.ca/other/cs4/1948Ch93.html#FN35>; *Sindel v Georgiou* (1984) 154 CLR 661 <https://jade.io/article/67140>; *Investmentsource v Knox* [2002] NSWSC 710 <https://jade.io/article/130883>

¹¹ *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 (UKSC)

¹² Alan Watts and Maura McIntosh, 'Supreme Court rules that contract exists despite "subject to contract" provision' (Herbert Smith Freehills / HSF Kramer Litigation Notes, March 2010) <<https://www.hsfkramer.com/notes/litigation/2010-03/supreme-court-rules-contract-exists-subject-contract-provision>> accessed 11 August 2025



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