

Response from Stephen Trombala, on behalf of Shepherd and Wedderburn:

From: Trombala, Stephen

Sent: 13 February 2017 13:17

To: Clark J (Jill) (Justice)

Subject: RE: The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 [S+W-LegalDiv.FID517737]

Dear Jill

Many thanks for your email. In my experience the Act has had a positive impact. In particular in multiple party transactions (e.g. private equity investments and the like), where the various parties are based in multiple different jurisdictions (including, in my most recent transaction, England and the United States) the ability to have the document executed in counterparts has been extremely useful. Prior to the introduction of the Act, I generally took a reasonably relaxed / pragmatic view regarding informal counterpart execution under Scots law (other than where the Requirements of Writing Act mandated subscription for the creation of certain categories of obligation). However now having a statutory framework in which to operate is a significant improvement. So, in answer to your first 2 questions, (i) I am now completing transactions (involving execution of documents) under Scots law; and (ii) the legislation has enabled more efficient (and certain) completion of transactions with international parties. I could not point to any obvious efficiencies provided or other difficulties solved by the legislation or any measurable benefit to my business (aside from the execution stage of any transaction being made clearer / more certain). I am not aware of any difficulties with the legislation itself and market practice will no doubt continue to develop with respect to: (i) testing clauses / counterpart execution clauses and the like; and (ii) practitioner comfort regarding electronic documents and electronic delivery.

Best regards

Stephen

From: Clark J (Jill) (Justice)

Sent: 13 February 2017 10:48

To: Trombala, Stephen

Subject: The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015

Dear Mr Trombala,

I hope you don't mind this speculative approach.

The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 came into force on 1st July 2015. It implemented the legislative recommendations contained in the Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 213) which was published in April 2013. It had 2 main policy aims: to provide a clear framework by which parties may execute a document in counterpart under Scots law; and to provide a mechanism to enable documents created and signed on paper to be delivered for legal purposes by electronic means. Much of the impetus for the legislation was derived from criticisms of the unavailability of the ability to execute in counterpart in Scots law. This was reported as leading to a preference for the use of English law for key transactions. The consequential effect of this was the concern that fewer contracts were subject to Scots law and therefore fewer contracts resulted in litigation in the Scottish courts or arbitration under Scots law which was potentially leading to a loss of business in Scotland.

In light of the change to the law under the 2015 Act we would be interested in knowing whether or not the Act has had a positive impact on the use of Scots law in this area. In particular:

- Are you now completing transactions, involving execution of documents, under Scots law?
- Has the legislation enabled more efficient completion of transactions with international parties?
- Has the legislation resulted in other efficiencies or solved difficulties that would otherwise have arisen? If so, what are they?
- Has the legislation had a positive impact on your business?
- Are there any difficulties with the legislation that you would wish to highlight?

If you have any available evidence in support of your views, be that anecdotal or statistical we would be pleased to receive that too. It would be very helpful to have your response by **3 March**.

Thank you and kind regards.
Jill Clark