

## **Response from Brenda Scott, on behalf of Brodies:**

**From:** Brenda C Scott (Brodies Solicitors)

**Sent:** 28 February 2017 15:02

**To:** Clark J (Jill) (Justice)

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

Jill

Undernoted is some feedback passed onto me by colleagues. I hope it is helpful.

B

### **Overall comment**

The new counterparts law is most welcome and is relied on for many transactions and agreements. Nearly all the issues that we've been encountering are more practical ones rather than problems with the legislation as such. We are learning by experience and are working constructively with other law firms to make the process work smoothly.

### **Are you now completing transactions, involving execution of documents, under Scots law?**

Yes. For some types of agreement, it has made the decision to use Scots law a lot easier. For others, the agreement was always going to have be governed by Scots law but completion has been made easier because of the counterparts law.

### **Has the legislation enabled more efficient completion of transactions with international parties?**

Yes – especially where timescales are tight.

### **Has the legislation resulted in other efficiencies or solved difficulties that would otherwise have arisen? If so, what are they?**

More efficient completion of transactions with multiple parties, wherever located.

Our Banking team has seen documents that would normally be executed unilaterally being converted to bilateral documents (making use of counterparts clauses) so that a clear date of delivery is stated on the face of the document. This can be very useful when dealing with international parties not used to the vagaries of dating/delivering documents in Scotland.

### **Has the legislation had a positive impact on your business?**

Even if an agreement had been executed under English law in the past (to enable execution by counterparts), we would have been able to act in most cases. However, it has made completions easier which in turn make it more cost effective for the client.

There have been a few teething problems which have resulted in our having to spend time on research and/or collaboration, both internally and with counterparts at other firms, to discuss solutions. See below.

### **Are there any difficulties with the legislation that you would wish to highlight?**

1 A major unresolved issue is where one of the contracting parties chooses to (or can only) execute the counterpart through two individuals/signatories. The two most common examples are:

- Mr and Mrs Smith are joint owners of shares. They are selling them to Mr Jones. Both Mr and Mrs Smith will have to execute the sale agreement as “the seller”.
- ABC Limited is entering into a contract to sell a car to Mr Jones. ABC Limited’s internal policy is that 2 directors have to execute sale contracts.

Do both signatories of the seller have to sign the same counterpart, or can they each sign a separate counterpart?

So, in the above examples, can there be 3 counterparts (one signed by each of the seller’s signatories; the other by Mr Jones)? Or can there only be two, because there are only two contracting parties?

We think that, under English law, there could only be two – but there is no clear consensus as to how the Act should be interpreted here.

2 Sections 4(2) and (3)(a) – practical challenges over ensuring that the part that is sent electronically is sufficient in all the circumstances to show that it is part of the relevant document. Ideally, we would like to be able to rely on a confirmation from the sender in the covering email. But section 4(3)(a) would not appear to allow that. We are able to work round this but it might be more helpful if the Act provided more flexibility.

3 Liability of the nominated person – there was some concern that, where a law firm is acting as a nominated person, it might inadvertently be undertaking duties or potential liabilities to persons who are not clients. This is being addressed by disclaimer wording being issued by the law firm when it agrees with the other parties the basis on which it will act as nominated person.