

## Execution in Counterpart etc. (Scotland) Bill

### Notes on sections

#### *Introduction*

These notes are intended to aid the reader of the draft Execution in Counterpart etc. (Scotland) Bill (draft CC; 18 January 2013). In due course, the Scottish Law Commission's Report on Execution in Counterpart will contain a much fuller explanation of everything which is covered in the bill, together with a final draft bill and updated notes on sections. We hope to publish the report around Easter 2013.

#### *General*

The main topic of the bill is "execution in counterpart" but it also covers some related issues. "Execution in counterpart" refers to the procedure used when a multi-party document is signed remotely, that is without the parties all meeting at the same location to sign a single copy of the document. Instead, they each sign their own copy (or counterpart) of the document and deliver it to the other party or parties. We are told that this procedure is standard under English law but that it is not at all widespread for documents governed by Scots law.

#### *Section 1*

This section is the cornerstone of the execution in counterpart procedure. It establishes a clear and secure legal basis for two or more parties to create a binding document by, first, signing their own counterpart and then delivering it to the other party or parties. At that point, when each party has signed and delivered, the document becomes effective, although parties are free to agree a later date if they wish. Sections 2 and 3 set up additional facilities which we understand will be useful in many cases: we provide fuller notes below but in brief section 2 allows parties to nominate a single person to take delivery of the signed counterparts (in which case the document becomes effective no earlier than the time when the final counterpart is delivered: see section 1(4)) and section 3 allows delivery by electronic means (not only of documents executed in counterpart but of traditional documents generally).

We expect that the document will be signed by hand – with a "wet ink" signature – but section 5 of the bill provides that the signature can be digital.

#### *Section 2*

We understand that, particularly where a document is to be signed by a large number of parties and where it has been negotiated with the input of legal advisors, it is common for the advisor to one of the parties to act as administrator for the signing process. That person will send out the documentation and collect back the signed copies. In order to remove any doubt as to the efficacy of such an arrangement for execution in counterpart, section 2 makes it plain that parties are free to nominate a person to take delivery of the counterparts (or, if desired, of just certain counterparts). Subsection (2) says that it is no obstacle to a person being nominated if they are either a party to the document or an agent (eg solicitor) to a party.

Subsection (3) states that a person who is nominated to take delivery must hold and preserve what has been delivered for the benefit of the parties involved. This is subject to an alternative arrangement being made. This provision is included so that parties who deliver their signed counterpart to a nominated person can be sure that it will be held safely.



We consider that this is important: if what is delivered has a wet ink signature, then there is an obvious utility in the recipient (who may not be a party to the document) being obliged to hold it pending further instruction, and if (as may be more typical) what is delivered is an electronic copy of the signed original (in the form, say, of a scan or a fax) then that too will be valuable as the timing of its delivery may determine the point at which the document takes legal effect (as explained in the note to section 1).

### *Section 3*

Section 3 is an innovation on the Scots law of delivery. It permits a "traditional document" (ie one on paper and not in electronic form) to be delivered by electronic means, and some examples of this are set out in subsection (3). The existing rules on delivery still stand and section 3 is simply additional to them: that is the effect of subsection (2)(b). It follows, therefore, that the present requirement for delivery still stands but the ways in which that can be achieved are expanded by the addition of email delivery, fax and the like.

Subsections (4) to (6) permit parties to come to an arrangement between themselves both as to the means of delivery (eg by fax, or by pdf document attached to an email) and also as to whether the whole or just a part of the signed document is to be delivered. Where no such arrangement has been made, or where the arrangement is uncertain or impracticable, then the means of delivery and the question of what is to be delivered will be whatever is reasonable. Importantly, if only part of the document is delivered electronically then subsection (5) imposes two conditions: it must be clear from the part that is delivered that it is part of the counterpart which parties are signing, and it must contain, as a minimum, the page which the delivering party has signed.

Subsection (7) is included to remove any doubt as to the use which the delivered counterpart (or part of the counterpart) serves. It serves to fulfil the requirement of delivery which is a prerequisite for the creation of legal obligations. But what is delivered (eg a fax or a print out of a scanned pdf) cannot be used in place of the counterpart with the wet ink signature and so cannot, for example, be registered.

Subsection (8) states that, once a person has sent a counterpart by electronic means (and therefore still retains the original), that person holds the wet ink version in accordance with whatever arrangements parties have made. We trust that, by including this provision, parties will be prompted to think about what arrangements they would like to make. For example, if the document is to be registered then it is likely that the wet ink signatures will need to be ingathered for that purpose and this should therefore be agreed. In other cases parties may be content that the sender simply holds the wet ink version for a period and then disposes of it if no call has been made for it. The bill is not prescriptive on this point and it is up to parties to decide what is best for their needs.

The effect of subsection (9) is to modify subsection (8), described above, to take account of the situation where parties have nominated a person to take delivery of counterparts (under section 2).

### *Section 4*

If a document is probative it is 'self-proving', or presumed to have been validly executed by the individual(s) who granted it. The detailed requirements for probativity are in the Requirements of Writing (Scotland) Act 1995. It is standard practice for many types of document, eg high-value commercial ones but others too, to be executed probatively; one reason for this is that, in many cases, only probative documents can be registered, eg in the Books of Council and Session or Land Register. Section 4 makes clear that a document executed in counterpart is probative if at least one counterpart is subscribed and witnessed

on the page containing the final lines of the agreement and any other granters have signed, with witnesses, either on the equivalent page of their own counterpart or on a subsequent page. We have also noted, however, that this matter may already be sufficiently covered by section 6(2)(b) of the Requirements of Writing (Scotland) Act 1995, and we would welcome comments on this point.

#### *Section 5*

See the comment at the end of the note to section 1 above.

21 January 2013

