

LEGAL WRITINGS (COUNTERPARTS AND DELIVERY) (SCOTLAND) ACT 2015

EXPLANATORY NOTES

THE ACT – COMMENTARY ON SECTIONS

Execution of documents in counterpart

Section 1: Execution of documents in counterpart

5. As set out in Chapter 2 of the SLC Report, it is possible to argue that Scots law already recognises the possibility of execution in counterpart. However the argument is dependent on eighteenth-century sources, and is not widely accepted within the legal profession. Subsection (1) therefore confirms the validity of executing documents in counterpart under Scots law. However, execution in counterpart is an optional process and existing methods of signing multi-party documents, such as gathering the parties together to sign a single version of the document, remain valid. Subsection (2) sets out what is meant by “execution in counterpart”. It provides that where a document is to be signed by more than one party, it will be validly executed in counterpart under Scots law if one party subscribes (i.e. signs in the appropriate place) its own copy (“counterpart”) of the document and the second party subscribes another counterpart (and so on), provided that each counterpart is a duplicate which is otherwise interchangeable with the others. Each counterpart may be signed in different locations and at different times though, in practice, counterparts are likely to be signed close in time to one another.
6. Subsection (3) provides that, once executed, the counterparts are deemed to form a single document. Subsection (4) provides that the single document may be made up of both or all the counterparts but also may be made up of a collated version of one entire counterpart together with the page or pages on which the other counterpart or counterparts have been subscribed. This has advantages for registration purposes, as explained in Chapter 3 of the SLC Report. For example, if there is a document to be executed by 5 parties, each of whom subscribe their own counterpart in self-proving form (i.e. before a witness who also signs), then that document can be registered in the Books of Council and Session as a collated version of one of the counterparts in its entirety and the subscription pages of the other 4 counterparts. Such an approach makes both registration and searching of the register more straightforward.
7. Subsection (5) specifies when a document executed in counterpart becomes effective. A document executed in counterpart becomes effective upon delivery in accordance with the delivery requirements under either subsection (6) or (7). Where the document is a traditional document, delivery by electronic means under section 4 (see paragraph 19 below) is also an option. “Delivery” is the term used in law to describe the step which the granter of a document may be required to take before he or she becomes bound by the document’s terms. In the common law this has usually been taken to mean when the granter transfers possession to the grantee with the requisite intention that the document thereby becomes binding or enforceable.

8. Subsection (5) requires delivery of both or all of the counterparts without spelling out what constitutes delivery. This is left to the existing law save insofar as modified by the Act. The only modification in that regard is in section 4, which makes it clear that, where a traditional document (including a counterpart) is delivered by electronic means, this can be done either (a) by delivery of a copy of the whole document or (b) by delivery of a copy of part of the document by fax, email, etc. provided it satisfies section 4(3). See further paragraph 19 below.
9. Subsection (5)(b) is a reminder that any additional requirements under the current law (whether under the common law or statute) which are needed for a particular class of document to become effective continue to apply. For example, the law requires that a document containing a guarantee must be delivered to the beneficiary before it is effective. So, if two co-guarantors execute the guarantee in counterpart, it does not take effect until each party delivers its counterpart to the other and, in addition, the counterparts (or a single document made up of or from the counterparts, as described above at paragraph 6) are also delivered to the beneficiary.
10. Subsection (6) imposes a requirement that a counterpart must be delivered to every other party to the document whose signature is not on that counterpart. Section 2 of the Act allows a party to nominate a person to take delivery of one or more counterparts. Where that has happened, subsection (7) requires the counterpart to be delivered to the nominee instead. In this way, execution in counterpart is subject to the existing requirement of Scots law that a written document must generally be delivered before it can become obligatory. That general requirement is not altered in any way; rather, an additional class of writing (i.e. documents executed in counterpart) is brought within its scope.
11. Subsections (8) and (9) make clear that parties may control the date and time at which their counterpart is to be treated as delivered (i.e. will become legally effective) so that this could be a later time than the point at which possession is transferred to the party or parties to whom it must be delivered. Existing Scots law permits this for documents executed in another way and that law remains unchanged. This is in keeping with the general policy in the Act of allowing parties the greatest amount of freedom to make their own arrangements as is consistent with the minimum requirements of the law. Subsection (9) deals with the situation where a counterpart is to be held by a recipient as undelivered. It provides that in such circumstances the document is only to be treated as delivered for the purposes of subsection (5)(a) either (a) at the time when the sender indicates to the recipient that it is to be so treated (e.g. the sender may indicate at the time of sending at what future time the counterpart is to be treated as delivered, in which case it is to be treated as delivered for the purposes of subsection (5)(a) only at that time) or (b) if a specified condition (e.g. a condition specified by the sender at the time of sending or a condition specified in the document itself) is to be satisfied before the counterpart may be so treated, the condition has been satisfied.

Section 2: Nomination of person to take delivery of counterparts

12. This section makes provision for the scenario where parties wish to nominate a person to administer the execution of their document. Such a scenario is most probable where a document is to be signed by multiple parties (who would otherwise have to deliver a signed counterpart to every other party) and has been negotiated with the input of legal advisers. In this scenario, it is common for the legal adviser to one of the parties to act as administrator for the signing process. That person will send out the agreed documentation and collect back the subscribed counterparts. In order to remove any doubt as to the efficacy of such an arrangement, subsection (1) provides that parties may nominate a person to take delivery of the counterparts (or certain of the counterparts). Subsection (2) provides that that person may be a party to the document or an agent (e.g. solicitor) acting on behalf of a party to the document but this is not a requirement.
13. Subsection (3) sets out the duties of a person who is nominated to take delivery of counterparts. The nominee must hold and preserve what has been delivered, and must

do so for the benefit of the parties involved. Subsection (4) provides that this is subject to any alternative arrangement made by parties. For example, parties might agree that the nominee is to advise parties of the successful delivery of all required counterparts or to forward what has been delivered to one of the parties. These provisions allow parties to make whatever arrangements they consider most suitable and ensure that, in the absence of any agreement, the delivered counterpart or counterparts will be held safely. If what is delivered contains a wet ink signature, then there is utility in the recipient (who may not be a party to the document) being obliged to hold the counterpart pending further instruction, for example to collate the counterparts in order to produce a single document for registration purposes. If what is delivered is an electronic copy of a signed traditional document, for example in the form of a PDF file or a fax, then there may also be utility in holding that pending further instruction; for example, because the time of its delivery may determine the point at which the document becomes effective.

14. Subsection (5) clarifies that a nominee's failure to meet the obligations under subsection (3) or (4) does not alter the effectiveness of a document's execution. In other words the document has its intended legal effect, even if the nominee's non-compliance with the duty to hold and preserve the counterparts makes it more difficult to prove such things as delivery.

Section 3: Use of counterparts: electronic documents

15. **Section 3** provides that sections 1 and 2 apply to both traditional and electronic documents. References to execution in section 1 therefore mean execution of a traditional document or an electronic document. This means it is competent to execute an electronic document (by means of an electronic signature) in counterpart and, if desired, to nominate a person to take delivery of the counterparts. It also follows that it is competent for a document to be signed in various counterparts some by electronic signature and some in wet ink. However, given that Part 3 of the Requirements of Writing (Scotland) Act 1995 as inserted by section 97 of the Land Registration etc. (Scotland) Act 2012, provides for execution of electronic documents by electronic signature, it is unlikely that execution in counterpart will be used frequently for transactions where the parties deal entirely in electronic documents as parties can simply apply their electronic signature to the agreed electronic document wherever it is. Execution in counterpart does not provide any advantage in this scenario. However, in applying sections 1 and 2 to electronic documents, section 3 covers the mixed situation noted above where some parties execute their counterpart on paper and others apply an electronic signature to the counterpart sent to them and return that to the nominee.
16. Subsection (2) provides that where the electronic document is one that requires to be in writing under section 1(2) of the Requirements of Writing (Scotland) Act 1995 (writing required for certain contracts, obligations, trusts, conveyances) the references to subscription of the counterpart in section 1 mean that it must be subscribed according to the standards of authentication for those documents set out in section 9B of the Requirements of Writing (Scotland) Act 1995. Section 9B(2) sets out that the electronic signature must, amongst other matters, meet prescribed requirements. [The Electronic Documents \(Scotland\) Regulations 2014 \(SSI 2014/83\)](#) prescribe that it must be an advanced electronic signature.
17. For electronic documents that do not require to be in writing it remains for parties to determine what level of electronic signature should be sufficient to constitute subscription of the counterpart.
18. If parties nevertheless choose to authenticate an electronic document that does not require to be in writing in accordance with section 9C of the Requirements of Writing (Scotland) Act 1995, they will get the benefit of the document having self-proving status. However, such a standard of electronic signature is not necessary for the valid execution in counterpart of an electronic document under section 1 of this Act.