

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

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## 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.

*These notes relate to the Legal Writings (Counterparts and Delivery)  
(Scotland) Act 2015 (asp 4) which received Royal Assent on 1 April 2015*

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.