

## Response from Tim Dale, on behalf of Pinsent Masons:

**From:** DALE Tim

**Sent:** 16 February 2017 10:10

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

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

Jill

I've asked around a number of colleagues. Some of the comments:

- My experience is that in property transactions using counterpart execution is not the norm. But it is used more than I thought it would be used - if the particular circumstances make it the sensible route.
- It is very useful to have counterpart execution available in property transactions where there is insufficient time to circulate a document for signing around all of the parties. It has been particularly used in renewable energy transactions and when dealing with leases.
- We get a few questions about counterpart execution but generally I think it is being adopted without any difficulty. The Registers did reject the first few applications we submitted where the deeds had been executed in counterpart but it now seems to be business as usual when counterpart execution is used
- We've not seen a really significant uptake in employment as far as I can see. Whilst it can be used in e.g. Settlement Agreements, I think the more standard process is still to sign two copies, and each party keep one. This is probably more familiarity than anything else
- absolutely – we use counterparts much of the time [in Financing transactions] now. It enables issues around timing of when documents are effective to be resolved as well as just signing logistics around where people are
- I haven't noticed any marked difference (in Energy transactions), as most of the transactions we work on use English law governed documents (even if the assets are located in Scotland).

So on the whole, I think this is as predicted. It's being used where it's appropriate and resolves challenges we'd previously faced. I think uptake will continue and we may, in time, see a shift away from English law as preferred choice – it may take time to shift market practice.

One issue that was raised:

I think the issue we discussed involved the interaction of the LW(CD)(S)A 2015 with the CA 1985, and in particular the distinction between (i) execution; (ii) delivery; and (iii) creation in regards to instruments of alteration under s.466 CA 1985.

- s. 1(5) LW(CD)(S)A 2015 provides that a document executed in counterpart “*becomes effective when... both or all the counterparts **have been delivered** ....*”
- s. 466(4C) CA 1985 provides that the relevant period for delivery of an “instrument of alteration” of a floating charge is the “*period of 21 days beginning with the day after the **date of execution** [N.B. not creation or delivery] of the instrument of alteration*”.
- This contrasts with the obligation to register charges, where s. 859A CA 2006 provides that the “period allowed for delivery” is “*21 days beginning with day after **the creation** of the charge*”.

The LW(CD)(S)A 2015 maintains the distinction between execution and delivery (the latter I think would be equivalent to “creation” (using the CA 2006 terminology) in the case of an instrument of alteration).

My reading of the above is that if a ranking agreement were executed in counterparts, the date of execution from which the relevant period would run would be the date of the last signature, regardless of when it was delivered. Theoretically, it is therefore possible that the relevant period

for delivery of an instrument of alteration could expire before the document becomes effective through delivery.

Another issue was resolved regarding 'subscription' and 'execution'.

Regards,  
Tim

**From:** Clark J (Jill) (Justice)  
**Sent:** 13 February 2017 10:50  
**To:** DALE Tim  
**Subject:** The Legal Writings (Counterparts and Delivery)(Scotland) Act 2015

Dear Mr Dale,

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