Submission from Shepherd and Wedderburn LLP

Shepherd and Wedderburn strongly supports the introduction of the Legal Writings (Counterpart and Delivery) Bill, which will significantly facilitate the swift completion of commercial and domestic transactions under Scots law.

Counterpart signing

The completion of many commercial transactions in Scotland involves numerous parties, multiple documents requiring all-party execution, and frequently, the parties are based in two or more separate legal jurisdictions. The inability, under the law of Scotland as it stands at present, for those parties to complete the multiplicity of documents simultaneously in any way other than gathering in person, causes considerable practical problems.

The nature of modern commercial transacting means that completion “in person” is simply not a practical alternative in the majority of cases. This has resulted in the requirement either to construct elaborate, but inefficient and often time-consuming completion mechanisms, or where these will not deliver the required legal effect, resort often has to be had to the law of another jurisdiction, usually English law, where counterpart execution is permitted, as the only way to achieve the required result and effect completion. Where the transaction requires, for proper legal effect, to be subject to Scots law, this option is simply not available.

Increasing complexity in modern commercial transaction means that the shortcomings in the Scottish system are more difficult to surmount. The introduction of a system of execution in counterpart has the potential to transform the delivery of commercial and business transactions in Scotland, even where there are multi-jurisdictional aspects.

By designing a workable and comparatively simple counterpart signing structure in this Bill, it is possible for Scotland to create an efficient and enviable approach to commercial completion. By including electronic as well as traditional documents, Scotland will bring itself to the leading edge of practice in this area, and anticipate and facilitate developments in electronic transacting that are emerging. Doing business in Scotland becomes easier. We commend the structure for counterpart signing contained in the Bill, which provides a clear and simple to follow procedure for ensuring effective simultaneous execution and completion.

Delivery of documents

Delivery of traditional documents in Scotland poses problems of a different type, in the modern commercial and domestic arena. For written contracts to be legally binding in Scotland, physical delivery must take place. For property transactions in particular, that has meant that, to ensure the creation of a legally binding contract (“missives” consisting of an exchange of letters between solicitors acting for the parties) by same day delivery, resort has to be had to using couriers at what can often be considerable expense. Some alternatives which involve complicated workarounds, where the solicitors are located in different towns or cities, are time consuming and sometimes simply not available.
The vast majority of communication and correspondence among solicitors and between solicitors and their clients takes place via email and the invariable practice is to attach documents, either in Word or other suitable format, or pdf, to emails for speed and immediate delivery. This does not however create the legally binding requirement for contract, which needs physical delivery. The practice has evolved for contracts consisting of traditional documents with a “wet” signature to be converted to pdf and then attached to, and sent via an email. As delivery does not take place until the principal document arrives with the recipient (or in the case of letters concluding the contract, when they are put in the post) the sending solicitor provides an irrevocable undertaking to hold the document to the order of the receiving party until it is sent, and to send it in the next available post. This is characterised as “constructive delivery”. The procedure has not, to our knowledge, been tested in the courts, but there is doubt about whether such undertakings could, under the law of Scotland as it stands at the moment, actually override the requirement for physical delivery. Many contracts have had to rely on this legally fragile arrangement.

Accordingly the proposal in the Bill, to make electronic delivery of such traditional contractual and other documents legally binding, is an innovative and ground-breaking proposal which will, at a stroke, dispense with an antiquated procedure, and modernise and make more effective Scottish practice. Both commercial and residential conveyancing practice, in particular, will see enormous benefits, and not only is this new enablement consistent with the Scottish Government’s digital strategy, it will also provide greater clarity and certainty for parties transacting in Scotland, and fills the gap in procedure, that was not addressed by Part 10 of the Land Registration etc. (Scotland) Act 2012, which enables electronic delivery of electronic documents but not traditional ones. The vast majority of legal documents are still created in traditional format, and executed traditionally. The Bill will bring these types of documents on a par with their electronic equivalents, and bring significant efficiencies and cost savings to current commercial and domestic legal practice in Scotland.