Execution of Documents in Counterparts

This note sets out some general comments and suggestions in respect of the Legal Writings (Counterparts and Delivery) (Scotland) Bill (the Bill). Please note we have not sought to comment on any amendments to existing Scottish or other law that may be required as a result of the Bill.

References in this note are references to sections of the Bill. New wording proposed to be inserted in the Bill is underlined.

Key comments and suggestions:

1. **Ability to execute documents in counterpart (s.1(1))**: We note that the Bill does not refer to counterparts clauses. We therefore assume the intention is that no express provisions as to the ability to execute documents in counterpart are required to be included in Scottish law governed agreements.

2. **Definition of execution in counterpart (s.1(2))**: The reference to “two or more duplicate, interchangeable, parts” could be amended to clarify that a counterpart is an exact copy of a document. We would suggest that either “two or more duplicate copies” or “two or more duplicate versions” would be clearer formulations.

3. **Effectiveness of documents executed in counterpart (s.1(5))**: Limb (b) of s.1(5) appears very wide. It would seem that this could result in a Scottish law governed document not becoming legally effective due to the existence of an enactment or rule of law (which, we assume, could be a foreign enactment or rule of law) which states that a particular agreement or arrangement is not permitted unless a particular formality is complied with or some other action is taken. By way of illustration, the law of another jurisdiction may state that a particular type of asset (e.g. real estate located in that jurisdiction) can only be legally transferred following some particular process or action (e.g. the granting of consent by a certain body in that jurisdiction). In such a case, it could be argued that a Scottish law governed agreement which sought to transfer title to that asset would not be deemed to be legally effective under Scottish law because a rule of law required some other step to be taken before such a transfer (and therefore arguably the document itself) could “become effective”. In light of this, we would suggest that the reference to “become effective” be amended to refer to “be validly executed” or wording to that effect. This should clarify that s.1(5)(b) is seeking to cover only enactments or rules of law which relate to formalities which are required to be complied with in order for a document to be validly entered into (i.e. parties should be capable of entering into a legally binding Scottish law governed agreement which is technically in breach of the laws of another jurisdiction).

4. **Deemed delivery (s.1(9))**: We would suggest that the words “the person from whom the counterpart is received indicates that” be inserted at the start of
s.1(9)(b) (or alternatively, be inserted at the end of the preamble in s.1(9) and removed from the start of sub-clause (a)). This would appear to accord with the explanatory notes to the Bill (see the last sentence of paragraph 11 of the explanatory notes).

5. **Obligations of nominated person (s.2(3))**: As drafted, there is no requirement for the nominated person to consent to being a nominated person and to accepting delivery of counterparts. This seems unsatisfactory in light of the obligations imposed on nominated persons under s.2(3). In addition, there is no method specified by which a nominated person can return documents delivered to him so as to relieve himself of such obligations. We would therefore suggest that s.2(3) be amended to allow a nominated person the option of returning a counterpart to either the sender or to court (in addition, consent wording could be added to s.2(1)). We would also suggest that s.2(3) be amended to read “hold and preserve it for the benefit of the parties who nominated it”, so as to clarify that a nominated person is not required to hold a counterpart on behalf of all the parties (but rather, only those parties who nominated it).

6. **Agreement between parties regarding obligations of nominated person (s.2(4))**: We suggest that s.2(4) be amended to read “does not apply in so far as the parties and the nominated person may agree” as it would seem reasonable that the nominated person should be involved in any agreement which varies his statutory obligations in s.2(3).

7. **Delivery of traditional documents by electronic means (s.4(2))**: This section relates only to delivery by electronic means. As a consequence, the Bill does not appear to allow parties to deliver counterparts of “traditional documents” in any other method, e.g. by post. Whilst practice seems to favour email and other electronic methods of delivery, a party may, conceivably, wish to delivery wet ink hard copy counterparts to the person coordinating the process by some other method. For example, it may be convenient for a party to post a number of wet ink hard copy counterparts (either the whole document, or where this is cumbersome, just the signature pages) to the coordinating solicitor if that solicitor will be responsible for filing those wet ink originals e.g. with HMRC, the Land Registry etc. We would therefore suggest that s.4 be extended to cover delivery of counterparts by non-electronic means.

8. **General**: A few observations and additional points are set out below:

   a. It may be helpful to clarify that: (i) although documents may be executed in counterpart, a signatory’s signature cannot be witnessed in counterpart, i.e. a witness must sign the same hard copy version as the signatory whose signature he is witnessing; and (ii) where two signatories are signing on behalf of a single party (e.g. a director and a company secretary signing on behalf of an English company), those two signatures can be in counterpart, i.e. the director and the company secretary may sign different hard copy versions of the document.
b. We note that the Bill does not refer to dating of documents. We assume that the Bill does not seek to amend the current Scottish law on this point and that the current Scottish law related to when a document is deemed to have been dated will not be affected by the Bill.

c. We assume that there are no categories of document which, under Scottish law, should be executed in counterpart in a different way to that described in the Bill. For example, under English law, different rules apply to the execution of deeds and real estate contracts by electronic means (see the Law Society’s practice note, *Execution of documents by virtual means*).