Execution of documents under Scots Law

For those dealing with transactions and businesses in Scotland it is important to remember that Scots Law differs from English Law in a number of respects, and one of area of difference which has, in the past, caused much gnashing of teeth (particularly during late night closing processes) is the law around the requirements for the execution of documents.

A particularly challenging feature of the Scottish requirements was, in the past, the inability to execute in counterpart and exchange remotely. However, in July 2015 legislation was passed in Scotland to permit execution in counterparts and facilitate electronic closings. Some six months have now passed under the new system and market practices are now developing. Accordingly, it seems timely to review current law and practice as a whole.

Overall, the new regime seems to be working well and closing processes touching Scotland should be rendered considerably more straightforward. However, the Scottish execution rules (even as amended) do still differ in a number of respects from those under English law and therefore it will still be important to review execution formalities and clauses against the Scots law requirements.

When is a written document required?

As a starting point it is worth reiterating that not all contracts and obligations governed by Scots law need to be created and evidenced in formally executed documents. Contracts and other obligations can be created orally or by conduct. Accordingly, care should always be taken when encapsulating a provisionally agreed
position in a working document (such as heads of terms) that is not intended to be binding, to state this clearly on the face of the document – whether or not it is intended to be signed.

The Requirements of Writing (Scotland) Act 1995 (‘the Act’) provides that formal writing is required only in the following instances:

- the making of any will, testamentary trust disposition and settlement or codicil;
- the creation, transfer, variation or extinction of an interest in land, other than by operation of a court decree, enactment or rule of law and a contract or unilateral obligation relating to such an interest in land;
- the creation of a gratuitous unilateral obligation except an obligation undertaken in the course of business (so it is worth remembering that the need for consideration or a deed poll is not a feature of Scots law and that unilateral promises given in a business context can be binding without a formal instrument – again care should be taken to clarify when statements are not intended to be binding); or
- the establishment of a trust when the trustor is also a trustee.

Of course, although these are the only situations in which formal writing is mandatory, it is always strongly advisable to follow the formal writing rules when executing any legal document.

**The requirement for valid execution**

Under the Act, subscription by (or on behalf of) the granter (in the case of a unilateral obligation) or parties (in a mutual contract) is the only requirement for the valid execution of a document. If there is more than one granter or party then the document must be subscribed by each granter or party.

**What constitutes subscription?**

A document is subscribed by a granter or party if it is signed by them. Individuals should sign their full name as set out in the body of the document or with their full first name or initial followed by their surname. Under Scots law valid execution of a document by a company requires signature by one director, the secretary or by another authorised signatory, meaning anyone who is duly authorised by the company to sign. This is a wider meaning than ‘authorised signatory’ under English law under section 44 of the Companies Act 2006.

Signature should be at the end of the last page of the main body of the document (excluding any annexation or schedule, whether or not it is incorporated in the document). If there is more than one party, the requirement to sign at the end of the last page of a document is met if at least one party signs at the end of the last page and any others sign on additional pages.

For this purpose the ‘last page’ is the last page containing an operative clause (and not a schedule or annex). Accordingly, the first signatory must sign a page that contains some operative text from the main agreement. The common practice in England, and many other countries, of starting all the signatures on clean signature pages beginning with the ‘in Witness Whereof’ testing language will not suffice. This is a point to stress in cross-border closings as the temptation on colleagues from other jurisdictions to tidy up the signing pages across all documents to make them consistent is often strong and all too often this point gets overlooked.

If a person is executing a document in more than one capacity (for example, in a personal capacity and as a director of another party), one subscription of the document by him is sufficient to bind him in all capacities.
However, it is not unusual in practice (and helpfully evidences the signing authorities) to have such a person sign multiple times (once for each capacity).

**Probativity**

Subscription alone is sufficient for the valid execution of a document. However, if the document is challenged in the future in a court it would still be necessary for the person seeking to rely on the document to lead evidence to prove that it has in fact been validly executed, i.e. that the signatories were the correct signatories and that the signatures were indeed their signatures etc.

If a document is executed in a manner that gives it ‘probative’ status under Scots law this burden of proof is reversed and the document is presumed to be validly executed and does not require the leading of any evidence to establish its validity in court. Any person challenging its validity would need to lead evidence that its appearance was misleading and it had not, in fact, been validly executed.

The Act provides that a document can achieve probativity by attestation (which means having on its face a description of the signing parties and process which evidences correct signature). For this, a document must indicate on its face that:

- it has been subscribed by the granter(s)/parties;
- it has also been signed by at least one witness to the subscription of each granter/party, whose name and address are also stated; and
- nothing in the document indicates that it was not properly subscribed or witnessed.

This is typically achieved by including all of the relevant information in the signing blocks and ‘testing clause’.

As well as proving due execution, probativity also applies a presumption as to the date and place of execution where the signing docket or testing clause appears to state the date or place of subscription (and nothing in the document or testing clause indicates that the statement of date or place is incorrect). For this reason it is often the case that Scottish testing clauses refer to both the date and place of execution – however, neither is essential.

Probativity can also be achieved through judicial application; where there has been a failure to witness a person who has an interest in the document can later apply to the court, and, if the court is satisfied that the document was subscribed by that granter it can confer probativity by court order.

**Alterations to documents**

What about last minute alterations, such as marginal additions and deletions inked into the printed document? Any alteration that is made before the document is subscribed by the granter, or, if there is more than one granter or party, by the first granter or party to subscribe will validly form part of the executed document. The fact that an alteration to a document was made before the document was subscribed may be established by all the relevant evidence, whether written or oral. However, if reference to the alteration is made in the testing clause, then the alteration will be presumed to form part of the document.

Any alteration to a document made after it has been subscribed will take effect as a valid amendment to the document if the alteration has been signed by all the granter(s)/parties. If the post-subscription alteration has also been signed by a competent witness, then it will be presumed to have been signed by the granter.
Good practice in Scotland continues to be that alterations made to a document immediately before it is subscribed are initialled by all the signatories, and alterations made after a document has been subscribed are made by a separate ‘Instrument of Alteration’ subscribed by all the granters of the original document.

**Schedules and annexations to documents**

Except in the case of documents relating to land, any annexation, (such as a schedule or appendix or attached plan, drawing or photograph) to a document is regarded as incorporated in the document without the need for it to be signed or subscribed if it is both:

- referred to in the document; and
- identified on its face as being the annexation referred to in the document.

In practice, identifying an annexation is done by inserting language at the top of the first page of the schedule or annex which refers back to the main agreement e.g. ‘This is Schedule 4 referred to in the foregoing Agreement between […] and […] dated […]’. Additional rules apply to schedules and annexures documents relating to land or interests in land.

**Delivery and counterparts**

The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 (‘the Counterpart Act’) came into force on 1 July 2015 and allows parties to a document governed by Scots law to sign it in counterpart – a long awaited improvement! The Counterpart Act permits a document to be executed in two or more duplicate interchangeable parts where no individual part is subscribed by both or all parties. In that case the executed counterparts are to be treated as a single document (and this may comprise either (i) all of the signed counterparts put together in their entirety; or (ii) one of the counterparts in its entirety, collated with the signature pages from all the other counterparts). No formal counterpart clause is required.

Where a document is executed in counterpart it will only become effective if the signed counterpart is delivered by each party to the other party or parties. The Counterpart Act provides expressly that delivery of a ‘traditional’ document (i.e. one on paper, whether or not executed in counterparts) can be made by electronic means (such as by e-mailing a PDF). Any such PDF may be the entire executed document or just part of the document, providing this includes the signed signature page and the part sent is sufficient in all the circumstances to show that it is part of the document. However it should be noted that while delivery can be affected by sending the signed signature pages alone, Scots law still requires the entire document to be executed, i.e. printed and signed as a complete document – so the complete document and not just the signature pages should be circulated for execution.

The Counterpart Act also expressly allows parties to control when delivery takes place and therefore when the document becomes effective. It expressly allows executed documents sent to other parties to be held by the recipients as undelivered until either (a) the sender tells the recipient(s) that it can be treated as delivered; or (b) if a specified condition is to be satisfied, that the condition has been satisfied. In addition, a third party can be nominated to take delivery of any or all documents on behalf of others. It is also possible to have multiple nominated persons for complex transactions, e.g. where different law firms are responsible for different suites of documents.

As a result of these changes there is now much greater scope to orchestrate cross-border and ‘choreographed’ closings, where documents are released in a pre-agreed phasing.