

Execution of Scots Law Documents

The signing rules for documents governed by Scots law, whilst sharing many similarities to the rules applicable in England and Wales, have important differences. Knowledge of these rules is vital for cross-border finance transactions, with failure to follow the requirements giving rise to the potential for documents to be deemed invalid by a court.

This briefing provides guidance on the signing requirements for documents governed by Scots law. As Scots law does not recognise a distinction between a *deed* and a *simple contract* as is the case in England, the execution formalities outlined generally apply to all documents (with a few notable exceptions we will flag below).



Valid vs. Probative

The Requirements of Writing (Scotland) 1995 Act (the “**1995 Act**”) distinguishes between documents that are executed **validly**, and those which are *probatively*. For a document to be **validly executed** under Scots law, at a basic level:

- it must be signed by all parties to the document at the end of the document; and
- the signature blocks cannot (for valid *or* probative execution) be on a standalone page and must commence on the same page as a clause, or part of a clause, of the document itself.

A probative document is self-proving, meaning that it is **presumed to be validly executed**. Should the execution of the contract be challenged in the future, this presumption means the burden of proof shifts onto the party challenging the execution of the document such that they would have to prove that it has **not** been validly executed. Generally in commercial finance transactions, a lender will want to ensure documents are probative in order that, if the execution of any document was to be subsequently challenged in court, the burden of proof would lie with the challenging party.

Certain documents **must be executed probatively in order to be valid** at all - these documents are set out in section 1(2) of the 1995 Act. Notably for commercial transactions, this list includes contracts dealing with real rights in land (such as standard securities over heritable or long leasehold property, leases or dispositions of land) and certain types of unilateral obligation (being a document where one party unilaterally undertakes something to another party).

To **achieve probative status**:

1. A document must be signed:

- on behalf of a Company, by
 - One director, company secretary or authorised signatory and a witness; or
 - Two directors; or
 - One director and a company secretary; or
 - Two authorised signatories.

*The definition of an authorised signatory is much broader in Scotland and can be **anyone approved by the Board of Directors** to sign on behalf of the Company. It is not limited to a director or company secretary as is the case in England.*

- on behalf of a traditional Partnership, or a Limited Liability Partnership, by
 - Two members; or
 - One partner in the presence of a witness.

2. Both the **place of signing**, with the town or city sufficient for this purpose, and the **date of signing**, must be included as part of the signing block. The date of signing provided must be the actual date each party signed the document and cannot be left blank and subsequently updated with document's agreed effective date.



Signatures

For a document to be **probative**, the signature of the signatory(principal)(s) and witness must be legible and must include either the individual's full name, or an initial or abbreviation of their first name and their surname, irrespective of whether this is the individual's usual way of signing.

For **non-probative** documents, a witness must still sign as outlined, but the principal signatory can sign using a name that is not their full name or by a description, initial or mark provided it is their usual method of signing and is intended to be their signature.



Schedules, plans and appendices

Diverging from the English approach, the 1995 Act requires a document to be signed **at the end of the last page** (and not on a standalone signatures page), excluding any schedules. Scots law documents are therefore ordered such that the execution page (i) includes a clause or part of a clause of the document; and (ii) precedes the schedule, whereas in English documents the schedules will usually appear before the execution page (and the execution page will also generally be standalone).

Where a Scots law document relates to land and includes a schedule with a description of that land, the schedule must be signed on each page that contains a drawing, photo or plan, or on the last page of the schedule if it includes a description only. Schedules only require signature by the signatory (principal), a signature from the witness is not required.

Additional requirements apply to testamentary documents of more than one page, such as Wills, which are outwith the scope of this note.



Witnesses

A witness must:

- **be over the age of sixteen;**
- have **legal capacity;**
- be identified by **name and address;** and
- **not be one of the parties granting** the document, and whilst a witness can be a grantee, this is not recommended.

It is best practice for a witness to sign **immediately after** the principal as one continuous process (although, in another distinction from English law, **it is permitted** under the 1995 Act for a principal to acknowledge their signature at any time post-signing before a witness, with the witness then adding their witness signature and details at that time).



Counterparts

The enactment of the Legal Delivery and Counterparts Act on 1 July 2015 brought Scots law broadly into line with the English position on the signing of documents in counterpart. A document is signed in counterpart if each party signs a separate copy of the document; and is classed as a single executed document once all of the counterparts are collated together; or all of the signature pages are compiled together in one document.

The 2015 Act requires the entire document to be printed for valid counterpart signing (if being signed physically, rather than electronically).

Unless otherwise agreed, a document signed in counterpart is deemed as delivered on the date the **last party signs its counterpart**. However, parties can agree to a separate date of delivery at which point the document becomes effective. Importantly, as a date of signature is required for a document to be probative, all signatories must ensure (if they wish the document to be probative) that their signing block is dated even where a separate date of delivery is agreed.



Electronic Signing

Scots law documents can be electronically signed, with e-signing creating a document that is valid in the same way as if it were signed in wet-ink. The only **exception** to this is documents relating **to land and requiring registration at Registers of Scotland**, which must be signed in wet ink.

Electronically signed documents are **not probative** unless the qualifying electronic signature (**QES**) process is followed. This process is currently fairly complex and onerous, involving an ID verification process, and as a result is not generally widely used in practice. The default approach to Scots law documents for commercial transactions where the parties wish the documents to be probative therefore remains wet-ink signatures.