

# LAW SOCIETY SUBMISSION

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## **Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, Section 32 (Execution of Documents in Counterpart)**

**DEPARTMENT OF JUSTICE AND EQUALITY**

September 2020

The Law Society of Ireland (the “**Society**”) welcomes the opportunity to contribute its views on Section 32 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 dealing with execution of documents in counterpart (“**Section 32**” and the “**Act**” respectively). The Society has examined the implications of Section 32 from both a commercial transactions and a conveyancing perspective and has considered the concerns raised by and on behalf of practitioners in relation to both of these areas of practice. This submission reflects the Society’s views and recommendations resulting from its examination of Section 32.

## **1. Introduction**

- 1.1. The Society welcomes and supports the objective of improving efficiencies in our legal system in relation to the execution of documents. The Society is, however, concerned that if commenced, Section 32 may have unintended adverse consequences for both practitioners and their clients by introducing a degree of uncertainty regarding the execution of documents between commercial parties and private individuals, in a manner which may in fact outweigh the intended benefit of Section 32. The Society is of the view that any potential for uncertainty or debate amongst practitioners may undermine the efficiency of Irish legal practice and the attractiveness of Irish law as the governing law for commercial transactions, a particular concern in light of the initiative to position Ireland as a global centre for legal services after the Brexit transition period ends.
- 1.2. The Act was signed into law by the President on 6 August 2020. It provides for a range of important reforms in response to new challenges and legal issues arising in the context of the COVID-19 pandemic. Section 32 has not yet been commenced, and the Minister for Justice and Equality (the “**Minister**”) has sought input from the Society on this provision<sup>1</sup>.
- 1.3. The Society notes that the intention behind Section 32 is to facilitate transactions, to provide a transparent and certain mechanism for safe, simple and effective execution of documents (particularly in the context of COVID-19), and to reflect a procedure which is common practice in commercial contracts. The Minister has expressed her view in the letter from her office of 17 August 2020 that Section 32 is permissive, allowing a method of execution for all persons who do not have the benefit of contractual provisions permitting execution in counterpart. It is noted that the Minister has stated that there is some doubt as to whether execution of a document in counterparts is permitted in the absence of an express ‘counterparts clause’ in that document.

## **2 Business/Commercial Transactions**

### **2.1 Rationale for Section 32**

- 2.1.1 The execution of documents (whether they are agreements or deeds) in counterpart has long been a feature of Irish contract law, and is common practice across all types of legal transactions, both domestic and international. The Society is of the view that there is no perceived doubt as to the permissibility under Irish Law of execution of documents in counterpart.

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<sup>1</sup> Precise parameters of “input” TBC on receipt of letter from Minister to Law Society.

- 2.1.2 While it is common practice to include a ‘counterparts clause’ in a document expressly permitting the execution of that document in counterpart, it is important to note that the absence of such a ‘counterparts clause’ does not preclude execution in counterpart. The Society is not aware of any case law or commentary to the contrary, or of any recommendation for clarity or for a change in the law in this area. In the Society’s view, the absence of an affirming legislative or judicial authority does not imply that this established contractual practice is open to doubt.
- 2.1.3 The Society is concerned that Section 32 is likely to pose difficulties for commercial transactions that have already been entered into by potentially implying that, prior to the commencement of Section 32, execution of the relevant documents in counterpart, whether they included an express ‘counterparts clause’ or not, may not have been permitted. This could lead to some risk of the validity of those documents being challenged by a contracting party where the relationship between the contracting parties is fraught. While it is understood from correspondence with the Minister’s office that this is not the intention of Section 32, the existence of Section 32 in its current form may nonetheless create avoidable uncertainty and debate amongst practitioners and their clients in commercial transactions. Further, although the Minister has expressed a view that Section 32 is intended to be permissive rather than prescriptive, this is not expressly provided for by the terms of Section 32.
- 2.1.4 The Society remains of the view that there already exists a certain mechanism for safe and effective execution of documents in counterpart, which has been successfully relied upon by parties for many years, and more recently has greatly facilitated the completion of commercial transactions during the COVID-19 pandemic when parties could not be physically present in the same location when documents were to be signed. The Society does not believe there is any need for greater clarity in this area, and as such would question whether the introduction of the measures set out in Section 32 is necessary. In any event, the Society believes that, if greater clarity was indeed to be sought, Section 32 would not provide it.

## **2.2 Practical Implications – Business/Commercial Transactions**

The Society is also concerned about how Section 32 will operate in practice and, in particular, the interaction between the new requirements stipulated by Section 32 and existing legislation and established practices regarding the execution and delivery of documents.

### **2.2.1 Delivery:**

- (a) Section 64 of the Land and Conveyancing Law Reform Act 2009 governs the execution of deeds. One of the requirements for the valid execution of a deed is that it must be ‘delivered’ (a formal act requiring an intention to give effect to the deed) in order for it to take legal effect. Delivery in this context means an indication, by a party's words or actions, of their intention to be bound by the deed and need not amount to physical delivery of the deed, thereby facilitating both remote and international transactions (this also reflects the position in England and Wales).
- (b) Documents which are not deeds become effective upon execution other than where a contrary intention is indicated, and there is no requirement for delivery.
- (c) The Society is concerned that Section 32(5) of the Act, in its use of the term “delivered”, may cause uncertainty and debate regarding this

long-established common law principle that a document other than a deed takes effect upon execution (unless the document expressly provides otherwise)..

- (d) Section 32(5) requires a counterpart of a document (whether a deed or a contract) to be delivered before it becomes effective. The context of what constitutes 'delivery' for the purpose of this section is not clear. Even if 'delivery' is intended in the non-legal sense (for example, as a method of notifying the other contracting party of the execution of the counterpart, or providing the executed counterpart to them), this would introduce a further element of conditionality into the contractual process, which may increase uncertainty.
- (e) Furthermore, it is unclear how practitioners are to deal with the mechanics for 'delivery' under Section 32, including but not limited to matters such as the potential for delivery into escrow, electronic delivery and verification of the date of delivery. It also is uncertain how documents that are executed in Ireland but which are governed by the laws of another jurisdiction will be impacted by this provision and documents executed abroad but governed by Irish law.

#### 2.2.2 Virtual and Electronic Execution:

- (a) Virtual closings and the use of electronic signatures are now well-established in Irish legal practice.
- (b) Throughout the COVID-19 pandemic, the closing of commercial and other transactions on the basis of the existing law and practice regarding virtual execution, including the use of counterparts (with or without the inclusion of an express 'counterparts' clause), has continued. Even prior to the challenges posed by the pandemic, virtual execution of commercial transactions was the preferred mechanism for the majority of practitioners in Ireland, as evidenced by the Society's Guidance Note on Virtual Execution [*insert hyperlink*] (June 2011), which sets out the current recommended practices regarding the exchange of executed documents. If Section 32 were to be commenced, further consideration would be required in relation to the interaction between Section 32, the Society's Guidance Note and established market practice.
- (c) Further consideration and analysis will also be required as to how Section 32 is intended to operate in relation to documents which are (as is routine in commercial practice) executed, by one or more parties, using electronic signatures in accordance with the Electronic Commerce Act 2000 and the eIDAS Regulation (Regulation (EU) 910/2014).

#### 2.2.3 Multi-Party Transactions:

- (a) In addition to the concerns expressed above, the Society does not agree that Section 32 reflects the current practice regarding execution of documents in counterpart.
- (b) Section 32 is drafted from the perspective of a document which has only two contracting parties. In practice, it is frequently the case that not every contracting party receives an original counterpart from each

other contracting party following execution – this is particularly the case where there are multiple contracting parties (especially if within corporate groups) e.g. guarantees of leases.

- (c) If applied to a multi-party transaction, Section 32(4) and (5) would introduce inefficiencies and additional costs to the process for exchanging counterparts, culminating in a more protracted and cumbersome completion process whereby entire physical documents (and not merely images of execution pages) would need to be exchanged. This would be a marked inefficiency and source of additional costs, time and environmental impact, when compared with current practice, without any perceived benefit to the contracting parties. The Society is concerned that introducing additional layers of complexity, time and cost to commercial transactions would adversely impact Ireland's attractiveness as a jurisdiction in which to do business.

### **3. Conveyancing Transactions**

#### **3.1 Current Position under Irish Law and Potential Effect of Section 32**

- 3.1.1 The possibility of execution of documents in counterparts is already firmly established in Irish law, widely accepted in conveyancing practice, and has been confirmed in case law<sup>2</sup> without controversy or confusion. The Society is not aware of any doubt or risk regarding the execution of documents in counterparts under Irish law and thus it questions the need for Section 32 (as currently drafted) to be commenced at all, as if commenced it may do significantly more harm than good.
- 3.1.2 Execution in counterpart is already commonly used in conveyancing transactions and involves each of the parties to a document executing a separate identical hard copy of the document before the copies are exchanged so that each party holds a copy of the document signed by the other party or parties. It allows for time and cost efficiencies particularly where there are multiple parties to a transaction in different locations. While the parties to a document will often include a "counterparts clause" which expressly confirms that execution in counterparts has the same effect as if all parties to the document executed a single copy for the avoidance of any doubt, execution in counterparts is effective even without such a clause.
- 3.1.3 Execution in counterpart should not be confused with the practice (particularly in conveyancing transactions) of execution of documents in duplicate. It is standard practice with contracts for the sale of property that each party signs both copies and the contracts are then exchanged. However they are not referred to or considered as counterparts.
- 3.1.4 With regard to deeds, in conveyancing practice there is generally a single original deed, being the deed vesting an interest in land in a purchaser, tenant or other recipient, whether by deed of sale or other disposition, grant of easements or rights, or grant of a lease. Where there are covenants by the recipient, reservation of easements or rights in favour of the person disposing of an interest, or the disposal of part only of a holding, the disposer will retain a counterpart of the deed. However as a matter of conveyancing practice there is a significant distinction between the original and the counterpart(s) of the deed. It is a requirement in the production of

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<sup>2</sup> Embourg Limited v Tyler Group Limited [1996] 3 IR 480.

good marketable title that the original (as opposed to a counterpart) of the deed, or a statutory acknowledgement and undertaking for the safe custody and production of the original deed) be furnished.

- 3.1.5 While it is appreciated that a counterpart in this context does not fall within Section 32 provided all parties sign both the original and each counterpart (Section 32(2)(b)), Section 32 could still provide a trap for the unwary, and require significant additional administrative steps in the conveyancing process to ensure that each party has signed each copy of the deed, so as not to fall foul of Section 32.
- 3.1.6 By way of illustration, a developer is selling units in a managed estate. The deed of sale will be executed by the developer, the management company and the purchaser. The deed contains covenants by the purchaser for the payment of service charge and management of the estate, as well as reservations for the benefit of the remainder of the estate. Under Section 32(4) the deed only becomes effective when delivered in accordance with Section 32(5). Until such time as the purchaser signs the deed Section 32 applies to each copy of the deed. It will be necessary therefore to ensure that the purchaser either attends the completion of the sale in order to sign (which gives rise to the very difficulties which Section 32 is presumably intended to avoid) or the deed will need to be executed by the purchaser in advance of completion of the sale, requiring the purchaser to attend their solicitor's office (again giving rise to travel and a meeting which is presently unnecessary). This would present logistical and administrative issues directly attributable to section 32. The deed could not be sent to the purchaser by post for signing because the developer will require to retain control of it until the property is paid for.
- 3.1.7 When one factors in the requirements of lenders, who will require to be satisfied that the deed furnished to them vesting the property in the borrower is the original (and not a counterpart) and that Section 32 does not apply (or that if it does, then the deed has been delivered to each party to it, not just to the purchaser as under the present law), even more complications arise in the conveyancing process.
- 3.1.8 Section 32(3) states that the counterparts are to be treated as a single document. It is not clear how that subsection would impact on the concept of an original deed with counterparts as recognised in conveyancing practice.
- 3.1.9 Section 32, if commenced, would have a most unwelcome and disruptive impact on current conveyancing practice.

### **3.2. Specific issues with Section 32**

- 3.2.1 While the following list is by no means exhaustive, the Society has the following concerns with Section 32

#### **3.2.1.1 Origins of Section 32:**

It seems that Section 32 is inspired by section 1 of the Legal Writings (Counterparts and Delivery)(Scotland) Act 2015. That Act was introduced to address a deficiency in Scottish law, namely that there was a great deal of confusion as to whether executing documents in counterpart was permitted under Scots law prior to the 2015 Act. In addition the concept of "delivery" in Scotland means (or at least includes) physical delivery which is not a requirement under Irish law. Neither that deficiency, nor the Scots concept of "delivery", apply under Irish law such that the introduction of Section

32 in Ireland is entirely inappropriate and could have long-lasting and damaging effects on established Irish law and practice.

### 3.2.1.2 Validity of and risk of challenge to past execution in counterpart

By its very wording Section 32 introduces an element of uncertainty to conveyancing agreements, deeds and transactions executed and completed by way of counterparts prior to the commencement of Section 32. It implies that what is facilitated by Section 32 (once commenced) was prohibited beforehand and thus exposes agreements, deeds and transactions previously executed in counterpart to unnecessary risk of challenge. At the very least, Section 32 should have been drafted in a confirmatory or 'for the avoidance of doubt' basis to ensure that there is no doubt cast on the validity of execution in counterparts in the past.

### 3.2.1.3 Conflict with Section 51 of the Land and Conveyancing Law Reform Act 2009

Section 51 of the Land and Conveyancing Law Reform Act 2009 provides that "... no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent." This means that the contract need only be signed by the defendant (against whom the contract is being enforced) and not the plaintiff (who is seeking to enforce the contract). Section 51 does not require execution by both parties or delivery, and Section 32 would appear to contradict that long established position (bearing in mind that Section 51 of the 2009 Act has its origins in the Statute of Frauds 1695).

### 3.2.1.4 No definition of "delivery" and conflict with existing law

Subsections (4) and (5) of Section 32 appear to require the physical delivery of the counterparts in question and this raises a number of issues.

(a) Physical delivery (as envisaged by Section 32) is a different concept to the 'delivery' which is required to make a deed enforceable under current Irish law. The current position is that a deed is delivered "as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him", and even though the other party retains possession of the document<sup>3</sup>. If Section 32 is commenced there will be an additional requirement for a deed executed in counterparts to be physically delivered to each of the parties to the deed unless each party executes it. Such a requirement does not exist under Irish law at present and will cause difficulties in conveyancing transactions in particular where multiple parties are required to join in a deed resulting in a more protracted, cumbersome and costly completion process.

(b) It introduces a new requirement for an agreement executed under hand (which has never been subject to a requirement for delivery) and is entirely inconsistent with Section 64 of the Land and Conveyancing Law Reform Act 2009.

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<sup>3</sup> Evans v Grey (1882) 9 LR Ir 539

(c) It is unclear whether delivery to an agent (such as a lawyer acting for a party) is permitted, or whether delivery is required as between different persons of the same party. Consider for example the case of a husband and wife purchasing a property. As they are each a party is it necessary under Section 32 that each have delivered to them a separate counterpart? That would then require three counterparts (or four if there are a couple of vendors also) rather than two as under present law. Not only is that cumbersome but it is hardly environmentally friendly, and is entirely unnecessary in most circumstances.

(d) Is electronic delivery of physical counterparts permitted (for example by attaching pdf copies of executed documents to an email)?

(e) It is unclear how practitioners are to deal with the mechanics for delivery in escrow, and verification of the date of delivery.

(f) It does not expressly allow for parties to agree otherwise as to how counterparts are to be executed (i.e. contract out of Section 32).

### 3.2.1.5 Section 32- Permissive or Prescriptive?

The Minister has stated that Section 32 is permissive. Specifically, while sub-section 9(1) is clearly permissive - "A document may be executed in counterpart in accordance with this section", the subsequent sub-sections are not contingent upon any "opting in" to section 32 and are in the nature of being prescriptive. Thus sub-section (2) says "A document is executed in counterpart where (a) it is executed in 2 or more parts in like form, and (b) no part is signed by both or all parties to the document.". The following sub-sections likewise are prescriptive.

A consequence (presumably unintended) of sub-section 2 is that any document engrossed in more than one copy and executed by any party to it is a counterpart under this definition until at least one copy is signed by all parties, whereupon it ceases to fall within the definition of counterpart (as do the other copies, even though they may not be signed by everyone).

Practitioners would expect that there is an element of intention in the use of counterparts - a decision is made that parties will execute one or more copies and exchange, thereby creating binding legal commitments, without the necessity of ensuring that their signed copy is subsequently signed by the other parties. That element is not reflected in section 32 as drafted.

## **4 Conclusions/Recommendations**

4.1 For the reasons set out above, the Society does not believe that there is a gap in the current law and practice which necessitates the introduction of the measures contemplated in Section 32. The Society is not aware of any calls from the profession or indeed clients for a provision like Section 32 regarding execution of documents in counterpart either before, during or after the lockdown brought about by the Covid-19 pandemic.

4.2 While Section 32 is well intentioned, and all measures introduced to improve conveyancing efficiency are welcomed (particularly measures to assist the conveyancing process when meetings and movement are restricted and discouraged) Section 32 is likely to have the precise opposite effect to that intended.



- 4.3 The Society believes that, if commenced, Section 32 would create uncertainty and inefficiencies in practice without any apparent countervailing advantage. Rather than encouraging the use of counterparts to facilitate transactions, the uncertainty introduced by the wording of Section 32 may well have the consequence that in practice lawyers will avoid the use of counterparts, and will instead opt for execution of each copy of each document by all parties. Alternatively, if practitioners attempt to execute in counterparts in accordance with Section 32, the confusion and inconsistency with current practice regarding the concept of “delivery” as described above will result in the physical delivery of all documents to each of the parties to the document, inevitable delays, and increased costs.
- 4.4 The Society believes that the need for certainty in relation to the execution of documents in commercial transaction is paramount, as is certainty in relation to those previously executed in accordance with the laws in place and accepted practice at the time of the execution of those documents. Commencement of Section 32 in its current form has the potential to create uncertainty and debate amongst legal practitioners which, in the Society’s view, is more significant than any perceived issue which it is intended to remedy. Any such uncertainty and debate has the potential to undermine Irish law as the choice of governing law for commercial transactions and open existing contracts to challenge, thereby potentially placing Ireland at a considerable competitive disadvantage, for example in attempting to establish Dublin as an international centre for arbitrations. In addition our Brexit initiatives have included marketing Ireland as the key English-speaking common law jurisdiction in which to do business post the end of the current Brexit transition period and any contractual uncertainty such as those caused by the commencement of Section 32 would in our view derail these initiatives.
- 4.5 On the basis of the above, the Society is of the view that the Minister should not commence Section 32 as currently drafted.

We hope that these comments are helpful to the Department in its consideration of these issues. The Law Society is available to engage further on any of the matters raised.

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