



KEY DIFFERENCES BETWEEN SCOTS LAW AND ENGLISH LAW

BANKING HANDY GUIDE

An introduction

When involved in cross-border transactions, it is important to understand the key differences between Scots law and English law, particularly where the transaction involves financing portfolios of investment properties, a group of companies with material Scottish subsidiaries or a fund structure.

While there are many similarities in practice between the two jurisdictions, it's not unusual for some of the quirks of Scots law to add an extra dimension to transactions. Here we look at some of the common differences and terminology we encounter and use in finance transactions.

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What are the key features?

- The primary difference is in the type of security available, and how that is typically structured. An English law-style debenture, capturing all of the assets of a chargor via fixed and floating security, isn't competent in Scots law. Separate, stand-alone securities are usually required for each asset class, and the type of security varies with the asset. Perfection steps usually also differ.
- Scots law does not recognise the concept of equity. Formalities for creation of security are less flexible in Scotland - you either have a security or you don't, so post-completion steps such as intimating assignments are key. In Scotland, we don't recognise the difference between legal and beneficial ownership either, so proper advice is key to achieve an English-style split if that's necessary for a transaction.
- Counterpart execution is now possible in Scots law, but we have various additional requirements to ensure execution of documentation meets the standards imposed under our legislation (such as the need to have substantive text on the signing page). There is no corresponding distinction between deeds and simple contracts, and therefore the need to execute under hand/as a deed does not apply in Scotland.

- Conditions precedent usually need to be tweaked for Scottish assets, depending on the stance being taken on perfection steps. In particular, real estate completion deliverables differ from the terminology for the searches conducted to the provision of advance notices for example.
- Security registrations – while the regime at Companies House mirrors that in England (save for registrations taking place in Edinburgh rather than Cardiff), security over land must be registered at the Land Register of Scotland prior to registration at Companies House (as opposed to the Companies House then Land Registry approach in England). The 21 day period for registering standard securities only starts upon due registration at the Land Registers.



Key terminology

Advance notices

An advance notice can be lodged in the Land Register in respect of a standard security to protect the position of a lender, establishing a 35-day period during which any other applications for the registration of a standard security against the same property will be postponed to the standard security protected by the advance notice.

Assignment

Broadly equivalent to an assignment in England, it is used to create fixed security over incorporeal moveable assets in Scotland (e.g. rental income/contractual rights). Assets subject to the assignment must be identifiable, existing (i.e. future assets cannot be assigned) and controlled by the secured creditor, and cannot be sold or otherwise dealt with, without the consent of the secured creditor. The assignment must be intimated to the debtor/counterparty of the obligation or right being assigned. Failure to intimate means the assignment is ineffective, therefore no security interest is created, only a contractual right.

Floating charge

A statutory form of security in Scots law, created as a stand-alone security. Commonly used for trading corporate borrowers or in ABL/invoice financing transactions, it essentially operates in the same way as an English law floating charge until enforcement is required. Instruments of alteration of a floating charge (i.e. ranking or inter-creditor agreements) must be registered at Companies House within 21 days of execution/delivery if signed in counterpart. The floating charge crystallises on either the appointment of a receiver or an administrator or on the commencement of winding up and becomes a fixed security over the pool of assets at this point of crystallisation.

Heritable title

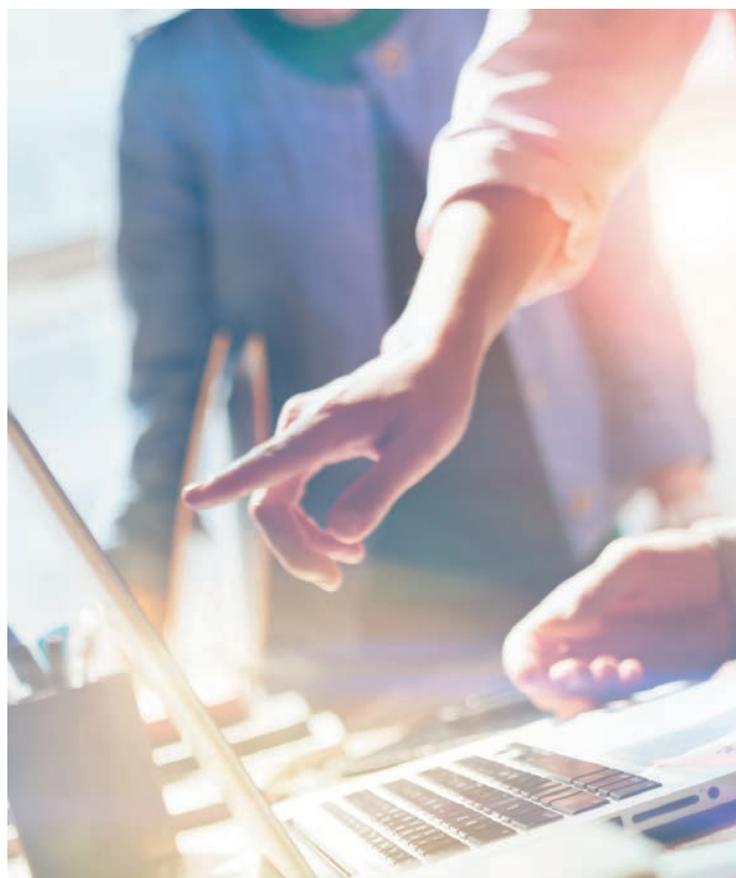
The Scots term for absolute ownership, equivalent to freehold in English law.

Personal Bar

Essentially the Scots law equivalent of estoppel in English law.

Share pledge

The Scots law equivalent of an English law share charge. As Scots law does not recognise the concept of equitable charges, title to the shares must be wholly transferred to the secured creditor (although voting rights and the rights to dividends usually remain with the chargor until default). A stock transfer form and new share certificate should be issued and the company books must be written up to reflect the title transfer. Advice should be taken on the effect of such security on the Persons with Significant Control Regime.



Standard security

The only effective form of fixed security over land in Scotland. Created by the Conveyancing and Feudal Reform (Scotland) Act 1970 which prescribes (1) the basic form; (2) essential terms; and (3) standard conditions (which can be varied to the extent allowed by the 1970 Act) e.g. maintenance and repair, insurance, restriction on letting. Enforcement is statutory by way of serving a “calling up” notice. Note that the Law of Property Act (LPA) 1925 does not apply in Scotland and consequently LPA receivers are not recognised under Scots law.

Warrandice

Usually ‘absolute warrandice’ and when given is similar to ‘full title guarantee’ in English law.

How Brodies can help you

Getting our banking team involved at the outset of a cross-border transaction is key, so that we can assist with advising on the appropriate structure of security, and make sure that conditions precedent and plans for signing documents reflect the requirements of Scots law. We have significant experience across our Edinburgh, Glasgow and Aberdeen offices of all aspects of banking – from real estate finance to leveraged finance and funds finance to shipping finance regularly act in cross-border transactions alongside English, US and European firms.

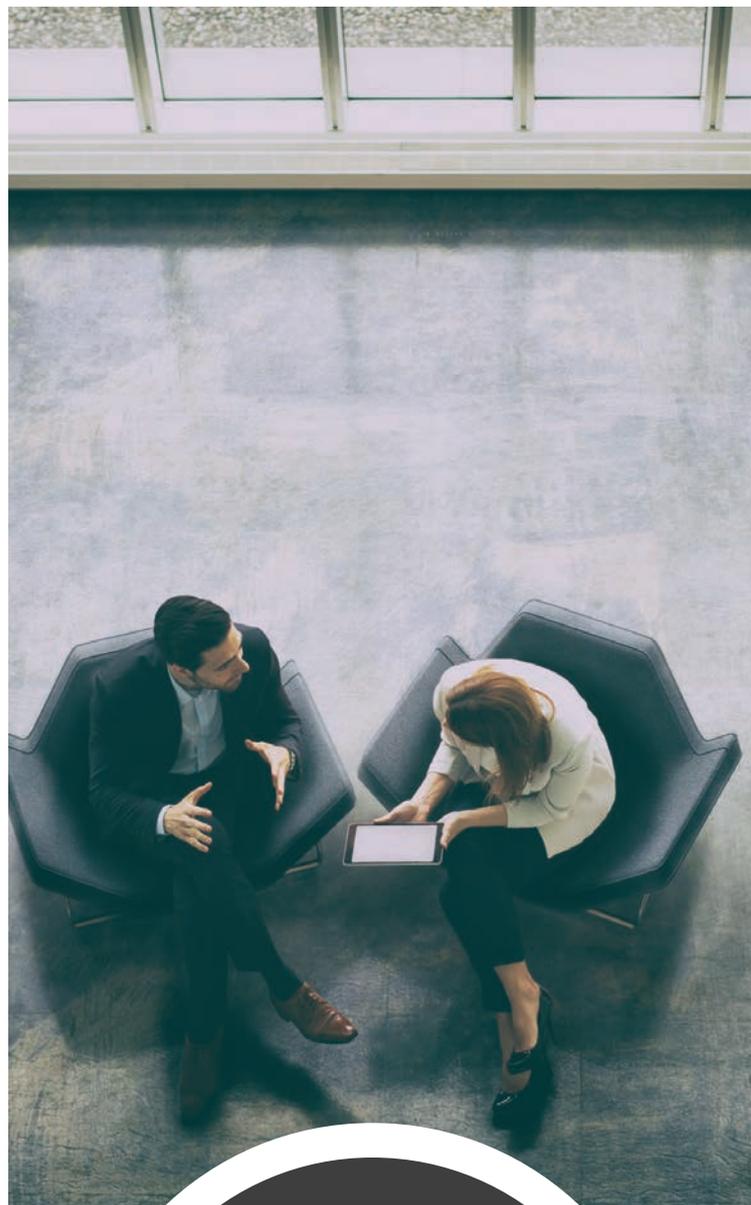
Key contacts



Alan Knowles
PARTNER
+44 (0)131 656 0016
alan.knowles@brodies.com



Kimberley Ryder-Forman
ASSOCIATE
+44 (0)131 656 0263
kimberley.ryderforman@brodies.com



Did you know?

Brodies LLP acted as Scots law counsel to the Moto group in relation to its Senior Credit Facilities and Second Lien Notes in 2016



