Submission from Tods Murray LLP

1 Introduction

1.1 Tods Murray is a leading independent Scottish law firm, dedicated to providing first rate, innovative and commercially aware specialist advice to companies, institutions and organisations, within both the private and public sectors, and to families, individuals and charities.

1.2 Our Banking and Finance team is one of the largest in Scotland. We provide a full range of services to a client base which includes UK and overseas banks and other financial institutions as well as borrowers operating in a variety of sectors. We are focussed on understanding and delivering our clients requirements and assisting them in meeting their commercial objectives. We have particular experience of cross-border transactions and a clear understanding of the issues involved when dealing with multiple jurisdictions.

2 Analysis

2.1 Our submission is made largely in the context of banking and finance transactions, particularly multi-jurisdictional transactions where Scots law forms just one (and usually a minority) part of a larger transaction. The existing Scots law, particularly the lack of counterpart execution as a valid form of execution, can cause problems in terms of transaction logistics and requirements as well as giving a poor impression of Scots law and Scotland generally as a place in which to do business. The lack of execution in counterpart under Scots law is, however, an issue that goes wider than just banking & finance transactions. Members of our Corporate, Projects and Real Estate departments also encounter difficulties on a regular basis and have also had input into this response.

2.2 We are aware that some “work-around” methods are used in transactions to circumvent the lack of availability of execution in
counterpart under Scots law. These include the use of powers of attorney and undertakings (whereby the solicitors agree to accept executed counterparts in order to allow a transaction to complete, but undertake to each other to deliver a fully, validly executed document at a later date). These are, however, to differing degrees unsatisfactory and uncertain and Scots law should not have to rely upon work-around methods for something as fundamental as the execution and validity of documents.

Not infrequently if a multi-jurisdiction transaction is facing execution difficulties because of Scots law requirements, then we will see the document being written under English law to avoid these challenges. Where this cannot be done great care has to be taken in explaining to the parties how the document must be signed in accordance with Scots law. However where this is within a large multi-jurisdiction transaction this can cause frustrations for the signatories and give a regressive impression of Scots law. We have also very occasionally seen the Scottish aspects of a transaction dropped completely from the wider transaction because of the difficulties and complexities that Scots law poses. This is obviously unsatisfactory and indeed commercially detrimental to Scotland.

2.3 In our view the Legal Writings (Counterparts and Delivery) (Scotland) Bill (the “Bill”) is in a format which would be of great utility to Scots law. We provided detailed comments to the Scottish Law Commission on the draft Bill as it progressed through their review and drafting processes and the final Bill reflects these comments in various respects. Our comments here are accordingly of a more general nature.
3 Summary

Our view is that in general the Bill is to be greatly commended and would offer a welcome innovation which would benefit all aspects of Scots commercial law. The Scots law formalities on execution can – to the wider commercial world – seem antiquated and give a negative impression of Scots law as a modern, dynamic legal system and indeed Scotland itself as a place to do business. The enactment of the Bill would bring Scots law requirements on execution of documents into line with many other worldwide jurisdictions and, more importantly, would promote Scotland as a business-friendly legal jurisdiction.

4 Costs & Impact

It is difficult to quantify the value and cost benefit that the Bill would bring. We see the issues with the existing Scots law as being less cost-related and more about making sure that Scots law is business-friendly (which in terms of execution formalities it currently is not) and promoting Scots law as a legal system which can facilitate commercial transactions. The demands of the existing law are cumbersome and can – as stated above – lead to transactions being structured under English law (sometimes even with Scots law assets being dropped from the transaction entirely). Making Scots law certain but more attractive to business are the principles which we consider should underpin the Bill and the law reform project more generally.