



Law Society
of Scotland

Consultation Response

Moveable Transactions (Scotland) Act – Consultation – Definition of Insolvency

November 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Banking, Company & Insolvency Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Moveable Transactions (Scotland) Act 2023 – Definition of Insolvency.

The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Question 1. Should the relevant definitions of insolvency capture insolvency procedures or the state of being insolvent? Please provide reasons for your views.

We are of the view that only insolvency procedures should be captured. This is because factual insolvency will be impossible or at least highly impracticable for a third party to determine, in particular a creditor seeking to rely on taking a statutory pledge or relying on a registered assignation. There needs to be certainty for stakeholders on whether assets have been transferred/pledged and so there must be a clear point at which 'insolvency' is triggered. Using the state of being insolvent as a basis for the definition of insolvency would create too much scope for debate and uncertainty.

We consider that other protections exist in respect of the voluntary alienation of assets or creation of preferences when factually insolvent, in particular the rules on the challengability of gratuitous alienations and unfair preferences.

Question 2. Please provide your views on the current definitions of insolvency in the Act and highlight any circumstances which are unnecessary or alternately are missing. It would be helpful if you could provide reasons and/or examples for your views.

We consider that this response is answered by the below questions.

Question 3. Should all trust deeds be included in the definition of insolvency for individuals? Please provide reasons for your answer.

We remain of the view that the inclusion of all trust deeds is too broad for reasons already provided.

We remain of the view that the inclusion of all trust deeds is too broad. As outlined in our suggested amendments at stage 2, we consider that only statutory “Protected Trust Deeds” that have been registered by the Accountant in Bankruptcy should be included here.

Question 4. Should the terms composition and arrangement be excluded from the definition of insolvency for individuals? Please provide reasons for your answer.

We remain of the view that the terms composition and arrangement are too vague for the reasons already provided.

We remain of the view (as outlined in our suggested amendments at stage 2) that the terms composition and arrangement should be excluded from the definition of insolvency for individuals. We note that “composition” was a specific technical term until 2014, when its technical use was repealed. We also note that “arrangement” is a technical term in England but not in Scotland. We therefore consider that references to compositions and arrangements should be removed.

Question 5. Do you agree that the definition of insolvency should include company voluntary arrangements? Please provide reasons for your response.

Given protections elsewhere, we consider that there is a policy decision to be made here – whether to prefer a creditor who is a potential assignee or pledgee (i.e. where the debtor has agreed to assign/pledge but such assignation or pledge has not yet been completed), or whether to prefer the wider body of creditors more generally. It seems that the policy is that the latter is to be preferred, and if so, then CVAs should be included.

Question 6. Should only company voluntary arrangements which include the claim/encumbered property fall within the definition? Please provide reasons for your response.

Yes, we consider that insolvency processes which do not cover the relevant asset should be irrelevant for the creation of a statutory pledge over the property or effectiveness of an assignment. This is, of course, rather conceptually difficult, as CVAs principally cover claims against an entity, rather than the assets of that entity. It is difficult to remove CVAs entirely, as they are an indication of financial distress. On the other hand, if any CVA has the effect of intervening in statutory pledges/assignments, then there is space for the pledgor/assignor to abuse these rules.

On balance, we consider that some form of link between the CVA and the asset should be included, although note that it is difficult to do so.

Question 7. Do you agree that the definition of insolvency should include the making of an order sanctioning an agreement under Part 26A of the Companies Act 2006? If so, at what point in the process should the definition be aligned to? Please provide reasons for your views.

As per the above, and our response to Stage 2 amendments, if CVAs are to be included for the policy purposes outlined above, then Part 26A restructuring plans should be included, too. However, if a decision were made to remove such plans or CVAs, for policy or technical reasons, then the other procedure should probably also be removed for consistency.

For maximum certainty, we consider that the trigger for a Part 26A restructuring plan should be the granting of a court order under s901F. It is only at this point that a restructuring plan is formally approved. It would be inappropriate to use an earlier point in the process, as the restructuring plan may not ultimately be sanctioned by the court and so would not come into effect.

Question 8. Should only compromises or arrangements which include the claim/encumbered property fall within the definition? Please provide reasons for your views.

Please see our response to question 6.

For further information, please contact:

Gavin Davies
Policy Team
Law Society of Scotland
DD: 0131 370 1985
GavinDavies@lawscot.org.uk