



Law Society
of Scotland

Moveable Transactions (Scotland) Bill

Stage 3 Briefing

May 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.

The Moveable Transactions (Scotland) Bill¹ (the Bill) was introduced by the Cabinet Secretary for Justice and Veterans, Keith Brown MSP, on 25 May 2022. In August 2022 we responded to the Financial Memorandum on the Bill from the Finance and Public Administration Committee Calls for Views² and in September 2022, we responded to the call for evidence on the Bill from the Delegated Powers and Law Reform Committee³. We also gave oral evidence on the Bill to the Delegated Powers and Law Reform Committee on 4 October 2022⁴.

We note that the Delegated Powers and Law Reform Committee published the Stage 1 report on the Bill on 2 December 2022⁵.

We issued a briefing on the Bill ahead of the Stage 1 debate on 13 December 2022⁶ and we issued amendments on the Bill ahead of the Stage 2 Changes to detail on 21 March 2023⁷.

We now welcome the opportunity to provide comment on the Bill ahead of the Stage 3 debate which is due to take place on 4 May 2023.

General comments

The Bill seeks to modernise Scots Law on moveable transactions and implements the Scottish Law Commission Report on Moveable Transactions (Scot Law Com No. 249)⁸ which was published in December 2017. The Bill aims to change the law concerning

¹ [Moveable Transactions \(Scotland\) Bill \(parliament.scot\)](https://www.parliament.scot/bills/2022/moveable-transactions-scotland-bill)

² [bci-moveable-transactions-scotland-bill-financial-memorandum-written-evidence.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/banking-company-and-insolvency-law/)

³ [bci-ip-ob-con-moveable-transactions-scotland-bill-delegated-powers-and-law-reform-committee.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/banking-company-and-insolvency-law/)
<https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/banking-company-and-insolvency-law/>

⁴ SP Paper 273

⁵ [Stage 1 Report on the Moveable Transactions \(Scotland\) Bill \(azureedge.net\)](https://www.azureedge.net/.../stage-1-report-on-the-moveable-transactions-scotland-bill)

⁶ [moveable-transactions-bill-stage-1-briefing.docx \(live.com\)](https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/banking-company-and-insolvency-law/)

⁷ [moveable-transactions-bill-stage-2-amendments.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/banking-company-and-insolvency-law/)

⁸ [Scottish Law Commission:: Moveable transactions \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/banking-company-and-insolvency-law/)

moveable property on assignment of claims (i.e. the transfer of a claim from one person to another), and pledges (i.e. a type of security).

We are pleased to support the modernisation of Scots law in relation to security over and assignment of moveable property. We consider reform in this area to be a priority.

We consider that the Bill removes a competitive disadvantage for Scottish businesses in comparison to their English counterparts. We have seen that parties have incurred difficulties in raising finance on moveable property in Scotland, and this creates difficulties for parties accessing finance in Scotland, which impacts negatively on the business sector.

We are aware that there are several categories of assets over which lenders are unwilling to provide access to finance to Scottish companies or in respect of Scottish assets. We have set out in detail elsewhere the benefits that we believe the Bill will provide to various asset classes and would be happy to reiterate the benefits to particular asset classes if at all helpful. In particular, though, we note that difficulties have also arisen where lenders would not let corporate groups incorporate Scottish companies because of difficulties taking securities over their shares, however similar concerns did not apply to English and Channel Islands companies.

We acknowledge that transactions still occur in respect of Scottish assets and to Scottish businesses, however we believe that the existing legal rules provide an extra level of cost and administration which makes it more expensive to operate within Scotland than it is within England, and we consider that the Bill is an important step to redressing this balance. It is, of course, possible that industries utilising such existing workarounds will continue to do so, rather than utilise the new registers created by the Bill. However, it is our view that corporate transactions will heavily utilise both new registers that will be created by the Bill.

We also consider that there is a difficulty with the unclear rule arising from case law which provides that you need actual rather than constructive delivery to constitute a pledge. This is a particular problem for small distillers where the spirit is held by a third-party custodian, as it means that such goods cannot be pledged without being physically delivered to the creditor. We are of the view that this rule would be effectively repealed by the Bill.

We have already provided a number of detailed comments on the Bill. We have, though, one key item of concern in respect of the Bill. We consider it to be vital that shares and other financial instruments can be made subject to a statutory pledge, either by direct incorporation or via interaction with the UK Government. It is obviously not for us to opine on the competence of the Scottish Parliament, and so we take no position on which of these routes should be followed.

The Bill comprises of 118 sections and is divided into three parts.

We have the following comments to put forward for consideration.

Specific comments on the Bill

Part 1

Part 1 of the Bill sets out the Assignment provisions. Chapter 1 concerns Assignment of claims (sections 1 to 9), Protection of Debtors (sections 10 to 14), Accessory security rights (section 15), Abolition of certain rules of law (section 16) and Saving (section 17). Chapter 2 concerns the Register of Assignations and Chapter 3 concerns the Miscellaneous and Interpretation of Part 1.

We note the provisions on Assignment, as set out in sections 1 to 9 and the creation of the Register of Assignations in section 18 and propose no amendments to any of these provisions at this stage.

We note that amendments 1 and 2 to be proposed at Stage 3 remove the amendment made at Stage 2 to section 1(2) that clarifies that an assignment document may cross refer to data not reproduced and not just to a document not reproduced. This Stage 2 amendment made it absolutely clear that uploading of data to an online system (such as details of book debts to be sold under an invoice discounting system that may be uploaded on a daily basis) would be effective under the new regime and that there would be no argument that the data as uploaded was not a “document”. We do not support amendments 1 and 2 as removal of this clarification regarding data means this doubt is not addressed and the use of technical innovations in Scotland may be restrained. Stage 3 Amendments 17 and 26 seek to reverse corresponding Stage 2 amendments relating to the statutory pledges regime in sections 43 and 56 and we do not support these amendments for the same reasons.

We further note that Amendments 4 and 6 to be proposed at Stage 3 remove the amendments made at Stage 2 to section 4(6)(b) (i) and (v) to ensure that an assignment will not be effective following a creditors voluntary arrangement or restructuring plan only if the claim assigned is part of that CVA or restructuring plan. It has been common, for example, for CVAs to relate only to leases under which a retailer holds property and it appears unfair if such a limited CVA were proposed that (as Amendment 4 requires) it would automatically terminate (for example) ongoing invoice discounting arrangements entered into with the retailer and when it would be possible if the retailer so chose to propose a CVA that also included those invoice discounting arrangements. Restructuring plans can be used in a similar restricted way as CVAs. We do not support amendments 4 and 6, and Stage 3 Amendments 21 and 23 seek to reverse corresponding Stage 2 amendments relating to the statutory pledges regime in section 47 and we do not support these amendments for the same reasons.

Part 2

Part 2 of the Bill relates to Security over Moveable Property. Chapter 1 concerns the Pledge (sections 40 to 41), Possessory pledge (section 42), Statutory pledge (sections 43 to 47), Property encumbered by statutory pledge: effect of transfer by provider (sections 49 to 53), Rights relating to matrimonial or family home where relevant to a statutory pledge (section 54), Assignment, amendment, restriction or extinction of statutory pledge (sections 55 to 57), Ranking of pledges etc. (sections 58 to 60), Enforcement of the pledge (sections 61 to 76), and Liability for loss suffered by virtue of enforcement (section 77), and Service of documents for purposes of Chapter 1 (section 78).

Chapter 2 concerns the Register of Statutory Pledges (section 79), Structure and contents of the register (sections 80 to 82), Registration Process (sections 83 to 88), Effective registration (sections 89 to 92), Duration (section 93), Corrections (sections 94 to 101), Searches and extracts (sections 102 to 104), Request for information (sections 105 to 106), Entitlement to compensation (sections 107 and 108), and rules (section 109).

Chapter 3 of Part 2 sets out the Miscellaneous and Interpretation of Part 2.

We note the inclusion of section 43A, regarding the competence of an individual acting as provider of a statutory pledge. In particular, we note that it will not be competent for an individual to be the provider of a statutory pledge, unless they are acting in the course of - their business; the activities of a charity of which the individual is a trustee; or the activities of an unincorporated association (other than a charity) of which the individual is a member. We are of the view that an individual trustee should be able to grant a statutory pledge over any trust property (not just over the property of a charitable trust), otherwise an individual trustee will be disadvantaged in comparison with a corporate trustee as regards the raising of finance.

We also note that for an individual providing a statutory pledge (e.g. in the course of their business as a sole trader), there is a £3000 threshold (to rise annually on the basis of the retail prices index (RPI)) for corporeal moveable property. Only assets exceeding that value can be a "permitted asset" and thus property that can be covered by a statutory pledge created by an individual. Such a threshold would be justifiable as a protection for someone granting a statutory pledge in their capacity as a consumer, but given that this will not be possible, the inclusion of the threshold for property is, in our view, not merited for individuals acting in other capacities. This is particularly so given the other protections that exist regarding individuals granting statutory pledges.

We also believe that it was not necessary at Stage 2 to replace s.64(2) so that a court order was introduced to enforce a statutory pledge against a sole trader, given that s.65(4) continues to require repossession and other protective actions to be taken by messengers-

at-arms or sheriff officers if the pledge provider does not consent at the enforcement stage or the court is not involved and that s.64(2) should accordingly be deleted.

As section 43A(4) – (b) stands the definition of ‘trustee’ is the same as the definition of ‘charity trustee’ in section 106 of the Charities and Trustee Investment (Scotland) Act 2005. We consider that there is the potential for possible confusion with the overlapping but legally different category of ‘trustee’. We believe that any confusion between ‘trustee’ and ‘charity trustee’ should be avoided.

We also note section 43(6) and are very happy with its inclusion. Given the addition of new section 43(4), though, section 43(6) will need to start with “For the purposes of subsections (2), (3) and (4)” to avoid contradiction. The same issue arises in respect of section 56(7), which will also need to refer to the newly introduced section 56(4A).

We also note that section 47(3)(a) relates to personal insolvency processes, and section 47(3)(b) relates to corporate insolvency processes. The process listed at section 47(3)(a)(vii) (Pt 26A restructuring plan under the Companies Act 2006) is a corporate insolvency process, and so should be moved to section 47(3)(b)(v).

We believe that it is crucial that the regime established by the Bill applies to shares, whether included in the Bill (should it be competent to do so) or through co-operation with the UK Government through the statutory mechanisms. The Scottish Government has indicated that it intends to pursue the latter. As we stated in oral evidence to the committee, this would be a satisfactory approach provided that these reforms can be implemented at the same stage as the provisions in the Bill itself.

Part 3

Part 3 of the Bill sets out the Miscellaneous and General provisions. We have no comment to make.

For further information, please contact:

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