



Consultation Response

Moveable Transactions (Scotland) Act 2023 – Consultation – Claims and Categories

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: Moveable Transactions (Scotland) Act 2023 – Claim and Property Categories Consultation.

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

Consultation Questions

Claim and Property Categories

Claim categories

- **Rents**
- **Royalties**
- **Invoices for goods or services**

Encumbered property categories

- **Motor Vehicles**
- **Plant Machinery**
- **Equipment**
- **Intangible property**
- **Financial property**
- **Stock**
- **Livestock**
- **All present and after-acquired property**

Q1. Are there any categories which are missing? If yes, please set out the categories.

We remain unconvinced by the need for claim and property categories. We think that there is a risk that such categories generate confusion in relation to the register. For reasons previously stated, those searching (or otherwise using) the register will always need to refer to the document. The more categories of property that exist, the greater the risks of seriously misleading inaccuracies arising under sections 28(5) and sections 94(4)). We think that presenting such categories at all therefore risks causing confusion, as users may not realise that they need to look beyond such categories.

This is further exacerbated by the lack of an easy form of taxonomy to adopt. The foregoing list looks like a reasonably good attempt to do so, however even then the categories are not necessarily exclusive. For example, payment for a serviced office could be seen as both a form of 'Rents' and 'Invoice for Goods or Services'. Similarly, the line between 'Plant & Machinery' and 'Equipment' is unclear, and 'Financial Property' itself is a subset of 'Intangible Property' (it should be noted that intangible property is an English law expression which is inapplicable under Scots law, but roughly equates to incorporeal moveable property under Scots law – so further clarity on this term is required).

To the extent that categories are required, we consider that they should go no further than:

1. For pledges:
 - a. Corporeal Moveable Property;
 - b. Intellectual Property (including an application for or licence over intellectual property); and
 - c. Shares and/or other Financial Instruments (depending on the precise wording agreed with the UK government to allow these assets to be included within the ambit of the reforms).
2. For statutory assignments:
 - a. Monetary Claims; and
 - b. Non-Monetary Claims.

Any subdivision of these risks uncertainty and undermining the strength and utility of the registers.

Q2. Are there any categories you consider unnecessary? If yes, please give your reasons.

Please see our response to Q1 above.

Q3. Are the descriptors used for any of the categories ambiguous or otherwise unclear? If yes please say in what way and how they might be improved.

Please see our response to Q1 above.

Q4. Do you consider that any of the descriptions require to be further defined? For example, would it be useful or beneficial to replace the over-arching category of ‘Royalties’ with specific examples such as ‘Trademarks’, ‘Patents’ or ‘Copyrights’ etc.

Please see our response to Q1 above – we think that any narrowing is unhelpful.

Q5. In other jurisdictions where it is relatively common to include an “all present and after-acquired property” they sometimes include a variation on that theme in terms of “all present and after-acquired property except...” or “all present and after-acquired property relating to...”. Would this be helpful? Please give your reasons.

We consider that being too precise here causes the same issues noted in Q1 above.

To mitigate this, we would recommend following an approach in the MR01 forms, and including the following questions with ‘Yes/No’ tick boxes:

1. Does the document purport to pledge/assign all assets of the grantor; and
2. Does the document apply to future assets.

Q6. One particular issue which has arisen is whether a distinction between, on the one hand, an assignation over the entire book debt of the assignor and on the other hand, an assignation of a specific set of invoices from named debtors of the assignor is required. Again, your views on the need for such a distinction are welcome.

As per above, we think that this type of distinction would be unhelpful and risks confusion.

Unique Numerical Identifiers

Q7. What are your views on the need to provide a unique numerical identifier (where relevant? It would helpful if you can give reasons for your response.

Given the ability to pledge and assign future assets, and assets that fall within a category, documents themselves will not inevitably contain all relevant unique numerical identifiers. Similarly, should such identifiers be included, then it does not inevitably mean that (a) the assets ever belonged to the granter, or (b) that if they did, any pledge/assignment remains currently valid.

We think that this combination of features makes use of unique numerical identifiers highly dangerous, as it risks creating two dangerous false impressions, that (a) should a search reveal such number, then it is definitively subject to valid assignment/pledge, and (b) if a search does not reveal such number, then the asset is definitively not subject to valid assignment/pledge. Neither of these is correct, and including any form of numerical identifier requirement risks creating both false impressions.

Q8. Are you aware of other types of property which would have a unique identification number?

Following the above, we would discourage use of unique identification numbers.

Q9. Do you have any comments about this proposed approach?

We strongly agree with this approach in respect of UK companies and registered granters, as legal names can change but such numbers cannot. Such numbers are therefore more important than names to be included.

We consider that it is worth extending obligations to ensure that such numbers are updated if changed in respect of pledges, as searchers and other users will retain interest in knowing who, exactly, the pledgor and pledgee are. We do not consider that such obligation should be extended to company name, given the related administration burdens. We consider that such updating obligation is of lesser importance for the register of assignments, which reflects individual specific transactions as at specific dates.

For further information, please contact:

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