

MOVEABLE TRANSACTIONS (SCOTLAND) BILL

AMENDMENTS TO BE MOVED AT STAGE 2

- Section 1, page 1, line 14 Add at end <including by making reference in the assignment document to another document, the terms of which are not reproduced, or to data not reproduced>
- Section 1, page 1, line 20 Leave out < Nothing in this Part applies to the assignment of a claim as part of a financial collateral arrangement>, insert <The provisions in this Part are without prejudice to the rules in respect of financial collateral arrangements>
- Section 4, page 3, line 35 Leave out <the assignor grants a trust deed for creditors or makes a composition or arrangement with creditors> and insert <the Accountant in Bankruptcy registers a Protected Trust Deed in relation to the assignor,>
- Section 4, page 4, line 7 After < assignor> insert <which includes the claim>
- Section 4, page, 4, line 15 Add at end <(v) an order under section 901F of the Companies Act 2006 sanctioning a compromise or arrangement entered into by the assignor comes into effect over all or part (being a part which includes the claim) of the property of the assignor>
- Section 8, page 7, line 8 After <is> insert < subject always to the terms of the determination of the method of service>
- Section 10, page 8, line 20 Leave out < (b) the application of section 8(9),
(c) the application of section 8(10).>
- Section 10, page 8, line 21 Add at end < (4) Where an assignment of a claim has been intimated in accordance with section 8, it will be presumed that the debtor is not in good faith in respect of payment to any previous holders of the claim unless the debtor is able to demonstrate otherwise.>
- Section 39, page 23, line 1 Add at end <or a trustee or agent of the assignee (where the context so requires),>

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Section 43, page 25, line 28	Add at end <(4) For the purposes of subsections (2) and (3), the ways in which the encumbered property or the secured obligation can be identified in the constitutive document include by making reference in the constitutive document to another document, the terms of which are not reproduced, or (in addition in the case of encumbered property) to data not reproduced.>
Section 47, page 27, line 15	Leave out <the provider grants a trust deed for creditors or makes a composition or arrangement with creditors> and insert <the Accountant in Bankruptcy registers a Protected Trust Deed in relation to the provider>
Section 47, page 27, line 22	Add at end<(vii) an order under section 901F of the Companies Act 2006 sanctioning a compromise or arrangement entered into by the provider comes into effect over all or part (being a part which includes the encumbered property) of the property of the provider>
Section 47, page 27, line 26	After < provider>insert <which includes the property>
Section 48, page 28, line 8	Leave out <£1000> and insert <£5,000>
Section 56, page 32, line 23	Add at end <(7) For the purposes of subsections (3) and (4), the ways in which property added can be identified in the amendment document include by making reference in the amendment document to another document, the terms of which are not reproduced, or to data not reproduced>
Section 76, page 43, line 10	Add at end insert <which ranks prior to the statutory pledge>
Section 111, page 61, line 25	After <representative> insert <trustee or agent>

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Section 1, page 1, line 14

Add at end <including by making reference in the assignment document to another document, the terms of which are not reproduced, or to data not reproduced>

Effect

This amendment expressly allows the assignment document to refer to the claim by reference to another document or data which is not reproduced in the assignment document itself.

Reason

A number of invoice discounting systems use online portal-based invoice discounting systems, and we need to ensure that they are able to utilise the register of assignments. Similarly, we want to avoid lengthy documents, including customer lists, needing to be uploaded to the register. We also consider that this approach is coherent with, and follows, the approach taken for conditions to assignment in section 2(4).

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Section 1, page 1, line 20

Leave out < Nothing in this Part applies to the assignment of a claim as part of a financial collateral arrangement>, insert <The provisions in this Part are without prejudice to the rules in respect of financial collateral arrangements>

Effect

This amendment deletes part of section 1 (5) by ensuring that Part 1 of the Bill operates without prejudice to the rules relating to financial collateral arrangements.

Reason

Section 1 deals with the assignment or transfer of claims. As the explanatory notes state at paragraph 11 “Subsection (5) provides that nothing in Part 1 applies to the assignment of a claim as part of a financial collateral arrangement within the meaning of the Financial Collateral Arrangements (No.2) Regulations 2003¹”. Financial Collateral Arrangements are defined as “a title transfer financial collateral arrangement or a security financial collateral arrangement, whether or not these are covered by a master agreement or general terms and conditions²”. Financial Collateral Arrangements are a form of security arrangement designed to simplify the process of obtaining financial collateral. Financial Collateral is also defined “as either cash or financial arrangements”³.

We believe that the current terms of section 1 (5) referring to the proposition that nothing in Part 1 applies to the assignment of a claim as part of a financial collateral arrangement lacks clarity. Instead, we consider that the provisions of Part 1 should be without prejudice to the rules for financial collateral arrangements.

¹ [The Financial Collateral Arrangements \(No.2\) Regulations 2003 \(legislation.gov.uk\)](http://legislation.gov.uk)

² Regulation 3 of the The Financial Collateral Arrangements (No.2) Regulations 2003

³ Regulation 3 of the The Financial Collateral Arrangements (No.2) Regulations 2003

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Section 4, page 3, line 35

Leave out <the assignor grants a trust deed for creditors or makes a composition or arrangement with creditors> and insert <the Accountant in Bankruptcy registers a Protected Trust Deed in relation to the assignor,>

Effect

This amendment replaces an existing ground on which an individual will be considered to be insolvent.

Reason

Section 4 of the Bill provides for the legal effect of an assignation document in the event of the assignor's insolvency.

Section 4 (6) provides the circumstances where an "assignor who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent".

Those circumstances are set out in section 4(6) (i) –(vi). As initially drafted, they included the assignor granting a trust deed for creditors or makes a composition or arrangement with creditors. We consider that these are too vague: a trust deed could include a privately agreed trust arrangement, and a particular specified statutory "Protected Trust Deed". We consider that only the latter should apply. In respect of compositions and arrangements with creditors, 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.

This amendment clarifies that where the Accountant in Bankruptcy registers such a Protected Trust Deed that is a basis for recognition of the assignor's insolvency and removes references to compositions (a historical technical term in Scotland of no continuing importance) and arrangements (a technical term in England but not Scotland).

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Section 4, page 4, line 7

After < assignor> insert <which includes the claim>

Effect

This amendment ensures that a Company Voluntary Arrangement (CVA) only constitutes the insolvency of an assignor for the purposes of the assignment provisions in the Bill if it affects the relevant claim in question.

Reason

This prevents irrelevant CVAs from affecting assignments, and reflects the position adopted in respect of administrative receivers set out in section 4(6)(b)(iii).

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Section 4, page, 4, line 15

Add at end <(v) an order under section 901F of the Companies Act 2006 sanctioning a compromise or arrangement entered into by the assignor comes into effect in respect of all or part (being a part which includes the claim) of the property of the assignor>

Effect

This amendment ensures that a restructuring plan which affects an assigned claim under Part 26A of the Companies Act 2006 constitutes the insolvency of an assignor.

Reason

Part 26A of the Companies Act 2006 deals with arrangements and reconstructions of companies in financial difficulty. Section 901A sets out the provisions for Part 26A to apply to a company. This section applies where a company is encountering financial difficulties that may affect the company's ability to carry on business as a going concern, and that a compromise or arrangement is proposed between the company and its creditors or shareholders with a view to eliminate, reduce, prevent, or mitigate the financial difficulties which the company is experiencing. In other contexts, for example in section 233B of the Insolvency Act 1986, Part 26A arrangements are recognised as being relevant insolvency procedures. The Bill makes no reference to such arrangements under the Companies Act 2006 and we consider that it should do so, to ensure consistency with wider insolvency law. In line with the approach taken in respect of administrative receiverships, this should only apply to the extent that it affects the claim.

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Section 8, page 7, line 8

After <is> insert < subject always to the terms of the determination of the method of service>

Effect

This amendment ensures that the timescales for valid intimation will also be subject to a determination as to the method of service.

Reason

The Law Society of Scotland notes that the wording in the Bill as introduced that some of the detail in respect of intimation is slightly too prescriptive. More aspects of intimation, including how long after serving a notice should receipt of such notice be deemed, should also be subject to a determination as to the method of service.

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Section 10, page 8, line 20

Leave out < (b) the application of section 8(9),
(c) the application of section 8(10).>

Effect

This amendment deletes section 10 (3) (b) and (c).

Reason

Section 10 (1) states that a debtor will satisfy the debt if the debtor in good faith paid the last person who they knew held the debt. Section 10 (3) includes provisions that a debtor will not be considered to have performed other than in good faith just because the debtor is deemed to have received notice of an assignation of the debt.

We consider that if the assignee can demonstrate that the processes for intimation have been complied with, then the onus should be on the debtor to demonstrate that they were in good faith.

MOVEABLE TRANSACTIONS (SCOTLAND) BILL
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Section 10, page 8, line 21

Add at end < (4) Where an assignation of a claim has been intimated in accordance with section 8, it will be presumed that the debtor is not in good faith in respect of payment to any previous holders of the claim unless the debtor is able to demonstrate otherwise.>

Effect

The Bill states that a debtor will satisfy the debt if they, in good faith, pay the last person who they knew held the debt. The Bill currently states that a debtor will not be considered to not be in good faith just because they have received an intimation of an assignation of the debt. This amendment removes that provision and should be read in conjunction with the previous amendment.

Reason

We consider that if the assignee can demonstrate that the processes for intimation have been complied with, then the onus should be on the debtor to demonstrate that they were in good faith.

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Section 39, page 23, line 1

Add at end <or a trustee or agent of the assignee
(where the context so requires)>

Effect

This amendment changes the definition of assignee by including trustees or agents of the assignee.

Reason

We take the view that simply defining the assignee as “the person to whom a claim is assigned” lacks clarity. Trustees and agents of the assignee can act on the assignee’s behalf. It is possible for creditors to hold claims/pledges as trustees and/or agents for themselves and other creditors. This amendment makes clear that those acting in the place of assignees are included in the definition of assignees.

MOVEABLE TRANSACTIONS (SCOTLAND) BILL
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Section 43, page 25, line 28

Add at end <(4) For the purposes of subsections (2) and (3), the ways in which the encumbered property or the secured obligation can be identified in the constitutive document include by making reference in the constitutive document to another document, the terms of which are not reproduced, or (in addition in the case of encumbered property) to data not reproduced.>

Effect

This amendment expressly allows the constitutive document in a pledge to refer to the property pledged by reference to another document or data which is not reproduced in the constitutive document itself.

Reason

We consider that a number of pledges will be composite pledges referring to a large number of the debtor's assets, and that having to upload such asset lists may be prejudicial to debtors.

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Section 47, page 27, line 15

Leave out <the provider grants a trust deed for creditors or makes a composition or arrangement with creditors>, and insert < the Accountant in Bankruptcy registers a Protected Trust Deed in relation to the provider>

Effect

This amendment provides replaces an existing ground on which a provider who is an individual will be considered to be insolvent.

Reason

Section 47 of the Bill provides for the legal effect of a creation of a pledge in the event of the provider's insolvency.

Section 47 (3) provides the circumstances where a "provider who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent".

Those circumstances are set out in section 47(3) (i) –(vi). As initially drafted, they included the provider granting a trust deed for creditors or makes a composition or arrangement with creditors. We consider that these are too vague: a trust deed could include a privately agreed trust arrangement, and also a particular specified statutory "Protected Trust Deed". We consider that only the latter should apply. In respect of compositions and arrangements with creditors, 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.

This amendment clarifies that where the Accountant in Bankruptcy registers such a Protected Trust Deed that is a basis for recognition of the provider's insolvency, and removes references to compositions (a historical technical term in Scotland of no continuing importance) and arrangements (a technical term in England but not Scotland).

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Section 47, page 27, line 22

Add at end <(vii) an order under section 901F of the Companies Act 2006 sanctioning a compromise or arrangement entered into by the provider comes into effect over all or part (being a part which includes the encumbered property) of the property of the provider>

Effect

This amendment ensures that a restructuring plan under Part 26A of the Companies Act 2006 which affects the encumbered property constitutes the insolvency of a provider.

Reason

Part 26A of the Companies Act 2006 deals with arrangements and reconstructions of companies in financial difficulty. Section 901A sets out the provisions for Part 26A to apply to a company. This section applies where a company is encountering financial difficulties that may affect the company's ability to carry on business as a going concern, and that a compromise or arrangement is proposed between the company and its creditors or shareholders with a view to eliminate, reduce, prevent, or mitigate the financial difficulties which the company is experiencing. In other contexts, for example in section 233B of the Insolvency Act 1986, Part 26A arrangements are recognised as being relevant insolvency procedures. The Bill makes no reference to such arrangements under the Companies Act 2006 and we consider that it should do so, to ensure consistency with wider insolvency law. In line with the approach taken in respect of administrative receiverships, this should only apply to the extent that it affects the encumbered property.

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Section 47, page 27, line 26

After < provider> insert <which includes the
property>

Effect

This amendment ensures that a Company Voluntary Arrangement (CVA) only constitutes the insolvency of a provider for the purposes of the pledge provisions in the Bill if it affects the relevant encumbered property in question.

Reason

This prevents irrelevant CVAs from affecting statutory pledges, and reflects the position adopted in respect of administrative receivers set out in section 47(3)(b)(iii).

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Section 48, page 28, line 8

Leave out <£1000> and insert <£5,000>

Effect

This amendment protects the interests of consumers, as household items that are reasonably required by consumers are excluded from being subject to a statutory pledge.

Reason

We note that to support giving consumers the ability to grant a statutory pledge, personal and household items that are reasonably required by consumers should be excluded from being the subject of a statutory pledge. We consider that the limit on the value of the goods that can be used for a statutory pledge should be increased from £1000 the current figure in section 48 to £5000, as it affords consumer(s) protection as it is less likely that reasonably required personal and household consumer goods could be made subject to a pledge.

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Section 56, page 32, line 23

Add at end <(7) For the purposes of subsections (3) and (4), the ways in which property added can be identified in the amendment document include by making reference in the amendment document to another document, the terms of which are not reproduced, or to data not reproduced>

Effect

This amendment expressly allows for an amendment document in respect of a pledge to refer to the property pledged by reference to another document or data which is not reproduced in the constitutive document itself.

Reason

We consider that a number of pledges will be composite pledges referring to a large number of the debtor's assets, and that having to upload such asset lists may be prejudicial to debtors. This could also apply in respect of an amendment of the pledge.

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Section 76, page 43, line 10

Add at end insert <which ranks prior to the statutory pledge>

Effect

This amendment clarifies that only the execution of prior ranking diligence will extinguish a statutory pledge.

Reason

We consider that only the execution of prior-ranking diligence should extinguish a statutory pledge. Lower-ranking diligence will be subject to a statutory pledge and so the execution of such diligence should not extinguish that higher-ranking statutory pledge. The alternative is that a prior-ranking pledge could be extinguished by subsequently granted diligence.

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Section 111, page 61, line 25

After <representative> insert <trustee or agent>

Effect

This amendment is to extend the interpretation of a “secured creditor”.

Reason

We note that the bill does not include a “trustee or agent” within the interpretation of a “secured creditor”. This amendment provides a fuller definition of the parties defined as a secured creditor. In corporate finance transactions it is likely that a club, or syndicate, of lenders jointly lend to a corporate debtor. Here, one will take security in their own name as “Security Agent” or “Security Trustee”, to hold the security for the benefit of all lenders. Thus, we could have HSBC, Bank of Scotland, and Royal Bank of Scotland jointly agreeing to advance a loan to ABC Limited, in various proportions, with one of them (say HSBC) holding all security granted in respect of the aggregate amount of the loan owed to all lenders. Whilst HSBC would be the beneficiary of the security, it would be misleading to think of them as the sole beneficiary of the security as they are holding the security as trustee or agent for all lenders.