

REPORT ON MOVEABLE TRANSACTIONS SUMMARY

Introduction

1. The Scottish Law Commission has published recommendations for the reform of the law of moveable transactions. The recommendations are set out in its Report on Moveable Transactions (Scot Law Com No 249, 2017). The Report is a substantial one and consists of three volumes:

- Volume 1: Assignment of Claims;
- Volume 2: Security over Moveable Property; and
- Volume 3: Draft Moveable Transactions (Scotland) Bill.

2. The draft Bill extends to 124 sections.

What is moveable transactions law?

3. Moveable transactions law is vital to the Scottish economy. It enables both businesses and individuals to use their assets to raise finance by selling debts or by granting security over moveable property.

4. For example, a business may wish to acquire funding by transferring to a financial institution its claims to payment of its customer invoices. This would be done by means of an assignment. Alternatively, it may want to retain assets such as vehicles, equipment and intellectual property, but use these as collateral to obtain loan finance. Individuals might wish to use art work or vehicles to secure finance.

5. The existing Scottish law in this area is badly outdated, mainly non-statutory and unclear in some important respects (parts of it have little changed from Roman law and the principal relevant statute on assignment dates from 1862). It is also unduly restrictive and unfit to meet the needs of modern Scottish commerce.

6. The Report considers three main areas of moveable transactions law:

- (i) assignment of claims;
- (ii) security over corporeal moveable property; and
- (iii) security over incorporeal moveable property.

7. Area (i) involves the assignment (transfer) of “claims” ie a right to the performance of an obligation. This is typically the right to be paid money, such as under an invoice. (In everyday language the word “claim” is typically used with reference to compensation and insurance claims, but its legal meaning is much broader). Such rights can be sold, thus helping a business’s cashflow. Another common transaction is landlords assigning the rents due by tenants in order to obtain loan finance.

8. Area (ii) involves security over corporeal (tangible) assets, such as vehicles, equipment, whisky and livestock. Such assets can be used to secure loans at less cost because there is less risk to the lender as the asset can be sold if the loan is not repaid.

9. Area (iii) involves security over incorporeal (intangible) moveable assets and in particular financial instruments and intellectual property. The latter includes copyright, trade marks, design rights and patents. Scotland is home to many intellectual property-rich enterprises in the food and drink, oil and gas, renewable technologies, IT, life science and creative sectors. Intellectual property is an increasingly important asset worldwide in relation to obtaining loan finance.

Problems with the current law

10. The main problems are:

- If a business wishes to assign its unpaid invoices to a financial institution in order to raise finance, there has to be written intimation (notification) of the assignation to every invoiced customer. This is cumbersome, expensive and often impractical. In particular it cannot be done in respect of future claims, such as invoices due by future customers, where the debtor cannot yet be identified.
- Some Scottish businesses write their contracts under English law in an effort to avoid the need for intimation. The Commission understands that because of doubts about the ability to assign claims under future invoices, invoice financiers can charge more for their services in Scotland than in England and Wales.
- The inadequate nature of the law of assignation causes difficulties in other transactions, such as project finance, assignation of rents and securitisations.
- The only way to use incorporeal moveable property for security (other than by means of a floating charge) is to transfer it into the name of the creditor. Unlike under English law, there is no such thing as an equitable fixed charge or equitable mortgage. For example, intellectual property must be transferred to the lender and complicated licence-back arrangements put in place. Shares in a company similarly have to be transferred to the lender and the lender registered as shareholder. Again, contractual arrangements have to be used to deal with the consequences of transfer, such as entitlement to dividends and voting rights.
- Effectively the only “fixed” security (rather than a floating charge) over corporeal moveables is pledge. In a consumer context this is known as “pawn”. It requires delivery of the encumbered property to the creditor. This is commercially impractical, as businesses require possession of their assets to trade. In Scotland there is no equivalent to the bills of sale legislation in England and Wales, and no such thing as a chattel (goods) mortgage.

11. Floating charges are only available to corporate debtors. Sole traders and partnerships cannot grant them. They give a relatively low ranking in insolvency and the Commission understands that therefore lenders charge more than they would if they could take a “fixed” security.

Proposed scheme

12. The Report recommends a new statutory scheme for moveable transactions law.

13. Volume 1 of the Report makes recommendations in relation to the law of assignation of claims. In outline:

- Registration would be an alternative to intimation for the assignment of a claim.
- The option of registration would facilitate the assignment of future claims.
- Assignations could be registered in a new register (“Register of Assignations”). This would be electronic and would be administered by the Registers of Scotland.
- The Register of Assignations would be searchable electronically, primarily by reference to the assignor’s details.
- The rules on intimation of assignments would also be brought up-to-date and in particular electronic intimation would be facilitated.
- It would be made clear that assignments can be subject to a condition which must be satisfied before the assignment takes effect.
- It would also be made clear that the intimation of an assignment can instruct the debtor to continue to perform to the assignor.
- Debtors who perform to the assignor in good faith, because they are unaware of the assignment, would be protected.
- As under the current law the parties to a claim could provide for it to be unassignable.
- There would be special rules for assignments of financial collateral in order to comply with the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226).
- International private law and jurisdiction questions would be left to the general law.

14. Volume 2 of the Report makes recommendations in relation to the law of security over corporeal and incorporeal moveable property. In outline:

- A new “fixed” security called a “statutory pledge” would be introduced in respect of corporeal moveable property, such as vehicles, equipment, whisky and livestock. The property would not require to be delivered to the creditor.
- It would not be possible to grant a statutory pledge over aircraft or ships because the law already provides for special types of security right over these assets.
- The statutory pledge would also be available in respect of certain types of incorporeal moveable property, namely intellectual property and financial instruments. The property would not require to be transferred to the creditor.
- Registration would be required for a statutory pledge to be created.
- While primarily aimed at businesses, the statutory pledge could be used by consumers to raise finance against assets they already own (above a level to be prescribed by Scottish Ministers) where hire-purchase is not available.
- The rules on possessory pledge would also be clarified. In particular it would be made clear that this type of pledge could be created by constructive delivery ie by intimation to a third party holder, such as a warehouse.

- There would be a generally uniform enforcement regime for possessory and statutory pledges, with a range of remedies including sale, lease and licensing. Enforcement against a private individual would require a court order.
- A new register (“Register of Statutory Pledges”) would be established in which statutory pledges would be registered. Like the Register of Assignations, this would be electronic and run by Registers of Scotland.
- It would be possible to update the Register of Statutory Pledges to take account of amendments, transfers and discharges of statutory pledges.
- The Register of Statutory Pledges would be searchable electronically, primarily by reference to the details of the party that provided the security. But it would also be possible to search by reference to the unique numbers of certain assets, notably motor vehicles.
- Floating charges would be retained.
- It would no longer be possible to create agricultural charges, a little-used security under the current law, but floating charges could be used instead.
- There would be special rules for statutory pledges of financial instruments in order to comply with the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226).
- International private law and jurisdiction questions would be left to the general law.