

Moveable Transactions (Scotland) Bill

I refer to your [letter to Lady Paton dated 29 September 2022](#) following the evidence session of 27 September. This asked me to explain further my comment that I had “my own thoughts at a small level, but I do not think that we have time to go into those at the moment”. I have agreed with Lady Paton that I would write to you directly.

General

I know that at stage 1 the committee’s main focus is on the general principles of the Bill. The Bill team confirmed to me that technical amendments are normally made at stages 2 and 3. I see that some of the committee’s consultees have made technical suggestions. In particular I notice Dr Hamish Patrick’s lengthy submission. Due to other pressures, I have not had time to consider this systematically. If, however, the committee would like my assistance on any of the specific technical suggestions made by other consultees I would be happy to try and help.

Electronic signing: s 116

Since the Commission’s [Report on Moveable Transactions](#) was published in 2017, electronic documents have become more and more common, accelerated of course by the pandemic. Under the Bill electronic signing is tied to the meaning of this given in the Requirements of Writing (Scotland) Act 1995. This requires a high-level electronic signature which is effectively restricted to signing by solicitors. The form of electronic signature required under the 1995 Act can be changed by regulations to take account of technological developments. The Report on Moveable Transactions para 4.23 states:

“We consider that electronic signature of assignments should be subject to [the 1995 Act] provisions, but that the Scottish Ministers should have the power to vary this requirement, if, for example, they consider in the interest of facilitating commerce that a less strict approach is justified. In the interests of further flexibility we think that they should have power to amend the meaning of “execution” in relation to a traditional document”.

The result is s 116(3) of the Bill. Perhaps that is sufficient and no amendment is needed. But the general policy of the appropriate level of sophistication of electronic signature to meet today’s needs should be considered.

Financial collateral: ss 1(5) and 38

Financial collateral is a hugely difficult legal area. As a result of the Scottish Government’s conclusion that financial collateral and financial instruments are reserved to the UK Parliament, the provisions on these in the Commission’s draft Bill do not appear in the Bill.

The approach to the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226) is to disapply the Bill’s provisions: see s 1(5). As a result of this, the Transmission of Moveable Property (Scotland) Act 1862 is not fully repealed: s 38. It is retained for financial collateral arrangements. See the explanatory notes. In my

view it is almost certain that the cumbersome intimation rules in the 1862 Act do not comply with the 2003 Regulations whose purpose is to reduce formalities.

It would therefore be better to repeal the 1862 Act completely and to state that the provisions in Part 1 of the Bill are without prejudice to the 2003 Regulations. There is a precedent for this in s 17 of the Bill in relation to the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (SI 2015/912).

Secured obligation: s 41

The definition of the obligation which can be secured by a statutory pledge is a wide one. Following completion of the Report on Moveable Transactions, my final work at the Commission was on the [Discussion Paper on Heritable Securities: Pre-default \(Scot Law Com DP No 168, 2019\)](#). Chapter 4 of that Discussion Paper looks in considerable detail at the types of obligation which can be secured by a standard security. This was prompted by the fact that the existing legislation – the Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(c) – explicitly permits an obligation *ad factum praestandum* – that is to say a non-monetary obligation binding someone to perform a certain act – to be secured. There are various difficulties with this and the Discussion Paper considers reform.

My view now is that if a security is stated to secure a non-monetary obligation then the legislation should make it clear that what is actually secured is damages for breach of that obligation. The Commission, however, with my successor Professor Frankie McCarthy as lead Commissioner, continues to work on the project and is not due to report until 2025.

Probably therefore s 41 should be left as it is. I would like to put down a marker that as and when there is a Heritable Securities Bill it should amend the moveable transactions legislation so that the two are consistent.

Meaning of “invalid”: ss 25, 27, 89, 90

The word “invalid” appears in these provisions in relation to documents. The provisions were influenced by the use of the word “valid” in the Land Registration etc (Scotland) Act 2012 in particular s 23(1)(b), 25(1)(a), 26(1)(a) and 50(2). The word “valid” is defined in s 113(2) of the 2012 Act. Consideration might be given to defining “invalid”.

Professor Andrew Steven