Association of Business Recovery Professionals

3rd Floor (East), Clerkenwell House, 67 Clerkenwell Road, London, EC1R 5BL

T: 020 7566 4200
F: 020 7566 4224

E: association@r3.org.uk
www.r3.org.uk

Scottish Government Justice Directorate
Civil Law and Legal System Division

Online submission and email - [redacted]

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Dear Sir / Madam,

MOVEABLE TRANSACTIONS (SCOTLAND) BILL
RESPONSE FROM INSOLVENCY AND RESTRUCTURING TRADE BODY R3

1. INTRODUCTION

1.1 R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices.

1.2 The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of restructuring and insolvencies and their impact on the UK economy and various stakeholders.

1.3 This response has been prepared by R3's Scottish Technical Committee ('STC') who deals with issues of general importance and significance to the profession in Scotland, keeping under review all UK and EU legislation, prospective and other matters relating to insolvency law and practice in Scotland specifically. The Committee is multi-disciplinary and has a good spread of representation, including practising insolvency practitioners, lawyers, solicitors, academics and others working within the insolvency profession.

2. GENERAL COMMENTS

2.1 The committee welcomes the opportunity to respond to the Moveable Transactions (Scotland) Bill having offered comments in 2011 on the earlier discussion paper and in 2017 on the Scottish Law Commission consultation on the draft Moveable Transactions (Scotland) Bill.

2.2 Our comments are made with a view to ensuring the legislation is workable in practice from an insolvency law and insolvency practitioner's perspective and in particular that there is clarity when pledges and assignations are made so that they are not open to challenge. If they are challengeable in terms of insolvency legislation and law, we have considered whether this should be reflected in the Bill.

3. VIEWS OF THE COMMITTEE

ASSIGNATION OF CLAIMS: INSOLVENCY

3.1 Section 4(6)(b)(i)

3.1.1 Should reference here be to section 4A of Part 1 of the Insolvency Act 1986 (the "1986 Act")?

3.1.2 Should restructuring plans under Part 26A of the Companies Act 2006 be included in the list of corporate insolvency procedures listed in ss 4(6)(b)?

3.2 Section 4(2)

3.2.1 It is unclear how this section relates to the provisions contained in the 1986 Act surrounding a right to assign by the insolvency practitioner (section 246ZD of the 1986 Act). We suggest it would be helpful to include a qualifying provision to note that nothing in Section 4 prohibits or affects the rights of an office holder under existing legislation in whom estate assets of the assignor are vested or who has power to act as agent of the insolvent assignor, from effecting any assignment of the assignor's claims.

3.2.2 Consideration may also wish to be given to a timescale linked to the expiry of the 4 year period of acquirenda, in line with non-vested contingent assets re-vesting in the debtor.

3.3 Section 4(4) and4(5)

3.3.1 These sections are silent on the application to limited companies.

3.3.2 It is not clear in any event why, as a matter of law, the debtor's discharge should render the assignation ineffective.

CLAIM IN RESPECT OF WAGES OR SALARY

3.4 Section 7(2)(v)

3.4.1 Should "any other emolument" be moved and added as 7(2)(d), rather than forming part of the sub-list of 7(2)(a)?

INTIMATION OF THE ASSIGNATION OF A CLAIM

3.5 Section 8(1)

3.5.1 Should the methods by which the debtor may acknowledge the claim is assigned be defined?

3.5.2 Are judicial proceedings to be limited to proceedings in Court, or should this be widened to encompass other forums of dispute resolutions such as tribunals, arbitrations and adjudications?

3.6 Section 8(2)

3.6.1 The proposed legislation states that where there are co-debtors, intimation to any one or more of them is for the purposes of s.3(2)(b)(i) intimation to them all. Although we appreciate that this mirrors existing provisions, we ask whether given that corporate structures can be complicated is it reasonable to expect intimation made to a single co-debtor as being made to all potential co-debtors? Could this give rise to potential issues?

3.7 Section 8(3)

3.7.1 Should the legislation set out with greater specificity the core details that should be included of the claim as signed?

3.7.2 There seems to be some inconsistency between sections 8(3)(a)(ii) , 8(3)(b) and 8(4). It seems that section 8(3)(b) requires that a notice (which must contain the details set out in section 8(3)(a)) must be in writing and contained within one or more documents, but section 8(4) provides that the information in section 8(3)(a) can be satisfied by the information being provided on an electronic website or portal. It is understood from the Explanatory Notes that "document" is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and would include e-mails and attachments to emails. However, would it clarify matters in section 8(3)(b) more if the latter was expanded so as to explain that writing and documents, includes writing by electronic means and soft copies?

3.8 Section 8(11)

3.8.1 Use of the term "principal office" would benefit from definition, it may be clearer simply to use the term "registered office".

WARRANDICE IMPLIED IN THE ASSIGNATION OF A CLAIM

3.9 Section 9

3.9.1 It is generally impracticable for an insolvency practitioner to provide any form of guarantee or warrandice to a counter party when entering into a transaction with them and will require an express exclusion of warrandice or any form of title guarantee. Section 10 imposes statutory warrandice. An exception for assignations by insolvency practitioners (whether for themselves or as agents of the assignor) should be considered.

PROTECTION OF DEBTOR WHO PERFORMS IN GOOD FAITH

3.10 Section 10

3.10.1 The proviso in s10(1) suggests that the "good faith" protection applies "after a claim is transferred": a claim is transferred in terms of s3(2)(b)(i) when intimation is effected under s8(1), which is effected "when served", which under s8(9) and (10) seems to be the point at which the service of the intimation is treated as having been received/effected. Therefore the point of deemed receipt of the intimation is "after a claim is transferred", leaving the potential confusion as to what s10(3)(b) and (c) mean. Any financier/assignee would not accept the notion that once actual intimation to a debtor is given (as opposed to registration without actual intimation), the debtor can nevertheless pay the assignor and claim good faith in defence notwithstanding compliance with the statutory prescribed intimation and that being effective. If a claim is transferred in terms of section 3(2)(b)(i) and section 8(9) and (10) then the debtor has actual intimation (in financier terms, this is a disclosed invoice discounting transaction) the debtor should not then be able to get a good receipt from the assignor and should not be able to claim "good faith" as a defence.

FURTHER PROVISION AS TO PROTECTION OF DEBTOR

3.11 Section 11

3.11.1 We wonder whether an insolvency practitioner's right to assign a right of action per 246ZD of the 1986 Act is compromised in any way by section 11? Is a debtor granting an assignation, subsequently challenged in terms of insolvency provisions, protected by this section, notwithstanding the statutory rights of the IP to challenge?

PERFORMANCE IN GOOD FAITH WHERE CLAIM ASSIGNED CANNOT BE TRANSFERRED BY INTIMATION

3.12 Section 12(3)

3.12.1 Section 12(3) provides that a debtor or co-debtor is not to be taken to perform in good faith where they know that (a) the assignation document has not been registered and (b) that transfer of the claim requires registration. The requirements and section 12(3)(b) would seem to be very difficult to prove in most cases. It is not clear why its addition is necessary. Greater certainty in application of the legislation may be achieved if the debtor is not to be taken to perform in good faith in circumstances where they simply know the assignation document has not been registered.

THE ASSIGNATION RECORD

3.13 Section 20(1)(f)

3.13.1 On the basis that companies' employees may leave, it may be helpful if the legislation provides that any email address be one designated specifically for the receipt of requests for information, so that it will not be affected by a change in personnel and will therefore limit the need to update the register as and when there is such a change in personnel.

APPLICTION FOR REGISTRATION OF ASSIGNATION

3.14 Section 22

3.14.1 Section 22(1) states an application for registration of an assignation may be made to the Keeper by the assignee. Does this imply an application may also be made by the assignor? For transparency and for confirmation of an assignation we would suggest that this should be the case.

3.14.2 Regarding the Registers (assignation and pledge), it is unclear whether in making an application for registration, an insolvency practitioner would be registering as an individual in a personal capacity or as the Office Holder on behalf of a company. We do not have sight of the RoA Rules and it may be that clarity has been provided in the RoA Rules.

3.14.3 At section 22(4), is it intended that the Keeper will provide detail as to why the application is rejected and the process should the applicant wish to re-apply or correct an error?

VERIFICATION STATEMENT

3.15 Section 24

3.15.1 At Section 24(1), is it the case that if no email address is provided then the Keeper will not verify the registration to the assignor and/or assignee? If so, will this be made clear during the application process?

EFFECTIVE REGISTRATION OF ASSIGNATION DOCUMENTS

3.16 Section 25

3.16.1 Why is the phrase "seriously misleading" being used, rather than simply "misleading"? Is it the case that there are instances where you envisage an assignation document may be misleading and the registration still effective?

CORRECTION OF ASSIGNAMTIONS RECORD

3.17 Section 27(3)

3.17.1 Should this set out the definition of "manifest inaccuracy" rather than the definition of "inaccuracy"?

PROCEEDINGS INVOLVING THE ACCURACY OF THE ASSIGNATIONS RECORD

3.18 Section 29

3.18.1 Should this section provide that the Keeper should be given notice of any civil proceedings in accordance with any relevant rules of court or tribunal?

EXTRACTS AND THEIR EVIDENTIAL STATUS

3.19 Section 33(4)

3.19.1 This section would benefit from an explanation as to what is meant by "traditional document".

LIABILITY OF KEEPER

3.20 Section 35(3)

3.20.1 There is a reference here to the Keeper having been "misled", should this be seriously misled? Or does this indicate a different test between this section and section 25?

CREATION OF STATUTORY PLEDGE BY REGISTRATION: GENERAL

3.21 Section 45(2)(a)

3.21.1 Is the requirement here that the property is owned by the provider. If so, it may avoid any unnecessary confusion by specifying this.

CREATION OF STATUTORY PLEDGE: INSOLVENCY

3.22 Section 47(3)(b)(i)

3.22.1 Should reference here be to Section 4A of Part 1 of the Insolvency Act 1986?

3.22.2 Should restructuring plans under Part 26A of the Companies Act 2006 be included in the list of corporate insolvency procedures listed in ss 47(3)(b)?

PROVIDERS WHO ARE INDIVIDUALS

3.23 Section 48

3.23.1 Does an office holder act in a personal capacity or on behalf of an "individual"?

3.23.2 Do you consider that this section provides sufficient restrictions as regards the ability of an individual to grant a pledge, in order to achieve adequate safeguards for individuals?

ACQUISITION IN GOOD FAITH FROM SELLER ACTING IN ORDINARY COURSE OF BUSINESS

3.24 Section 51(2)

3.24.1 For corporate borrowers at least, the registration particulars which will require to identify the moveables which are the subject of the statutory pledge, should be effective. The stated objective of enabling businesses to access finance more easily in respect of moveable property, is set out with comparisons to English law which is essentially the concept of a fixed charge on specifically identifiable moveables (e.g. a patent, a design right, or a piece of plant or machinery), and once registered the financier knows that this security and the specifically identifiable moveable is registered. The terms prohibit dealing without consent, dealings are not in the ordinary course of business, and that by registration a buyer will take subject to the security. If the subject matter of the security is free to be dealt with in the ordinary course of business, it should not be subject to a security which ranks as fixed and is really a matter for floating charge. Once a debtor has agreed to secure specified machinery by fixed ranking security (here a statutory pledge) and registered it as such, then it should not be possible to subvert that security by purporting to sell without notice or consent in the ordinary course.

3.24.2 Financiers may find the structure of this provision rendering any registration system as largely ineffectual to protect their interests and security, and that detailed provisions in lending documentation will still be required to protect the lender, which may negate any cost efficiencies for the lender and borrower, thereby defeating the purposes of the proposed legislation.

RESTRICTION OR DISCHARGE OF STATUTORY PLEDGE

3.25 Section 57

3.25.1 This provides that a statutory pledge may be restricted or discharged by means of a written statement by the secured creditor. This section may benefit from some more particularity as to the form of that written statement and the mechanics by which it is to be brought to the attention of other relevant parties.

RANKING

3.26 Section 58

3.26.1 We would suggest that from an IP and general public perspective for purposes of transparency, it would be preferable for an agreement under subsection (6) to be registrable.

AMENDMENT OF COMPANIES ACT 1985 AND OF INSOLVENCY ACT 1986

3.27 Section 59

3.27.1 Under this section a statutory pledge becomes a fixed charge. It is clear that a statutory pledge granted before a floating charge is granted, ranks above a floating charge. The draft Bill is silent on pledges granted after the creation of a floating charge. Is there sufficient clarity on ranking in that situation, and are you satisfied that the terms of any floating charge would be sufficiently robust to deal with that situation?

ENFORCEMENT OF PLEDGE GENERAL

3.28 Section 62

3.28.1 We query the appropriateness of placing a legislative restriction on secured creditors from enforcing security with the introduction of the requirement to conform with "reasonable standards of commercial practice". There will be Banking Code of Conduct, Treat Your Customers Fairly, regimes which apply, but the insertion into statute of this sort of undefined concept is a rogue's charter to resist and challenge as invalid any enforcement on the allegation of a failure to follow an unspecified standard of practice. Enforcement is most often in circumstances where the debtor would prefer enforcement not to take place; they are most likely to have the subjective view that the act of enforcement was not reasonable or unfair. For the non-institutional holder of security, must they educate themselves as to what banks and commercial institutions standards of practice are? We recommend that this provision in particular should be removed entirely.

APPROPRIATION WITH PRIOR AGREEMENT

3.29 Section 72

3.29.1 At section 72(4) should the term "reasonable market price" as opposed to simply "market price" be used, so as to ensure consistency with section 72(3)?

APPLICATION OF PROCEEDS ARISING FORM ENFORCEMENT OF PLEDGE

3.30 Section 75

3.30.1 These provisions do not appear to recognise that in certain situations an IP can reduce diligence by statute. Has consideration been given to that statutory challenge?

THE STATUTORY PLEDGES REGISTER

3.31 Section 81(f)

3.31.1 On the basis that companies' employees may leave, it may be helpful if the legislation provides that any email address be one designated specifically for the receipt of requests for information, so that it will not be affected by a change in personnel and will therefore limit the need to update the register as and when there is such a change in personnel.

APPLICATION FOR REGISTRATION OF A STATUTORY PLEDGE

3.32 Section 84(3)

3.32.1 Where the application is rejected, will the Keeper explain why and how the applicant may correct an error or reapply?

APLICATION FOR REGISTRATION OF AN AMENDMENT

3.33 Section 86(3)

3.33.1 Where the application is rejected, will the Keeper explain why and how the applicant may correct an error or reapply?

SERIOUSLY MISLEADING INACCURACIES IN THE STATUTORY PLEDGES REGISTER

3.34 Section 92

3.34.1 What is the purpose of the addition of the word "seriously", in the phrase "seriously misleading"? Is there a clear distinction that can be drawn between misleading and seriously misleading?

APPLICATION OF SECURED CREDITOR FOR AMENDMENT TO STATUTORY PLEDGES REGISTER

3.35 Section 94(3)

3.35.1 Where the application is rejected, will the Keeper explain why and how the applicant may correct an error or reapply?

RESPONSE TO APPLICATION FOR CORRECTION UNDER SECTION 96(6)

3.36 Section 97(2)

3.36.1 Where the application is rejected, will the Keeper explain why and how the applicant may correct an error or reapply?

EXTRACTS AND THEIR EVIDENTIAL VALUE

3.37 Section 104(4)

3.37.1 This section would benefit from a clearer definition of "traditional document".

SECURED CREDITOR'S DUTY TO RESPOND TO REQUEST FOR INFORMATION

3.38 Section 105

3.38.1 There currently is no type of security in respect of which secured creditors are under a statutory duty to provide information on request (whether or not the costs are met), or to face a decision of the Court for failure to comply with a request. If sufficient information is provided in the prescribed particulars on registration, which is available via online search facilities, the secured creditor should have made the particulars of the security publicly available from the outset. Insolvency practitioners who may require further information have powers under the Insolvency Act 1986. We therefore do not see any necessity to impose such additional duties for secured creditors for this particular type of security.

INTERPRETATION OF ACT

3.39 Section 116

3.39.1 At definition of "Court" should this state Court of Session and "Sheriff Court"?

4. CONCLUSION

4.1 As mentioned above, our comments are made with a view to ensuring the legislation is workable in practice from an insolvency law and insolvency practitioner's perspective and in particular that there is clarity when pledges and assignations are made so that they are not open to challenge. If they are challengeable in terms of insolvency legislation and law, we have considered whether this should be reflected in the Bill.

4.2 If you would like to virtually meet or if you have any other queries, please contact R3's Head of Technical, Ben Luxford, at ben.luxford@r3.org.uk or on 020 7566 4218.

Yours faithfully

Ben Luxford
Head of Technical
R3, the insolvency and restructuring trade body

Email: ben.luxford@r3.org.uk