



Moving on with moveable security in Scotland



Background

The long-awaited reform of the law on taking security over moveable property in Scotland is underway, following the passing of the Moveable Transactions (Scotland) Bill (the “**Bill**”) on 9 May 2023. The Bill is expected to come into force initially by the end of 2023 and into full effect (once the new registers are established) at some point in 2024. The Bill will be welcomed by lenders and borrowers alike for significant improvement of the area “**where reform is longest overdue and most needed**” (Scottish Law Commission). In this briefing we discuss the scope of the reform and the practical consequences.



What is moveable property?

Under Scots law, property is either:

- “**heritable**”, usually being land or buildings; or
- “**moveable**”, essentially property that can physically move or be moved, such as equipment, machinery and vehicles but also cash, debts and intellectual property such as patents and copyrights.



How can a lender take security over moveable property?

Whereas under English law, in principle, legal and equitable mortgages and charges can be used to secure all property in favour of a lender, Scots law takes different approaches, some with strict formality requirements and depending on the nature of the asset and chargor.

The method for taking security over moveable property will depend on whether the property is:

- “**corporeal**” property, existing in physical form, such as equipment and machinery (generally known as “**chattel**” under English law). In order to obtain a fixed security, or pledge, over corporeal moveable property, currently the lender must take actual physical possession of the asset. This is rarely practical. There are obviously difficulties associated with lenders taking actual possession of physical assets of their borrowers; or
- “**incorporeal**” property, which does not exist in physical form, such as rights against another person under a contract and intellectual property rights (known as intangible assets or choses in action under English law). In order to create fixed security over an incorporeal moveable asset, a creditor will generally require an assignation in security which must be “**intimated**” (notice must be duly served) to the relevant contractual counterparties. It is often practically inconvenient and may be commercially sensitive for a borrower to intimate the grant of an assignation in security, for example, to their trade debtors. If a debt does not yet exist or a future debtor is unknown, intimation is not possible, and so under current law in Scotland future rights cannot be assigned in security.

There is no doctrine of equity under Scots law as there is under English law, which currently makes it more difficult for lenders to take fixed security in Scotland (as compared to England and Wales). Consequently, lenders will often instead only take floating charges as security over Scottish moveable property, although floating charge assets are likely to be subject to claims of certain prior ranking statutory creditors in the event of enforcement. Lenders may then take such claims into account where lending against “**floating charge only**” assets, possibly reducing available debt amounts for borrowers.



How will the Bill reform the current regime?

The Bill introduces the possibility of new forms of security and related public registers for security over moveable property:

1. **The Register of Assignations** – it will be possible once the Bill is in effect to grant assignations of claims that can, instead of intimation to the relevant contract counterparties, instead be registered in a new publicly searchable Register of Assignations. As well as removing the requirement for intimating an assignation (required currently in order for an assignation to be validly constituted), this will enable assignations in security to be granted over future claims and rights of the relevant chargor, so long as such claims or rights are adequately described in accordance with the requirements of the Bill. It will not be necessary to record the name of the relevant counterparties or debtors in the Register of Assignations (either initially, or on an ongoing basis), however the relevant claim will not be assigned in security until such time as it actually exists.
2. **The Register of Statutory Pledges** – this will be used to grant and record new statutory pledges over corporeal moveable property. These will not require physical delivery of the asset provided they are recorded on the register and the original security provider/owner will maintain full possession. This reform will also apply to certain types of incorporeal moveable property, including intellectual property rights.

It will also still be possible going forward for lenders to require intimation of assignations of incorporeal moveable property, or to take physical pledges of corporeal moveable property (by delivery of the physical asset into the lender's possession), instead of using the new registers to record and complete their security interest. It will be up to individual lenders to consider what form of security (essentially, old or new) will be appropriate for them, the assets and the particular borrower in the context of the relevant financing transaction.



A note on shares

One current exception to the above reforms, although they do also comprise “**incorporeal moveable**” property under Scots law, are shares in Scottish limited companies. These are beyond the scope of this note; security over such shares in a Scottish company will continue to be technically possible only by way of either (i) floating charge; or (ii) otherwise by a form of security (commonly called a “**shares pledge**”) which requires actual transfer of the shares into the name of the lender, or an applicable trustee or nominee, with the company's register of members written-up to reflect this, which is increasingly unpopular with lenders. Further reforms are anticipated that should allow fixed security over shares to be taken more easily in future under Scots law, but currently this does not form part of the Bill as passed.



Conclusion

The new regime and simplified process for granting security over most types of physical and incorporeal moveable assets will be appreciated by lenders, borrowers and legal practitioners alike, and may be transformational. Greater ease of taking fixed security over these forms of property should create greater flexibility, access to potentially improved terms and a wider choice of financing structure options. In particular, we note that the ability to assign a defined class of future claims using the new Register of Assignations method means securitisation and invoice finance (both of which can currently involve unwieldy legal mechanics and structures under Scots law) should become significantly easier and more attractive to businesses in Scotland.

To access the Bill in full, see [here](#).



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