



RESPONSE
by
FACULTY OF ADVOCATES
to
MOVEABLE TRANSACTIONS (SCOTLAND) BILL

A. INTRODUCTION

1. The Faculty responded in detail to the Commission's Discussion Paper on Moveable Transactions (DP151) in 2011.
2. In that response, the Faculty highlighted a number of key concerns, including:
 - 2.1 the fact that the Commission's proposals did not address the substantive law of insolvency, that being the most obvious context in which many of the proposals would be likely to be tested; and
 - 2.2 questions in respect of the status of the proposed register.
3. The Faculty considers that the issues highlighted in its previous response remain, to a greater or lesser extent, matters of concern in the light of the terms of the draft **Moveable Transactions (Scotland) Bill** (the "**Bill**"). The Faculty acknowledges, however, the rationale for the approach taken by the Commission in the covering note prepared by Dr Steven.
4. With these introductory comments having been made, the Faculty's comments on the Bill are set out below.

B. COMMENTS ON THE BILL

5. Generally, the Faculty considers that the Bill is a well-structured and detailed piece of legislative drafting, which will give effect to the Commission's intentions.
6. The Faculty adds only the following specific comments on the drafting of the Bill.
Clause 3
7. So far as clause 3(1)(b) is concerned, the practical efficacy of a rule which provides for a transfer on the happening of an uncertain event, which may be unknown to the debtor (to take the example given in the Explanatory Notes (paragraph 40)

the “sending of a schedule listing invoices”), must be questioned. Such a rule does not appear to be likely to be conducive to certainty in business.

Clause 5

8. The policy objective which is set out at paragraph 54 of the Explanatory Notes is clear enough but, having regard to Example 2 set out in that paragraph, it is not clear to the Faculty that the language in clause 5(2)(b) would achieve the stated purpose. In particular, the suggestion in Example 2 that an assignation of future rents would be effective notwithstanding a later sequestration of the landlord “because the rents derive from an asset (the property) rather than from the effort of the landlord” appears to address only clause 5(2)(c) but not 5(2)(b) – might it not be said that the landlord is providing “property” after the date of sequestration?
9. It appears to the Faculty that further consideration will have to be given to the terms of clause 5 in order to achieve the Commission’s policy objective.

Clause 11

10. Protection for the debtor is plainly necessary. The Faculty has commented above on the issues which arise in this respect having regard to the terms of clause 3 of the Bill.
11. As to the terms of clause 11, it appears to the Faculty to be sensible to have a rule generally to the effect set out in clause 11. The Faculty considers, however, that it may be prudent to seek to define how the identity of the “person last known to the debtor... to be the holder of the claim” is to be determined.

Clause 45

12. The Commission’s intention, as set out in paragraph 228 of the Explanatory Notes, regarding the provision for “symbolic delivery of property by means of delivery of a title document for the property, such as cargo aboard a ship as represented by the bill of lading, or shares or bonds as represented by a bearer instrument” is clear but the Faculty considers that the language of clause 45(2)(d), in cases other than those involving bills of lading, is unclear and likely to be productive of disputes. The Faculty considers that the provision should spell out clearly what will or will not be considered to be a “document representing the property” in the case of corporeal moveable property generally.

Clause 52

13. The intention is clearly and unambiguously set out at paragraph 263 of the Explanatory Notes. With respect, however, the Faculty suggests that the language used in clause 52(1) and (2) is very difficult to follow and does not clearly, if at all, achieve the Commission’s intended purpose.

Clause 71

14. The Faculty understands the general intention behind a requirement that a “court order” be obtained where a pledge is to be enforced against an individual. In a

case which does not involve a statutory pledge consisting of, or including, the sole or main residence of an individual (clause 71(2)) it is not apparent to the Faculty what the practical effect of clause 71(1) might be. In particular, the clause provides no indication as to the grounds, if any, which must be made out before a “court order” may be granted; indeed, as the clause is drafted, it rather appears that the obtaining of the “court order” under clause 71(1) would be a mere formality (always assuming the pledge exists and is valid). In that state of affairs, the requirement to obtain a “court order” does not appear to afford any real protection to the individual.