

# Feature

## KEY POINTS

- Restrictions on assigning, which are onerous for invoice financing, still work in Scotland unlike in England.
- There are still more post-insolvency assets in Scotland than England for insolvency practitioners as the Moveable Transactions (Scotland) Act 2023 (2023 Act) contains restrictions on assigning rights following an assignor's insolvency.
- There are pros and cons of publicity through the Scottish Register of Assignations.
- There are priority advantages from the Scottish Register of Assignations over England.
- Is Scotland moving ahead?

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# Moveable transactions: Scotland v England: Round 1 – assigning receivables

Scottish moveable transactions law is currently outdated and much less useful in practice than the law in England and Wales. The Moveable Transactions (Scotland) Act 2023 (2023 Act) will bring Scots law up to date when it comes into force and will arguably move it ahead of the law south of the border. This article tests whether or not that is the case when assigning receivables.

## INTRODUCTION

The Moveable Transactions (Scotland) Act 2023 (2023 Act) was recently passed by the Scottish Parliament and is expected to come into force in the second half of 2024. It radically reforms the Scottish law of assignment (assignment) of receivables and other “claims” and introduces a new “statutory pledge” over corporeal moveables (broadly, chattels) and intellectual property. A new Register of Assignations and Register of Statutory Pledges are to be introduced, to be maintained by Registers of Scotland and with electronic registration of an assignation or pledge document in the relevant register assigning the claim or creating the pledge. Registration will be an alternative to the existing methods of assigning claims by giving notice of (“intimating”) the assignation and of taking fixed security by taking possession of the “chattel” or transferring the intellectual property – which will continue, with some modernisation.

It is not proposed to outline the Scottish reforms or the opportunities arising from them in detail here as this has been done in previous articles by Hamish Patrick in the February 2018 edition of this Journal (with the then Scottish Law Commissioner Dr Andrew Steven, (2018) 2 JIBFL 71) and in the June 2022 edition of this Journal ((2022) 6 JIBFL 389). It suffices to note that the 2023 Act as passed is quite similar in most ways to the Scottish Law

Commission's draft Bill outlined in the first article mentioned, except that the Act does not permit consumers to grant statutory pledges – and statutory pledges over shares and other financial instruments are to be introduced by UK Statutory Instrument under the Scotland Act 1998 rather than being included directly in the 2023 Act.

Currently, England is very much ahead of Scotland in the moveable transactions game. This is because equity does not exist in Scots law in the manner in which it exists in English law. There are no equitable assignments, no equitable charges and no equitable mortgages in Scots law. It is only possible to take the equivalent of legal assignments and legal mortgages and in not dissimilar ways to those in which English legal assignments and mortgages are taken. It will not, therefore, surprise English readers that it is currently often wholly impracticable to assign certain types of Scottish rights or take fixed security over Scottish moveables and some of these impracticalities are outlined in the articles mentioned above.

The Scottish reforms do not import alien English equity, but instead make it more straightforward to put in place what might be considered with English eyes to be legal assignments and legal fixed securities. Might Scotland therefore be seen to move ahead of England in the moveable transactions game once the 2023 Act comes into force? The answer to this question

may be a little more subtle both at a legal and operational level, in view of various provisions included in the 2023 Act. The rest of this article attempts to compare some of the effects of these provisions with the English position when assigning receivables.

## ASSIGNING RECEIVABLES

Many types of rights can be assigned in many different circumstances under both Scots and English law and the scope of the 2023 Act is accordingly very broad. For current purposes, it is intended largely to compare commercial invoice financing by registration in the new Scottish Register of Assignations with equitable assignment under English law of corresponding invoices.

### Assignability

In many circumstances, the Business Contract Terms (Assignment of Receivables) Regulations 2018 restrict the effectiveness of terms of English contracts that seek to restrict assignment of receivables arising under those contracts, facilitating commercial invoice financing. Section 6(3) of the 2023 Act restates the Scottish common law position that rights under a Scottish contract cannot be assigned if the contract so provides, continuing more onerous requirements in Scotland than England for invoice financing. Section 6(5) of the 2023 Act does, however, allow for contrary legislation and this difference north and south of the border could readily be resolved by the Scottish Ministers exercising their powers under the Small Business, Enterprise and Employment Act 2015 to put in place Scottish regulations corresponding to the 2018 English regulations. It is not clear why this has not happened yet.

## Documents

Currently, a document is not strictly required for an assignment under Scots law, but s 1(1) of the 2023 Act will require a physical or electronic assignment document and for it to be executed, whether or not it is registered in the Register of Assignations. In England no document is required for an equitable assignment. As it would be unusual in practice not to have an executed document of some sort in an invoice financing transaction, the need for one under the 2023 Act may not be a real disadvantage of the new Scottish regime, save perhaps in some fully online systems where there is no electronic signature applied to what may be considered an electronic assignment document in that system. In addition, the fact that an assignment document is publicly available once uploaded to the Register of Assignations may mean that a separate short form document may need to be used for commercial reasons in Scotland rather than uploading the full invoice financing agreement that might be used in England and not be required to be publicised anywhere. If an English legal assignment is required in order to provide additional priority benefits as indicated below, it will however need to be in writing to comply with s 136(1) of the Law of Property Act 1925, but as with a Scottish assignment under the 2023 Act there are likely to be limited additional requirements for the document.

Where notices are to be used, the 2023 Act makes it clear that electronic notices are effective and that informal notices will not be required to be acknowledged, in line with the English position – and while the 2023 Act sets out some required information for notices and allows for an optional form of notice to be prescribed, Scottish notices will not be required to be signed and the provisions are otherwise relatively flexible and unlikely to keep notices in Scotland more onerous than in England once the 2023 Act is in force.

## What is assigned?

One of the main benefits of the 2023 Act is that it clarifies in s 1(4) that rights that do not exist at the time of assignment may be assigned without further action when

they come into existence and are vested in the assignor. In addition, s 1(3) and (5) permit assignment of classes of rights and by cross-reference to separate (unregistered) data. This will bring Scotland into line with the position regarding English equitable assignments and will be particularly useful in the context of commercial invoice finance.

As is possible with an English equitable assignment, s 5 of the 2023 Act permits assignment of part of a monetary claim without restriction. This is not possible under s 136(1) of the Law of Property Act in relation to an English legal assignment, if the additional benefit of a legal assignment is required. It is, however, relatively unusual for invoice financing to involve assigning parts of invoiced amounts due.

## Debtors

Sections 10-13 of the 2023 Act set out a series of protections available to a debtor when a receivable is assigned under Scots law, a key feature of which is to make registration of an assignment in the Register of Assignations irrelevant in itself to the debtor's position. Accordingly, if a debtor pays an assignor in good faith the debtor will be discharged under s 10 even if the assignment is registered in the Register of Assignations. It is notable that the concept of good faith is used here rather than notice and that the deemed notice receipt provisions in s 8(9) and (10) of the 2023 Act are disapplied here too. If notice can be proved to have been given to a debtor it does, however, seem unlikely that good faith will be able to be established. While the detailed rules set out in the 2023 Act may differ in some respects from the corresponding position in England, it seems likely that results in practice will be similar and that if notice can be proved to have been given to a debtor, payment to an assignor will not discharge a debt assigned in either Scotland or England.

In many types of invoice financing notice is not given to debtors that debts have been assigned and/or debtors continue to pay the assignor. Currently a Scottish assignment is ineffective until notice is given and continued payment to an assignor may also undermine an assignment notified to the debtor (and

these issues are currently addressed using trusts and floating charges granted by the assignor in favour of the assignee). Registration of an assignment in the Register of Assignations will address the first point and s 17(1)(b) of the 2023 Act will address concerns about the second, bringing the Scottish position largely into line here with that in England.

## Disclosure

Confidentiality may be seen to be an advantage of equitable assignment of receivables as no public disclosure of equitable assignments is normally required. While the assignee will be exposed to debtor payment to the assignor as indicated above and to third parties as indicated below, the assignee will at least have a preference in the insolvency of the assignor, as also indicated below. Confidential invoice discounting and other confidential receivables financing structures are popular when the assignor does not want its customers or others to be aware that its receivables are being sold and where the assignee is comfortable that the risks mentioned above can be accepted.

As the Register of Assignations will be able to be searched online with reference to the assignor, it will not be possible to use it to assign Scottish receivables when complete confidentiality is required. However, as specific details of receivables assigned will not be required to be contained in the assignment document uploaded to the Register of Assignations, only the fact that the assignor has assigned some claims falling within a given category will be disclosed, which may or may not address relevant confidentiality concerns in different circumstances. Trusts currently taken in Scottish receivables financing by the assignor in favour of the assignee will remain competent in Scotland and as no public disclosure of such trusts is required they may continue to be used to provide similar effects to equitable assignments when confidentiality is particularly important, whether or not supported by floating charges in favour of assignees commonly also taken, which will normally be required to be registered and publicly available at

# Feature

## Biog box

Hamish Patrick and Andrew Kinnes are Banking and Finance partners at Shepherd and Wedderburn LLP. Both sat on the Advisory Group to the Scottish Law Commission's Moveable Transactions Project from which the 2023 Act derives and remain actively involved in implementation of the 2023 Act.

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Companies House. Confidential receivables financing will accordingly remain a little more difficult in Scotland than in England.

On the other hand, the Register of Assignations will provide an opportunity to incoming receivables financiers to check if an assignor may already have assigned relevant receivables. Unless and until registration in the Register of Assignations becomes the only method of assigning a relevant category of receivables (by statutory instrument under s 3(8) of the 2023 Act), searching the register is not going to provide complete assurance to an incoming financier, but as more receivables financiers use the register for its other benefits, searches in the register are going to provide increasing reassurance here.

## Third parties

Notice plays a big role in the priority of an assignment in English law and one particular reason to take a legal assignment in England and give notice to a debtor is to take priority over other competing assignments which have not been notified to the debtor. Priorities among competing assignments are otherwise rather complex under English law as are priorities of un-notified assignments relative to other third parties such as competing charge holders and attaching creditors. It is not proposed to wade into that particular marsh here, save to note the advantage of having a notified legal assignment.

Priorities are more straightforward under Scots law – normally being by the relative times at which given proprietary interests come into existence. Currently for an assignee, this is the time at which notice is given to a debtor of an assignment. Under the 2023 Act this priority point will be the first to occur of notice to the debtor and registration in the Register of Assignations, provided the right assigned is then identifiable and owned by the assignor and the assignment is unconditional. This priority point will apply among competing assignments and will also apply relative to other third parties such as attaching creditors. A registered Scottish assignment will accordingly have priority advantages over the equitable assignment normally taken in England on invoice finance transactions.

## Insolvency

In England, an equitable assignment provides a preference over unsecured creditors in the insolvency of the assignor. In Scotland an assignment currently provides no preference in the insolvency of an assignor until notice has been given to the debtor, which is the main reason why trust mechanisms and floating charges are currently used to protect assignees in Scottish invoice finance transactions. Under the 2023 Act registration of the assignment in the Register of Assignations will provide the same effect as notice to a debtor and a registered assignment will therefore prevail in the insolvency of the assignor without notice being given, providing for similar results north and south of the border in invoice finance transactions where no notice is given to debtors as well as when notice is given.

Section 4 of the 2023 Act does, however, contain specific restrictions on assigning rights following an assignor's insolvency. These are intended to provide insolvency practitioners with working capital for trading in insolvency by ensuring that Scottish receivables generated by the insolvency practitioner are available to the insolvency practitioner and not assigned by a pre-insolvency assignment. There are some uncertainties about how these provisions will operate and the Scottish government is consulting on them with a view to making any required changes to them before they come into effect. English law contains no such specific restrictions on assignment of post-insolvency receivables although the extent to which a pre-insolvency assignment will be effective in relation to post-insolvency receivables is not completely clear. However, as s 4(3) of the 2023 Act only gives effect to assignments pre-insolvency of post-insolvency claims in relation to income from property existing pre-insolvency and to the extent not attributable to post-insolvency actions of the assignor (ie the insolvency practitioner), the English position may be more favourable to the assignee than that in Scotland.

## SOME CONCLUSIONS

By and large the Scottish reforms have brought Scotland into line with England at a

practical level as regards assigning receivables. Assignability restrictions continue to count against Scotland as, for some, may the extent of restrictions on assignability of post-insolvency receivables. While disclosure of assignments in the Register of Assignations may cause problems for confidential receivables financing, this may be increasingly outweighed by the advantages of searching the register by way of due diligence. However, the priority advantages of a registered Scottish assignment over an unnotified English assignment seem finally to tip the balance in favour of Scotland. Perhaps this will provide further impetus to pushing forward with the English reforms put forward by the City of London Law Society<sup>1</sup> and the Secured Transactions Law Reform Project?<sup>2</sup> ■

- 1 <https://www.citysolicitors.org.uk/storage/2020/03/Secured-Transaction-Code-and-Commentary-discussion-draft-March-2020.pdf>
- 2 <https://securedtransactionslawreformproject.org/>

## Further Reading:

- Moveable transactions law reform coming in Scotland? (2018) 2 JIBFL 71.
- Moveable Transactions (Scotland) Bill: some funding opportunities (2022) 6 JIBFL 389.
- Lexis+® UK: Banking & Finance: Moveable Transactions (Scotland) Bill: statutory pledges.