The City of London Law Society

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Response to Consultation on the Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009

1 This is the response of the Financial Law Committee of the City of London Law Society ("CLLS") in relation to the revised Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009 circulated on 3 April 2009. Details of the CLLS and of the Committee's working party on this topic appear at the end of the email.

Draft Regulations

2 We have two areas of comment:

- Identification of overseas companies subject to the duty to register.
- Oppressive nature of obligation to register charges over intangibles.

Overseas Companies to which the Regulations Apply

3 We have discussed in the past the concern which lenders have - which is to ensure that they will know, when taking a charge, whether or not the Regulations apply. What we would like to achieve is a situation in which the requirement to register will only arise if, at the time the charge is created, a search conducted by the lender at Companies House would reveal that the company concerned had registered as an overseas company. We believe it is in both common sense and economic terms important not only to get rid of "Slavenberg" filings against companies not registered here, but to ensure that there is no lacuna through which the need for such filings could continue to be present.

4 Although paragraph 3 of the note on the revised Regulations indicates that that is the intention, there still seems to be some doubt in paragraph 3 of the Regulations themselves. We attach a mark-up of the Regulations which includes language that we believe would be helpful to rule out the possibility that a charge created after a registration was presented, but before the registration became available to searchers of Companies House records, could be at risk of being held void for want of registration, a risk that would lead to continued "Slavenberg" filings.

5 Following earlier consultation on this topic, we understand it to be settled that the regime should not seek to catch charges in existence at the date of registration of the UK branch of an overseas company. We have added a few

words in the same place to remove any risk of an interpretation that could require such charges to be registered, so as to avoid unnecessary "fail-safe" registrations.

Charges over Intangibles

6 The second point relates to the types of charge which require registration. In view of the uncertainty about the location of intangibles (other than certain types of intellectual property), the Regulations as currently drafted will effectively force lenders to register wherever there is a possibility that the intangible asset might be regarded as being situated in the United Kingdom. Although this largely continues a current situation, the debate has focused attention on the disproportionate nature of this requirement in the modern world. Since it has proved impossible to reach a consensus on a clarification of the law as to where intangibles are situated, we believe that the most cost-effective approach would be to exclude the requirement for registration of security over intangibles altogether.

7 This is because, as regards intangibles, registration is unlikely to be comprehensive or useful and because the penalties are disproportionate to any benefits that could be realised. There are two main reasons:

- uncertainty as to the scope of what is registrable. The basis of situs of an intangible is far from clear. This is exacerbated by the fact that trading in intangibles (including debts, shares and other securities) is now highly international (far more so than when the rule was first introduced). A company with a branch in the UK (just like a company without such a branch) may create anywhere in the world and without any involvement of its UK branch, a charge over assets including intangibles arguably situated in the UK (eg present or future debts owed by a UK resident debtor, debts payable or recoverable in the UK, shares and other securities issues by UK companies, other companies with branches in the UK, or where there is a UK paying agent or a UK listing, even without any branch in the UK). It is highly probable that most such charges created outside the UK will miss registration, because those involved in their creation do not recognise the possible UK connection in the mere existence of a UK branch (which in itself is not concerned in the transaction), and it is also probable that the enforcement of these charges will also take place through insolvency processes conducted outside the UK despite the existence of a UK branch. The process will not therefore be effective to give comprehensive notice to third parties dealing with an overseas company with a UK branch of its charges over UK situs intangibles and will impinge largely on activities outside the any UK jurisdiction and not connected with the affairs of the UK branch. The uncertainty of the current law has been highlighted by the consultation on possible criteria for situs of intangibles, which included a choice of English law.

- because several common classes of charge in this category are exempt from registration in any event (eg charges within the Financial Collateral Directive), so that the register is generally of lesser value as regards charges over intangibles.

The conclusion from the two points above is that, in contrast with the rules on charges over land and tangibles (which are manageably clear), third parties could not rely on the UK register in any sense as comprehensive, or even

useful, as regards prior charges over intangible assets possibly situated in the UK which they are offered as security by any overseas company with a branch in the UK. The expense, legal uncertainty and increased enforcement costs of continuing any registration requirement in relation to intangibles is therefore not balanced by a corresponding benefit for persons dealing with the overseas company. We submit therefore that it would be disproportionately burdensome to those taking security from overseas companies with UK branches and not in accord with the principles of comity, to continue this uncertain "long-arm" requirement in the new Regulations, with severe sanctions for failure to register. It is even more monstrous that directors of companies with a UK branch could be exposed to criminal sanctions in relation to the creation of minor charges in the ordinary course of business over arguably UK situs intangibles by colleagues somewhere far from the UK (and quite possibly far from the head office as well).

8 In considering the points made in the above, we note that the impact assessment considers only the savings from the abolition of the Slavenberg register: we believe that those benefits would not be fully realised without additional clarification of when the obligation to register arises. In addition the impact statement does not even consider the huge burdens regarding charges over intangibles which this law perpetuates and the ability to alleviate them without wholly abolishing the registration requirements. It does not cost either whole or partial abolition of the law. We have advocated partial abolition because we believe that this would result in savings for registered overseas companies and their lenders, both at the time of creation and of enforcement of charges which relate only to intangibles, as well as lightening the load for the registrar, while getting rid only of categories of registration which could not be reliable in any event and which therefore perform no very useful function for third parties at any stage. It would also promote legal certainty which carries economic benefits for all those using the legal systems of the UK.

9 Intellectual property is a form of intangible for which the concerns in identification of situs may be thought to be less. We also note that while this may be true for forms of intellectual property, such as patents, whose existence is evidenced on a UK register, non-registrable intellectual property may also be difficult to identify: eg whether UK copyright has come into existence. We therefore suggest that if charges over intellectual property are retained as a registrable category, then the definition should be limited to intellectual property registered in a UK register. We note, however, (and the same will apply to certain tangibles) that pan-European registers may be created. This is not, however, an immediate issue for the proposed Regulations.

Conclusion

10 Although we have commented on this matter in earlier submissions and in a meeting with the Department, we have thought it sensible to summarise above the reasons for our views. Our comments are directed to reducing the cost of maintaining a register of charges in relation to overseas companies, (1) by limiting registrations to companies which should be capable of being verified as having a place of business in the UK and (2) to charges of a nature which should be readily identifiable by companies and lenders taking security as involving UK property and where the registration would be of real value to parties searching the register (as likely to be comprehensive as regards the existence of enforceable charges over the assets in question). We have also been conscious of the need to ensure that criminal offences on individuals

outside the jurisdiction are created only in circumstances where they might reasonably be expected, without excessive cost, to identify the need to register, and that the penalty of invalidity also only arises where companies and their lenders could be reasonably expected to identify, without excessive cost, that a registration requirement exists.

11 We have indicated the changes that we suggest and raised a few minor queries and drafting points on the attached mark-up of the Regulations.

The City of London Law Society

12 The CLLS represents approximately 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

13 The CLLS responds to Government consultations on issues of importance to its members through its 17 specialist Committees. A working party of the CLLS Financial Law Committee, made up of solicitors who are experts in their field, have prepared the comments above in response to the Proposals.

14 The members of the working party comprise:

Richard Calnan	-	Norton Rose LLP (Chairman of the working party)
Robin Parsons	-	Sidley Austin LLP
John Naccarato	-	CMS Cameron McKenna LLP
Alan Newton	-	Freshfields Bruckhaus Deringer LLP
Claire Watson	-	Linklaters LLP
David Ereira	-	Linklaters LLP
Chris Smith	-	Slaughter and May
Mark Evans	-	Travers Smith LLP
Kate Gibbons	-	Clifford Chance LLP
Dorothy Livingston	-	Herbert Smith LLP (Chairman of the Financial Law Committee)
Geoffrey Yeowart	-	Lovells LLP (Deputy Chairman of the Financial Law Committee)

30 April 2009