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BIS consultation on registration of charges: March 2010

1 This is the response of the Financial Law Committee of the City of London Law Society to the Consultation Paper issued on 12 March 2010 by the Department for Business Innovation and Skills on the registration of charges created by companies and limited liability partnerships.

2 Information about the City of London Law Society and the working party of its Financial Law Committee which produced this response is contained in the Annexure.

3 The consultation concerns laws throughout the UK, but our comments are restricted to English law.

SUMMARY

4 Before commenting on the specific questions raised in the Consultation Paper, it might be helpful to explain the principles which have guided us in answering those questions. Our answers are based on our experience of the way in which the registration of company charges works in practice.

5 There are four main principles which underlie our response to the Consultation Paper:

- All charges created by English companies should be registrable unless registration is exempted by other legislation.
- Charges should be able to be registered by sending the charge document to the Registrar of Companies electronically.

- Failure to register within 21 days should render the security created by the charge void.

- The registration of charges created by overseas companies should be regulated by the law of their place of incorporation.

Registrable charges

6 We consider that all charges created by English companies should be registrable unless registration is exempted by other legislation, such as that concerning financial collateral arrangements or charges given in favour of central banks (as provided by section 252 of the Banking Act 2009).

7 We say this because we believe that the registration requirement provides great practical benefits to creditors and other persons dealing with companies, and we can see no logical or practical reason to restrict this benefit to particular types of charge, as is the case under the current law.

8 If there are to be any other exceptions to the principle of registration, it should be on the basis that there is a real practical reason why registration of a particular type of charge should not be required.

9 As under the present law, we consider that the registration requirement should only apply to charges (which, for this purpose, includes mortgages), and not to pledges or contractual liens or to so-called "quasi-security"[1].

Method of registration

10 Our practical experience of registration of charges leads us to believe that the current system by which charges are registered is unnecessarily time-consuming, cumbersome and expensive.

[1] When we use the expression "charge" in the rest of this paper, we mean a charge in the sense used in the current companies legislation - ie a mortgage or charge. The reasons why we would not extend the registration requirement beyond charges in this sense are explained in our comments on the previous Law Commission proposals.

11 If the chargee were able to send the charge document to the Registrar of Companies electronically, on the basis that it is then immediately loaded on to the company's file, we believe this would have the following significant benefits:

- It would speed up the process of registration.
- It would obviate the necessity to produce particulars of the charge which, in our experience, is a time-consuming and costly exercise.
- The chargee would be certain that the charge could not be set aside on the basis that the particulars do not actually reflect the charge.
- Those searching the register would be able to see the whole charge, rather than just edited (and potentially misleading) extracts from it.
- The Registrar of Companies would no longer have to compare the particulars with the charge - he would simply have to register the charge document sent to him and confirm the time and date of receipt.

The effect of non-registration

12 We believe that failure to register within 21 days should render the security created by the charge void.

13 At present, the security is only void in insolvency proceedings and against secured creditors.[2] It is not void against other persons (such as purchasers) who acquire a proprietary interest in the charged assets - a distinction which we find it impossible to justify. The current law also gives connected lenders the ability to take security without registration and enforce it before an insolvency to the detriment of other creditors.

[2] The legislation states that an unregistered charge is void against "any creditor of the company", but in practice an unsecured creditor cannot challenge its validity if the company is not in insolvency proceedings: *Re Ehrmann Brothers* [1906] 2 Ch 697.

14 We therefore consider that, if the charge is not registered within the 21 day period, the proprietary interest created by the charge should be void. The personal obligations of the chargor to the chargee under the charge should continue to be effective.

Overseas companies

15 The majority of our Committee consider that the time has come to abolish the requirement for the registration of charges created by overseas companies. The extent of any registration requirement should, in their opinion, be a matter for the law of the place of incorporation of the chargor. The rest of our Committee believes that such a change should only be effected following wider consultation.

16 The Committee is unanimously of the view that, if this requirement is to be retained, it should be limited to charges over assets which can clearly be established to be situated in the UK.

COMMENTARY ON THE QUESTIONS AND PROPOSALS

Question 1.A

17 We can see that it would be desirable, where practicable, for the same rules to apply throughout the UK. But, in view of the very different property laws existing in Scotland from the rest of the UK, this may not be easy to achieve. In our view, the most important consideration from the point of view of English law is to ensure that the rules in England are clear and simple. It would be unfortunate if the effect of trying to co-ordinate the position with Scotland was to create more complexity than would otherwise be required.

Proposal A

18 We agree that any charge created by a UK company should be registrable unless specifically excluded.

19 The current law, under which only certain categories of charge are registrable, is impossible to justify, whether as a matter of logic or of practicality.

20 We believe that the legislation should be expressed to exclude financial collateral arrangements (whether under the Financial Collateral Arrangements (No. 2) Regulations or regulations made under section 255 of the Banking Act 2009) and security given to central banks. We appreciate that this would be the case in any event, because they are excluded by other legislation. But we think that it would be potentially misleading if the new legislation did not specifically refer to them and also generally to the possibility of other overriding exclusions, whether under community law or otherwise.

21 We can see no purpose in requiring the registration of a charge created by a corporate trustee over trust property (an issue which is discussed in paragraph 21 of the Consultation Paper). In this respect we disagree with the recommendations of the CLR and the Law Commission. Registration should, in our view, only be required where the company concerned has a beneficial interest in the assets which are charged. This is because the trust assets would not form part of the insolvency estate of the corporate trustee and there is no reason why the creditors of that company need be made aware of such a charge.

Proposal B

22 In our view, Lloyd's trust deeds should only be excluded from the registration requirement if it can be demonstrated that there is a clear practical problem with requiring registration. We understand that a large number of charges do have to be registered by Lloyd's, and that may be a reason for excluding them from the registration requirement if there is a general understanding in the market that Lloyd's does have security over these assets. It is not clear to us why Lloyd's deposit trust deeds and Lloyd's security and trust deeds are to be registrable, whereas other Lloyd's trust deeds are not.

Question 1.B

23 Charges which are not currently registrable would require registration as a result of the proposed changes, but we do not consider that this would make a material difference in practice. The practice is to register all charges created by English companies even if they do not clearly fall within the ambit of the current legislation, unless there is a specific statutory disapplication of the registration requirement on which the chargee can confidently rely. In practice, therefore, we do not consider that the change to the law will be problematic.

Question 1.C

24 We agree that the requirement to register should not apply to floating charges (including fixed charges which are recharacterised as floating[3]) over financial collateral, but we think that this aspect would better be dealt with in the context of the general reform of the laws applicable to financial collateral arrangements, rather than specifically in the legislation made under the Companies Act.

Question 1.D

[3] The reference to "a charge created as a floating charge" in the definition of "security interest" in the Financial Collateral Arrangements (No. 2) Regulations 2003 is unfortunate as it may not encompass a charge created as a fixed charge which is recharacterised as a floating charge.

25 We are strongly of the view that there should be no requirement to register the crystallisation of a floating charge.

26 In most cases, floating charges are crystallised by the appointment of an administrator or an administrative receiver, in which event notice of the appointment is required to be given under the current law. We see no practical merit in requiring the registration of other events which crystallise floating charges, particularly because they rarely occur in practice.

27 The justification for registering appointments of administrators and administrative receivers is the fact that a new person has taken over the management of the company from the directors. The effect of the crystallisation of a floating charge without the appointment of an administrator or an administrative receiver is simply that some or all of the company's assets are now the subject of a fixed, rather than a floating, charge; and we cannot see why this fact (which does not create new security) should require to be registered in relation to a charge which, as created, was a floating charge. Indeed, in some instances, the chargee would have no means of knowing within any time limit that might be prescribed that automatic crystallisation had occurred.

28 In practice, if the chargee does not in fact terminate the authority of the directors to deal with the chargor's assets in the ordinary course of business through the appointment of an administrator or administrative receiver, the charged assets will continue to be disposed of free from the crystallised interest. This is because (as against third parties), the chargor retains the ostensible authority to do so. Registration of an event other than the appointment of an administrator or administrative receiver will not, by itself, terminate the chargor's *de facto* management of the charged assets and its ability to dispose of the assets to third parties free from the crystallised interest of the chargee. This fundamental fact, coupled with other disadvantages of "automatic crystallisation" clauses, has in our experience resulted in a marked

decrease in their use in recent years or a narrow confinement of their scope.

29 In summary, we cannot see that this requirement would achieve any practical benefit and may inadvertently create legal uncertainty where, notwithstanding a registered crystallisation, the chargee has left the directors with day-to-day control of the chargor's business.

Proposal C

30 We agree that the requirement to register existing charges on property acquired by the company should be abolished. If a company obtains an asset which is subject to an existing charge, its interest in that asset is limited, but it does not itself create a charge. In our view, only charges created by the company should be registrable.

Question 1.E

31 We consider that the 21 day time limit for registration should be retained.

32 In our view, it is essential to the registration system that there should be a time limit within which registration should be required, and that the security should be void if that requirement is not met. This is the most practical way in which the requirement to register can be given teeth.

Question 1.F

33 We cannot see how the requirement to register could be safeguarded if the time limit were abolished. It is far better, in our view, to have a simple requirement for registration within 21 days rather than complex legislation dealing with the problems caused by the abolition of the requirement.

Question 1.G

34 We are not aware of cases in which a third party has suffered from a conclusive certificate having been issued in circumstances where it should not have been. In our experience, persons dealing with

companies who are concerned with the precise scope of a charge will ask to see the charge document; and, if they are proposing to enter into a transaction with the company, it is of course in the company's interests to comply with that request. Not to provide details of existing charges in the context of raising money would lay management of the chargor open to fraud charges, so company management already has an incentive to disclose charges in answer to a request from a prospective financier (or purchaser of potentially charged assets) regardless of whether a charge has yet appeared on the public register.

35 So we do not consider that this is a problem in practice. But we can see that it is undesirable, and the simplest way to deal with it is to require the electronic registration of the charge document itself, so that those dealing with the company can read the document and do not have to rely on registered particulars.

Proposal D

36 We can see the merit in defining the date of creation of a charge. We broadly agree with the proposal as far as English law is concerned, although it would be necessary to consider the detail if this proposal were to be adopted.

Proposal E

37 In our view, the proprietary interest created by a registrable charge should be void if the charge is not registered within 21 days of its creation. It should therefore be ineffective against anyone who acquires a proprietary interest in the asset concerned, whether or not that person has notice of the unregistered charge, as well as against the company's insolvency officers.

38 The reason for this is that we consider that the best way to ensure that charges are registered is for the sanction for failure to be the invalidity of the security created by the charge; and we can see no reason why a purchaser or other third party dealing with the company or an execution

creditor should be in any different position from a subsequent mortgagee. Under the current law,[4] a subsequent mortgagee takes free of an unregistered charge whether or not he is aware of it, and we believe this principle should apply to everyone dealing with the company.

39 In our view, therefore, Proposal E is too narrow. It would only make the charge invalid in an insolvency proceeding or against an execution creditor. On the face of it, this would limit the current law. We would extend the invalidity, not reduce it.

Question 1.H

40 We do not believe it is necessary for the Act to provide for the case where insolvency proceedings are begun 21 days or less after the creation of the charge. It is not, in our view, a material issue in practice and we do not believe that it is sufficiently important to be legislated for specifically.

41 We would add, in relation to paragraph 45 of the Consultation Paper, that the current rule that the secured obligations become repayable if the charge is not registered within 21 days a potentially useful protection for chargees, although it would be preferable if the secured obligations were to become payable at the instance of the chargee, rather than automatically. If the parties intended a charge to be created and, by inadvertence, it was not, it is important that a new charge should be created as soon as possible and then registered. That is what the parties had agreed, and the principle that the secured obligations are repayable at the instance of the creditor is an incentive for the chargor to co-operate in creating the new charge.

Question 1.I

42 We consider that a buyer of property subject to an unregistered charge should always take free of it. As we say in our answer to Proposal E, we

[4] *Re Monolithic Building Co* [1915] 1 Ch 643.

can see no justification for treating purchasers differently from mortgagees in this context.

Proposal F

43 This proposal seems to us to be essentially concerned with priorities. Under the current law,[5] whether or not a person has notice of a registered charge depends on whether, in the circumstances of the transaction in which he is involved, he ought reasonably to have searched the register. As a test, that lacks a little in certainty but, in our view, it produces a perfectly fair result.

44 We support Proposal F(i). In our view, a chargee ought to search the register and this proposal simply acknowledges that fact. If this proposal is adopted, it will be necessary to deal with the case where the chargee is taking a charge which does not require to be registered (for instance, under a financial collateral arrangement). If a chargee is not taking a registrable charge, it is arguable that, under the Financial Collateral Directive, he should not be required to search the register because this would remove one of the intended benefits of his exclusion from the registration regime.

45 We have more of a concern about Proposal F(ii). In some cases, other persons dealing with the company ought to search the register. A purchaser of a material asset for a substantial amount of money probably ought to search the register, whereas a purchaser of a small asset for an insignificant amount of money probably should not. We therefore think it is inappropriate to say that no-one other than a chargee should be taken to have notice of a registered charge. We can see no real alternative to stating the principle under the current law - which is that whether or not notice is obtained by someone other than a chargee depends on whether, in the circumstances, that person ought reasonably to have searched the register.

Proposal G

[5] *Wilson v Kelland [1910] 2 Ch 306; Lingard's Bank Security Documentation, Fourth Edition, paragraph 9.16.*

46 In our view, chargees should be able to register the charge document electronically, rather than send in particulars of the charge, although we appreciate that particulars will still be required in relation to oral charges (which are, of course, extremely rare), and may also be appropriate as an alternative for a chargee who wishes to use them.

47 We have concerns in relation to (e), (f) and (g) of Proposal G.

48 As far as (e) is concerned, the real problem with identifying classes of property charged is that in practice secured transactions do not always fall within neat categories. For instance, a charge over a tangible asset may very well extend to intangibles (e.g. a charge on investment property is likely to extend to the rent emanating from the property). In addition, the property may change in character (e.g. a charge on book debts is likely to extend to the proceeds of the book debts). To try to fit the types of transaction which occur in practice into pre-ordained categories is, in our opinion, doomed to failure.

49 The most practical option would be to allow the chargee to tick one of two boxes - either “all assets” or “some assets”. If it ticked the “some assets” box, we appreciate that this would not be particularly helpful from the point of view of a person searching the register, but it would at least put that person on notice of the existence of a charge and he would then be able to obtain a copy of the charge from the company. (Of course, if our suggestion to register the charge electronically is accepted, a copy of the charge would in any event appear on the register.)

50 The problem with requiring any greater degree of particularity in the nature of the charged assets is the difficulty of shoe-horning charges into particular categories. To do this would be to run the risk of misleading those dealing with the company and would also expose the chargee to the risk of the charge being ineffective as regards certain classes of assets if they were not mentioned.

51 As far as (f) is concerned, we can see no reason why there needs to be any mention of after-acquired property.

52 As far as (g) is concerned, we can see no reason to require the statement as to whether there is an automatic crystallisation clause. As to the negative pledge, the advantage of making the negative pledge a prescribed particular is that it is then much easier to establish that a person dealing with the company has obtained constructive notice of it. But, if there is a requirement to state the negative pledge, it is important that failure to do so should not render the charge void - the issue is solely one of priority. The alternative approach would be to make it open to a chargee to describe the negative pledge, but that it should not be compulsory to do so.

Question 2.A

53 The first part of this question has already been answered in our answer to Proposal G. There is no other information we consider should be required.

Proposals H and I

54 The problem with Proposal H is the difficulty, discussed in our answer to Proposal G, of clearly categorising the scope of a particular charge by reference to pre-ordained criteria. In practice, it often becomes a question of trying to fit round pegs into square holes.

55 The same problem arises in relation to the certification by the Registrar of the classes of charged property.

Question 2.B

56 Quite apart from its importance at the Land Registry, we consider that the conclusive certificate is a very important part of the registration process. When the registration process was first established in 1900, it was recognised that the sanction of invalidity required to be balanced by a process by which a chargee could be clear that its charge was valid.[6] The conclusive certificate of registration is the *quid pro quo* for the sanction of invalidity. In secured transactions, certainty is of paramount importance. It is far better for the issue to be checked at the time the charge is created than for litigation to take place years later about matters which happened long ago.

57 In our view, therefore, it is essential that the Registrar should be able to confirm that the charge which has been created is valid. If our proposal for the electronic registration of the charge document is accepted, it makes it much easier for the Registrar to do this.

Question 2.C

58 The note entered by the Land Registry would amount to a defect in the title of the chargee and in our view would therefore be unacceptable to chargees and those dealing with them. The Land Registration Act 2002 (section 52) provides an assumption in favour of a purchaser (or other disponee) that a registered chargee has full powers of disposition, but this is subject to any entry in the land register to the contrary, as this would be. The note would trigger the need for additional enquiries and investigations on the part of a potential purchaser (or other disponee) - for example on a transfer of the charge or a sale of the property under the chargee's power of sale - to ensure that the chargee has good title to enter into the proposed transaction. While the Land Registry already has the right to enter such a note on the register when evidence of registration at Companies House is not produced, in our experience such entries are rare in practice.

[6] See the judgment of Atkin LJ in *National Provincial v Charnley* [1924] 1 KB 431, 453.

59 The additional title investigations would be particularly onerous in the case of a multiple transaction, such as a sale of a portfolio of charges, or a mortgage-backed securitisation.

60 In addition, unless and until the conclusive certificate is produced to the Land Registry, the note would presumably remain on the land register even after the registration of the initial disposition from the chargee. If that is so, the title enquiries may need to be repeated on subsequent dispositions, such as a further transfer of the charge.

61 The Land Registry has also stated that such a note on the register is "considered to act, where necessary, as a contrary entry for the purpose of Rule 101 of the Land Registration Rules 2003". This Rule states that, subject to any entry to the contrary, registered charges are to be taken to rank as between themselves in the order in which they are shown on the register. The note would therefore be unacceptable to a chargee as it casts doubt on its priority as against other registered charges.

62 Generally, a policy of entering such a note on the land register would be a backwards step in terms of electronic conveyancing. The fundamental aim of the land registration regime is to create an electronic register that is a complete and accurate reflection of the state of a registered title, so that it is possible to investigate title to land with the minimum of additional enquiries and inspections (Law Com 271).

Question 2.D

63 We have answered this question in our reply to Question 2.B. In our view, the effect of the proposed changes in relation to conclusive evidence would be to reduce certainty and to increase litigation.

Question 2.E

64 We do not consider that there is any real concern about malicious registration in systems that are not notice filing regimes. For the last 110 years, our registration system has enabled the chargee to register a

charge, and we are not aware of any case in which a person has done so maliciously. If problems have arisen in other jurisdictions, it may well be because they have a notice filing system in which it might be easier for such malicious registrations to be effected without there actually being any charge in existence. Be that as it may, we are not aware of any evidence that this is a problem in the UK, or that it is likely to be a problem, and we consider that it is quite unnecessary to try to counter a problem which does not exist.

65 The practical problems involved in only allowing a charge to be registered by the chargor are immense, particularly because the risk of non-registration is on the chargee. It would alter the whole way in which registrations are effected. We can see no justification for that.

Question 2.F

66 Yes. We believe that the requirement to deliver the charge document (even if in electronic form) does reduce the risk of malicious registration, and we have proposed that registration be effected in this way.

Question 2.G

67 We consider that the electronic registration of charges would be a very great improvement on the current system, and would significantly reduce the costs of registration.

68 The process would be quicker than under the current regime. It is at present quite a time-consuming process to complete the form MG01. If, instead, the charge could be registered by it being sent electronically to the Registrar of Companies, the process could be effected much more quickly. And because the process would be quicker, it would also be cheaper, both to the Registrar of Companies in saving the time of public employees and also to businesses in saving the chargeable time of law firms.

69 It would also be more useful for persons searching the register to be able to see the whole charge document rather than particulars of it. In their very nature, particulars do not give the full picture, and they can be misleading. It would certainty save time if the person searching the register were able to see the charge document on the file.

70 One of the problems with requiring particulars to be delivered to the Registrar is the concern that they may not accurately reflect the terms of the charge. This is a particular problem in relation to the description of the charged assets. At present, this is a problem for the person searching the register. If there were to be no conclusive certificate of registration, the problem would then become one for the chargee. The problem can be avoided altogether if the requirement is simply to send the charge document itself for registration electronically.

71 This proposal would also greatly simplify the requirements for the Registrar of Companies. At present, he has to check the particulars against the charge document. If the requirement were to send him the charge document electronically, all he would need to do would be to confirm the date and time of receipt of the charge document. From the Registrar's point of view, therefore, the process would be much simpler.

72 We do not believe that the registration of the charge document itself would create any confidentiality issues. In practice, charge documents are relatively standard, and it is easy to ensure that the confidential arrangements between the parties are contained in the underlying documentation rather than in the charge document itself. All that would need to be registered would be the document creating the charge, not the underlying documents.

Question 2.H

73 We consider that the time limit should continue to be 21 days. We see no particular reason to alter it. Although the "21 day invisibility period" is a theoretical problem, in practice it involves little difficulty, and we do not

believe that the reduction of the period of registration by 7 days will achieve a great deal.

Proposal J

74 We do not agree with Proposal J. The risk of non-registration is on the chargee, and we think it is imperative that the chargee should be able to register the charge.

Alternative to Proposal J

75 We strongly support the alternative to Proposal J. We think this is a practical proposal which will simplify the process, make it cheaper to operate, provide more accuracy for those dealing with the company and be simpler to operate by chargees and by the Registrar of Companies. We explain why in our answer to Question 2.G.

Question 2.I

76 Yes. It should be possible to deliver an electronic PDF copy of the charging document. This would be the most practical way of effecting registration, and we do not think that this would result in any significant risk of fraud.

Proposal K

77 We have no strong views on this. In practice, if there is a problem with late registration, and the company is not insolvent, a new charge is created in preference to an application being made to the court.

Proposal L

78 We agree with Proposal L(i). We think it is very sensible that the chargee can voluntarily file changes relating to the person entitled to the charge. It is one of the disadvantages of the current regime that, if the secured loan is transferred to another lender, it is not possible to record that fact. We agree that the chargee should be entitled, but not required, to do so.

79 We do not agree with Proposal L(ii). We can see no need to require the chargor to file the addition of a negative pledge. We do not think that this would serve any useful purpose.

Proposal M

80 We fundamentally disagree with Proposal M.

81 One of the problems with the current law is that it is possible for the directors of a company to remove particulars of a charge from the file without the chargee being aware of it. In our view, is it essential that the chargee (or the court on its behalf) should be required to consent to any removal of registered particulars. The CLR Proposal is, in our view, much more appropriate. The chargee's signature should be required in all cases, but the chargor should have the right to apply to the court for an order if the chargee does not consent and, if the consent was unreasonably withheld, to be indemnified for costs and other liabilities by the chargee.

Question 3.A

82 Our firms and our clients use the information about companies' charges held at Companies House in a wide variety of commercial transactions, both financial and corporate. The information is useful to the company's customers, suppliers, lenders, bondholders and even auditors. Our experience of what is available leads us to believe that it is an extremely useful resource for persons dealing with companies to have this information.

Question 3.B

83 Our firms tend to obtain information about company charges on-line through the subscription service.

Proposal N

84 We agree that Proposal N is a more sensible process than the current one.

Questions 3.C and 3.D

85 We are not aware of cases in which persons dealing with the company have inspected the company's own register. We do not consider that there would be any adverse consequences of abolishing the requirement for a company to keep a register of its charges, especially as it is proposed to have a public register of all the charges created by a company (save for very limited exceptions). It is obviously good housekeeping for it to do so, and there may be accounting reasons why such information may be required, but we can see no reason for there to be a separate legal requirement for it to do so. In any event, to the extent charges are not filed, a company still has incentives to provide full information on its charges to financiers and purchasers who make enquiries.

Proposal O

86 For the reasons given in our answer to Questions 3.C and 3.D, we agree that the requirement for a company to maintain a register of all the charges it has created should be abolished.

Proposal P

87 We do not agree with Proposal P.

Proposal Q

88 We agree that it would be sensible to extend the registration requirement to all UK companies, so long as they have a registered number at Companies House. The current registration system for bodies such as industrial and provident societies and friendly societies is flawed.

Question 4.A

89 The current arrangements concerning the registration of charges created by overseas companies are a very great improvement on the previous position. But there are still practical problems.

90 The main argument in favour of continuing to require the registration of charges created by registered overseas companies is that it gives creditors dealing with the UK branch of an overseas company the same level of information about charges over that company's UK assets as they are entitled to have from a company incorporated in the UK.

91 Against that is the practical concern that a transaction carried out outside the UK may involve the creation of security over UK assets but, because lawyers in the UK are not involved in the transaction, it may not be apparent to the parties that registration is required. And in a cross-border transaction, a requirement of domestic UK law that the charge is void if it is not registered is very likely to conflict with the laws which, under conflict of laws rules, establish the validity of the charge and its effectiveness in an insolvency.

92 In addition, a person dealing with a company knows where it is incorporated and can conduct such searches as it requires in the place of incorporation. If its place of incorporation does not have a system for registration of charges, it will need to conduct its searches in a different way, but it is difficult to justify the UK legislating for perceived imperfections in the registration requirements of other jurisdictions.

93 In the result, the majority of our Committee consider that overseas companies should no longer have to register charges that they create even if they have a registered UK establishment. The remaining members of the Committee believe that abolition of the requirement would require wider consultation.

Question 4.B

94 If charges created by overseas companies do continue to be registrable, we would restrict the requirement to:

- tangible assets situated in the UK at the time the charge is created; and

- assets which are entered on asset registries in the UK at the time the charge is created.

95 The problem with establishing where an intangible asset is situated is manifest. There have been many attempts to define it, all of which have failed.[7] The only practical conclusion we can draw from that is that intangible assets should be removed from the registration requirement altogether.

Question 4.C

96 If charges created by overseas companies are to continue to be registrable, we would remove the sanction of invalidity, on the basis that it is only likely to create conflict of law problems in its application.

Question 4.D

97 We have answered this question in our answer to Question 4.A.

Proposal R

98 Yes. We consider that LLPs should continue to be subject to the same rules relating to registration of charges as apply to UK companies.

Question 5.A

99 We think it is very important that those inspecting a company's record at Companies House should be able to discover whether it has granted any registrable charges. Our reasons for this view are discussed above.

Question 5.B

100 We believe that it is important that a person searching for charges against a company should be able to do so in one place - at Companies

[7] See the letter dated 6 May 2009 addressed by Lord Woolf, Chairman of the Financial Markets Law Committee, to Ms Anne Scrope of the Department for Business Enterprise & Regulatory Reform (appearing on the FMLC website).

House. If this requires the chargee to register certain charges twice, then so be it. Unless and until it is possible for a charge created at an asset registry automatically to be available for searching at Companies House, we believe that the importance of easy searching outweighs the (relatively minor) disadvantage of a chargee sometimes having to register a charge in an asset registry as well as at Companies House.

Question 5.C

101 We consider that it would be confusing to have two time limits for registration at Companies House and that the disadvantages would outweigh any potential benefits. As you note, very few legal charges requiring registration at the Land Registry and at Companies House are over land alone. As a minimum they may charge land and also plant, machinery and equipment on it and any income provided by the land. Would such a charge fall within the longer registration period?

102 In our view, the preferred option is option C, but with improved and streamlined registration procedures. For example Companies House could issue a conclusive certificate in electronic form and this could then be included in the application to the Land Registry. A similar procedure already exists for acknowledgements from HMRC that an SDLT return has been submitted in relation to a transaction. The acknowledgement is issued by HMRC electronically and accepted by the Land Registry when the transaction is submitted for registration

Question 5.D

103 For the reasons stated in our answer to Question 5.B, we agree that charges over land in England and Wales should continue to be registered at Companies House.

Questions 6.A to 6.E

104 We do not have any specific information on the cost of registering charges under the current regime, but we do spend a very great deal of

our time registering company charges and, in our view, the current procedure for registration is more expensive than it needs to be. The one thing which would reduce the cost of the procedure significantly (both for the parties and for the Registrar) is for the chargee to be able to register the charge document itself electronically instead of having to produce particulars of the charge.

4 June 2010

ANNEXURE

The City of London Law Society ("CLLS") represents approximately 12,000 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.

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

The members of the Working Party are:

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