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Companies Bill 2012 Analysis

Charges and Debentures

[This note is based on the version of the Companies Bill 2012, as initiated]

Key points

- **Registration of charges may be effected under two methods:**
 - *first, the current system of filing within 21 days, or*
 - *secondly, a notice period locking the priority of 21 days assuming a second notice, confirming the charge, is filed within that period*
- *The priority of charges is changed from the date of creation of the charge to the date of filing of the charge, and in the case of the two-stage process the date of the first filing*
- *Charges over all categories of assets created by Irish incorporated companies are registerable, save for certain specific exclusions such as cash and securities*
- *A certificate of registration of charge remains conclusive evidence of the filing but only in respect of particulars of property and assets actually filed; thus failure to include details of all property charged will render the security over the omitted details void*
- *The form C1 is simplified by the deletion of reference to the amount secured and some superfluous material such as negative pledges*
- *The Slavenburg filing, namely filing of charges over assets in the State created by foreign companies with an established place of business in the State, is to be abolished*

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These two principal headline reforms in Part 7 of the Bill are designed to ensure that a creditor proposing to make finance available can have greater certainty that when the credit is advanced, security taken for such advance will have priority over other charges created not only subsequently but also prior to any charges previously created but unfiled at the date of the advance. Currently a creditor may not be able to obtain the desired priority, even if at the time of taking security no security was registered against the debtor in the Companies Registration Office.

This difficulty can arise due to the fact that where security is taken over assets which do not require specific registration for priority in other registries (such as in the Land Registry), the current law is that priority rests with the creditor who has taken security first in time, but not necessarily the first to register. This system is clearly open to abuse, as a lender although taking all appropriate precautions may not attain a first ranking charge if following a clear search on closing it finds that a charge in favour of a third party was registered later but actually created before the date of closing of the lender's transaction. Although to date there has been no evidence of abuse, the system, inherited from the UK, was left open for abuse to the detriment of potential providers of finance.

Priority is now to be given to the creditor who files the first in time. This priority will be subject to any over-riding priority applicable to certain assets, such as land, under already established principles applicable to the Land Registry. The priority would also be subject to any contrary agreement between the creditors such as an inter-lender or priority agreement often entered into by credit institutions where more than one such institution lends to a particular company.

To ensure that another charge does not obtain priority in the period between obtaining a clear search and filing a form C1, a filing may now be submitted prior to the completion of a transaction, provided a further very simple filing (evidencing the date of the creation of a charge) is made within 21 days of the first filing. The charge would take effect as to priority on the date of the first preliminary filing, or where there is no preliminary filing, on the date of the filing of the form C1. Such a notice filing system has been applied for decades in the United States and applies also in Canada and New Zealand as well as the International Registry in Dublin for airframes and engines. It has been recommended in the United Kingdom. To avoid abuse, particulars of the first filing are to be signed on behalf of the chargor and the chargee. In the absence of a second filing within 21 days, the first filing would lapse, thereby avoiding the cumbersome requirement of filing a satisfaction.

The procedure for registration where the current procedure is adopted, referred to in section 410(3) as the one-stage procedure, consists of the taking of steps so that there is received by the Registrar, not later than 21 days after the date of the charge's creation, the prescribed particulars, in the prescribed form, of the charge.

The procedure for registration of a notice filing, referred to in section 410(4) as the two-stage procedure, consists of the taking the following steps:

- (a) a notice is filed with the Registrar stating the company's intention to create a charge (being a notice in the prescribed form and containing the prescribed particulars of the charge); and

- (b) not later than 21 days after the date of the Registrar's receipt of the notice under paragraph (a) (the "first notice"), there is received by the Registrar a notice, in the prescribed form, stating that the charge referred to in the first notice has been created.

If the requirement under paragraph (b) above is not complied with, within 21 days, the notice received under paragraph (a) in relation to the charge shall be deemed to have lapsed and removed from the register.

This preliminary filing will now be a useful safeguard to secured lenders, to put in place at the time a completion date for the transaction is imminent, for example seven days prior to the completion date. A search on the completion date should show the filing in place. Where there is no other filing, the lender would be secure in the knowledge of having priority by advancing funds on the completion date and then subsequently filing the second notice within 21 days of the first filing date.

There is no obligation to make two filings. A single filing of the completed Form C1 within 21 days of the creation of the charge as currently applies may be carried out. However, it is considered lenders may consider it prudent to make two filings. Where two filings are made, the first filing would contain all the required details of the Form C1 other than the date of the charge. The second filing would confirm the creation of the charge (specified in the first filing) and indicate its date. Thus, completion of the second filing statement would not be time consuming or cumbersome.

Apart from the proposed reform giving priority to first in time to file rather than first in time to create, the law as to priority and notice has been left untouched.

Charges over all categories of assets created by Irish incorporated companies are registerable save for certain specific exclusions such as cash and securities

The approach adopted by the Bill is to require particulars of all non-possessory security created by companies to be filed in the Companies Registration Office so that the public are put on notice as to assets which are purportedly under the control of the debtor but in reality are set aside for the debtor's creditor.

The one exception has been the desire not to counteract any European regulation or legislation arising out of a European Union Directive. A relevant EU Directive is Directive 2009/44/EC which gives rise to the European Communities (Financial Collateral Arrangements) Regulations 2010 (SI 626 of 2010). These regulations provide that security given by companies over certain types of collateral in favour of a financial institution does not require registration. The reasoning behind this exemption is to facilitate the trading by companies of money market deposits, shares, bonds and debt instruments, money market instruments and units in collective investment undertakings without a requirement to register.

Accordingly, the Bill exempts from registration charges over cash, funds in a bank account or securities.

A certificate of registration of charge remains conclusive evidence of the filing but only in respect of particulars of property and assets actually filed; thus failure to include details of all property charged will render the security over the omitted details void.

The certificate of charge is now to be conclusive evidence that registration has been complied with in regard to such prescribed particulars as have been filed. The charge will be void, against a creditor or liquidator, in respect of charged assets particulars of which are not filed. The Companies Act 1963 provides that the certificate of registration of charge shall be conclusive evidence that the requirements as to registration have been complied with. As there is no requirement to file a copy of the charge where the particulars have been signed on behalf of the company and the creditor, certificates of registration of charge confirming compliance could be issued (without fault on the part of the CRO)

where the requirements have not been complied with (namely where details of some of the charged assets have been omitted from the required form filed).

Although the new proposal may result in the filing of extensive particulars of the property secured, such an approach will be no different to what has become the current practice. The new provision means that creditors will no longer be prejudiced by being misled as to what a company has charged due to insufficient particulars having been filed.

The form C1 is simplified by the deletion of reference to the amount secured and some superfluous material such as negative pledges.

Traditionally, in filing particulars of charges, the purpose was to make third parties aware that certain assets were charged or effectively set aside to cover the debts owed to named creditors and secondly to indicate the extent of the debt for which the assets were set aside as security. The second strand has become meaningless as most corporate security secures all sums which may become due and payable to the specified creditor. Accordingly, details of the amount secured are not required in the filing form, nor indeed the category of assets charged or whether or not the charge requires registration abroad. Furthermore, save for charges in favour of the Central Bank, it is specifically provided there will be no benefit in filing negative pledge details.

The Slavenburg filing, namely charges over assets in the State created by foreign companies with an established place of business in the State, is to be abolished.

The filing of such charges, although necessary, was wasteful as there is no register as such of foreign companies (save those which have established a branch in the State). There is no effective search mechanism for establishing charges created by foreign companies. The requirement to register in other registries, such as the Land Registry, remains unaffected.

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This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.