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**Charges and Debentures:  
Part 7 of the Companies Act**

## **Contents of Presentation**

- 1. Part 7: Charges and Debentures**
- 2. Chapter 1 – Definition**
- 3. Chapter 2 – Registration of charges and priority**
- 4. Chapter 3 – Provisions as to debentures**
- 5. Chapter 4 – Prohibition on registration of certain matters affecting shareholders/debentureholders**

## **Part 7 – Charges and debentures**

- Consists of 4 Chapters.
- Contain 20 sections of law.

# Chapter 1 - Definition

## *Section 408 - Definition*

- The definition of charge is designed to catch any security interest for non-possessory security over any real or personal property but specifically exclude assets referred to in the Financial Collateral Regulations.
- However, the Act goes further, as to fall within the exception of the Financial Collateral Regulations, the creditor is required to come within a certain category. As this requirement could give rise to some charges over cash being registerable and others not, to be consistent it was considered appropriate to exempt charges requiring registration by reference to asset class only.

## Chapter 2 – Registration of charges and priority

### *Section 409 – Registration of Charges Created by Companies*

- The law currently provides that failure to file the prescribed particulars of a registerable charge within 21 days after the date of its “creation” will render the charge void against any creditor or liquidator of the company.
- However, the present system can create anomalies because, aside from priority under any specialist registries dealing with particular assets, charges acquire their priority from the date they are created not the date they are registered, provided they are subsequently registered within the 21 day period.

# Chapter 2 – Registration of charges and priority

## *Section 409 – Registration of Charges Created by Companies*

- To minimise the potential for abuse, priority is 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 Registry of Deeds or the Land Registry (as the case may be). 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 financial institutions where more than one such institution lends to a particular company.

## Chapter 2 – Registration of charges and priority

### *Section 409 – Registration of Charges Created by Companies*

- 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 be submitted prior to the completion of a transaction, provided a further filing evidencing the actual creation of a charge is filed (within 21 days of its creation) within 21 days of the first filing. The charge will 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.

## Chapter 2 – Registration of charges and priority

### *Section 409 – Registration of Charges Created by Companies*

- This preliminary filing can 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 to advancing funds on the completion date and then subsequently filing the form C1 within 21 days of the first filing.



## Chapter 2 – Registration of charges and priority

### *Section 409 – Registration of Charges Created by Companies*

- Subsections (1) and (3), taken together, re-enact the current law namely, prescribed particulars of the charge submitted to the Registrar within 21 days of the creation of the charge will not invalidate the charge for want of filing.
- Subsections (1), (4) and (5) represent the new option and headline reform referred to above which effectively will protect the priority of the secured creditor.
- Subsection (2) should be read in conjunction with section 415 which deals with the Certificate of Registration. It is designed to protect third parties who may be misled by inadequate filing.

## Chapter 2 – Registration of charges and priority

### *Section 409 – Registration of Charges Created by Companies*

- The impact of subsection (2) is dealt with in the discussion below on Section 415.
- Subsection (6) re-enacts the provisions at the end of Section 99(1) of the Companies Act 1963.
- Subsection (7) re-enacts section 99(4) of the Companies Act 1963.

## Chapter 2 – Registration of charges and priority

### *Section 410 – Duty of Company with respect to Registration under Section 409 and Right of Others to Effect Registration*

- This section is an amended re-enactment of Section 100 of the Companies Act 1963.

## Chapter 2 – Registration of charges and priority

### *Section 411 – Duty of Company to Register Charges Existing on Property acquired*

- This section is a re-enactment of most of Section 101 of the Companies Act 1963.

## Chapter 2 – Registration of charges and priority

### *Section 412 – Priority of Charges*

- The Companies Acts are silent on the issue of priority of charges. The precise date is not expressly specified for the priority of charges, although it is accepted to be the date of creation of the charge.
- Subsection (3)(a) changes the relevant date for the priority of charges to the date of the delivery of the prescribed particulars to the Registrar for registration, or where the dual filing is used, the date of the first filing. In respect of same day filings under subsection (3)(b) priority is given to the earlier filing that day. This priority will be subject to any over-riding priority applicable to certain assets, under already established principles applicable to other registries including the Land Registry, the Shipping Registry or Chattel Registry.

## Chapter 2 – Registration of charges and priority

### *Section 412 – Priority of Charges*

- Subsection (5) provides that priority as to charges is subject to any contrary agreement between the creditors such as an inter-creditor or priority agreement, often entered into by financial institutions where more than one such institution makes finance available to a particular company.
- Subsection (6) restricts the particulars which are capable of being delivered for registration to the Registrar. It is customary to insert additional details to the prescribed particulars being delivered for registration, the most common of which are details of negative pledge clauses, details of crystallisation events in relation to floating charges and other restrictive provisions.

## Chapter 2 – Registration of charges and priority

### *Section 412 – Priority of Charges*

- The above details are all contractual restrictions in the deed of charge. Currently, any such information on the form submitted to the Registrar is ignored when transcribing details onto the register of charges, applicable to the debtor. It would be quite exceptional that relevant charges would not contain these restrictions.
- The Act provides in subsection (6) that the practice of delivering a negative pledge provision for registration should be discontinued. Negative pledge is defined in subsection (8). However, subsection (7) retains the negative pledge provisions where security is granted to the Central Bank.

## Chapter 2 – Registration of charges and priority

### *Section 412 – Priority of Charges*

- Other extraneous material commonly used in the filing form such as automatic crystallisation or covenants as to book debts shall not enter the register.



## Chapter 2 – Registration of charges and priority

### *Section 413 – Registration and Priority of Judgment Mortgages*

- This section is an amended re-enactment of Section 102 of the Companies Act 1963 with some modifications. The obligation on the judgment debtor to file details of the judgment mortgage with the Registrar has been removed. Failure on the part of the company to do so resulted in a small financial penalty on the company and its officers. However, the net result of the inaction by the company could give rise to enforceability issues of the judgment mortgage. The requirement on the debtor could be open to abuse.

## Chapter 2 – Registration of charges and priority

### *Section 413 – Registration and Priority of Judgment Mortgages*

- Accordingly, the role of the judgment debtor is removed and the requirement of the judgment creditor to deliver certified copies of the affidavit to the company is replaced with the requirement that it deliver one certified copy to the Registrar. Failure to deliver the affidavit to the Registrar within 21 days from the date of notification to the creditor by the Property Registration Authority will render the judgment mortgage void against the debtor's liquidator and creditors.

## Chapter 2 – Registration of charges and priority

### *Section 414 – Register of Charges*

- This section is an amended re-enactment of Section 103 of the Companies Act, 1963. Section 103(1)(b)(iv), which referred to the amount secured by the charge, has not been included. This provision is of little relevance today to a person making a search. The reason for this is that most charges now secure all sums due or to become due by the company to the creditor. A subsequent potential creditor is likely to require the first charge be released or to have sight of the first charge, which can be provided by the company, to ascertain exactly the nature of the security which will have priority. Thus, the information relating to the amount of the charge, as filed, has little practical significance.

# Chapter 2 – Registration of charges and priority

## *Section 415 – Certificate of Registration*

- This section is an amended re-enactment of Section 104 of the Companies Act, 1963. It provides that the Registrar shall issue a Certificate of Registration of Charge and this shall be conclusive evidence that the requirements, pertaining to any charges for which prescribed particulars have been filed as to registration have been complied with. The section has been amended in a number of respects.

# Chapter 2 – Registration of charges and priority

## *Section 415 – Certificate of Registration*

- The certificate of charge is now to be conclusive evidence that registration has been complied with in regard only to such prescribed particulars as have been filed. This provision is set out in section 409(3) of the Act and it should be read in conjunction with section 409(2) of the Act which renders the charge void in respect of charged assets particulars of which are not filed.

## Chapter 2 – Registration of charges and priority

### *Section 415 – Certificate of Registration*

- The security document is now to be incapable of filing with the Registrar, and Certificates of Charge should be conclusive evidence that the registration requirements have been complied with, but only insofar as they relate to charges for which particulars have been filed.
- Although this may result in the filing of extensive particulars of the property secured, this practice will be no different to the current practice, but this time particulars of negative pledges will not be filed. The change means that creditors will no longer be prejudiced by being misled as to what a company has charged due to insufficient particulars being filed.

## Chapter 2 – Registration of charges and priority

### *Section 416 – Entries of Satisfaction and Release of Property from Charge*

- This section is an amended re-enactment of s105 of the Companies Act 1963. The current system of registering satisfactions requires the company to submit a form C6 which the secretary and a director of the company sign; in addition, they are required to make a statutory declaration. Following this, the Registrar notifies the secured creditor and, unless she hears from the creditor within 21 days, she registers the satisfaction. This is open to abuse since the notice sent from the Registrar to the creditor may not reach it, yet the satisfaction would be registered since the creditor would have failed to object within the 21 day period. Despite the fact that it appeared to prevent signatories making fraudulent declarations, the requirement to make a statutory declaration was cumbersome.

## Chapter 2 – Registration of charges and priority

### *Section 416 – Entries of Satisfaction and Release of Property from Charge*

- To avoid making such statutory declarations, yet continuing to guard against the possibility of abuse, a statement, in the prescribed form, signed by a director and secretary of the company or two directors of the company, is to be signed and submitted to the Registrar who would then send the 21 day notice to the creditor, and a potential personal liability is to be imposed on the signatory for all the debts of the company, or such portion thereof as the court deems just and equitable, where the signatory did not honestly believe on reasonable grounds that the statement was true. This is provided for in subsections (6) and (7). In addition it is now provided that the secured creditor may sign and file the relevant form.



## Chapter 2 – Registration of charges and priority

### ***Section 417 – Extension of Time for Registration of Charges and Rectification of Register***

- This section is an amended re-enactment of Section 106 of the Companies Act, 1963, which permits an application to be made to court for late registration where there has been a failure to file the prescribed particulars of a charge within the 21 days. The Court, when permitting late registration, is required to be satisfied that the late registration will not prejudice the position of the company's creditors or shareholders. In practice, such an application to Court is both costly and embarrassing for the chargee and/or its solicitor. It does, however, focus the attention on those taking charges to ensure that the correct particulars are filed in a timely manner.

## Chapter 2 – Registration of charges and priority

### ***Section 418 – Copies of Instruments creating Charges to be Kept***

- This section is an amended re-enactment of Section 109 of the Companies Act, 1963. The last line, referring to debentures, has been removed in light of the repeal of Sections 91 and 92 of the Companies Act, 1963. Provision has also been made for the register of charges to be kept in a place other than the registered office of the company.

## **Chapter 2 – Registration of charges and priority**

### ***Section 419 – Registration of Charges Created Prior to Commencement of this Part***

- This section replaces section 112 of the Companies Act 1963.

## Chapter 2 – Registration of charges and priority

### *Section 420 – Transitional Provisions in Relation to Priorities of Charges*

- This section deals with transitional provisions of priority of charges. Note that subsection (2) applies the pre-existing law to charges created before the commencement of the new legislation.

## Chapter 2 – Registration of charges and priority

### ***Section 421 – Netting of Financial Contracts Act 1995 not to affect Registration Requirements***

- The Netting of Financial Contracts Act 1995 (the “Netting Act”) was enacted in response to the perceived difficulty posed by the C(A)A Act 1990 to Ireland being a safe jurisdiction to effect swaps (referred to in the Netting Act as financial contracts). Certain international bodies wishing to do business in Ireland were concerned particularly as to the effect of the appointment of an examiner to an Irish counterparty. The prohibition of usual creditor remedies following the appointment of an examiner discouraged contractual relations for swaps and similar arrangements with Irish companies. The effect of the Netting Act has been to enable persons to enter into financial contracts with Irish companies without the risk that an examiner appointed to the company would put a stay on the enforcement of the financial contracts.

## Chapter 2 – Registration of charges and priority

### *Section 421 – Netting of Financial Contracts Act 1995 not to affect Registration Requirements*

- Financial contracts are netting contracts between two persons often involving assets which would typically fall into the definition of financial collateral under the financial collateral regulations. Section 421 is designed to counteract the exclusion under the Netting Act of the need for registration as the absence of a requirement to register can give a distorted picture to a person inspecting a company's file at the CRO.

## Chapter 2 – Registration of charges and priority

### *Section 421 – Netting of Financial Contracts Act 1995 not to affect Registration Requirements*

- At first this may seem confusing because it is not contemplated such assets would be the subject of registration arising out of the Financial Collateral Regulations, or under the Act because of the definition of “charge”.
- However, where it is relevant is where non-financial collateral assets, such as land or machinery are charged to secure the obligations of a debtor under a financial contract.

## **Chapter 3 – Provisions as to debentures**

### ***Section 422 – Liability of Trustees for Debentures Holders***

- This section is a re-enactment of section 93 of the Companies Act 1963.



## **Chapter 3 – Provisions as to debentures**

### ***Section 423 – Perpetual Debentures***

- This section is a re-enactment of section 94 of the Companies Act 1963.

## **Chapter 3 – Provisions as to debentures**

### ***Section 424 – Power to Re-issue Redeemed Debentures***

- This section is an updated re-enactment of section 95 of the Companies Act 1963.

## **Chapter 3 – Provisions as to debentures**

### ***Section 425 – Saving of Rights of Certain Mortgages in case of Re-issued Debentures***

- This section is an updated re-enactment of section 96 of the Companies Act 1963.

## **Chapter 3 – Provisions as to debentures**

### ***Section 426 – Specific Performance of Contracts to Subscribe for Debentures***

- This section re-enacts section 97 of the Companies Act 1963.

## Chapter 4 – Prohibition on registration of certain matters affecting shareholders or debentureholders

### *Section 427 – Registration against company of certain matters prohibited.*

- This section states that (other than pursuant to an investigation initiated by the ODCE (Part 13), or a disclosure order (Part 14)) the CRO has no jurisdiction to accept receipt of, or to register, an order of any authority affecting a shareholder or debentureholder of the company, or any notice of the making of such an order.
- The CLRG's 2011 Report had found that the requirement in recent years that the CRO register charging orders over shares was of little purpose and not consistent with obligations elsewhere.

## For Further Information Contact

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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.*

# Thank You.

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