

CHAPTER 6

REGISTRATION OF CHARGES

I. INTRODUCTION

1 The provisions reviewed under this section relate to registration of charges. The current law on the registration of charges is set out in sections 131 to 141 of Division 8 to Part IV of the Companies Act. A company is obliged to lodge with the Registrar for registration particulars of every charge created by it that falls within the list of registrable charges set out in section 131(3).

(a) *Survey of reform initiatives*

2 There have been law reform initiatives on the registration of charges in the UK, as encapsulated in the following reports and consultation documents:

- (a) *The Crowther report 1971*;¹
- (b) *The Halliday report 1986*;²
- (c) *The Diamond report 1989*;³
- (d) *The Companies Act 1989*;⁴
- (e) In November 1994, the then Department of Trade and Industry (DTI)⁵ published a consultation document, *Company Law Review: Proposals for Reform of Part XII of the Companies Act 1985*;⁶
- (f) In October 2000, the Company Law Review Steering Group published its consultation document *Modern Company Law for a Competitive Economy: Registration of Company Charges*;⁷

¹ In addition to suggesting legislation to increase consumer protection, the report recommended a sweeping change to the law: the introduction of a new legal framework of security over movable property which would include a notice-filing system that would take a functional approach to commercial transactions, including within its scope, quasi-securities.

² This report recommended the introduction of a system for creating security over movable property based upon the establishment of a register of security interests with notice-filing.

³ The report also recommended that the law should be reformed by the introduction of a new law of security and the creation of a notice-filing system.

⁴ An attempt was made to change the scheme of registration of company charges by Part IV of the Companies Act 1989: new sections were introduced into the Companies Act 1985, but the relevant provisions have never been brought into force. Under these reforms, changes were made to the list of charges that would be registrable and to the requirement to file the instrument of charge itself.

⁵ Currently known as the Department for Business Innovation and Skills.

⁶ Consultation document from the Department of Business Enterprise and Regulatory Reform (currently known as the Department for Business Innovation and Skills).

⁷ Consultation document from the Department of Business Enterprise and Regulatory Reform (currently known as the Department for Business Innovation and Skills).

- (g) The Law Commission Consultation Paper No. 164 (2002) – *Registration of Security Interests: Company Charges and Property Other than Land*;⁸
- (h) The Law Commission Consultation Paper No. 176 (2004) – *Company Security Interests*;⁹
- (i) The Law Commission Final Report (Law Com. No. 296, 2005) – *Company Security Interests*;¹⁰
- (j) Department for Business Innovation and Skills Consultation Paper (2010) - *Registration of Charges Created by Companies and Limited Liability Partnerships*, Proposals to amend the current scheme and relating to specialist registers.¹¹

3 The following common law jurisdictions have also introduced changes to their respective laws on registration of charges:

- (a) Canada – Model Personal Property Security Act;
- (b) Australian Personal Property Securities Act 2009;¹² and
- (c) New Zealand Personal Property Securities Act 1999.

4 In Singapore, law reform of the registration of charges was last mentioned in the Company Legislation and Regulatory Framework Committee (CLRFC) Report.

5 In Hong Kong, the Financial Services and the Treasury Bureau (FSTB) launched a comprehensive rewrite of the Companies Ordinance in mid-2006. Two public consultations covering the accounting and auditing provisions of the Hong Kong Companies Ordinance as well as company names, directors' duties, corporate directorship and registration of charges have already been conducted. A new Companies Bill was introduced into the Legislative Council on 26 January 2011 and is now being considered by a Bills Committee.

6 The regime for registration of charges in Hong Kong is similar to Singapore, and the Hong Kong Consultation Paper is a useful reference and guide for law reform recommendations in the Singapore context.¹³

⁸ <http://www.lawcom.gov.uk/docs/cp164.pdf>

⁹ http://www.lawcom.gov.uk/docs/cp176_final_version.pdf

¹⁰ http://www.lawcom.gov.uk/company_security.htm and <http://www.lawcom.gov.uk/docs/lc296.pdf>

¹¹ <http://www.bis.gov.uk/Consultations> and <http://www.bis.gov.uk/assets/biscore/business-law/docs/g/10-1319-government-response-consultation-registration-of-charges.pdf>

¹² <http://www.comlaw.gov.au/Series/C2009A00130>

¹³ The relevant chapter of the Hong Kong Consultation Paper is available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2ndPCCOR_Chapter5_e.pdf.

II. CONCEPTUAL ISSUES IN REGISTRATION OF CHARGES

(a) *List of registrable charges under section 131(3)*

7 The current list of registrable charges under section 131(3) of the Companies Act is outdated, and should be either expanded or replaced entirely so that the provision will be able to better accommodate new and modern financial instruments. In this regard, the rationale behind the selection of items on the list was explored. However, there does not appear to be any in-depth philosophy or jurisprudence behind the choice of items in section 131(3).

8 The list is based on the UK Companies Act 1948, and can be traced back to 1900. At that time, there were only four items on the list: issues of debentures; charges on the uncalled capital of a company; bills of sale; and floating charges. However, over the years, more items were added to the list. In 1907, a charge on book debts was added. In 1928, a charge on calls made but not paid, ship/ share in ship, and charge of goodwill, patents, trademarks and copyright were added. In 1972, a charge on aircraft was brought within the scope of the Mortgaging of Aircraft Order 1972).¹⁴ The list had since then become “fossilised”.

9 A charge on the shares of a subsidiary company is a registrable charge under section 131(3)(c). This is because of the possibility of the assets of the parent company being siphoned off to the subsidiary, at the creditors’ expense. Whilst this item was part of the Companies Bill 1973 in the UK, it was not included when the Act was eventually passed in Parliament. Some academic writers considered this regrettable on the part of the UK.¹⁵ The item was included in the Singapore Companies Act.

10 The precise rationale for the items on the list in section 131(3) has not been clearly established. The list is a pragmatic reflection of the commercial needs or realities of the period in which the items were included. It is not possible to predict types of security interests that will be created in the future. One leading English textbook noted that it may be a burden to require registration of unforeseen interests and to require registration even with respect to the known types of legal charge, particularly those conferring the right to possession, would produce overkill.¹⁶ To require the registration of all charges could dry up certain types of secured borrowing if the security interest is transient; the need to register it could curtail its effectiveness.¹⁷

11 The UK¹⁸, Australia¹⁹ and Hong Kong²⁰ have similar regimes as Singapore for the registration of charges. There have been various law reform attempts in these jurisdictions.

(b) *Hong Kong: inclusionary vs negative listing approach*

12 The existing legislation on company charges²¹ in Hong Kong sets out the list of registrable charges, in a similar manner to Singapore. A recent consultation paper in Hong

¹⁴ See Gerard McCormack, *Registration of Company Charges* (1994).

¹⁵ See Gower LCB, *Principles of Modern Company Law* (Fourth Edition), 1979.

¹⁶ Gower’s *Principles of Company Law* (5th Edition) at p. 427.

¹⁷ This was a point that was noted in a footnote in Gower’s *Principles of Company Law* - referring to the Jenkins Committee at paragraph 301 and the Diamond Report at paragraph 23.1.6.

¹⁸ Part 25, Chapters 1 and 2 of the UK Companies Act 2006.

¹⁹ Chapter 2K of the Australia Corporations Act 2001.

²⁰ Sections 80 to 91 of the Hong Kong Companies Ordinance (Cap. 32).

Kong (HKCP)²², recommended that this approach be retained, rather than adopt a “negative listing” approach which would seek to make all charges registrable except those which would be specifically excluded. The HKCP explained that this would create uncertainties as “it might include a lot of complex financial transactions which are not registrable at the moment.”

13 The HKCP also noted that legal practitioners are familiar with the current regime and have not encountered any major problems with it.

14 The Steering Committee notes that the “negative listing approach” does not offer any effective solutions to the problems arising from the current “listing approach”. For example, there would be problems with defining what needs to be registered under both approaches. Also, in any event, both approaches would have to be regularly updated – that is, in the case of the “listing approach”, there would be the need to update the list of charges registrable, and for the “negative listing approach”, there would be the need to update the list of charges excluded.

15 Thus, based on the HKCP, it would appear that Hong Kong’s approach is to maintain the status quo of list of registrable charges in the Hong Kong Companies Ordinance, but clarify the meaning of certain ambiguous items on that list (namely, “bill of sale”²³ and “book debts”²⁴, and delete the item on charges securing issues of debentures²⁵), in order to improve the existing regime.

(c) United States and New Zealand: Notice-filing system

16 In contrast to the charge registration system in the UK, Hong Kong, Australia and Singapore, the US adopts a notice-filing system which merely provides that a security interest may exist without definitively establishing its existence. The US approach is based on Article 9 of the US Uniform Commercial Code (UCC), which provides a filing regime for all security interests regardless of whether the provider of the security is a company, some other form of business organisation or indeed an individual. By contrast, the UK, Hong Kong and Singapore registration schemes apply only where the security provider is a company. New Zealand has adopted the US-style notice-filing system.²⁶

²¹ Section 80(2) of the Hong Kong Companies Ordinance (Cap. 32).

²² The HKCP was released in April 2008 and is available at

http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/2ndPCCOR_Chapter5_e.pdf.

²³ Paragraphs 5.13 and 5.14 of HKCP.

²⁴ Paragraphs 5.15 to 5.18 of HKCP.

²⁵ Paragraphs 5.9 to 5.12 of HKCP.

²⁶ New Zealand Personal Property Securities Act 1999 (No. 126).

(d) Reform attempt in Australia and UK: adopting the notice-filing system

17 Australia is also considering a similar approach to New Zealand, although the outcome of the Australian review has not yet been confirmed. The UK Law Commission also proposed a form of notice-filing system that would apply to traditional security interests as well as to sales of receivables.²⁷ However, the Law Commission's proposal met with a considerable amount of resistance from practitioners and has not been adopted. The current UK approach is similar to Singapore's. However, following the recent consultation by the Department for Business Innovation and Skills, the Government has stated its intention²⁸ that the requirement to register should apply to every charge or mortgage granted by a company registered in the United Kingdom over any of its property (wherever situated) unless expressly excluded by Regulations under the Companies Act or any other statute.

18 The HKCP concluded that fully adopting the notice-filing system in the Hong Kong context would require reform beyond the realm of company law and that it would not be within the scope of the Hong Kong's current company law reform exercise.

19 It has been agreed likewise that the notice-filing system for registration of personal properties would not be suitable for the Singapore context. If the New Zealand system were to be adopted in Singapore, it would involve a complete overhaul of the current system as it is premised on the US-style registration system, which is completely different from the current charge-registration regime in Singapore. Any attempt to overhaul the current system would involve not only ACRA but also other relevant government agencies, and would be beyond the scope of the Companies Act review.

(e) Current "inclusionary" regime under section 131(3)

20 Currently, in Singapore most banks and law firms attempt to register charges on behalf of their clients under section 131(3) of the Companies Act, even if the charges do not really fit into any of the registrable categories or items listed in section 131(3). In so doing, law firms and banks have attempted to "squeeze" the relevant charges they wish to register into one of the categories in the list. An example would be where law firms and banks have attempted to register charges on bank accounts as "book debts" under section 131(3)(f). It is possible to argue that a bank account is not a book debt and that the charge has been incorrectly registered.

21 The current list in section 131(3) is practically redundant as the list is being "stretched" to take account of charges that may not fit into the "normal" definition of a charge. This has made the list rather artificial. Moreover, there are now new types of securities and assets that may not fit into section 131(3) as it stands. It would be more flexible to leave it to the chargor and chargee to decide whether such securities and assets should be registrable as a charge. (A written instrument will provide some form of evidence to back up the claim of a charge.) The Steering Committee considered two alternatives approaches. The first was based on a reform of the definition of charge and making all charges registrable. The second was to update the section 131(3) list of registrable charges.

²⁷ See the Law Commission Final Report (2005, Law Com No 296, Cm 6654).

²⁸ <http://www.bis.gov.uk/assets/biscore/business-law/docs/g/10-1319-government-response-consultation-registration-of-charges.pdf>

(f) Reform of definition of charge

22 The first alternative considered by the Steering Committee was:

- (a) to define a charge as being:
 - (i) a written instrument that is not created or does not arise as a result of an operation of law (for example, liens and pledges); and
 - (ii) one that requires an overt act of creation and evidenced by some form of documentation; and
- (b) the law should require all such charges to be registrable.

23 There was substantial disagreement expressed with this approach by some of the respondents to the consultation including practising lawyers and academics. MAS suggested retaining the current list of registrable charges and adding a catch-all as per the proposed definition. Some views expressed were as follows:

- (a) While the current system is not perfect, it largely works.
- (b) The proposed changes will broaden the category of registrable charges which endorses the current excessive registrations rather than rectifying the situation. Making more charges registrable can result in increased registration and due diligence checking costs and may inhibit financial innovation.
- (c) The proposed changes may impact the relative competitiveness of Singapore as a regional financial hub since it deviates from familiar common law principles and systems.
- (d) The ‘negative listing’ approach does not solve the problem because it will just mean moving from an inclusionary list to an exclusionary one and there will be problems defining the exclusionary list.
- (e) There are problems with the proposed definition. It may be necessary to specify that any statutory definition is not meant to affect the common law on what amounts to a charge.

24 The second alternative is to improve on and clarify the list of registrable charges in section 131(3). This alternative is recommended by the Steering Committee. The danger of the first alternative is that what emerges will be different but not necessarily better than the current situation.

Recommendation 6.1

The current framework for registration of charges should be maintained but the list of registrable charges at section 131(3) should be reviewed and updated.

III. OPERATIONAL ISSUES IN REGISTRATION OF CHARGES

(a) Registration of charges in a name other than an individual or company

25 Currently, section 132 of the Companies Act allows for companies and persons to register charges with ACRA, but does not cater for registration of charges by other types of business entities, such as partnerships. ACRA had recently rejected a charge application in which the chargee was a business entity, because the name under which a person carries on business is not allowed to be registered as a chargee.

26 To resolve this, the Steering Committee is of the view that section 132 should be broadened to provide for the registration of charges in the name of a business entity, rather than just in an individual's or company's name. This would facilitate the registration of charges for partnerships, limited partnerships, and other types of business entities other than companies. The intention for the filing of charges under section 131 is to alert anyone of the charges existing on a company. Limiting the ability to register a charge to only companies and individuals needlessly impedes this function of the register of charges.

27 On a related note, the Steering Committee is of the view that broadening section 132 to provide for the registration of charges in a name of a business entity rather than just in an individual's or company's name would however pose some potential challenges concerning the clarity of the charges, for example, where the entity in question is a business trust or real estate investment trust (REIT). To illustrate, if a REIT takes out a secured loan, the charge is registered against the trustee. However, if a third party were to undertake an inspection of the register of charges of the trustee, it would come across a number of charges which would have no real relevance in relation to the obligations in respect of that specific REIT (given the other trusts for which the trustee has responsibility over). The tracing of REITs registered under section 131 may involve the inconvenient process of finding out who the trustee is, and then doing a search of the charges registered under that trustee's name.

28 The majority of respondents to the consultation agreed with this recommendation.

Recommendation 6.2

Section 132 should be broadened to provide for the registration of charges in the name of a business entity, rather than just in an individual's or company's name.

(b) Satisfaction of charge under section 136

29 Currently, for the satisfaction of charges under section 136(2) of the Companies Act, the chargee has to endorse a statement of payment to indicate that the charge has been satisfied. The Companies Act however does not cater for situations where the chargee is either missing, dead or refuses to endorse the statement. The Act also does not cover situations where a company has been merged with another company. In the case of a merger, where Company A (the chargee) is merged with Company B, Company B is not likely to have the relevant documents to endorse the satisfaction of the charge since it is not the chargee.

30 Whilst a majority of the respondents to the consultation agreed with maintaining the status quo, there was also a suggestion that there should be an alternative to going to court provided to address situations where the chargee is uncooperative.

31 The Steering Committee has decided against recommending the amendment of the Act to allow the chargor to sign a statutory declaration that the charge has been satisfied, as this could be abused by the chargor. The Steering Committee is of the view that in a scenario where the chargee is not able to endorse the statement of satisfaction, the statement should only be verified by the court. The Steering Committee further notes that charges are not the same as ordinary debts. Charges are secured debts with priority rights of creditors attached to them. Hence, it would not be appropriate to rely on the chargor to initiate removal of the charge from the register.

32 The Steering Committee is of the view that the current requirements for satisfaction of a charge should be maintained.

Recommendation 6.3

The current requirements for satisfaction of a charge should be maintained.

(c) Retention period for instrument of charge

33 Currently, section 138(1) of the Companies Act provides that a company must cause instruments creating the charge to be kept at the registered office of the company. However, it seems that the books and papers must be kept for so long as the company is in existence, and for a period of 2 years after dissolution.²⁹

34 In this regard, the Steering Committee is of the view that section 138(1) of the Companies Act should be amended to specify that an instrument should be kept for as long as the charge is in force, and upon discharge, should be retained on the basis that it forms part of the accounting and other records required to be kept under and for the purposes of section 199 of the Act. (On that basis, the record retention would thus be 5 years from the end of the financial year in which the charge was fully discharged).

35 The current ACRA registration forms require a confirmation by the chargee (if the charge is registered with ACRA by the chargee) that the instrument is kept at the registered office. This may not be appropriate as the chargee has no control over this. In this regard, the Steering Committee is of the view that ACRA should review its form and also consider the possibility of including in the e-notification confirming registration, a reminder of the chargor's responsibility to keep a copy of the charge at the registered office.

36 The respondents to the consultation unanimously agreed with these recommendations.

²⁹ Section 320(2).

Recommendation 6.4

Section 138(1) of the Companies Act should be amended to specify that an instrument should be kept for as long as the charge is in force.

Recommendation 6.5

Upon discharge of the charge, the instrument by which the charge is created should be retained on the basis that it forms part of the accounting and other records required to be kept under and for the purposes of section 199 of the Act.

Recommendation 6.6

There should be a review of ACRA's form for registration of charges in which a confirmation is required by the chargee (if the charge is registered with ACRA by the chargee) that the instrument is kept at the company's registered office.

Recommendation 6.7

A reminder of the chargor's responsibility to keep a copy of the charge at the registered office should be included in the e-notification confirming registration.

(d) Charges created by unregistered foreign entities

37 Some law firms have attempted to register with ACRA charges created by companies which are not registered under the Companies Act. However, sections 131 to 141 of the Companies Act clearly apply to only locally-incorporated companies and registered foreign companies, and not other unregistered foreign entities. The ambit of section 141 clearly does not extend to unregistered foreign entities.

38 Section 141 further clarifies that the word "company" in the Division dealing with charges will include foreign companies that have been registered under Division 2 of Part XI. Whilst the law firms concerned have attempted to interpret the ambit of section 141 to be an inclusive provision, ACRA's position is that section 141 of the Companies Act only covers foreign companies registered with ACRA (and its coverage should not be "stretched" beyond this ambit). The interpretation accorded by ACRA is that the provision is exhaustive in that the word "company" within the Division refers only to companies incorporated under the Companies Act and registered foreign companies. The Steering Committee agrees with ACRA's stance and thus confirms that unregistered foreign companies cannot register a charge with ACRA. The drafting of section 141 should be improved to make this absolutely clear, and to stop attempted registration of such charges with ACRA. Hence, for avoidance of doubt, the Companies Act should clarify that the reference in section 141 does not include a reference to unregistered foreign companies.³⁰

³⁰ In Hong Kong, the "*Slavenburg* registration" issue has been laid to rest as the current legislation confines charge registration requirements to charges of Hong Kong incorporated companies and non-Hong Kong companies registered under the Companies Ordinance.

39 The Steering Committee went further to consider whether it would be beneficial to amend the current law in Singapore so as to allow for the registration of charges of unregistered foreign companies; in other words, whether the Registrar should accept lodgments of charges by unregistered foreign companies.

40 In order to decide if the law should allow for unregistered foreign companies to register charges with ACRA, it would be necessary to consider whether the interests of members of the public in Singapore are prejudiced in any way. In this context, the Steering Committee is of the view that there is no local public interest to protect.

41 It is further noted that in the context of immovable property in Singapore, the provision for registration will be covered by the Land Titles Act. However, for all other types of movable property, there is no public register to reflect that the property has a charge over it. Thus, it would be up to that chargee to take the necessary measures to protect its own interest if the chargee were to grant a facility to an unregistered foreign company. The chargee would most likely have to take the risk of being an unsecured creditor. (This argument would apply even if the chargee were a Singapore entity because it would have no ability to register a charge against an entity that is not registered in Singapore.)

42 There could be a downside to allowing unregistered foreign companies to register their charges – it may be onerous on foreign creditors of an unregistered foreign company to be required to check the ACRA register for charges which will be deemed to be good notice once the charge is registered with ACRA.

43 Since local companies cannot register a charge over a foreign company in a foreign register, the same position should also apply to an unregistered foreign company.

44 Thus, foreign unregistered companies cannot register a charge in Singapore and chargees involved will have to proactively protect their interests under the current laws of the relevant jurisdictions.

45 The respondents to the consultation unanimously agreed with this recommendation.

Recommendation 6.8

The registration of charges regime should continue to apply only to foreign companies registered under the Companies Act and should not be extended to unregistered foreign entities.

(e) Whether submissions of physical charge documents (by unregistered foreign companies) are to be accepted

46 The word “lodged” is defined under section 4(1) of the Companies Act to mean lodged under the Companies Act or any corresponding previous written law. The lodgment must therefore be in accordance with the Companies (Filing of Documents) Regulations. The Regulations require that “any form and any relevant accompanying document” be lodged using the electronic filing system with exceptions given only “as the Registrar thinks fit”.

47 If the Registrar has not agreed to accept such documents in the form of physical delivery of the documents, then arguably, the documents have not been duly lodged by the mere delivery of the documents to the Registrar.

48 Some law firms have attempted to register charges of unregistered foreign companies by lodging physical copies of the relevant charge documents with ACRA, relying on the procedures which were allowed under the UK case of *NV Slavenburg’s Bank v. Intercontinental Natural Resources Ltd* [1980] All ER 995 (“*Slavenburg*”).

49 Whilst *Slavenburg* may be relevant in the UK, it is not relevant in the Singapore context. In the UK, it was possible under section 106 of the Companies Act 1948 for overseas companies which established a place of business in England and Wales (but which may not have been registered with Companies House) to register charges in the UK. However, this provision has since been repealed through the UK Companies Act 1989. In Singapore, the mere physical lodgment of charge documents with ACRA does not equate with successful registration of the charge (even though the *Slavenburg* case says so). Lodgment of charge documents must be through BizFile – which can only be done for local companies and registered foreign companies. Thus, the “*Slavenburg* Principle” for the registration of charges by unregistered foreign companies will not apply in Singapore.

50 The respondents to the consultation unanimously agreed with this recommendation.

Recommendation 6.9

Maintain ACRA’s current practice/position that the mere physical lodgment of charge documents with ACRA does not equate with successful registration of the charge and that the lodgment of the charge documents must be made through BizFile.