

BERR Ref: D09/569479

The Rt.Hon. Lord Woolf  
Chairman,  
Financial Markets Law Committee  
c/o Bank of England  
Threadneedle Street  
LONDON EC2R 8AH

20 May 2009

Dear Lord Woolf,

Thank you for your letter of 6 May 2009 providing the Financial Markets Law Committee's response to the consultation on the April 2009 draft Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009.

As from 1 October 2009, the existing regime will be changed so that the requirement for an overseas company to register a registrable charge applies only to those overseas companies that have registered an establishment in the United Kingdom (which is to be defined to include a branch under the 11th EU Directive or a place of business). At present, the requirement to register a charge applies to all overseas companies that have an established place of business in the United Kingdom whether or not the company has registered it with the Registrar of Companies.

The Government agree that further discussion is needed before making any other significant change to the regime for registration of overseas companies' charges, including as to which charges are registrable. This will be part of the review, in early 2010, of the regime for registration of company charges. We are grateful to the FMLC for its offer to discuss further the issues for overseas companies. We would like to take up this offer this Autumn, prior to the public consultation next year.

In the meantime, the Regulations coming into force on 1 October 2009 will retain the status quo in most regards, including as to which charges are registrable. However, in the light of the continuing legal uncertainty as to which charges are registrable, the criminal sanction on the company will be abolished. There will be no change to the sanction under which, in the event of the company's insolvency, a charge is invalid against an administrator, lender or creditor. This means that in practice it will be a commercial decision for the lender whether to ensure that security provided by an overseas company will be recognised in the UK in the event of the company's insolvency.

I attach an advance copy of the Government's response to the consultation in which this decision is announced.

I am copying this letter to Joanna Perkins, and sending it by both post and email.

Yours sincerely,

ANNE SCROPE

**COMPANIES ACT 2006 IMPLEMENTATION:**

**The Overseas Companies (Company Contracts and Registration of Charges)  
Regulations 2009**

**GOVERNMENT RESPONSE TO RESPONSES TO CONSULTATION ON  
REGISTRATION OF CHARGES**

**Background**

1. At present, every overseas company that has an established place of business in a UK jurisdiction<sup>1</sup> is required to register any charges it creates over property in that jurisdiction and charges on property in that jurisdiction which it acquires if that charge would be registrable if created by a UK company. On 1 October 2009, all the provisions relating to registration of charges will be replaced by the Companies Act 2006.

2. For UK companies, the Companies Act 2006 (the 2006 Act) restates the existing provisions. It also provides a power to apply, with or without modification, any of the provisions for the registration of charges by a UK company to a registered overseas company. A draft of the regulations relating to registration of charges by overseas companies was placed on the BERR website on 4 April 2009 with a request for comments by 5 May 2009. These draft Regulations replaced Part 6 and Chapter 5 of Part 9 of the draft Overseas Companies Regulations published on the BERR website in June 2008.

3. Under the 2006 Act, the requirement to register charges applies only to those overseas companies that have registered a UK establishment with the UK Registrar of Companies. For these overseas companies, the April 2009 draft Regulations retained the existing requirements with the following differences.

- They provide for a single UK-wide regime (rather than, at present, different regimes according to the UK-jurisdiction in which the overseas company has registered).
- There was no provision for late registration of a charge.
- There is no requirement to register charges on property that it acquires.
- They apply the rules for inspection of records that generally apply to private companies including provision to specify a location for inspection other than its principal office.

The April 2009 draft Regulations, unlike the June 2008 draft Regulations, followed the existing provisions in not providing any definition of location for property subject to a charge.

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<sup>1</sup> I.e England & Wales or Scotland or Northern Ireland

## Continuation 2

### Consultation

4 We received 10 substantial responses to the request for comments on the draft Regulations (see Annex A). In addition, 5 law firms wrote in support of the response made by the City of London Law Society.

5. Most respondents were concerned at the lack of clarity as to whether a charge over most types of intangible assets would be registrable. It was pointed out that this is particularly serious as the sanction for failure to register a registrable charge within the specified period is that, in the event of the company's insolvency, the charge is not valid against a liquidator, administrator or creditors. In addition, there is a criminal sanction on the company.

6. Several respondents drew attention to the problems associated with floating charges being registrable when covering property in the UK. This is particularly problematic when the floating charge is created by an overseas company with a registered establishment in the UK but where the floating charge is unconnected with that establishment.

7. Other points made were that:

- the rules for late filing should apply to overseas companies;
- the rules relating to debentures need updating in the light of dematerialisation and modern market practices.

### Government Response

8. The Government are extremely grateful for the speedy and substantive responses to their request for comments on revised draft Regulations.

9. The Government share respondents' concern as to the possible consequences of the lack of clarity as to which intangible assets are registrable. This is a complex issue over which there is no consensus. The best solution may require other changes to be made to the system for registration of charges, and not just its application to overseas companies. The Government are already committed to reviewing this system with a view to using the power to change it provided by the 2006 Act. There will be consultation in early 2010 with a view to revising the system for both UK companies and overseas companies simultaneously. Other points made will also be addressed as part of this review.

10. In the meantime, the Government considers the status quo to be the most prudent course as regards which charges should be registrable. They have decided that the 2009 regulations should differ from the April 2009 draft only so that:

- there is no longer a criminal sanction on a company for failure to register a registrable charge; and
- to retain the existing provisions for late registration of a charge.

11. The Government are also grateful for the many useful comments on the drafting of the Regulations, especially those relating to Scottish security law, and on the operation of the regime.

20 May 2009

ANNEX A

RESPONDENTS

City of London Law Society Financial Law Committee <sup>1</sup>

Letters of support for CLLS response from:

Travers Smith LLP

Norton Rose LLP

Linklaters LLP

Herbert Smith LLP

Clifford Chance LLP

Peter Graham

Lloyds TSB Wholesale & International Banking

Professor Hugh Beale QC FBA

Bank of England

Registers of Scotland

Banking Law Sub-Committee of the Law Society of Scotland

The British Bankers Association

The Rt.Hon Lord Woolf, Chairman, Financial Markets Law Committee

The Land Registry

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<sup>1</sup> Comments prepared by a working party of the CLLS Financial Law Committee, made up of solicitors who are experts in their field, ie:

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