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Paul Allen
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Scottish Government
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floating-charges@scotland.gsi.gov.uk

Dear Mr Allen

Issue 151: Consultation by the Scottish Government regarding the bringing into force of Part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007 in light of the options presented in the report of the Technical Working Group on the Register of Floating Charges

The remit of the Financial Markets Law Committee (the "FMLC" or the "Committee"), established by the Bank of England, is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

The FMLC welcomes the opportunity to respond to the consultation by the Scottish Government (the "Consultation")¹ on the options presented in the report of the Technical Working Group on the Register of Floating Charges (the "Report").² The Report sets out three options with regard to Part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007 ("Part 2"): (i) bringing Part 2 into force, (ii) bringing Part 2 into force with a number of substantial amendments as detailed in the Report and (iii) not bringing Part 2 into force. The Consultation welcomes views on these options

It is the view of the FMLC that, on balance, the bringing into force of Part 2 will not contribute to legal certainty. The Committee believes that Part 2 gives rise to a number of legal and practical difficulties.³ The FMLC notes, for example, that there are concerns as regards the compatibility of Part 2 with the European rules on the law applicable to assigned or subrogated claims (these rules are contained in the Rome I Regulation).⁴

¹ Views were requested in a letter from you, with the subject line 'investing in business in Scotland: floating charges', which was sent to a range of interested parties on 14 March 2012.

² The report is available at <http://www.scotland.gov.uk/Resource/Doc/254430/0121799.pdf>.

³ This letter is not intended to cover exhaustively the legal and practical problems, considered in the Report, which may arise from the bringing into force of Part 2.

⁴ Regulation (EC) No 593/2008.

The bringing into force of Part 2 would also give rise to the possibility that a charge created by a non-Scottish UK company would have two dates of creation: one under the law of England and Wales and a second under the law of Scotland. The emergence of such a distinction would, by its nature, seem likely to give rise to increased uncertainty and practical difficulties.

The coming into force of Part 2 would, moreover, introduce a requirement for foreign incorporated companies to register charges over assets situated in Scotland. The FMLC has, on a number of occasions, expressed concerns about the imposition of such a requirement, notably in the context of HM Government's consultation on the draft Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009. That submission, and others on this subject, can be accessed at <http://www.fmlc.org/Pages/papers.aspx>. The recent removal of the requirement to register charges created by foreign incorporated companies under Part 25 of the Companies Act 2006 was strongly supported by the FMLC.

The Committee acknowledges that the amendments provided for in the Report's second option may reduce certain practical difficulties and costs. It is not for the FMLC to comment on the policy benefits of the three options set out. The Committee would underline, however, that notwithstanding the amendments envisaged under option 2, serious legal uncertainty will remain if Part 2 is brought into force, not least with respect to the requirement for the registration of charges by foreign incorporated companies.

Please do not hesitate to contact the FMLC Secretariat if you should like further information or wish to discuss these issues further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'H Hoffmann', written in a cursive style.

Lord Hoffmann