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STATUTORY INSTRUMENTS

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**2009 No. 0000**

**COMPANIES**

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

<i>Made</i> - - - -	<i>Date</i>
<i>Laid before Parliament</i>	<i>Date</i>
<i>Coming into force</i> - -	<i>1<sup>st</sup> October 2009</i>

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NOTE: We think the contents page needs some updating

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Schedule

The Secretary of State, in exercise of the powers conferred by sections 1045, 1052(1) to (4) and 1292 of the Companies Act 2006(a), makes the following Regulations:

## PART 1 INTRODUCTION

### Citation and commencement

1.—(1) These Regulations may be cited as the Overseas Companies (Company Contracts and Registration of Charges) Regulations 2009.

(2) These Regulations come into force on 1st October 2009.

### Interpretation

2. In these Regulations—

“certified copy” means a copy certified as a correct copy;

“establishment” means—

(a) a branch within the meaning of the Eleventh Company Law Directive (89/666/EEC)(b),  
or

(b) a place of business that is not such a branch,

and “UK establishment” means an establishment in the United Kingdom; and

“Overseas Companies Regulations” means the [Overseas Companies Regulations 2009].

## PART 2 COMPANY CONTRACTS ETC

To be inserted

## PART 3 REGISTRATION OF CHARGES

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(a) 2006 c.46.

(b) OJ L395, 31.12.1989, p.36.

## Application and interpretation of Part

3.—(1) This Part applies to an overseas company that—

- (a) has complied with Part 2 (initial registration of particulars) of the Overseas Companies Regulations in respect of one or more UK establishments, and
- (b) has not subsequently given notice under regulation 78 of those Regulations (notice of closure of UK establishment) in respect of all those establishments;

provided that this Part shall not start to apply until the public particulars of the registration of that overseas company has been made available by the registrar to parties searching the register and shall continue to apply until any notice given by that overseas company under regulation 78 of the Overseas Companies Regulations has likewise been made available and shall not apply to any charge that was created by that overseas company on a date when this Part was not applicable to it.

(2) In this Part “charge” includes a mortgage.

## Charges requiring registration

4.—(1) A charge requires registration under this Part if—

- (a) it is created by a company to which this Part applies,
- (b) the property subject to the charge is situated in the United Kingdom, and
- (c) the charge is of a type requiring registration.

(2) Whether the conditions in paragraph (1)(a) and (b) are met is determined when the charge is created.

(3) The types of charge requiring registration are—

- (a) a charge on land or any interest in land, other than a charge for any rent or other periodical sum issuing out of land,
- (b) a charge created or evidenced by an instrument that, if executed by an individual, would require registration as a bill of sale,
- (c) a charge on a ship or aircraft, or any share in a ship,
- (d) a charge on any intellectual property.

NOTE we believe that a floating charge including any of the above categories of assets would still require registration. However, throughout the world charges over pools of securities and other intangible assets are very likely to be (common law jurisdictions influenced by English law) or be characterised under English law as floating charges (even though floating charges are probably not understood in the place of creation). We think it is both impractical and oppressive to continue any registration requirement which could be understood as requiring a charge created eg in New York, Hong Kong or Frankfurt in support of financial markets operations to be registered in the UK, just because the creating company has a branch in the UK and the charged intangible assets might include eg a debt or a security that might according to uncertain situs rules be situated in the UK. Financial businesses create thousands of such charges in the course of normal operations and they are normally exempt from registration requirements in the place of creation – however, they could be caught by this language. At present, even if caught, they are not registered, but now the point has been debated, it is important to remove the disproportionate risk of non-registration in the UK.

(4) For the purposes of paragraph (3)(a)—

- (a) a charge on land includes a charge created by a heritable security within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970; and
- (b) the holding of debentures entitling the holder to a charge on land is not an interest in the land.

(5) For the purposes of paragraph (3)(f) the deposit by way of security of a negotiable instrument given to secure the payment of book debts is not a charge on those book debts. NOTE: This should be deleted if Reg 4(3) is amended as indicated above.

(6) For the purposes of paragraph (3)(i), "intellectual property" means—

- (a) any patent, trade mark, registered design registered in a UK registry, [copyright or design right]; or
- (b) any licence under or in respect of any such right.

NOTE we suggest that intellectual property is limited to UK registered intellectual property rights, as for other IP rights there are many of the same difficulties as for intangibles generally.

#### **Duty to deliver particulars of charge etc for registration**

5.—(1) A company to which this Part applies that creates a charge requiring registration must deliver particulars of the charge, together with a certified copy of the instrument (if any) by which the charge is created or evidenced, to the registrar before the end of the period allowed for registration.

(2) The particulars required are—

- (a) the date of the creation of the charge,
- (b) a description of the instrument (if any) creating or evidencing the charge,
- (c) the amount secured by the charge,
- (d) the name and address of the person entitled to the charge, and
- (e) short particulars of the property charged.

(3) The period allowed for registration of the charge is 21 days, beginning with the day after the day on which the charge is created.

(4) Registration of the charge may instead be effected on the application of a person interested in it.

(5) Where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the registrar on registration.

(6) Paragraph (1) does not apply if the property subject to the charge is, at the end of the period allowed for registration, no longer situated in the United Kingdom.

#### **Penalty for failure to register**

6.—(1) If a company fails to comply with regulation 5(1) an offence is committed by—

- (a) the company, and
  - (b) every officer of the company who is in default.
- (2) A person guilty of an offence under this regulation is liable—
- (a) on conviction on indictment, to a fine;
  - (b) on summary conviction to a fine not exceeding the statutory maximum.

(3) Paragraph (1) does not apply if the registration of the charge has been effected on the application of some other person.

NOTE We believe that this sanction would be wholly oppressive if charges over intangibles generally are required to be registered. It seems any officer of a large company with a branch here would be likely to be at risk as a result of activities wholly un-connected with the company's UK branch.

#### **Special rules about debentures: charge in series of debentures**

7.—(1) Where a series of debentures is created by a company containing, or giving by reference to another instrument, any charge which is required to be registered under this part, to the benefit of which debenture holders of that series are entitled *pari passu*, it is for the purposes of regulation 5(1) sufficient if the following particulars, together with a copy of the deed containing the charge (or, if

there is no such deed, a copy of one of the debentures of the series), are delivered to the registrar before the end of the period allowed for registration.

(2) The particulars are—

- (a) the total amount secured by the whole series,
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the series is created or defined,
- (c) a general description of the property charged, and
- (d) the names of the trustees (if any) for the debenture holders.

(3) Particulars of the date and amount of each issue of debentures of a series of the kind mentioned in paragraph (1) must be sent to the registrar for entry in the register of charges.

(4) The period allowed for registration of particulars of a series of debentures is—

- (a) if there is a deed containing the charge mentioned in paragraph (1), 21 days beginning with the day after the day on which that deed is executed;
- (b) if there is no such deed, 21 days beginning with the day after the day on which the first debenture of the series is executed.

(5) Registration of the series of debentures may instead be effected on the application of a person interested in it.

(6) Where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the registrar on registration.

(7) Regulation 6 (penalty for failure to register) applies for the purposes of this regulation as it applies for the purposes of regulation 5(1).

#### **Special rules about debentures: additional registration requirement for commission etc**

8.—(1) Where any commission, allowance or discount has been paid or made either directly or indirectly by a company to a person in consideration of their—

- (a) subscribing or agreeing to subscribe, whether absolutely or conditionally, for debentures in a company, or
- (b) procuring or agreeing to procure subscriptions, whether absolute or conditional, for such debentures,

the particulars required to be sent for registration under regulation 5 include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made.

(2) The deposit of debentures as security for a debt of the company is not, for the purposes of this regulation, treated as the issue of debentures at a discount.

#### **Special rules about debentures: endorsement of certificate on debentures**

9.—(1) The company shall cause a copy of every certificate of registration given under regulation 10(6) to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the charge so registered.

(2) This does not require a company to cause a certificate of registration of any charge so given to be endorsed on any debenture or certificate of debenture stock issued by the company before the charge was created.

(3) A person commits an offence who knowingly and wilfully authorises or permits the delivery of a debenture or certificate of debenture stock which under this regulation is required to have endorsed on it a copy of a certificate of registration, without the copy being so endorsed upon it.

(4) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

NOTE: these technical rules are really only appropriate for debentures issued by Companies Act or other UK companies for trading in UK markets. We wonder if it is necessary to include the special rules in 8 and 9 for debentures issued by overseas companies?

### **The register of charges**

10.—(1) The registrar shall keep for each company to which this Part applies a register of all the charges requiring registration under this Part.

(2) In the case of a charge to the benefit of which holders of a series of debentures are entitled, the registrar shall enter in the register the required particulars specified in regulation 7(2).

(3) In the case of a charge imposed by the Enforcement of Judgments Office under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981, the registrar shall enter in the register the date on which the charge became effective.

(4) In the case of any other charge, the registrar shall enter in the register the following particulars—

- (a) if it is a charge created by the company, the date of its creation and, if it is a charge that was existing on property acquired by the company, the date of the acquisition,
- (b) the amount secured by the charge,
- (c) short particulars of the property charged, and
- (d) the persons entitled to the charge.

(5) The registrar shall enter in the register the particulars required to be delivered to the registrar under this Part.

(6) The registrar shall give a certificate of the registration of any charge registered in pursuance of this Part, stating the amount secured by the charge.

(7) The certificate—

- (a) shall be signed by the registrar or authenticated by the registrar's official seal, and
- (b) is conclusive evidence that the requirements of this Part as to registration have been satisfied.

(8) The register kept in pursuance of this regulation shall be open to inspection by any person.

### **Consequences of failure to register**

11.—(1) If a company creates a charge requiring registration under this Part, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against—

- (a) a liquidator of the company,
- (b) an administrator of the company, and
- (c) a creditor of the company,

if regulation 5 (duty to deliver of particulars of charge etc for registration) is not complied with.

(2) Failure to comply with—

- (a) regulation 7(3) (registration of series of debentures: duty to send particulars of each issue of debentures), or
- (b) regulation 8 (additional registration requirement for commission etc),<sup>1</sup> See above

does not affect the validity of the debentures issued

(3) Paragraph (1) is without prejudice to any contract or obligation for repayment of the money secured by the charge; and when a charge becomes void under this regulation, the money secured by it immediately becomes payable.

### **Registration of enforcement of security**

12.—(1) A person who—

- (a) obtains an order for the appointment of a receiver or manager of property of a company to which this Part applies, or
  - (b) appoints such a receiver or manager under powers contained in an instrument,
- must give notice of the fact to the registrar within seven days of the order or of the appointment under those powers.

(2) A person appointed receiver or manager of a company's property under powers contained in an instrument who ceases to act as such receiver or manager must, on so ceasing, give the registrar notice to that effect.

(3) The registrar must enter a fact of which notice is given under this regulation in the register of charges.

(4) A person who makes default in complying with the requirements of paragraph (1) or (2) commits an offence.

(5) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale.

#### **Entries of satisfaction and release**

**13.**—(1) This regulation applies if a statement is delivered to the registrar verifying with respect to a registered charge—

- (a) that the debt for which the charge was given has been paid or satisfied in whole or in part, or
- (b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking.

(2) The registrar may enter on the register a memorandum of satisfaction in whole or in part, or of the fact part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking (as the case may be).

(3) Where the registrar enters a memorandum of satisfaction in whole, the registrar must if required send the company a copy of it.

#### **Rectification of register of charges**

**14.** If the court is satisfied—

- (a) that the failure to register a charge before the end of the period allowed for registration, or the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction—
  - (i) was accidental or due to inadvertence or to some other sufficient cause, or
  - (ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or
- (b) that on other grounds it is just and equitable to grant relief,

the court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the period allowed for registration shall be extended or, as the case may be, that the omission or mis-statement shall be rectified.

#### **Companies to keep available for inspection copies of instruments creating charges**

**15.**—(1) A company to which this Part applies must keep available for inspection a copy of every instrument creating a charge requiring registration under this Part.

(2) In the case of a series of uniform debentures, a copy of one of the debentures of the series is sufficient.

[Company's register of charges

16.—(1) Every [limited] company to which this Part applies must keep available for inspection a register of charges and must enter in it—

- (a) all charges specifically affecting property of the company situated in the United Kingdom, and
- (b) all floating charges on the whole or part of the company's property or undertaking situated in the United Kingdom.

Note: we suggest omitting the word "limited" for consistency with other references

(2) The entry must in each case give a short description of the property charged, the amount of the charge and, except in the cases of securities to bearer, the names of the persons entitled to it.

(3) An officer of the company who knowingly and wilfully authorises or permits the omission of an entry required to be made in pursuance of this regulation commits an offence.

(4) A person guilty of an offence under this regulation is liable—

- (a) on conviction on indictment, to a fine;
- (b) on summary conviction, to a fine not exceeding the statutory maximum.]

Is it not sufficient to require overseas company's to keep a copy.

**Copies of instruments and company's register of charges to be available for inspection**

17.—(1) This regulation applies to—

- (a) documents required to be kept available for inspection under regulation 15 (copies of instruments creating charges), and
- (b) a company's register of charges kept in pursuance of regulation 16.

(2) The documents and register must be kept available for inspection at a location in the United Kingdom at which it carries on business notified to the registrar in accordance with paragraph (3).

(3) The company must give notice to the registrar—

- (a) of the place at which the documents and register are kept available for inspection, within 14 days of the first registration of a charge under this Part, and
- (b) of any change in that place, within 14 days of any such change.

(4) The documents and register shall be open to the inspection—

- (a) of any creditor of the company without charge, and
- (b) of any other person on payment of is £3.50 for each hour or part thereof during which the right of inspection is exercised .

(5) An overseas company shall make its company records available for inspection by a person on a day which has been specified by that person ("the specified day") provided that—

- (a) the specified day is a working day; and
- (b) that person gives the company the required notice of the specified day.

(6) The required notice is at least 10 working days' notice of the specified day.

(7) When the person gives notice of the specified day he shall also give notice of the time on that day at which he wishes to start the inspection (which shall be any time between 9 am and 3 pm) and the company shall make its company records available for inspection by that person for a period of at least 2 hours beginning with that time.



(8) If default is made for 14 days in complying with paragraph (3) or an inspection required under paragraph (4) is refused, an offence is committed by—

- (a) the company, and
- (b) every officer of the company who is in default.

(9) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale.

(10) If an inspection required under paragraph (4) is refused the court may by order compel an immediate inspection.

#### **Delivery of documents in language other than English**

18.—(1) The following documents are specified for the purposes of section 1105(2)(d) of the Companies Act 2006 as documents that may be drawn up and delivered to the registrar in a language other than English, but which must, when delivered to the registrar, be accompanied by a certified translation into English.

(2) The documents are a certified copy of a debenture or other instrument creating or evidencing a charge over the property of an overseas company.

#### **Transitional provisions and savings**

19. The Schedule to these Regulations contains transitional provisions and savings.

Name

[Job title],

Date

Department for Business, Enterprise and Regulatory Reform

## SCHEDULE

### COMPANY CHARGES

#### **Charge created by company**

1.—(1) The provisions of Part 12 of the 1985 Act relating to charges created by companies incorporated outside Great Britain continue to apply in relation to charges created before 1<sup>st</sup> October 2009.

(2) The provisions of Part 13 of the 1986 Order relating to charges created by companies incorporated outside Northern Ireland continue to apply in relation to charges created before 1<sup>st</sup> October 2009.

(3) The provisions of Part 9 of these Regulations apply to charges created after that date. NOTE: should this be a reference to Part 3 to align to current numbering?

#### **Charge in series of debentures**

2.—(1) The provisions of Part 12 of the 1985 Act relating to the registration of a series of debentures of a company incorporated outside Great Britain continue to apply where the first debenture of the series was executed before 1st October 2009.

(2) The provisions of Part 13 of the 1986 Order relating to the registration of a series of debentures of a company incorporated outside Northern Ireland continue to apply where the first debenture of the series was executed before 1st October 2009.

(3) The provisions of Part 9 of these Regulations apply where the first debenture of the series is executed on or after that date.

#### **Charge on property acquired by company**

3.—(1) The provisions of Part 12 of the 1985 Act relating to charges existing on property acquired by a company incorporated outside Great Britain continue to apply to property acquired before 1st October 2009.

(2) The provisions of Part 13 of the 1986 Order relating to charges existing on property acquired by a company incorporated outside Northern Ireland continue to apply to property acquired before 1st October 2009.

#### **Northern Ireland: registration of certain charges etc affecting land**

4. Article 408 of the 1986 Order (Northern Ireland: registration of certain charges etc affecting land) continues to apply in relation to a charge against land, or an estate in land, of a company incorporated outside Northern Ireland imposed by an order under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981 made before 1st October 2009.

#### **Registration of enforcement of security**

5.—(1) Section 405 of the 1985 Act or Article 413 of the 1986 Order (registration of enforcement of security) continues to apply where the order or appointment is made, or the receiver or manager ceases to act, before 1<sup>st</sup> October 2009.

(2) Regulation 80 applies where the order or appointment is made, or the receiver or manager ceases to act, on or after that date.