

**SECURED
TRANSACTIONS CODE**

**Discussion Draft
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GLOSSARY
of some expressions used in the Code

Expression	Section
asset registry	39.8
charge	2.1
charged asset	11.2
chargee	24.1
chargor	22 & 23
creation	5, 6.8
current asset	41.2
effectiveness	5 & 9
equitable charge	2.3
exempt charge	29.2
financial collateral charge	31.1
fixed asset	41.3
goods	11.3(b)
insolvency claw-back	53.3(d)
insolvency legislation	53.3(a)
insolvency officer	53.3(c)
insolvency proceedings	53.3(b)
intangible	11.3(c)
intention	3.3 & 3.4
interest (of a chargor in a charged asset)	11.4
land	11.3(a)
legal charge	2.2
possessory charge	30
receivables financing agreement	37.1
registrable charge	29.1
registrar	28.4
secured obligation	18.1
UK business	28.3

PART 1: WHAT IS A CHARGE?

1 The power to create a charge

- 1.1 A chargor can create a charge over its interest in a charged asset in favour of a chargee to secure the performance of a secured obligation.
- 1.2 These expressions are described in more detail later. In brief:
- (a) the chargor can, subject to the limitations described in part 5, be any person;
 - (b) the chargee can be the creditor to whom the secured obligation is owed or it may be another person (such as a trustee) on behalf of that creditor;
 - (c) the charged asset can be property of any kind;
 - (d) the chargee's interest in the charged asset can be any present or future interest in the charged asset which is capable of being transferred or over which a proprietary interest can be created; and
 - (e) the secured obligation can be any obligation or liability of any kind, and it does not have to be owed by the chargor.
- 1.3 This Code is concerned with charges created by a chargor. It is not concerned with charges which arise by operation of law.

2 The nature of a charge

- 2.1 A charge is a proprietary interest in a charged asset which secures the performance of a secured obligation.
- 2.2 A charge is a legal interest in the charged asset concerned if:
- (a) the chargee holds legal title to the charged asset; or
 - (b) the charged asset is land and the charge is registered at Her Majesty's Land Registry; or
 - (c) the charge is a possessory charge (see part 7).

A charge of this kind is described as a legal charge in this Code.

- 2.3 In any other case, a charge is an equitable interest. A charge of this kind is described as an equitable charge in this Code.
- 2.4 The rights, liberties, powers and immunities of the chargor and the chargee between themselves are the same whether the charge is an equitable charge or a legal charge. The distinction is only relevant in relation to third parties (see part 8).
- 2.5 The purpose of the chargee's proprietary interest is to assist the performance of the secured obligation.
- 2.6 The creation of a charge does not deprive the chargor of all of its interest in the charged asset. The chargor retains a residual interest in the charged asset. This residual interest is a proprietary interest. It consists of the interest which the chargor had before the charge was created, but which is now subject to the chargee's interest under the charge. The residual interest may be a legal interest or an equitable one, depending on the nature of the interest which the chargor had in the asset when it created the charge.
- 2.7 Once the secured obligation has been extinguished (for instance, by performance), the charge is automatically extinguished. If the charge is an equitable charge, no further documentation is required. If the charge is a legal charge, the chargee must transfer the legal title to the charged asset to the chargor. In either case, the chargee must execute a deed of release of the charge if so requested by the chargor.
- 2.8 A chargor can charge its residual interest. Any number of charges can exist concurrently over the same charged asset.
- 2.9 It is not necessary for the chargee to obtain possession of the charged asset unless the charge is a possessory charge (see part 7).
- 2.10 A charge can be created over a charged asset even if the chargor has the authority to dispose of the asset concerned free from the charge or to deal with it in any other way without the consent of the chargee. The powers of the chargor (and the chargee) in respect of the charged asset are a matter to be decided between the parties.

3 Intention

- 3.1 The creation of a charge depends on the intention of the chargor.
- 3.2 In particular, the following matters are determined by the intention of the chargor:

- (a) whether a charge exists;
- (b) when a charge has been created;
- (c) whether a proprietary interest created by the chargor is a charge or an outright proprietary interest;
- (d) the identity of the chargee;
- (e) the identity and extent of the charged asset; and
- (f) the identity and extent of the secured obligation.

3.3 Intention is a matter of substance, not of form.

3.4 Intention is established objectively. The question is: what would a reasonable person consider the intention of the chargor to be, based on what the chargor has written, said and done?

3.5 A charge can be created by a document, but it does not have to be. If there is sufficient evidence of the objective intention of the chargor to create the charge, it can be created orally or by the conduct of the chargor (for instance by delivering the charged asset, or something representing it, to the chargee). This is subject to any formal requirements imposed by other legislation (see part 2).

3.6 If the charge is created by a document, the objective intention of the chargor is established from the terms of the document in the context of any other relevant documents relating to the transaction concerned and any relevant background facts at the time it was entered into which are admissible in evidence for the purpose of interpreting the document.

3.7 Whether a person has created a charge is therefore decided:

- (a) first, by establishing, as a matter of fact, what the objective intention of that person is, based on what it has written, said and done; and
- (b) secondly, by determining, as a matter of law, whether that person's intention is to create a proprietary interest in a charged asset to secure the performance of a secured obligation.

4 Distinguishing a charge from an outright interest

- 4.1 What distinguishes a charge from an outright proprietary interest is that the chargee's proprietary interest in the asset concerned secures the performance of a secured obligation; and is therefore extinguished once the secured obligation has been extinguished (for instance, by payment).
- 4.2 Whether or not a proprietary interest in an asset does secure the performance of a secured obligation depends on the legal rights, liberties, powers and immunities of the parties to the transaction, not on the economic or functional effect of the transaction.
- 4.3 The determination of those legal rights, liberties, powers and immunities depends on the objective intention of the person creating the interest.
- 4.4 Whether a proprietary interest created by a person is a charge or an outright proprietary interest is therefore decided:
- (a) first, by establishing, as a matter of fact, what the objective intention of that person is, based on what it has written, said and done; and
 - (b) secondly, by determining, as a matter of law, whether that person's intention is, or is not, to secure the payment of a secured obligation.
- 4.5 The following examples illustrate the application of this principle.
- 4.6 Example 1:
- A leases an asset to B for the period of its useful life in consideration for the payment of rent, the amount of which approximates to the price of the asset and the cost of financing it over the period of the lease. If A's objective intention is to create a lease, the transaction is not a charge, even if it has a similar economic effect. A has created an outright limited proprietary interest in favour of B. A has retained a residual proprietary interest. B has not created any interest.
- 4.7 Example 2:
- A sells goods to B on the basis that A reserves title to the goods until their price has been paid. If A's objective intention is to sell goods on reservation of title, the transaction is not a charge even if it has a similar economic effect. This is also the case if A transfers legal title to B, but retains beneficial title (and, to the extent that there is any existing rule to the contrary, it is abolished). A has created an outright

limited proprietary interest in favour of B. A has retained a residual proprietary interest. B has not created any interest.

4.8 Example 3:

B sells its receivables to A on the basis that A has recourse to B for bad debts. If B's objective intention is to sell the receivables to A, the transaction is not a charge even if it has a similar economic effect. B has transferred a proprietary interest in the receivables to A, but the interest which it has transferred is outright, not by way of security.

4.9 Example 4:

A sells goods to B on the basis that B will lease them back to A. If the parties' objective intention is that B will acquire the goods and then lease them to A, the transaction is not a charge even if A remains in possession of the goods and the transaction has a similar economic effect to a charge. The transactions are outright, not by way of security.

4.10 Example 5:

A sells goods to B on the basis that the payment of the price is deferred, that A reserves title to the goods until they are sold and that, on sale, B holds the proceeds of sale on trust for A. The proceeds of sale belong to B, and accordingly the proprietary interest which A obtains in them is created by B; it is not retained by A. The trust over the proceeds of sale is a charge if B's objective intention is that the trust secures the payment of the price.

[Other examples can be added to clarify the application of this section in practice.]

PART 2: CREATION AND EFFECTIVENESS

5 Creation and effectiveness

- 5.1 There is a distinction between a charge:
- (a) being created; and
 - (b) becoming effective.
- 5.2 Once a charge has been created, all personal obligations which it imposes on the chargor become binding as personal contractual obligations to the extent permitted by the law of contract.
- 5.3 Once a charge has become effective, the proprietary interest created by the charge over the charged assets comes into effect.
- 5.4 Until a charge has become effective, it does not create any proprietary interest over the charged assets.
- 5.5 The distinction is relevant to charges which are registrable at Companies House. They are only effective once they are registered. See part 7.
- 5.6 All other charges become effective on creation.

6 Creating a charge

- 6.1 A charge is created if the chargor intends to create a charge. This will be the case if the chargor intends to create a proprietary interest over a charged asset to secure the performance of a secured obligation.
- 6.2 The existence of a charge, and the identity and extent of the charged assets and secured obligations, depend on what the chargor intends. Intention is established objectively (see part 1).

7 Formalities

- 7.1 This Code does not contain any formal requirements for the creation or effectiveness of a charge (such as the necessity for writing, a deed or signatures).
- 7.2 To the extent that other legislation prescribes formal requirements for the creation or effectiveness of a charge (such as a charge over land or over an equitable interest),

those requirements must be complied with; and failure to do so has the consequences prescribed by the legislation concerned.

- 7.3 Some charges require to be registered at Companies House (see part 7). This is a matter of substance, not of form. If registration is required, the charge is not effective until it is registered.
- 7.4 Where a charge is created over an asset which is registrable in an asset registry, failure to register the charge in the asset registry does not affect the validity or effectiveness of the charge, although it may affect the priority of the charge against other proprietary interests in the asset concerned (see part 8).

8 Time of creation

- 8.1 A charge is created when the chargor intends it to be created. Intention is established objectively (see part 1).

- 8.2 The following examples illustrate the application of this principle.

- 8.3 Example 1:

A document containing a charge is executed by the parties but the chargor does not objectively intend the document to become binding until a later time. The charge is not created until the document becomes binding. For instance, the document may be held “in escrow” or “as undelivered” until the happening of a later event. In such a case, the charge is only created on the occurrence of that later event (and, to the extent there is any existing rule to the contrary in relation to escrows, it is abolished).

- 8.4 Example 2:

A chargor has entered into a binding agreement under which it has agreed to create a charge on the happening of a future event. When the charge is created depends on the objective intention of the chargor. The chargor may have intended that the charge should automatically be created on the happening of the event, in which case it is created on the happening of that event. Alternatively, the chargor may have promised to execute a new document on the happening of the event, in which case the charge is only created when the new document is executed.

- 8.5 If, at a particular time, a chargor intends to create a charge over assets some of which it is then able to charge (for instance, because it owns them) and some of which it is not (for instance, because it does not yet own them), the charge is treated as being

created at that time even though some of the assets concerned will not fall within the scope of the charge until later.

8.6 If, at a particular time, a chargor intends to create a charge over assets none of which it is then able to charge (for instance, because it does not yet own any of them), the charge is treated as being created at that time even though none of the assets will actually be charged until later.

8.7 The following examples illustrate the application of these principles.

8.8 Example 3:

A chargor executes a document containing a charge (which it intends to be created immediately) over present and future assets. The charge is created when the document is executed. This means that the charge can immediately be registered (if that is required) and will immediately become effective (subject to any necessary registration), and the priority rules in part 8 will apply accordingly.

8.9 Example 4:

A chargor executes a document containing a charge (which it intends to be created immediately) over assets none of which it is then able to charge. The charge is created when the document is executed. This means that the charge can immediately be registered (if that is required) and will immediately become effective (subject to any necessary registration), and the priority rules in part 8 will apply accordingly.

9 Time of effectiveness

9.1 If a charge has been created which is registrable at Companies House, it only becomes effective on registration at Companies House in accordance with part 7.

9.2 If a charge is not registrable at Companies House, it becomes effective on creation.

10 Recharacterisation

10.1 A charge is now the only type of security interest which can be created by a person under English law.

10.2 Mortgages, security assignments, pledges and contractual liens are abolished.

10.3 Accordingly, if:

- (a) A purports to:
 - (i) transfer a proprietary interest in an asset to B, or,
 - (ii) create a proprietary interest over an asset in favour of B; and
 - (b) that proprietary interest secures the performance of a secured obligation,
- then it is a charge, regardless of its characterisation by the parties.

10.4 The following examples illustrate the application of this principle.

10.5 Example 1:

If A purports to pledge goods to B (or to create a contractual lien over them in favour of B), B's interest will be a charge, and not a pledge (or lien).

10.6 Example 2:

If A purports to mortgage an asset to B, B's interest in the asset will be a charge, not a mortgage.

10.7 Example 3:

If A purports to assign an intangible to B in order to secure the payment of a secured obligation, B's interest in the intangible will be a charge, not an assignment.

10.8 This Code does not affect security which arises by operation of law.

10.9 This Code does not affect security created before it came into force.

PART 3: CHARGED ASSETS

11 Charged assets in general

- 11.1 A chargor can create a charge over any interest which it has, or may have in the future, in a charged asset.
- 11.2 The charged asset can be property of any kind. It does not need to be located in England or governed by English law.
- 11.3 In this Code, property is, for certain purposes, divided into:
- (a) land: which means land and fixtures;
 - (b) goods: which means any tangible asset which is transferable by delivery, other than fixtures; and
 - (c) intangibles: which means any property other than land or goods (and some intangibles may constitute financial collateral).
- 11.4 The interest can be any collection of rights, liberties, powers and immunities which the chargor has in the charged asset if:
- (a) it is capable of being transferred or;
 - (b) a proprietary interest can be created over it.
- 11.5 The interest does not, therefore, have to amount to ownership. It can be legal or equitable. It can be outright or by way of security.
- 11.6 The charged asset must be capable of being identified as falling within the scope of the charge when the charge comes to be enforced. It is not necessary to identify it as falling within the scope of the charge at an earlier stage.
- 11.7 A person can create a charge over the benefit of a charge (in other words, a sub-charge).
- 11.8 A person can create a charge in favour of a chargee over a receivable owing by the chargee to the chargor.
- 11.9 A company's uncalled capital is property of the company and can be charged by it.

12 Future assets

- 12.1 A chargor can create a charge over any interest which it may subsequently own in a charged asset.
- 12.2 It is not necessary that the chargor has an interest in the charged asset at the time the charge is created. The charge will automatically extend to the asset concerned once the chargor has the power to charge it without the necessity for any other act by the chargor.
- 12.3 A chargor can therefore create a charge over all or any part of its interest in its present and future assets.
- 12.4 A chargor's future assets include assets which it acquires after it has entered into insolvency proceedings. But an asset recovered in an insolvency proceeding of the chargor as a result of the application of the insolvency claw-back provisions (see part 10) is not an asset of the chargor and accordingly cannot be charged by the chargor.

13 Part of an asset

- 13.1 A charge can be created over part of an asset if that part which is charged is identifiable.
- 13.2 A charge over a particular percentage or proportion of an asset is identifiable. Unless the charge provides to the contrary or the parties agree to the contrary, the chargee is entitled to all of the proceeds of the asset concerned until the chargee has received an amount equal to its percentage or proportion.

[Consider specific provisions to deal with pooled assets.]

14 Extent of charged assets

- 14.1 A charge over an asset extends to:
- (a) the proceeds of the disposition of that asset to the extent that they are capable of being traced at law or in equity (regardless of whether or not the chargee has consented to the disposition);
 - (b) the benefit of any insurance contract relating to that asset;

- (c) any income deriving from that asset (such as interest, dividends and distributions);
- (d) where the asset consists of a right to receive money, any security for that right, whether that security is proprietary (such as a charge) or personal (such as a guarantee);
- (e) where the asset consists of the benefit of an account, the benefit of any replacement account,

except to the extent that the charge provides to the contrary or the parties agree to the contrary.

14.2 A charge over land extends to fixtures on the land.

15 Receivables

- 15.1 A receivable is the right which one person (the payee) has to be paid money by another person (the payer). The right can arise under a contract or in any other way; and it can be present, future or contingent. It includes a debt and a claim for damages.
- 15.2 If a payee creates a charge over a receivable, the chargee obtains all of the payee's rights in relation to the receivable until the charge is extinguished, subject to the provisions of this Code.
- 15.3 Accordingly, the chargee can give a good discharge to the payer without the involvement of the payee. To the extent that, as a result of payment, the chargee receives more than is necessary to pay the secured obligations, it holds the balance on trust for the chargor.
- 15.4 It is not a requirement for either the creation or the effectiveness of a charge over a receivable that notice of the charge is given to the payer.
- 15.5 A payer only has notice of a charge if it is actually aware of it. No formalities are required, but constructive notice is not sufficient.
- 15.6 Until the payer has received notice of a charge, it will obtain a good discharge by paying the payee or as the payee has directed. Once the payer has received notice of a charge, it can only obtain a good discharge from the chargee.

- 15.7 Once the payer has received notice of a charge, the chargee can bring legal or arbitration proceedings in its own name against the payer without the involvement of the payee. To the extent necessary to resolve the proceedings, the tribunal concerned will join the payee to the proceedings; and any costs of doing so are payable by the chargee (although it may recover them from the payee if the payee has agreed to pay them or is otherwise liable for them).
- 15.8 The chargee obtains no greater rights to the receivable than the payee has. For instance, if the payment of the receivable is subject to a condition or to a right of set-off under the contract, then the chargee is subject to them in the same way as the payee is.
- 15.9 In addition, the payer can set off against the chargee any cross-claim which it has against the payee if:
- (a) the cross-claim is so closely connected with the chargee's claim against the payer that it would clearly be unfair for it not to be taken into account; or
 - (b) the cross-claim arises under a contract or other transaction entered into before the payee has received notice of the charge (even if the cross-claim was future or contingent at the time notice was received).
- 15.10 The rights, powers, liberties and immunities of the payer, the payee and the chargee under this section can be varied by agreement between the relevant parties.
- 15.11 *Provisions relating to specific types of asset can be addressed here if required, for instance in relation to registered land, ships and aircraft, intellectual property and particular categories of goods and intangibles.*
- 15.12 *For instance:*

Aircraft Equipment

To the extent that a charge is created over an asset to which the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015/912 apply, this Code is subject to those Regulations.

16 Contractual restrictions on charging intangible assets

- 16.1 The benefit of an intangible asset (for instance, a contract) cannot be charged if it is prohibited by the terms on which the asset is created (for instance, the terms of the

contract which creates it), unless it is permitted by other legislation (such as the Small Business, Enterprise and Employment Act 2015).

- 16.2 This is the case even if the prospective chargee is unaware of the restriction.
- 16.3 Whether or not the creation of a charge is prohibited by the terms of a contract is a matter of interpretation of the contract concerned. The question is whether it is the objective common intention of the parties that a charge is prohibited.
- 16.4 If the terms of a contract do prohibit the creation of a charge over all or any part of the benefit of a contract, then:
- (a) unless it is permitted by other legislation, any purported charge is, to the extent of the prohibition, invalid;
 - (b) the purported charge is not, of itself, a breach of the contract by the chargor; and
 - (c) if the chargor has agreed to create the charge, the invalidity of the charge may result in a personal claim by the intended chargee against the chargor for breach of contract.
- 16.5 For example, if:
- (a) A has entered into a contract with C under which A is entitled to a receivable from C;
 - (b) the contract contains a prohibition on A creating a charge over the receivable without C's consent;
 - (c) C has not consented; and
 - (d) A purports to charge the receivable to B,
- then:
- (i) unless the prohibition is ineffective under other legislation, the purported charge is invalid, and B therefore obtains no proprietary interest in the receivable;
 - (ii) the purported charge is not of itself a breach of A's contract with C; and
 - (iii) B may have a personal claim for breach of contract against A, depending on the terms of its contract with A.

17 Contractual restrictions on charging other assets

- 17.1 The validity of a charge is not affected by any other contractual restriction on the creation of a charge by a chargor.
- 17.2 This is the case even if the chargee is aware of the restriction.
- 17.3 This does not affect any personal claim for breach of contract which the chargor may be liable for.
- 17.4 If the chargee had actual knowledge of a contractual prohibition on the creation of the charge at the time the charge was created, and it deliberately encouraged the chargor to breach that provision, the chargee is liable in tort for the loss suffered by the person in whose favour the prohibition was given. The chargee has no other liability of any kind (for instance, in tort or in equity) if it takes a charge in breach of a contractual restriction of this kind.
- 17.5 For example, if:
- (a) A is the owner of goods and agrees with C that he will not charge the goods; and
 - (b) A purports to charge the goods to B,
- then:
- (i) the purported charge is valid;
 - (ii) in the limited circumstances described above, C may have a personal claim against B in tort to recover any loss which C has suffered as a result of the charge being created in breach of the prohibition (and, if it finds out in time, it may be able to get an injunction);
 - (iii) unless those limited circumstances apply, C will have no claim against B in relation to the charge; and
 - (iv) C will have a personal claim against A for breach of contract for the loss which C has suffered as a result of the charge being created in breach of the prohibition.

PART 4: SECURED OBLIGATIONS

18 Secured obligations

- 18.1 The secured obligation can be any obligation or liability of any kind of any person. It can be an obligation to pay money, but it does not have to be. It can be present, future or contingent. It does not have to be owed by the chargor.
- 18.2 The identity and extent of the secured obligation depends on the objective intention of the chargor (see part 1).
- 18.3 The scope of the secured obligation must be capable of being identified when the charge comes to be enforced. It is not necessary to identify it at an earlier stage.
- 18.4 For example, a secured obligation may include a liability to pay all money from time to time owing:
- (a) to a particular person or class of persons; or
 - (b) under a particular agreement or class of agreements.

19 Facility amendments

- 19.1 Except to the extent that the parties agree to the contrary, a liability (however it is expressed) to pay all money (or money of a particular description) from time to time owing under a particular agreement extends to all amounts (or amounts of that description) owing under that agreement as it may be amended from time to time, even if the amendment is fundamental (for instance, by increasing the amount of the facility to any extent, by changing the purpose of the facility concerned or by changing the identity of the persons providing the facility).

20 “All moneys” clauses

- 20.1 Except to the extent that the parties agree to the contrary, if A undertakes to pay all money or obligations or liabilities due or owing or incurred to B (or enters into the same type of undertaking in different words), that undertaking extends to every monetary liability of any kind from time to time owing by A to B. This includes monetary liabilities owing by A to B which are:
- (a) future or contingent, as well as present;

- (b) joint, as well as several;
- (c) payable as a guarantor, as well as payable as a principal debtor;
- (d) to pay damages, as well as debts; and
- (e) to pay amounts originally owed to a third party but which have been acquired by B, as well as amounts originally owing to B.

PART 5: THE PARTIES TO A CHARGE

21 The principles

- 21.1 The parties to a charge consist of the chargor (who creates the charge) and the chargee (in whose favour the charge is created).
- 21.2 If a charge is created over land in which the chargor does not yet have a proprietary interest (future land), it must be contained in a document and executed by the chargor and the chargee in accordance with the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.
- 21.3 If a charge over any asset other than future land is created by a document, it must be executed by the chargor or the chargor must agree to it in some other way.
- 21.4 It is not necessary for the chargee to execute a charge over any asset other than future land unless the charge contains an obligation on the chargee and the agreement of the chargee to that obligation is evidenced by its execution of the document.
- 21.5 Other persons may be parties to a document which creates a charge.
- 21.6 The same document may contain more than one charge.

22 The chargor

- 22.1 A charge can be created by any person, subject to the limitations contained in this part and to any limitations contained in other legislation.

23 Natural persons as chargors

- 23.1 A resident natural person cannot create a charge over goods unless:
- (a) it is a possessory charge (see part 7); or
 - (b) it secures a loan made to the chargor to acquire the goods, and the secured obligations do not consist of more than the amount from time to time owing in respect of the loan (including interest, costs and other ancillary amounts payable in connection with the loan); or
 - (c) the chargor is a member of a partnership or a limited partnership and the charged assets do not extend beyond the assets of the partnership concerned; or

- (d) the chargor is carrying on business as a sole trader and the charged assets do not extend beyond the assets of the business concerned.

23.2 A resident natural person is a natural person who has lived in the United Kingdom for at least two hundred days in the year immediately preceding the creation of the charge.

[A clear rule is needed to establish who is, and is not, resident. This is an initial starting point for a discussion of what is appropriate.]

23.3 The location of the charged assets and the governing law of the charge are irrelevant to the interpretation of this provision.

24 The chargee

24.1 The chargee can be:

- (a) the creditor or creditors to whom the obligation secured by the charge is owed (the creditors); or
- (b) another person (such as a trustee) on behalf of the creditors.

24.2 The creditors must be capable of being identified when the charge comes to be enforced. It is not necessary to identify them at an earlier stage.

24.3 A person can hold the benefit of security on behalf of any number of present, future or contingent creditors.

24.4 The rights, powers, liberties and immunities of that person and the creditors between themselves can be established and varied by agreement between them.

[Consider partnerships, trustees and agents as chargors.]

PART 6: THE TERMS OF A CHARGE

25 The principle

- 25.1 Subject to the provisions of this Code and of any other relevant laws and regulations (such as those concerning consumers), the terms of the charge can be agreed between the parties from time to time.
- 25.2 For instance, subject to those limitations, the parties can agree:
- (a) the rights, powers, liberties and immunities of the parties before enforcement;
 - (b) the chargee's powers of enforcement; and
 - (c) the rights, powers, liberties and immunities of the parties on and after enforcement.

26 Powers of the chargor

- 26.1 The powers of the chargor to deal with the charged assets during the continuance of the charge can be agreed between the parties in accordance with the preceding section.
- 26.2 In the absence of agreement, the chargor has the power to deal with the charged assets in any way (including by taking possession of them, using them, receiving income from them or disposing of them) until the charge is enforced, except that the chargor cannot:
- (a) create another charge over any of the charged assets;
 - (b) where the chargor carries on a business, dispose outright, or create an outright proprietary interest over, any of the charged assets which are fixed assets (see part 8);
 - (c) where the chargor does not carry on a business, dispose outright, or create an outright proprietary interest over, any charged assets;
 - (d) take possession of assets which are the subject of a possessory charge; or
 - (e) deal with the charged assets fraudulently (in the sense of dishonestly).

27 Clogs on the equity of redemption

- 27.1 The doctrine of “clogs on the equity of redemption” is abolished to the extent that it limits the freedom of the parties to a charge to determine its terms.
- 27.2 For example, neither of the following is invalid solely on the ground that it is a clog on the equity of redemption:
- (a) an option for the chargee to purchase charged assets; or
 - (b) an undertaking by the chargor in favour of the chargee which extends beyond the period of the charge.
- 27.3 This does not affect the chargor’s residual interest in the charged asset (see part 1) or the ability of the chargor to recover the charged assets once the secured obligation has been extinguished (for instance by performance).

PART 7: REGISTRATION

28 The scope of this part

- 28.1 This part provides for the registration of certain charges (described as registrable charges) created by UK businesses. Such charges do not become effective until they are registered.
- 28.2 It also enables the registration of charges created by UK businesses which are not registrable charges, and also of receivables financing agreements entered into by UK businesses. Charges and agreements of this kind do not require registration to be effective, but they may be registered if the parties wish.
- 28.3 A UK business is any of the following:
- (a) a UK-registered company within the meaning of section 1158 of the Companies Act 2006;
 - (b) a company incorporated by statute or created by Royal charter in any part of the United Kingdom;
 - (c) a limited liability partnership registered in any part of the United Kingdom;
 - (d) a partnership or limited partnership which is created under the law of any part of the United Kingdom;
 - (e) resident natural person who is carrying on business as a sole trader.
- 28.4 The registrar is the Registrar of Companies.

29 Registrable charges

- 29.1 Every charge created by a UK business is a registrable charge unless it is an exempt charge.
- 29.2 An exempt charge is:
- (a) a possessory charge; or
 - (b) a financial collateral charge; or
 - (c) a rent deposit charge; or

- (d) a Lloyd's charge; or
- (e) a central bank charge; or
- (f) a charge which is exempt from registration under this Code as a result of other legislation.

29.3 A charge is not created by a UK business if:

- (a) the charge arises by operation of law; or
- (b) the UK business acquires an asset which is already subject to the charge; or
- (c) the UK business is the owner of property and, in connection with a dealing with that property, it retains an interest in the property to secure the payment of a secured obligation.

30 Possessory charge

30.1 A charge is a possessory charge to the extent that the chargee has possession of the charged assets at the time the issue is to be determined.

30.2 A person has possession of charged assets if:

- (a) they are goods, and it has physical possession of them; or
- (b) they are goods, and it has possession of them by attornment; or
- (c) they are goods or intangibles, and it has documentary possession of them.

30.3 A person (A) has possession of goods by attornment if:

- (a) someone other than the chargor or the chargee (B) has physical possession of them; and
- (b) at the request of the chargor, B has acknowledged to A that B holds them on behalf of A.

The acknowledgement can be in writing, but does not have to be.

30.4 A person has documentary possession of goods or intangibles if:

- (a) it has physical possession of a document of title to them (for instance, a bill of lading, a bearer security or a negotiable instrument); and
- (b) that document is either made out to bearer or made in favour of the person concerned (whether initially or by endorsement).

30.5 A person who has possession of charged assets does not lose that possession only because:

- (a) the assets are taken from it without its consent; or
- (b) the assets are sub-charged by that person to someone other than the chargor with the consent of the chargor; or
- (c) the assets are delivered to the chargor for the purpose of sale and on the basis that the net proceeds of sale are held on trust for the chargee.

31 Financial collateral charge

31.1 A charge is a financial collateral charge if it arises under a security financial collateral arrangement.

31.2 Security financial collateral arrangement has the meaning given to it in The Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) as amended from time to time.

32 Rent deposit, Lloyds and central bank charges

32.1 A rent deposit charge is a charge in favour of a landlord on a cash deposit given as security in connection with the lease of land.

32.2 A Lloyd's charge is a charge created by a member of Lloyd's (within the meaning of the Lloyd's Act 1982) to secure its obligations in connection with its underwriting business at Lloyd's.

32.3 A central bank charge is a charge which falls within section 252 of the Banking Act 2009, as amended from time to time.

33 Registration procedure for charges

- 33.1 Where a UK business has created a charge (whether it is a registrable charge or an exempt charge), the chargee, the chargor or a person acting on behalf of either of them (a registrant) may deliver to the registrar:
- (a) a certified copy of the document which created the charge (or, if there is no such document, evidence of the creation of the charge); and
 - (b) a document specifying:
 - (i) the registered name and number of the chargor;
 - (ii) the name of the chargee;
 - (iii) the date of creation of the charge; and
 - (iv) whether the charge is expressed to cover all, or substantially all, of the present and future assets of the chargor.
- 33.2 The certified copy of the document which created the charge can be redacted to omit:
- (a) personal information relating to an individual (other than the name of the individual);
 - (b) the number or other identifier of a bank or securities account;
 - (c) a signature.
- 33.3 The charge becomes registered on receipt by the registrant of an email confirmation that the registrar has received those documents at a particular time. *[It is intended that this will be automatic, and can happen outside business hours.]*
- 33.4 That confirmation is conclusive evidence that the charge has been duly registered and of the time of registration.

34 The effect of registration

- 34.1 A registrable charge becomes effective on registration.

34.2 This means that, until it has been registered, the document creating the charge only creates personal rights. The proprietary rights created by the charge only come into existence on registration.

[This envisages that registration will be effected electronically and will be automatic. It would be possible to introduce priority searches if that were thought useful.]

34.3 An exempt charge becomes effective on creation. It does not require to be registered to become effective, but it can be registered if the parties wish to do so (for instance, because there may be uncertainty about whether the charge is exempt, or for reasons of priority (see part 8)).

35 Amendments to charges

35.1 If an amendment to a registrable charge extends the scope of the charged assets or of the secured obligations, it requires to be registered in accordance with this part 7 because, to the extent that it does so, it creates a new charge.

35.2 If any other amendment is made to a charge which has been registered, the registrant may deliver a certified copy of the amendment to the registrar, who may register it. Whether or not this is done does not affect the effectiveness of the charge or the conclusive nature of the existing certificate of registration.

36 Releases of charges

36.1 The registrant may send to the registrar a notice that:

- (a) the charge has been released; or
- (b) specified assets have been released from the charge.

36.2 If the registrar has received confirmation from the chargee (or from a person acting on behalf of the chargee) that the notice is correct, the registrar will, as soon as reasonably practicable, register it and confirm that he has done so to the registrant.

[It is sometimes impossible to get the confirmation of a chargee even where the charge has clearly been extinguished. Should it be possible to tidy-up the register without confirmation from the chargee?]

37 Registration of receivables financing agreements

- 37.1 A receivables financing agreement is an agreement by which one person (the receivables financier) agrees to purchase receivables owing to a UK business (the customer) and the purpose, or one of the purposes, of the arrangement is to provide finance to the customer. The agreement can provide for the purchase of some or all of the customer's present and future receivables; or it can provide a framework under which receivables can be purchased in the future. Assignments of particular receivables can be effected under the agreement or by separate documents or arrangements. It includes securitisation, factoring and invoice discounting agreements.
- 37.2 Where a receivables financing agreement has been entered into, the receivables financier, the customer, or a person acting on behalf of either of them (the registrant) may deliver to the registrar a document stating that the customer has entered into a receivables financing agreement and specifying:
- (a) the registered name and number of the customer;
 - (b) the name of the receivables financier;
 - (c) the date of creation of the receivables financing agreement; and
 - (d) the extent of the receivables which will or may be purchased under the receivables financing agreement.
- 37.3 As soon as reasonably practicable after receipt of those documents, the Registrar will register them and will deliver to the registrant a notice confirming that the receivables financing document has been registered and the time of registration.
- 37.4 The registration of a receivables financing agreement is voluntary. The agreement does not need to be registered in order to become effective. The reason for registration is to take advantage of the priority rules for receivables financing agreements described in part 8.

PART 8: PRIORITIES

38 The scope of this part

38.1 This part deals with the following priority issues:

- (a) priorities between charges;
- (b) priorities between receivables financing agreements;
- (c) priorities between a charge and a receivables financing agreement;
- (d) priorities between a charge and a subsequent outright disposition of assets subject to the charge;
- (e) priorities between a charge and a subsequent transaction for which no value is given; and
- (f) the ability of a chargor to tack further advances.

38.2 All these priority issues are determined in accordance with this Code, which overrides any priority rule which would otherwise have applied under the general law.

38.3 All other priority issues are determined under the general law. In a priority dispute between a charge and another proprietary interest which is not determined under this Code, it may therefore depend on whether the charge concerned is a legal charge or an equitable charge.

39 Priorities between charges

39.1 The priority of charges between themselves is determined by the following rules, which are to be applied in the following order.

39.2 Rule 1: Where a chargor has created more than one charge over the same charged asset, the priority of the charges can be agreed by the chargor and the chargees concerned. Subject to the requirements of any relevant asset registry, that agreement can be made at any time and without formality.

39.3 Rule 2: If a chargee takes a charge over an asset when it actually knows that it is already charged, the new charge will rank behind the earlier charge unless the parties have agreed to the contrary or the asset is registrable in an asset registry and the rules of the asset registry provide to the contrary.

39.4 Rule 3: To the extent that the charged assets consist of assets which are registrable in an asset registry and the parties have not agreed their priority in the manner required by the asset registry concerned, priority between charges depends on the rules of the relevant asset registry (which generally determine the priority of charges which are registrable in asset registries by reference to the date of registration in the asset registry concerned).

39.5 Rule 4:

It may be necessary to have special priority rules for financial collateral.

In relation to cash and financial instruments, this may involve two rules:

- *The basic rule would be that priority depends on the times when the chargees concerned obtained possession or control of the charged assets concerned: the first to take possession or control has priority. (In this context, “possession” and “control” would have the particular meanings given to them in the financial collateral legislation.)*
- *But this would be subject to the second rule: If the first chargee to take possession or control has an equitable charge, and the second chargee to do so has a legal charge, the second chargee will take priority over the first charge unless, at the time it took possession or control, the second chargee had actual (or possibly constructive) notice of the first charge.*

In relation to credit claims, it may be necessary to continue to use the rule in Dearle v Hall.

39.6 Rule 5: In any other case, the priority of charges between themselves depends on the times they become effective. As between two charges, the first to become effective has priority.

39.7 When applying these rules to a charge, it makes no difference that the chargee has authorised the chargor to dispose of charged assets free of the charge, unless the parties have agreed to the contrary.

39.8 The asset registries are:

- (a) Her Majesty’s Land Registry;
- (b) the register of British ships;

- (c) the register of aircraft mortgages maintained by the Civil Aviation Authority;
- (d) the registers of patents and of trade marks maintained by the Comptroller-General of Patents, Designs and Trade Marks.

[Other registries may need to be added, for instance international registries.]

40 The priority of receivables financing agreements

40.1 Where:

- (a) more than one receivables financing agreement; or
- (b) one or more receivables financing agreements and one or more charges

have been created over the same receivables, the priority between them is determined by the following rules, which are to be applied in the following order.

40.2 In this section:

- (a) a financing is a receivables financing agreement or a charge; and
- (b) a financier is a chargee taking a charge or a receivables financier entering into a receivables financing agreement.

40.3 Rule 6: The priority of financings between themselves can be agreed between the parties concerned. That agreement can be made at any time and without formality.

40.4 Rule 7: If a financing is created when the financier actually knows the receivables are already subject to an existing financing, the new financing will rank behind the earlier one unless the parties have agreed to the contrary.

40.5 Rule 8: In any other case, the priority of the financings between themselves depends on:

- (a) in the case of a charge, the time it becomes effective; and
- (b) in the case of a receivables financing agreement, the time it is registered in accordance with part 7.

The first to become effective (in the case of a charge) or registered (in the case of a receivables financing agreement) has priority.

41 Outright dispositions of assets

- 41.1 If a person other than a receivables financier (the acquirer) purports to acquire an outright proprietary interest in a charged asset by contract from a chargor which is not in insolvency proceedings (see part 10), the acquirer will obtain its interest in the asset free from the charge if:
- (a) the chargor had the actual or apparent authority from the chargee to effect the transaction; or
 - (b) in the case of a current asset, the following section applies; or
 - (c) in the case of a fixed asset, the next section but one applies.
- 41.2 A charged asset is a current asset if:
- (a) the chargor carries on a business; and
 - (b) the asset would be regarded as a current asset of that business under generally accepted accounting principles in the United Kingdom at the time the charge is created.
- 41.3 A charged asset is a fixed asset if it is not a current asset.

42 Outright dispositions of current assets

- 42.1 If a person other than a receivables financier (the acquirer) purports to acquire an outright proprietary interest in a current asset by contract from a chargor which is not in insolvency proceedings (see part 10), the acquirer will obtain its interest free from the charge unless:
- (a) the acquisition is prohibited in a contract entered into between the chargor and the chargee (a restriction on disposal); and
 - (b) the acquirer actually knew of the restriction on disposal at the time of the purported acquisition.
- 42.2 Nothing in this section absolves the chargor from the consequences of any breach of contract which it commits as a result of breaching a restriction on disposal.

42.3 In the absence of fraud (in the sense of dishonesty), the acquirer is not liable to any person for any breach of a restriction on disposal of a current asset by the chargor (whether in tort, in equity or in any other manner).

43 Outright dispositions of fixed assets

43.1 If a person other than a receivables financier (the acquirer) purports to acquire an outright proprietary interest in a fixed asset by contract from a chargor which is not in insolvency proceedings (see part 10), the acquirer will obtain its interest free from the charge unless, at the time of the purported acquisition:

- (a) the acquirer actually knew the asset was subject to a charge; or
- (b) the charge was on the register at Companies House or at an asset registry; or
- (c) the acquirer had constructive notice that the asset was subject to a charge.

43.2 A person will only have constructive notice that an asset is subject to a charge if that person would have discovered the existence of the charge if it had made all those enquiries which it ought reasonably to have made before entering into the transaction concerned. What is reasonable depends on all the circumstances relating to the transaction (for instance, the identity of the parties, the nature of the assets concerned and the size of the transaction).

44 Transactions for which no value is given

44.1 If a person purports to obtain a proprietary interest in a charged asset from a chargor for no consideration (for instance as a gift), that person takes its proprietary interest subject to the charge.

44.2 If a person obtains execution of any kind over a charged asset, the execution is subject to the charge.

45 Tacking further advances

45.1 When a charge has priority over any other proprietary interest (whether outright or by way of security) that priority extends to the entire secured obligation secured by the charge, regardless of the time advances were made by the chargee.

45.2 This is the case unless the parties have agreed to the contrary.

45.3 All restrictions on tacking further advances are abolished.

PART 9: ENFORCEMENT

46 The scope of this part

- 46.1 This part applies to the enforcement of charges, except to the extent that other laws (for example those concerning financial collateral or settlement finality) provide to the contrary.
- 46.2 Where the chargor is a natural person, this part is subject to all laws concerning consumers.

47 Time for enforcement

- 47.1 A chargee can enforce a charge at the time provided for it in the charge, or as otherwise agreed by the chargor.
- 47.2 If there is no such provision or agreement, the chargee can enforce the charge as soon as:
- (a) all or any part of the secured obligation is payable (or must otherwise be performed); and
 - (b) the person liable to pay the secured obligation has received notice requiring it to be paid (or otherwise performed); and
 - (c) unless the chargor is insolvent or admits it is unable to pay the secured obligation in full, forty-eight hours have elapsed from the receipt of that notice, and the amount payable has not been paid in full (or the secured obligation has not otherwise been performed in full).

48 Enforcement powers

- 48.1 A chargee can enforce a charge in the manner provided for in the charge, or as otherwise agreed by the chargor.
- 48.2 A chargee has the following default powers:
- (a) to the extent permitted by the insolvency legislation (see part 10), to appoint an administrator or administrative receiver of the chargor;
 - (b) to appoint a receiver over all or any part of the charged assets;

- (c) to take all such other actions (or to refrain from doing so) in relation to all or any part of the charged assets as the chargor could have done if they were not charged (for instance by taking possession of them, selling them or leasing them; exercising a power of netting; in the case of receivables, demanding and receiving payment; and, in the case of cross-claims, setting them off).

[It may be desirable to spell out the default enforcement powers in more detail.]

- 48.3 The default powers do not apply to the extent that they are inconsistent with the terms of the charge or the agreement of the parties. They can be increased, reduced, disapplied or amended in any other way in the charge or by agreement between the parties.
- 48.4 A chargee can transfer the legal title to a charged asset even if it only has an equitable charge over it.
- 48.5 To the extent that the charge is a financial collateral charge (see part 7), the chargee also has the powers (for instance, the power of appropriation) conferred on it by The Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) as amended from time to time.
- 48.6 The power to take possession of a dwelling-house is subject to the restrictions contained in section 36 of the Administration of Justice Act 1970, as amended by section 8 of the Administration of Justice Act 1973.
- 48.7 Foreclosure is abolished.

49 Powers of administrators and receivers

- 49.1 An administrator has the powers conferred on him by the insolvency legislation.
- 49.2 An administrative receiver and a receiver each have the powers conferred on them in the charge or by agreement with the chargor.
- 49.3 Except to the extent that they are amended in the charge or by agreement with the chargor:
 - (a) an administrative receiver has the powers conferred on him by the insolvency legislation (see part 10); and

- (b) an administrative receiver and a receiver each have the power to take all such actions (or refrain from doing so) in relation to all or any part of the charged assets over which they are appointed as the chargor could have done if they were not charged.

50 More than one charge

- 50.1 Where there is more than one charge over the same charged asset, a chargee can sell the charged asset free from any charges which rank behind its own charge. If it does so, the rights of the subsequent chargees are transferred from the charged asset to its proceeds of sale.
- 50.2 Where there is more than one charge over the same charged asset, a second or subsequent chargee can sell the charged asset subject to any charges which rank in priority to its own charge.
- 50.3 This section is subject to any agreement to the contrary between the relevant parties.

51 Effect on third parties

- 51.1 An administrative receiver of a chargor and a receiver of charged assets is the agent of the chargor (even if the chargor enters into insolvency proceedings).
- 51.2 A person dealing with a chargee, or with a receiver or administrative receiver, is entitled to assume, unless it has actual knowledge to the contrary, that:
 - (a) those persons have the power to do those things which they are purporting to do; and
 - (b) they are exercising their powers properly.

52 Duties on enforcement

- 52.1 When enforcing a charge over charged assets, the person doing so (the enforcer) owes a duty to each interested person to take reasonable care of the charged assets which are the subject of the enforcement.
- 52.2 An interested person is:
 - (a) the chargor (where it is in insolvency proceedings, acting through its insolvency officer – see part 10); and

- (b) any chargee of the charged assets other than the enforcer; and
- (c) any person (such as a guarantor) who is liable for all or part of the secured obligations concerned.

- 52.3 When selling charged assets, the enforcer owes a duty to each interested person to obtain the best price reasonably obtainable for the charged assets at the time of sale.
- 52.4 The enforcer can sell the charged assets when it decides to do so. It has no duty to delay a sale even if to delay might increase the sale proceeds.
- 52.5 Any claim for breach of these duties by the enforcer must be brought by or on behalf of an interested person for the amount of loss suffered by that person as a result of the breach of duty. For this purpose, loss suffered by the chargor includes loss suffered by its creditors (except to the extent that they are themselves interested persons).
- 52.6 An enforcer can sell charged assets to a person connected with the chargee or with anyone else with an interest in the charge. If it does so, it must have contemporaneous evidence from an independent person qualified to give it that it has obtained the best price reasonably obtainable for the charged assets at the time of sale.
- 52.7 An enforcer cannot sell charged assets to the chargee. *[Should it be permitted to retain the charged asset free of the chargor's equity of redemption subject to protections for the chargor?]*
- 52.8 Where the charged assets consist of financial collateral, this section is subject to the rules concerning enforcement contained in the legislation concerning financial collateral.

PART 10: INSOLVENCY PROCEEDINGS

53 Effectiveness of charges

53.1 A charge creates a proprietary interest in the charged asset and it remains effective until it is extinguished, whatever may happen to the chargor, including the chargor entering into insolvency proceedings.

53.2 If the chargor does enter into insolvency proceedings, the rights of the chargee in relation to the charge are subject to the insolvency legislation.

53.3 In this Code:

(a) insolvency legislation means:

- (i) the Insolvency Act 1986 and secondary legislation made under it;
- (ii) the European Insolvency Regulation (Regulation (EU) 2015/848 of 20 May 2015) as it may be amended from time to time; and
- (iii) any other primary or secondary legislation in force in England from time to time relating to, or affecting, insolvency or reorganisation.

(b) insolvency proceedings means:

- (i) where the chargor is a natural person, bankruptcy; and
- (ii) in any other case, liquidation or administration;

(c) insolvency officer means a trustee in bankruptcy, liquidator or administrator of a chargor;

(d) insolvency claw-back proceedings means the proceedings described in sections 54.2 to 54.5.

54 The effect of the insolvency legislation

54.1 If the chargor enters into insolvency proceedings, insolvency legislation may affect the charge. These effects include the following:

54.2 The charge may be set aside in whole or in part (and other remedies may be available) if the charge is a voidable preference (see Insolvency Act 1986, sections 239 and 340).

- 54.3 *Charges securing old money (to replace section 245)?*
- 54.4 If the secured obligation (or part of it) is owed by someone other than the chargor, the charge may be set aside in whole or in part (and other remedies may be available) if the charge is a transaction at an undervalue (see Insolvency Act 1986, sections 238 and 339).
- 54.5 A charge may be set aside (and other remedies may be available) if it is a transaction defrauding creditors (see Insolvency Act 1986, section 423). This is the case even if the chargor is not in insolvency proceedings.
- 54.6 If the chargor is a company which goes into administration, there are limitations on the chargor's power to enforce the charge (see Insolvency Act 1986, paras 43 and 44 of Schedule B1). There are similar limitations where a small company proposes to enter into a voluntary arrangement (see Insolvency Act 1986, Schedule A1).

55 Use of charged assets by a liquidator or administrator

- 55.1 *What replacement for the ability of a liquidator or administrator to use floating charge assets? The issues are discussed in the Second Discussion Paper on Secured Transactions Reform published by the Financial Law Committee of the City of London Law Society in February 2014.*

Note: Cross-border transactions

Cross-border transactions are so important in practice that it is considered desirable to add a further part to the Code – Part 11: Cross-Border Transactions – to deal with the conflict of laws. There are difficult issues here – not least its relationship with EU law – and it has been decided not to propose drafting at this stage but first to see if it is possible to reach a consensus on what is both feasible and desirable.