

Banking Department

Effect of the Companies Act 2014 on Secured Lending

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The Companies Bill 2012 was signed by President Higgins on 23 December 2014, and has been enacted as the Companies Act 2014 (the “Act”). This article sets out the main effects of the Act on secured lending transactions.

Part 7 of the Act relating to Charges

From the commencement of Part 7 of the Act, expected to be in June 2015, the following provisions will come into force.

Definition of a Charge

The current Companies Acts list nine categories of charges which require registration. There has been lack of clarity as to whether certain charges, e.g. on cash and shares, require registration.

The Act will require that all “charges” be registered. However a “charge” is now defined as a mortgage or a charge in an agreement (written or oral), that is created over an interest in any property of the company, but excluding:

- cash;
- money credited to an account of a financial institution or any other deposits,
- shares, bonds or debt instruments;
- units in collective investment undertakings or money market instruments; or
- claims and rights (such as dividends or interest) in respect of any of the foregoing (except cash).

This will reduce the number of charges required to be registered.

Process of Registration of Charges in the Companies Registration Office (“CRO”)

Under the Act, registration of charges may be effected under two methods:

- the existing “one stage procedure” – the current system of filing a Form C1 within 21 days of creation of the charge; or
- the new “two stage procedure” – notification can be given to the CRO of the intention to create a charge by filing a Form C1A (containing the prescribed particulars of the charge) in order to secure priority before the charge is actually created and then notifying the Registrar, within 21 days of the filing of the Form C1A, by filing a Form C1B, confirming that the charge has been created.

Particulars of a negative pledge, any events that crystallise a floating charge or any restrictions on the use of any charged asset, which are referred to in the Act as “extraneous material”, if received, will no longer be entered by the Registrar on the register.

Notably it will no longer be possible to comply with registration requirements by filing a certified copy of the relevant security document itself in the CRO.

CRO guidelines provide that all filings of particulars of charges will be required to be effected online i.e. paper filings will no longer be accepted.

Priority of Charges

Where not governed by some other regime, the priority of charges created by a company will be determined by reference to the dates of receipt by the Registrar of the prescribed particulars of the two or more charges concerned (being the date of receipt by the Registrar of the Form C1, or where the two stage procedure is used, the date of receipt by the Registrar of the Form C1A).

The priority of charges will remain subject to any contrary agreement between the creditors such as an inter-lender or priority agreement.

Potential Personal Liability re Satisfaction of Charges

There is no longer a requirement for the form C6 to contain a statutory declaration. The form C6 can now also be signed by two directors of the company or a director and the secretary of the company.

Personal liability could potentially be imposed on a signatory of a form C6 where they did not honestly believe on reasonable grounds that the statement of satisfaction or release was true.

Slavenburg File

The so-called *Slavenburg* file will be abolished and there will be no obligation to register a charge created by a non Irish company unless such an external company has registered a branch in Ireland.

New Summary Approval Procedure

Section 82 of the Act (replacing Section 60 of the Companies Act 1963) prohibits financial assistance for the purpose of an acquisition of shares in itself or in its holding company.

Section 239 of the Act (replacing Section 31 of the Companies Act 1990) prohibits loans to and certain credit transactions with directors and connected persons.

Such transactions can in future be validated by the Summary Approval Procedure (replacing the current “whitewash” procedures).

Key points of note:

- The scope of application of the prohibition on financial assistance has been narrowed by the removal of the phrase “in connection with” from the prohibition and by the express exemption of serial refinancings of facilities previously “whitewashed”.
- The directors’ declaration as to solvency (to be made by all or a majority of the directors) is no longer required to be sworn.
- The matters to be addressed in the directors’ declaration have been expanded.
- An auditor’s report for the Summary Approval Procedure to validate prohibited loans etc. is no longer required.

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