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Registration of Security Interests: Company Charges and Property Other Than Land - A Summary of the Consultation Paper

The Law Commission of England and Wales

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Abstract
[extract] In effect, this Consultation Paper follows on from the major reforms of company law proposed by the Company Law Review Steering Group. In its Final Report of July 2001 the Steering Group recommended that the current scheme for registering charges created by companies should be replaced by a system of 'notice-filing'. As the Steering Group had not been able to consult fully on this proposal, and as it recognised that security interests created by unincorporated businesses and individuals should be considered at the same time, the Final Report recommended that the Law Commission examine the system for registering company charges and security and 'quasi-security' generally over property other than land. The matter was formally referred to us on 3 May 2002.

In this short summary paper we set out the principal issues which we discuss in our Consultation Paper and invite comments from people who are involved in the registration of security interests or who might be affected by our provisional proposals. Only the principal proposals are referred to here; full details will be found in the Consultation Paper itself.

Keywords
security interests, registration, securities, Consultation Paper, Law Commission, company charges, United Kingdom

THE LAW COMMISSION

REGISTRATION OF SECURITY INTERESTS: COMPANY CHARGES AND PROPERTY OTHER THAN LAND

A SUMMARY OF THE CONSULTATION PAPER

INTRODUCTION

1. The Law Commission has produced a Consultation Paper on registration of security interests in response to a request from the DTI. The terms of reference requested that we:

   (1) examine the law on the registration, perfection and priority of company charges;

   (2) consider the case for a new scheme of registration and priority of company charges, including charges created by

      (a) companies having their registered office in England or Wales, wherever the assets charged are located; and

      (b) oversea companies and companies having their registered office in Scotland, where the charge is subject to English law;

   (3) consider whether such a scheme should apply both to security in the strict sense and to 'quasi-security' interests such as conditional sales, retention of title clauses, hire-purchase agreements and finance leases, including the extent to and means by which such interests should be made subject to the law governing securities;

   (4) examine the law relating to the granting of security and 'quasi-security' interests by unincorporated businesses and individuals over property other than land, including the feasibility of extending any new scheme for company charges to such interests, and the extent to and means by which such 'quasi-security' interests should be made subject to the law governing securities; and

   (5) make recommendations for reform.

2. In effect, this Consultation Paper follows on from the major reforms of company law proposed by the Company Law Review Steering Group. In its Final Report of July 2001[1] the Steering Group recommended that the current scheme for registering charges created by companies should be replaced by a system of 'notice-filing'. As the Steering Group had not been able to consult fully on this proposal, and as it recognised that security interests created by unincorporated businesses and individuals should be considered at the same time, the Final Report recommended that the Law Commission examine the system for registering company charges and security and 'quasi-security'

[1] Modern Company Law for a Competitive Economy URN 01/942.

generally over property other than land. The matter was formally referred to us on 3 May 2002.

3. In this short summary paper we set out the principal issues which we discuss in our Consultation Paper and invite comments from people who are involved in the registration of security interests or who might be affected by our provisional proposals. Only the principal proposals are referred to here; full details will be found in the Consultation Paper itself.

THE IMPORTANCE OF SECURED CREDIT

4. Credit is of great importance to business, whether carried out by a company, a partnership or a sole trader. A business may need credit to fund the purchase of capital equipment or day-to-day operations. Thus, a business may want to obtain stock-in-trade or raw materials on credit, or it may want to borrow to finance the gap between the time at which it supplies goods or services to its customers and the time when the customers pay. Credit is also of importance for consumers, whether this be for the purchase of a house or car, or through the use of the credit card or other forms of credit agreement.

5. Taking security in respect of the provision of credit is common. If insolvency occurs, a creditor which has taken 'security' over the borrower's property has a better chance of getting its money back than an unsecured creditor. In addition, lenders are often unwilling to lend without security or will lend at lower interest rates to those who can give security, so that security is advantageous to the borrower as well as the lender.

Property used as security

6. A business may offer as 'security' not only land or other capital assets, such as equipment or vehicles, but also stock-in-trade and, increasingly, its expected income ('receivables'). Private borrowers most commonly provide security by mortgaging their houses (security created by non-corporate borrowers over land is outside the scope of this project), but they can also use goods as 'security'. Mortgages of goods are uncommon but the other transactions that can serve a similar purpose, such as hire-purchase, are very common indeed.

Types of security

7. The security taken can be either possessory (as when goods are pledged) or non-possessory (as when they are mortgaged or charged). The borrower's assets may also be the subject of various other legal transactions that are not currently recognised by the law as creating a security but that serve the same purpose. For example, goods may be bought on credit by using forms of 'title finance', such as hire-purchase, conditional sale or a finance lease, that effectively enable the purchase of goods on credit using the goods as security for the loan. In addition, the sale of receivables may be used to raise money. These forms of transaction are often termed 'quasi-securities'.

The reasons for a system of registration

To give public notice

8. In the case of possessory security, where the creditor takes possession of the debtor's asset, it will generally be clear to third parties (such as other potential lenders) that the debtor does not own the asset outright. However, where the loan is secured on a non-possessory basis - a method that is generally more useful for either commercial or private purposes, because the debtor can continue to use the asset - the impression may be given that the asset is still owned outright by the debtor concerned. This carries the risk of

misleading someone contemplating supplying credit (whether on a secured or unsecured basis) to that debtor or, in the case of a business debtor, someone contemplating investing in the business.

9. It is difficult for a third party contemplating making a further loan to the debtor against security over the debtor's assets to know that a particular asset or class of assets is already subject to a non-possessory security. The same is true in the case of someone thinking of buying the property from the debtor.

10. In order for parties to be able to find out that assets have already been charged, both companies and individuals are required to register most kinds of non-possessory security. Registration of many charges created by companies is required under the Companies Act 1985. Mortgages and charges over goods created by individuals (whether for business or for private purposes) require registration under the Bills of Sale Acts 1878 and 1882. (The detailed registration requirements are set out in Parts II and VIII of the Consultation Paper.)

To safeguard the security

11. A creditor who takes a non-possessory security will want an assurance that, if the debtor does charge the same asset again to another creditor, that other creditor will not be able to claim the asset before the first security has been paid off. This is the question of which creditor will have 'priority'. Equally, the secured creditor will have priority over anyone who buys the asset from the debtor. For companies in particular, registration affects priority but does not guarantee it.

WHAT IS WRONG WITH THE CURRENT LAW

The aims of a system of registration

12. We suggest that a registration scheme should perform two basic functions: (1) to provide information to persons who are thinking of extending secured lending (and occasionally unsecured lending, where the amount is large), credit rating agencies and potential investors about the extent to which assets that may appear to be owned by the company are in fact subject to security interests in favour of other parties, in particular creditors; and (2) to determine the priority of securities.

13. In performing the first function the system should enable interested parties to find out about securities over the company's assets, particularly ones that they are unlikely to be able to discover easily from other sources. In relation to priority the system should, in general, enable potential secured parties to be confident (1) that they can take a security without any risk that it will be subject to other existing interests of which they had no reasonable means of knowing; (2) that, having checked the register, they will be able by taking simple steps to ensure the priority of any security they subsequently take over one that is taken in the meantime by another party; and (3) that registration will ensure the priority of their security against any subsequent security interest (unless there are good reasons of policy for the later interest to have priority). The system should also provide clear rules on the rights of purchasers who buy assets that are subject to security interests.

14. When measured against these aims, we suggest that the current law has a number of weaknesses.

Companies

The 'public notice' function

CHARGES

15. The current list of what is a registrable charge set out in the Companies Act 1985 is outdated. It omits a number of important charges that are commonly created over a company's assets. It is also hard to apply, and there is considerable doubt as to its scope, for example, on the question of book debts.

16. In principle, the Companies Register should be a reliable source of information. However, other parties cannot rely solely on the information the Register contains as it is unlikely to provide all the information needed (such as the amount of the secured debt).

17. In addition, there can be no absolute guarantee that the information is accurate. Although the registry staff are expected to check that the particulars submitted are correct, we understand that in practice it is difficult for them to do this reliably. If the registrar issues a certificate to the effect that the charge has been validly registered, the effect is that the registered charge is valid as to its original terms, not as to the terms actually appearing on the Companies Register. Consequently, the Companies Register may not be relied on to contain accurate information about the details of the charge and the conclusive certificate, whilst protecting the chargee, does not ensure the accuracy of the Companies Register.

18. The Companies Register will tell interested parties little that they cannot find out almost as easily from the company itself or the creditor, to whom they will need to talk in any event. What in practice the Companies Register seems to provide is a form of warning that there is a registrable charge in existence about which the person searching ought to seek more information from the chargor company or the secured chargee.

19. The net result of the current registration scheme is that the provision of a lot of information is demanded, but that information is not well used (particularly if it may be incomplete or possibly not completely accurate). Potential secured investors will in any event have to go to the company itself in order to obtain complete and up-to-date information about the state of the charged asset.

20. Moreover, each individual charge must be registered even when it is just one of a long series between the same parties. The difficulty and expense this causes is the explanation usually given for suppliers not registering extended retention of title clauses even though these frequently create registrable charges. Additional cost burdens are also imposed by the obligation for dual registration, in the case of some assets, at both Companies House and at specialist registries. This dual registration burden may not be necessary.

QUASI-SECURITIES

21. There is an even more fundamental criticism that the form of a transaction triumphs over its function. In other words, the law does not class as a security - let alone a 'charge' - a number of transactions that actually perform the function of securing payment of a debt or performance of an obligation. We examine such quasi-securities in Parts VI and VII of the Consultation Paper.

The 'priority' function

22. The registration scheme is also not an effective way of dealing with priorities. Failure to register may have an effect on the priority of a charge as against another registered

charge, in that an unregistered charge will be invalid against an administrator, liquidator or other creditors. However, registration itself is not a priority point.

23. First, even if a person checks the Register, he cannot be sure that there are no other interests in existence that will have priority. Secondly, because it is impossible to register a charge in advance of its creation, there is no way of securing his priority position whilst he is negotiating to lend the money. Thirdly, even if he has registered, another secured creditor may in some circumstances jump ahead of him in the priority queue.

24. There is further uncertainly over priority in relation to floating charges. Floating charges normally rank after later fixed charges. Floating charge-holders attempt to prevent this by using 'negative pledge' clauses that should prevent the debtor granting subsequent charges having priority. A negative pledge clause in a floating charge is not something that must be registered, and the clause will be ineffective to preserve the priority of a floating charge against a subsequent fixed charge unless it can be shown that the subsequent chargee had actual notice of the negative pledge clause.

25. The current registration scheme's relationship with the priority of a charge is therefore unsatisfactory: it has an impact on priority in some cases yet it does not set out a clear method of determining priorities.

PURCHASERS

26. The are additional problems in respect of purchasers of assets subject to securities. A purchaser may be bound by a fixed charge even if the charge has not been registered, unless the doctrine of bona fide purchaser of a legal estate without notice applies. This seems to offer inadequate protection. Conversely, it is uncertain whether purchasers are bound by charges that have been registered, as it is unclear whether purchasers are expected to check the register and will thus be fixed with constructive notice of a charge that has been registered. This uncertainty also seems unsatisfactory.

'OVERSEA' COMPANIES

27. We also consider in the Consultation Paper the problems raised by applying the registration scheme to companies incorporated overseas but having a place of business in Great Britain. In practice, the extension of the registration scheme to such companies has given rise to problems, as in some cases it would be difficult or impossible for an oversea company to comply with the registration requirements. We also consider whether the 'sanction of invalidity' resulting from failure to comply with the requirements of the Companies Act 1985 could constitute a disproportionate 'deprivation' of a person's possessions in contravention of Article 1 of Protocol 1 of the European Convention on Human Rights (although we are not convinced that this is a valid criticism).

Unincorporated businesses and individuals

28. The law governing registration of non-possessory security created by unincorporated businesses and individuals is even less satisfactory.

29. First, the law is so complicated as to be almost impossible to use. In practice, this means that it is very difficult for an unincorporated business to grant a fixed charge over its assets.

30. Secondly, it is unduly restrictive, preventing unincorporated businesses entirely from granting floating charges or allowing them to charge their after-acquired property.

31. Thirdly, there is a risk that the law will contravene the European Convention on Human Rights, because failure to comply with the rules relating to creation or registration of bills of sale will render the security not only void as against third parties, but void as between the debtor and creditor themselves.

32. Fourthly, the law also suffers from the fundamental criticism that was made in relation to companies: there is a failure to give adequate public notice of quasi-security interests.

THE PRINCIPAL PROPOSALS FOR REFORM

33. We understand that any reform that might be made to the scheme for registering company charges is likely to be introduced initially under any forthcoming Companies Bill. We have therefore split our consideration of this topic, so as to make provisional proposals in respect of companies first, and then to consider the question of other debtors.

Companies

34. We considered amending the current scheme of registration of company charges (see Appendix A of the Consultation Paper) but rejected such an approach. Instead we, like the Steering Group, provisionally propose the introduction of an electronic notice-filing system to replace the current registration scheme for company charges. A notice-filing system has been recommended in the past by previous reports, and operates in the United States and many Commonwealth jurisdictions. Reference to these reports and to the overseas systems can be found throughout Part IV of the Consultation Paper.

The principal advantages of notice-filing

Ease of use

35. A system of notice-filing would make it substantially easier for companies (or, more realistically, their creditors) to register security interests. Filing could be done electronically by the completion of a simple on-screen form (a 'financing statement') and the information filed would appear on the public register without imposing on registry staff the burden of checking the information submitted. The register could be searched easily and accurately on-line.

Reducing the paperwork without reducing the value of the register

36. Although less information would have to be submitted, there would be little reduction in the practical value of the register as a source of information about the company's financial affairs. There would no longer be any need to register twice - in the Companies Register and the various 'specialist registers' applying to land, aircraft, ships and other assets. There would be no need to register interests that were readily discoverable in any event.

Priority: greater security for those who register

37. A potential creditor could have confidence that any charge it filed would have priority over any earlier charge that does not appear on the register and any subsequent charge (other than a purchase-money interest, which we discuss below). The system would permit filing in advance of the creation of the security, in order to preserve priority during negotiations; and a single financing statement could be filed to cover future transactions, thus obviating the need to register successive security interests as and when they are created. Determining priority as between registered charges would become significantly easier as it would generally be determined by the date of filing,

although this would be subject to the special priority position enjoyed by the 'purchase-money interest'. The position of purchasers of charged property would also be rationalised.

Fairer rules of priority

38. We also consider a change that would make the law fairer to creditors who have provided the company with the finance to purchase new assets and who secure their loan by a charge over the new asset. Sometimes under the present law they may find that their charge is subordinated to those of more general secured creditors, so that the general creditor benefits at the expense of the purchase-money provider. We propose that 'purchase-money interests' should be given priority.

Reaching an international standard

39. Adopting notice-filing would bring our law into line with developments not only in the United States of America and many Commonwealth jurisdictions but also in modern international instruments. It is our provisional view that there would be significant advantages in adopting a system that is broadly similar to that which seems to be becoming a standard in many common-law jurisdictions of the world and will thus be familiar to and easily useable by foreign lawyers and business people wishing to do business in England and Wales.

What security interests should be registrable

40. We think that the notice-filing system described could be applied just to the charges that are currently registrable under the Companies Act 1985. However, we provisionally conclude that there would be advantages in bringing into the scheme at least those quasi-securities that, without a system of registration, may be misleading to potential creditors or purchasers. As with securities, we would give priority to purchase-money interests. This would mean that, as at present, the majority of quasi-securities would have priority.

THE MAIN FEATURES WE PROPOSE FOR THE NOTICE-FILING SYSTEM

41. Numbers in square brackets below refer to paragraphs in Part XII of the Consultation Paper which summarises the consultation questions.

Scope of the system

42. We begin by proposing a system of notice-filing for those charges that are currently registrable. As at present, possessory securities would not be within the scope of the notice-filing system (save where the creditor's possession is constructive and results from the debtor attorning to the creditor), nor would it apply to securities created by operation of the law. [12.3-12.4]

43. The notice-filing system that we propose would change the relationship between the Companies Registry and the other 'specialist' registries, such as the Land Registry. We would exclude all charges that are registrable in a specialist register from the notice-filing system. We invite views on whether the specialist registry should forward information about charges created by a company to the Companies Registry for public notice purposes. [12.49]

What information should be filed

44. Notice-filing is achieved by the filing of a 'financing statement' in a registry. The register should be operated on an electronic basis, and we list the brief details that the financing statement should contain. The principal particulars which would need to be filed would be the identities and addresses of the parties; a general description of the type of property subject to the security; (where filing is by a party other than the chargor) a statement that the chargor has consented to the filing being made; an indication of the period of validity of the security agreement; whether the charge is fixed or floating (or both); where applicable, any unique serial number identifying the secured asset; and confirmation that the chargor is either the beneficial owner of the property charged or that it holds it in trust. [12.5-12.7, 12.20, 12.24, 12.29-12.30, 12.68]

45. The financing statement would not need to be signed, although the person filing should be required to confirm that the chargor has consented to the filing, and there should be a criminal sanction for the provision of false or inaccurate information. [12.24]

46. The person filing would take responsibility for the contents of the financing statement. If an error occurred (for example, in the scope of the property covered by the charge) the party filing could not claim more than was stated (or, in the case of an overstatement, more than was covered by the security) although the filing would be effective for what was correctly filed. Only where there was a seriously misleading error would the filing be invalidated. [12.8]

Effect of not filing

47. Where a financing statement has not been filed, it is not necessary to have a criminal sanction (in other words, participation in the system should be voluntary), but the effect of a failure to file should be invalidity against an administrator and liquidator, and a loss of priority against a subsequent secured creditor who files first. [12.12-12.13]

Further information

48. Given that the financing statement will only contain brief details, there must be a means to get further information about the transaction. The debtor company, and anyone else with an existing interest in the company's property, should be entitled to obtain further information from the creditor about the security agreement. We ask for views as to whether this should include a copy of the agreement itself, and we also ask whether an error made in the details by a person who is responding to a request for information should give rise to an estoppel. However, there should not be a general requirement to provide further details to members of the public; they would be expected to obtain information from the debtor. [12.14-12.15, 12.17]

The company's own register

49. Given that there would be less information about the charge on the Companies Register, one possibility would be to increase the amount on information held on the register kept by each individual company. However, the indications are that this register is not used much and is not kept up-to-date, so we ask whether it is necessary to continue to register all charges on the company's own register, or whether this register could be dispensed with. [12.16]

Time limits

50. Under the current registration system, particulars of a charge must be sent for registration within 21 days of the charge's creation. Under notice-filing, a creditor

would not be required to file within a certain time after creation of the security interest, although we do invite views on whether 'last-minute filing' by creditors who are 'connected persons' (for example, directors of the company) should be permitted. [12.18-12.19]

Changes

51. We suggest a number of provisions to deal with the situation where there have been changes to the details contained on the financing statement, including allowing the debtor to demand that corrections be made to an inaccurate financing statement, or an outdated financing statement be removed, and requiring changes to be made where the identity of the parties changes. [12.21-12.23]

Advance filing

52. In line with other notice-filing systems, a financing statement could be filed before or after a security agreement is made, and a single filing could cover a series of transactions between the same parties. [12.25, 12.28]

Priorities

53. One of the most important changes that the introduction of a notice-filing system would bring about is in relation to priorities. In general, priority would be determined by the time of filing of the financing statement. However, this is subject to an important exception in the case of purchase-money interests. In such cases it would be unfair for that security to be subordinate to earlier filed interests. A purchase-money interest should have priority over an already registered non-purchase-money security. [12.36-12.37]

54. A change to 'date of filing' priority would have implications for floating charges: a floating charge should no longer give a company authority to create subsequent fixed charges that automatically get priority over an earlier floating charge. [12.29]

55. Where an asset subject to a security is dealt with or otherwise gives rise to proceeds, the security should extend to the proceeds, and in certain circumstances should have the same priority as the charge covered by the original financing statement. [12.38]

Purchasers

56. A notice-filing system would also set out a number of rules in relation to the position of a purchaser of assets that are subject to a security. A purchaser would not be bound by an unregistered charge, regardless of whether he knew of its existence. Where the charge has been registered, a purchaser of an asset sold in the ordinary course of business would take free (as he should not be expected to have to search the Companies Register), unless he knew that the sale was in breach of the security agreement. However, we ask whether buyers of capital equipment should be expected to search the Companies Register, and we also consider a number of other situations involving purchasers. [12.39-12.48]

What should be registrable under a notice-filing system

Charges

57. Our Consultation Paper goes on to consider whether the current list of registrable charges should be altered under a notice-filing system. Instead of having a list of registrable charges, we propose that all charges should be registrable unless excluded. [12.55]

58. However, some charges would continue to be exempt from filing, and these include the deposit of a negotiable instrument by way of security to secure the payment of a book debt; charges on goods or on insurance policies on goods where the goods are abroad or at sea, or are imported goods before they are delivered to a buyer or deposited in a warehouse, factory or store; and contractual liens over sub-freights (which are probably not true charges anyway). [12.58, 12.62-12.63]

59. Registration of charges over shares, and charges over rights to dividends when this forms part of a charge over the shares concerned, should not be necessary if the secured party has possession of the certificate or has control by being registered as owner. We ask whether it should be possible to perfect a charge over shares by filing a financing statement as an alternative to either taking possession of the certificates or taking control. [12.59-12.60]

60. A charge over a bank account in favour of the bank itself or of third parties should be possible only if the bank or third party takes 'control' of the account; and it should be exempt from registration. [12.64-12.65]

61. A charge created by a trustee company over trust property should be registrable against the trustee company (unless the charge is on the list of charges that are exempt from filing). [12.67]

62. We make specific proposals to exempt from registration charges arising from certain trust deeds entered into by Lloyds' corporate members. [12.70]

OVERSEA AND SCOTS COMPANIES

63. In dealing with the relationship between the notice-filing system and companies incorporated overseas, any notice-filing system should apply only to those oversea companies that have registered a place of business in England and Wales, whether they ought to have done so or not. We also propose that a charge that has been created by an oversea company on property that was then outside the United Kingdom, but which is subsequently brought into the United Kingdom, should also be registrable. [12.71-12.72]

64. The relationship between a notice-filing system and the registration scheme operating in Scotland needs careful consideration. We think that a charge created by a company registered in England and Wales over assets in Scotland should be registrable in England and Wales if the same charge would be registrable were the assets in England. We also propose that charges created by Scots companies over assets in England and Wales should continue not to be registrable in England and Wales, but we invite views. [12.73-12.74]

65. Charges created by unregistered companies should be within the notice-filing scheme we have proposed. [12.75]

Quasi-securities

66. Our Consultation Paper goes further than simply considering what 'charges' should be registrable under a notice-filing system. We think that notice-filing should be extended to cover certain quasi-security interests. The approach taken by the overseas systems as to the meaning of 'security interest' should be followed, so as to apply, in general, to transactions that secure payment or performance of an obligation. In particular, we think that the following quasi-securities should be registrable: hire-purchase agreements, conditional sales and retention of title clauses. [12.76-12.78]

CONSIGNMENTS AND FINANCE LEASES

67. We seek views on whether a consignment should be registrable only if it secures payment or performance of an obligation, or whether it should be registrable whatever its purpose. We also ask whether all leases should be registrable if over a certain minimum period, or whether only those leases that perform a security function should be registrable. [12.80-12.81]

RECEIVABLES

68. We think that sales of receivables (for example, under a factoring or block discounting agreement or as part of a securitisation) should be registrable, but that there should be an exception to the requirement to register when book debts are sold as part of a larger transaction (such as the overall sale of the business). [12.82]

SHARES AND INVESTMENT SECURITIES

69. There are a number of quasi-security transactions that should not be registrable, in particular the transfers of shares and investment securities under a 'repo' (or sale and re-purchase agreement). Third parties will in practice have no difficulty in finding out about the existence of such quasi-securities. [12.83-12.85]

PRIORITIES

70. As with charges, we think that quasi-securities that amount to purchase-money interests should be given priority over existing perfected security interests. [12.86]

UNIQUE SERIAL NUMBERS

71. A proposal that may be particularly useful for quasi-securities is that where the secured asset has a uniquely identifiable serial number it would be possible to require that the number should be included on the financing statement, which would allow searching in such cases not only by the name of the debtor but also by asset. This proposal would reveal security interests created by previous owners. (This proposal also applies in the case of charges, although we envisage that it will be most used in respect of quasi-securities.)

EXTENDING THE NOTICE-FILING SYSTEM TO UNINCORPORATED BUSINESSES AND INDIVIDUALS

72. In Part X of the Consultation Paper we consider whether unincorporated businesses and individuals should be brought within the notice-filing scheme, probably at a later stage. We propose that the outdated legislation relating to bills of sale should be replaced by notice-filing.

Unincorporated businesses

73. The same types of charge and quasi-security interests should be registrable when created by unincorporated businesses as when created by companies. Equally, the rules on priority should be the same. [12.92-12.96]

Consumers

74. The Bills of Sale Acts prevented individuals granting bills of sale over their after-acquired property in order to protect consumers from over-extending themselves to unscrupulous lenders. These concerns persist today and we propose to maintain this restriction. [12.97]

75. The current law allows consumers to give pledges, and in principle allows them to charge their existing goods, but in practice this is very difficult for them to do. Previous reports have suggested that consumers should be allowed to grant security interests where they are buying goods with money advanced by the financier (for example, buying a car on hire-purchase), but otherwise should not be allowed to charge their existing goods. Other systems, however, do allow consumers to charge their existing goods, but require the listing of individual items subject to the charge. We ask whether that should be permitted, or whether consumers should only be permitted to grant purchase-money interests. [12.97-12.98]

76. When it comes to filing a financing statement, we ask whether security interests over consumer goods should be valid without filing or whether they should be fileable. We think the most important question is the position of innocent purchasers who might buy the goods. In the case of motor vehicles, we propose that security interests should be filed regardless of the legal status of the debtor, and should then be effective against trade purchasers but not innocent private purchasers. For other consumer goods the case is less clear, but we provisionally prefer to permit filing. [12.99-12.100]

RESTATEMENT OF THE LAW OF SECURITY

77. We think that, in the long term, it is very desirable that there be a restatement of the law on the creation of security interests, the rights of the parties and enforcement of security interests, that would set out the extent to which such rules should apply to each kind of security interest (including quasi-securities). This is a course taken by the overseas systems and recommended in the other reports. Although we ask for views, we provisionally conclude that a restatement is not necessary for a new scheme applying only to security and quasi-security interests created by companies. Any 'codification' may be done if and when the scheme is extended to security interests created by non-corporate debtors. The detailed provisions of such a restatement are considered in Part XI and Appendix B of the Consultation Paper.

THE IMPORTANCE OF CONSULTATION

78. We are very conscious of the complexity of this project, and we are therefore very keen to obtain the views of all people who are interested, both on our proposals and on any points we may have missed. We would particularly welcome responses from those people who have experience of using notice-filing systems in overseas jurisdictions.

79. In each case it is important for us to obtain responses on the practical consequences of our proposals as well as views on the legal technicalities.

80. Our full proposals are contained in the Consultation Paper, which can be downloaded from our website at www.lawcom.gov.uk.

Law Commission
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