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# Part A7 – Debentures and Charges

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# Part A7 – Debentures & Charges

## Chapter 1 Interpretation

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### Head 1 Definitions

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- (1) For the purposes of this Part the expression “charge” means a mortgage or a charge in an agreement (written or oral) created by a company over an interest in any property, assets or undertaking of that company, but shall not include a mortgage or a charge in an agreement (written or oral) created by a company over an interest in cash, money credited to an account of a financial institution, or any other deposits, shares, bonds and debt instruments, units in collective investment undertakings, money market instruments and claims and rights (such as dividends or interest) in respect of any of the foregoing.
- (2) ‘Negative pledge’ has the meaning assigned to it in Part A7, Head 10.

#### **Explanatory note**

*This head is a new. Subhead (1) is taken, in substance, from Section 99(10)(a) of the Companies Act, 1963.*

*For the purposes of this Part, a charge is said to include a mortgage. This is also the position under Section 99(10)(a) of the Companies Act, 1963. The provision has been amended in accordance with the view of the Company Law Review Group in its Second Report to provide that a charge means a “a mortgage or a charge in an agreement (written or oral) created by a company over an interest in any property, assets or undertaking of that company, but shall not include a mortgage or a charge in an agreement (written or oral) created by a company over an interest in cash, money credited to an account of a financial institution, or any other deposits, shares, bonds and debt instruments, units in collective investment undertakings, money market instruments and claims and rights (such as dividends or interest) in respect of any of the foregoing”.*

*It is now expressly stated not to include a mortgage or charge over an interest in cash, accounts in financial institutions or any other deposits, shares or other financial instruments. This is in accordance with the exception to the registration requirement envisaged under Directive 2002/47/EC on Financial Collateral Arrangements. This directive was implemented by European Communities (Financial Collateral Arrangements) Regulations 2004 (S.I. No.1 of 2004) and European Communities (Financial Collateral Arrangements) (Amendment) Regulations 2004 (S.I. No. 89 of 2004.)*

## Chapter 2

### Provisions as to debentures

#### Head 2 Liability of trustees for debenture holders

- (1) Subject to Subheads (2) to (4), any provision contained in a trust deed for securing an issue of debentures or in any contract with the holders of debentures secured by a trust deed shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions.
- (2) Subhead (1) shall not invalidate—
- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or
  - (b) any provision enabling such a release to be given—
    - (i) on the agreement thereto of a majority of not less than three-fourths in value of the debenture holders present and voting in person or where proxies are permitted by proxy at a meeting summoned for the purpose, and
    - (ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.
- (3) Subhead (1) shall not operate—
- (a) to invalidate any provision in force on the commencement of this Bill so long as any person then entitled to the benefit of that provision or afterwards given the benefit thereof under Subhead (4), remains a trustee of the deed in question; or
  - (b) to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force.
- (4) While any trustee of a trust deed remains entitled to the benefit of a provision saved by Subhead (3), the benefit of that provision may be given either—

- (a) to all trustees of the deed present and future; or
- (b) to any named trustee or proposed trustees thereof; by a resolution passed by a majority of not less than three-fourths in value of the debenture holders present in person or where proxies are permitted by proxy at a meeting summoned for the purpose in accordance with the provisions of the deed, or if the deed makes no provision for summoning meetings, a meeting summoned for the purpose in any manner approved by the court.

#### **Explanatory note**

*This head is a re-enactment of Section 93 of the Companies Act, 1963.*

#### Head 3 Perpetual debentures

A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after 1st April 1964, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency however remote, or on the expiration of a period however long, notwithstanding any rule of law to the contrary.

#### **Explanatory note**

*This head is a slightly amended re-enactment of Section 94 of the Companies Act, 1963. The reference to the operative date has been replaced by that actual date.*

#### Head 4 Power to re-issue redeemed debentures

- (1) Where, either before, on or after 1<sup>st</sup> April 1964, a company has redeemed any debentures then—
- (a) unless any provision to the contrary, whether express or implied, is contained in the constitution or in any contract entered into by the company; or

- (b) unless the company has, by passing a resolution to that effect or by some other act, shown its intention that the debentures shall be cancelled, the company shall have and shall be deemed always to have had, power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place.
- (2) Subject to Part A7, Head 5 [equivalent of Section 96 of the Companies Act, 1963] on a re-issue of redeemed debentures, the person entitled to the debentures shall have and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.
- (3) Where a company has either before, on or after 1<sup>st</sup> April 1964, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.
- (4) Subject to Subhead (5), the re-issue of a debenture or the issue of another debenture in its place under the power by this head given to or deemed to have been possessed by a company, whether the re-issue or issue was made before, on or after the 1<sup>st</sup> April 1964, shall be treated as the issue of a new debenture for the purposes of stamp duty but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued.
- (5) Any person lending money on the security of a debenture re-issued under this head, which appears to be duly stamped, may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof unless he had notice or, but for his negligence, might have discovered that the debenture was not duly stamped but in any such case the company shall be liable to pay the proper stamp duty and penalty.

### **Explanatory note**

*This head is a slightly amended re-enactment of Section 95 of the Companies Act, 1963. All cross-references have been updated in accordance with the structure of the Bill. The references to the operative date have been replaced by that actual date.*

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## **Head 5 Saving of rights of certain mortgages in case of re-issued debentures**

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Where any debentures which have been redeemed before 1st April 1964 are re-issued on, or subsequently to, that date, the re-issue of the debentures shall not prejudice and shall be deemed never to have prejudiced, any right or priority which any person would have had under or by virtue of any mortgage or charge created before that date if Section 104 of the Companies (Consolidation) Act, 1908 had been enacted in the Companies Act, 1963 instead of Part A7, Head 4 [equivalent of Section 95 of the Companies Act, 1963].

### **Explanatory note**

*This head is a slightly amended re-enactment of Section 96 of the Companies Act, 1963. The reference to the “operative date” of the Companies Act, 1963 has been replaced by the insertion of the actual date (1st April 1964) and all cross-references have been updated in accordance with the structure of the Bill.*

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## **Head 6 Specific performance of contracts to subscribe for debentures**

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A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

### **Explanatory note**

*This head is a re-enactment of Section 97 of the Companies Act, 1963.*

## Chapter 3

### Registration and priority

#### Head 7 Registration of charges created by companies

- (1) Every charge, created after the commencement of this Part, by a company shall be void against the liquidator and any creditor of the company, unless either Subheads (2) or (3) are complied with.
- (2) The registration of a charge may be effected by the delivery of particulars, in the prescribed form, to the Registrar within 21 days after the date of its creation.
- (3)
  - (a) The registration of a charge may be effected by the delivery, in the prescribed form, to the Registrar of —
    - (i) a notice that it is intended to create a charge, and
    - (ii) within 21 days of the notice in Subhead(3)(a)(i), a further notice that the charge referred to therein has been created (whereupon no further filing is required);
  - (b) If the prescribed form referred to in Subhead (3)(a)(ii) is not delivered to the Registrar within the time referred to in Subhead (3)(a)(ii), the notice (referred to in Subhead (3)(a)(i)) shall be void and removed from the register.
- (4) Subhead (1) shall be without prejudice to any contract or obligation for repayment of the money thereby secured and when a charge becomes void under this head, the money secured thereby shall immediately become payable.
- (5) Compliance with Subheads (2) or (3) as the case may be, shall relieve the company from any requirement to register the charge under the Agricultural Credit Acts, 1978 - 1992.

#### Explanatory note

*This head is an amended re-enactment of Section 99 of the Companies Act, 1963, as amended by Section 122 of the Companies Act, 1990. Many subsections of Section 99 have been repealed in accordance with the views of the Company Law Review Group in its Second Report. Furthermore, subheads have been added in accordance with the recommendations of the Review Group in its Second Report. References to the “registrar of companies” have also been replaced with a reference to the “Registrar” throughout this Part.*

*Section 99(2) of the Companies Act, 1963 sets out the categories of charges requiring registration. The Review Group believes that the division of charges into categories is both a historical anachronism and cumbersome. In order to bring greater consistency, transparency and certainty to the law, the Review Group recommends that every charge, subject to EU requirements, should be subject to the requirement to register particulars with the CRO. The rationale for such a recommendation is that creditors should not be misled by a company appearing to have full title to an asset which it possesses, where such an asset is already encumbered in favour of another creditor. Accordingly, the Review Group recommended that the provision should be repealed.*

*An exception to the registration requirement is any charge falling within the ambit of Directive 2002/47/EC on financial collateral arrangements, as implemented by S.I. No.1 of 2004 and S.I. No. 89 of 2004. This exception is provided for in Head 1 of this Part.*

*Section 99(3) of the Companies Act, 1963 provides for an extension of the 21 day filing period where a charge is created outside of the State, comprising of property situate outside of the State, to allow for posting. The Review Group was of the opinion that such a provision was outdated given the accessibility of effective courier services. Accordingly, it was recommended that this provision be repealed.*

*Section 99(4) of the Companies Act, 1963 provides that where a charge comprises property situate outside the State, particulars may be sent for registration notwithstanding that further proceedings may be necessary to make the charge valid in the State where the property is located. All charges, subject to specific exceptions, created by companies incorporated in Ireland are required to be registered. Accordingly, the Review Group was of the opinion that this section is superfluous and recommended its repeal.*

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Section 99(5) of the Companies Act, 1963 provides that where a charge comprises property outside of the State and registration in the country where the property is situated is necessary to make the charge valid, a further certificate, in the prescribed form, stating that the charge was presented for registration in that country, is to be delivered to the CRO. The Review Group was of the opinion that it was of no concern to the Registrar or the public whether the charge needs to be perfected in a foreign jurisdiction. This is a concern of the chargee only. Accordingly, the Review Group recommended that the provision should be repealed.

Section 99(6) of the Companies Act, 1963 provides that where a negotiable instrument is given for the securing of book debts of the company, the instrument shall not be treated as a charge on those book debts. The Review Group was of the opinion that encumbrances involving the delivery of the encumbered asset, to the person entitled to the encumbrance should not be subject to Section 99 as the asset is not in the purported ownership of the company. Accordingly, the Review Group was of the opinion that the continuation of this Subsection (6) was unnecessary and should be repealed. In addition the definition of a charge, in Head 1 of this Part, removes from the categories of what is registrable, the delivery of a negotiable instrument.

Sections 99(7) - 99(9) of the Companies Act, 1963 deal with debentures. Section 91 of the Companies Act, 1963 imposes a requirement on companies to keep a register of debentures. This provision has been disregarded for many years without any apparent impairment to creditors' rights. Accordingly, the Review Group recommended the repeal of Sections 91 and 92 of the Companies Act, 1963. The Review Group was further of the opinion that Sections 99(7) - (9) have become redundant and should be repealed.

Subhead (1) of this head is an amended re-enactment of Section 99(1) of the Companies Act, 1963. It has been amended insofar as the charge is now said to be void unless Subheads (2) and (3) have been complied with.

Subhead (2) is new. It sets out the manner in which registration of the charge with the Registrar is to be effected i.e. by filing a statement of the particulars of a charge in the prescribed form within 21 days of the creation of the charge.

Subhead (3) is new. It provides for a system of preliminary filing of notice of charges in accordance with the recommendations of the Review Group. The Review Group identified anomalies within the system of registration of charges owing to the fact that charges acquire their priority from the date of their creation as opposed to the date of their registration, provided that they are filed within the 21 day period. Essentially, a charge created earlier but filed later (but within 21 days of its creation) would take priority over a charge created earlier but filed earlier, despite the fact that the creditor filing earliest would have no knowledge of the first-ranked charge when carrying out a search with the CRO. Accordingly, the Review Group recommended that priority be given to the creditor who files first in time. This recommendation is given effect to in this Part.

To ensure that another charge is not filed in the period between a clear search and the filing of the charge for registration, the Review Group recommended that a filing could be submitted prior to the completion of the transaction, provided a further filing evidencing the actual creation of a charge was filed with the Registrar within 21 days of the first filing of the intention to create a charge. In such circumstances, a charge would take effect as to priority from the date of the first preliminary filing. In the absence of a second filing within 21 days of the preliminary filing, the preliminary filing of an intention to create a charge would lapse. Such a notice filing system has been applied in the U.S., Canada and New Zealand and has been recommended in the UK. Subhead (4) is new. It is a re-enactment of the last line of Section 99(1) of the Companies Act, 1963.

Subhead (5) is new and gives effect to the High Court decision of Costello J in *Re Castlemahon Poultry Products Ltd.* (13th Dec 1985, Unrep HC). The effect of this decision was that where a company registered a chattel mortgage under Section 99 of the Companies Act, 1963, then, even if it was a mortgage over stock within the meaning of the Agricultural Credit Act, 1978, registration under that Act was unnecessary. Commentators advised that it may be imprudent not to follow the registration procedure under that Act since it was not expressly stated that registration under the Companies Acts would displace the requirements as to registration under the 1978 Act.

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### Head 8 Duty of company to register charges created by a company

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- (1) It shall be the duty of a company to deliver to the Registrar for registration, within the time required by Part A7, Head 7 [equivalent of Section 99 of the Companies Act, 1963], the particulars of every charge created by the company, but registration of any such charge may be effected on the application of any person interested therein.
- (2) Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by that person to the Registrar in respect of the registration.

#### **Explanatory note**

*This head is an amended re-enactment of Section 100 of the Companies Act, 1963. All cross-references have been updated in accordance with the structure of the new Bill and references to the “registrar of companies” have been replaced with references to the “Registrar”.*

*Sections 100(3) and 100(4) of the Companies Act, 1963 have been deleted in accordance with the recommendation of the Company Law Review Group in its Second Report. The Review Group noted that, although under Section 100 of the Companies Act, 1963 it is the duty of the company creating a charge to register particulars of the charge, in practice most particulars are filed by the chargee or its solicitor. The reason for the practice is that as the failure to file within 21 days of the charge’s creation will render the charge void against creditors and the liquidator of the company, the beneficiary of the charge wishes to ensure filing is done in a timely manner. Invariably, the company willingly permits the chargee the burden of preparing and filing the form, although the cost of so doing is usually borne by the company (as provided for in Section 100(2) of the Companies Act, 1963).*

*The Review Group acknowledged that such practice might warrant the repeal of Section 100 of the Companies Act, 1963. However, it considered the requirement that the officers of the company ensure that its file contains up to date, correct information for inspection by the public to be of over-riding importance.*

*The reference to the registration of the particulars of any debentures issued by the company has also been removed from Subsection (1) given that Sections 91 and 92 of the Companies Act, 1963 (which required the company to keep a register of debenture holders and make it available to the public for inspection) have now been repealed.*

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### Head 9 Duty of company to register charges existing on property acquired

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Where a company acquires any property which is subject to a charge of any such kind as would if it had been created after the acquisition of the property have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, verified in the prescribed manner, to be delivered to the Registrar for registration in the manner required by this Bill within 21 days after the date on which the acquisition is completed, so however that, if the property is situated outside the State 21 days after the date on which the prescribed particulars could in due course of post and if despatched with due diligence, have been received in the State, shall be substituted for 21 days after the completion of the acquisition as the time within which the particulars are to be delivered to the Registrar.

#### **Explanatory note**

*This head is an amended re-enactment of Section 101 of the Companies Act, 1963. Section 101(2) has been deleted in light of the fact that Section 100 of the Companies Act, 1963 has been repealed.*

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### Head 10 Priority of charges

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- (1) Subject to Subhead (2), in so far as the priority of a charge is not otherwise prescribed by law, a charge will take effect as to priority on the date of delivery of the prescribed form specified in Part A7, Head 7(2) [equivalent of Section 99 of the Companies Act, 1963] or the prescribed form specified in Head 7(3)(a)(i), as the case may be.
- (2) Subhead (1) shall not affect the terms of any agreement between charge-holders as to priority.
- (3) Subject to Section 33 and Schedule 3 of Part 2 of the Central Bank and Financial Services Authority of Ireland Act, 2004, the Registrar shall not enter particulars of a negative pledge in the register pursuant to Part A7, Head 12 [equivalent of Section 103 of the Companies Act, 1963] and the delivery of any such particulars shall have no legal effect but without prejudice to the validity of the prescribed particulars delivered.

- (4) In this head a “negative pledge” shall mean any covenant or agreement (written or oral) which provides that a company shall not, or shall not other than in specified circumstances —
- (a) borrow money or obtain credit from any person; or
  - (b) create or permit to subsist any mortgage, charge, lien or other encumbrance or any pledge over the whole, or any part of the property or undertaking of the company.

### **Explanatory note**

*This head is new. It sets out the priority of charges in accordance with the views of the Company Law Review Group in its Second Report. The Companies Acts, 1963-2005 are silent on the issue of priority of charges. The precise date was not expressly specified for the priority of charges, although it was accepted to be the date of creation of the charge.*

*Subhead (1) changes the relevant date for the priority of charges to the date of the delivery of the prescribed particulars to the Registrar for registration. The Review Group identified anomalies within the system of registration of charges owing to the fact that charges acquire their priority from the date of their creation as opposed to the date of their registration, provided that they are filed within the 21 day period. Essentially, a charge created earlier but filed later would take priority over a charge created later but filed earlier, despite the fact that the creditor filing earliest would have no knowledge of the first-ranked charge when carrying out a search with the CRO. Accordingly, the Review Group recommended that priority be given to the creditor who files first in time in order to minimise the potential for fraudulent abuse and thereby protect providers of finance. This priority will be subject to any over-riding priority applicable to certain assets, under already established principles applicable to Registry of Deeds, the Land Registry, the Shipping Registry or Chattel Registry.*

*Subhead (2) is new. It gives effect to the recommendations of the Review Group in its Second Report, that priority as to charges would also be subject to any contrary agreement between the creditors such as an inter-lender or priority agreement, often entered into by financial institutions where more than one such institution lends to a particular company.*

*Subhead (3) is also new. It restricts the particulars which are capable of being delivered for registration to the Registrar. The Review Group noted that it had been customary to insert additional details to the prescribed particulars being delivered for registration, the most common of which were details of negative pledge clauses, details of crystallisation events in relation to floating charges and other restrictive provisions. These are all contractual restrictions in the deed of charge. Currently, any such information on the form submitted to the Registrar is ignored when transcribing details onto the register of charges, applicable to the chargor-company. The Review Group noted that it should be regarded as quite exceptional by the public, that relevant charges would not contain these restrictions. Accordingly, the Review Group recommends that the practice of delivering this additional information for registration should be discontinued and this should be reflected in legislation.*

*Subhead(4) defines a negative pledge for the purpose of Subhead (3).*

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## **Head 11 Registration and priority of judgment mortgages**

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- (1) When a judgment is recovered against a company and such judgment is subsequently converted into a judgment mortgage affecting any property of the company, the judgment creditor shall cause a copy (certified by the Land Registry or Registry of Deeds as the case may be, to be correct) of the affidavit, required for the purpose of registering the judgment as a mortgage, to be delivered with the prescribed form to the Registrar for registration.
- (2) Subject to the law applicable to other registries, a judgment mortgage will take effect as to priority on the date of delivery for registration to the Registrar of the prescribed form.
- (3) This head shall not apply to any judgment mortgage created before the commencement of this Bill.

### **Explanatory note**

*This head is an amended re-enactment of Section 102 of the Companies Act, 1963. The amendments have been made in accordance with the views of the Company Law Review Group in its Second Report. Section 102(2) has been deleted as it was no longer relevant in light of these amendments.*

Subhead (1) is an amended re-enactment of Section 102(1) of the Companies Act, 1963. The obligation on the judgment debtor-company to file details of the judgment mortgage with the Registrar has been removed. Failure on the part of the company to do so resulted in a small financial penalty on the company and its officer under Section 102(2). The Review Group noted that the net result of the inaction by the company was the invalidity of the judgment mortgage. Thus, the provision was open to much abuse. Accordingly, the Review Group recommended that the role of the judgment debtor-company be removed and the requirement of the judgment creditor to deliver certified copies of the affidavit to the company be replaced with the requirement that it deliver one certified copy to the Registrar. The Review Group also recommended that the judgment mortgage should not be rendered invalid by the failure to deliver the affidavit to the Registrar within 21 days of the creation of the judgment mortgage.

Furthermore, the Review Group recommended that the affidavit be accompanied by the prescribed form when delivered for registration to the Registrar. This prescribed form is to be a modified version of that used to register charges. Under Section 102 of the Companies Act, 1963 there was no such prescribed form.

Subhead (2) is new. It provides that priority would be governed by the filing date. The Review Group recommended that the priority of judgment mortgages, subject to the priority of other registries (where appropriate), would arise from that date as is the case for the delivery of charges for registration to the Registrar under the previous head.

Subhead (3) is a slightly amended re-enactment of Section 102(3) of the Companies Act, 1963. "Operative date" has been replaced with "commencement of this Bill".

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### Head 12 Register of charges to be kept by Registrar

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- (1) The Registrar shall keep, in relation to each company, a register in the prescribed form, of all the charges requiring registration under this Part, and shall on payment of such fee as may be prescribed, enter in the register in relation to such charges, the following particulars—
  - (a) if the charge is a charge created by the company, the date of its creation and filing (including notice filing referred to Part A7, Head 7 [equivalent of Section 99 of the Companies Act, 1963]);

- (b) if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property;
  - (c) if the charge was a judgment mortgage, the date of the creation and filing of such judgment mortgage;
  - (d) short particulars of the property charged;
  - (e) the persons entitled to the charge.
- (2) The register kept in pursuance of this head shall be open to inspection by any person on payment of such fee, if any, as may be prescribed.

#### Explanatory note

This head is an amended re-enactment of Section 103 of the Companies Act, 1963. The amendments have been made in accordance with the views of the Company Law Review Group in its Second Report.

Subhead (1) is an amended re-enactment of Section 103(1) of the Companies Act, 1963. The Review Group recommended the retention of the requirement for the Register of Charges to be kept by CRO and for it to be open to public inspection as it serves a useful purpose for the provision of relevant information on companies registered in the State.

Section 103(1)(b)(iv), which referred to the amount secured by the charge, has not been included. The Review Group noted that this provision had become redundant and was of little relevance today to a person making a search. The reason for this is that most charges now secure all sums due or to become due by the company to the creditor-chargee. A subsequent potential creditor is likely to require the first charge be released or to have sight of the first charge, which can be provided by the chargor-company, to ascertain exactly the nature of the security which will have priority. Thus, the information relating to the amount of the charge, as filed, has little practical significance. Accordingly the Review Group recommended its repeal.

Subhead (2) is a re-enactment of Section 103(2) of the Companies Act, 1963.

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### Head 13 Certificate of registration

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The Registrar shall give a certificate of the registration of any charge registered in pursuance of this Part. The certificate shall be conclusive evidence that the requirements of this Part, pertaining to any charges for which particulars have been filed, as to registration have been complied with.

### **Explanatory note**

*This head is an amended re-enactment of Section 104 of the Companies Act, 1963. It provides that the Registrar shall issue a Certificate of Registration of Charge and this shall be conclusive evidence that the requirements, pertaining to any charges for which prescribed particulars have been filed as to registration have been complied with.*

*The section has been amended in a number of respects. The amendments have been made in accordance with the views of the Company Law Review Group in its Second Report.*

*The certificate of charge is now to be conclusive evidence that registration has been complied with in regard to such prescribed particulars as have been filed. Section 104 of the Companies Act, 1963 provides that the Certificate of Charge shall be conclusive evidence that the requirements as to registration have been complied with. This is an important distinction. The Company Law Review Group noted that although a certified copy of the charge may be filed, there is no requirement under the Companies Acts, 1963 - 2005 to file a copy of the charge where the particulars have been signed on behalf of the chargor-company and the chargee-creditor. As a result, it is quite possible that, in such circumstances, Certificates of Registration of Charge confirming compliance may have been issued where the requirements have not been complied with (e.g. where details of the charge have been omitted from the required form filed).*

*The Review Group acknowledged that, without sight of the charge, the Registrar should not be required to issue a Certificate of Charge which is conclusive evidence that all registration requirements for all charges in a security document have been complied with. Furthermore, to require that a copy of the charge be submitted to the Registrar to be cross-checked is unduly burdensome on the Registrar.*

*Accordingly, the Review Group recommended that the security document be incapable of filing with the Registrar, and Certificates of Charge should be conclusive evidence that the registration requirements have been complied with, but only insofar as they relate to charges for which particulars have been filed.*

*The words "...under his hand..." have been deleted. This was done in accordance with the view of the Review Group that such wording was archaic.*

*The reference to the charge stating the amount thereby secured has also been deleted. This was done in accordance with the repeal of Section 103(1)(b)(iv) of the Companies Act, 1963 in Head 12 of this Part.*

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## **Head 14 Entries of satisfaction and release of property from charge**

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- (1) The Registrar, on evidence being given to his satisfaction with respect to any registered charge—
  - (a) that the debt in relation to which the charge was created has been paid or satisfied in whole or in part; or
  - (b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,

and after giving notice to the person to whom such charge was originally given or to the judgment creditor where the satisfaction or release has not been signed on behalf of the chargee, as the case may be, may enter on the register a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, and where he enters a memorandum of satisfaction in whole, he shall, if required, furnish the company with a copy thereof.

- (2) The Registrar may accept as evidence of such release, a statement signed by a director and secretary of the company or by two directors of the company, stating that the release has occurred.
- (3) Where a person signs such statement with knowledge of it not being true, the person shall be guilty of a category two offence.
- (4) Where a person signs such statement and in doing so did not honestly believe on reasonable grounds that the statement was true, and
  - (a) contributed to a company being unable to pay its debts;
  - (b) prevented or impeded the orderly winding-up of the company; or
  - (c) facilitated the defrauding of the creditors of the company,

the court may, on an application of any creditor, contributor, liquidator, examiner or receiver, declare that the signatories to the statement referred to in Subhead (2) are liable for all or such portion of the debts of the company, as the court deems just and equitable.

### **Explanatory note**

*This head is an amended re-enactment of Section 105 of the Companies Act, 1963. The section has been amended in accordance with the views of the Company Law Review Group in its Second Report.*

*The system of registering of satisfactions under Section 105 of the Companies Act, 1963 requires the company to submit a form C6 which the secretary and a director of the company sign. In addition, they are required to make a statutory declaration. Following this, the Registrar notifies the chargee-creditor and, unless he hears from the chargee within 21 days, he registers the satisfaction. The Review Group noted that this was open to abuse since the notice sent from the Registrar to the chargee-creditor may not reach him, yet the satisfaction would be registered since the chargee would have failed to object within the 21 day period. It was further noted that despite the fact that it appeared to prevent signatories making fraudulent declarations, the requirement to make a statutory declaration was cumbersome. To avoid making such statutory declarations, yet continuing to guard against the possibility of abuse, the Review Group recommended that a statement, in the prescribed form, signed by a director and secretary of the company or two directors of the company, be signed and submitted to the Registrar who would then send the 21 day notice to the chargee-creditor.*

*Subhead (1) is an amended re-enactment of Section 105(1) of the Companies Act, 1963. It has been amended insofar as the requirement for the Registrar to give notice to the chargee is expressed to apply in a situation "where the satisfaction or release has not been signed by or on behalf of the chargee".*

*Subhead (2) is new. It gives effect to the recommendations of the Review Group in relation to the signing of the release in the prescribed form.*

*Subhead (3) is new. It creates an offence for someone to knowingly sign a false release statement.*

*Subhead (4) is also new. It imposes personal liability on the signor in accordance with the views of the Review Group. Personal liability may be imposed for all the debts of the company, or such portion thereof as the court deems just and equitable, where the signor did not honestly believe on reasonable grounds that the statement was true. In addition, such action must have contributed to the insolvency of the company, prevented or impeded the orderly winding-up of the company or facilitated the defrauding of the creditors of the company.*

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## **Head 15 Extension of time for registration of charges**

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The court, on being satisfied that the omission to register a charge within the time required by this Bill or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or mis-statement shall be rectified.

### **Explanatory note**

*This head is an amended re-enactment of Section 106 of the Companies Act, 1963.*

*Section 106 of the Companies Act, 1963 permits an application to be made to court for late registration where there has been a failure to file the prescribed particulars of a charge within the 21 days. The Court, when permitting late registration, is required to be satisfied that the late registration will not prejudice the position of the creditors or shareholders. In practice, such an application to Court is both costly and embarrassing for the chargee and/or its solicitor. It does, however, focus the attention on those taking charges to ensure that the correct particulars are filed in a timely manner. In 2002, over 7,000 charges were registered with the CRO but only 14 of these (0.2%) were registered pursuant to a court order. Accordingly, the Review Group recommended the retention of this section.*

*Section 106(2) has been deleted in light of the fact that Sections 100(3) and 100(4) of the Companies Act, 1963 have been repealed.*

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## **Head 16 Copies of instruments creating charges to be kept at registered office**

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Every company shall cause a copy of every instrument creating any charge requiring registration under this Part, including every affidavit, a copy of which has been delivered to a company under Part A7, Head 11 [equivalent of Section 102 of the Companies Act, 1963], to be kept at the registered office of the company or another place in the State, provided that such other place has been notified to the Registrar in the prescribed form.

### **Explanatory note**

*This head is an amended re-enactment of Section 109 of the Companies Act, 1963. References to the registrar of companies have also been replaced with references to the "Registrar" throughout. The last line, referring to debentures, has been removed in light of the repeal of Sections 91 and 92 of the Companies Act, 1963. Furthermore, in accordance with the views of the Company Law Review Group in its Second Report, provision has also been made for the register of charges to be kept in a place other than the registered office of the company.*

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### **Head 17 Right to inspect copies of instruments creating charges**

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- (1) The copies of instruments referred to in Part A7, Head 16 [equivalent of Section 109 of the Companies Act, 1963] may be inspected during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than 2 hours in each day shall be allowed for inspection) by any creditor or member of the company upon payment not exceeding the nominal fee.
- (2) If inspection is refused, every officer of the company who is in default shall be guilty of a category four offence.
- (3) In the event of any such refusal, the court may by order compel an immediate inspection.

### **Explanatory note**

*This is an amended re-enactment of Section 110 of the Companies Act, 1963. The amendments have been made in accordance with the views of the Company Law Review Group in its Second Report.*

*Subhead (1) has been amended insofar as copies of instruments creating charges are no longer open to creditors or members of a company without charge. Provision has now been made for a fee to be charged for such inspection by creditors or members, although this fee is not allowed to exceed the nominal fee. For this purpose, a definition of nominal fee, as may be prescribed by the Minister, shall be included in Part A1 of the Bill.*

*Subhead (2) has been amended insofar as the reference to a specific fine has been removed.*

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### **Head 18 Registration of charges existing before application of this Part.**

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Part A7 8, 9, 11 to 17, Part A8 9 and Part B10 22 [equivalents of Sections 99 to 112 of the Companies Act, 1963] shall continue to apply to charges created prior to the commencement of this Part.

### **Explanatory note**

*This head is new. It replaces Section 112 of the Companies Act, 1963.*

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### **Head 19 Registration of charges in a Netting Agreement**

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Section 4(1) of the Netting of Financial Contracts Act, 1995 shall not affect —

- (a) the requirement to register a charge; or
- (b) the consequences of failing to register a charge under this Part.

### **Explanatory note**

*This head is new. It was introduced in accordance with the recommendations of the Company Law Review Group in its Second Report.*

*The Netting of Financial Contracts Act, 1995 ("the Netting Act") facilitates the use of swap instruments and provides, inter alia, that a mortgage or charge to secure a liability under a "financial contract", shall be legally enforceable against the chargor, notwithstanding any "rule of law relating to bankruptcy, insolvency or receivership, or in the Companies Acts." The Netting Act was implemented in response to international bodies wishing to do business in Ireland. Such bodies were concerned particularly as to the effect of the appointment of an examiner to an Irish incorporated counterparty. The prohibition of set-off or other creditor remedies on the appointment of an examiner discouraged contractual relations for swaps and similar arrangements with Irish incorporated companies. The effect of the Netting Act has been to enable persons to enter into financial contracts with Irish incorporated counterparties without the risk that an examiner appointed to the counterparty would put a stay on the enforcement of the financial contracts.*

*The terms of the Netting Act are so broad that particulars of security created over a company's assets to secure its obligations under a "financial contract" may not require to be filed under Section 99 of the Companies Act, 1963. This goes beyond "the examinership difficulty" which the Netting Act successfully addressed. The absence of a requirement to register can give a distorted picture to a person inspecting a company's file at the CRO. Accordingly, the Review Group recommends the Netting Act be amended by specifying that particulars of a charge, within the meaning of the Head 1 of this Part, be filed in accordance with Head 7 of this Part. A charge, to secure obligations under a "financial contract", over cash, a bank account, shares, bonds and debt instruments would not require registration as it would not fall within the category of a registerable charge (under the definition Head 1 of this Part). Particulars of charges over other assets such as land or equipment, to secure obligations under a "financial contract" are generally filed with the CRO. Accordingly, the Review Group believes the foregoing recommendation in the previous paragraph will have no adverse effect on companies registered in the State which conclude financial contracts.*

