



Companies Act 1985

1985 CHAPTER 6

PART XVIII

FLOATING CHARGES AND RECEIVERS (SCOTLAND)

CHAPTER I

FLOATING CHARGES

462 Power of incorporated company to create floating charge

- (1) It is competent under the law of Scotland for an incorporated company (whether a company within the meaning of this Act or not), for the purpose of securing any debt or other obligation (including a cautionary obligation) incurred or to be incurred by, or binding upon, the company or any other person, to create in favour of the creditor in the debt or obligation a charge, in this Part referred to as a floating charge, over all or any part of the property (including uncalled capital) which may from time to time be comprised in its property and undertaking.
- (2) A floating charge may be created, in the case of a company which the Court of Session has jurisdiction to wind up, only by the execution, under the seal of the company, of an instrument or bond or other written acknowledgment of debt or obligation which purports to create such a charge.
- (3) Execution in accordance with this section includes execution by an attorney authorised for such purpose by the company by writing under its common seal; and any such execution on behalf of the company binds the company.
- (4) References in this Part to the instrument by which a floating charge was created are, in the case of a floating charge created by words in a bond or other written acknowledgment, references to the bond or, as the case may be, the other written acknowledgment.

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- (5) Subject to this Act, a floating charge has effect in accordance with this Part in relation to any heritable property in Scotland to which it relates, notwithstanding that the instrument creating it is not recorded in the Register of Sasines or, as appropriate, registered in accordance with the Land Registration (Scotland) Act 1979.

463 Effect of floating charge on winding up

- (1) On the commencement of the winding up of a company, a floating charge created by the company attaches to the property then comprised in the company's property and undertaking or, as the case may be, in part of that property and undertaking, but does so subject to the rights of any person who—
- (a) has effectually executed diligence on the property or any part of it; or
 - (b) holds a fixed security over the property or any part of it ranking in priority to the floating charge; or
 - (c) holds over the property or any part of it another floating charge so ranking.
- (2) The provisions of Part XX (except section 623(4)) have effect in relation to a floating charge, subject to subsection (1), as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due or to become due thereon.
- (3) Nothing in this section—
- (a) prejudices the operation of section 614(2);
 - (b) derogates from the provisions of sections 469(7) and 470(6) in this Part.
- (4) Subject to section 617, interest accrues, in respect of a floating charge which after 16th November 1972 attaches to the property of the company, until payment of the sum due under the charge is made.

464 Ranking of floating charges

- (1) Subject to subsection (2), the instrument creating a floating charge over all or any part of the company's property under section 462 may contain—
- (a) provisions prohibiting or restricting the creation of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge; or
 - (b) provisions regulating the order in which the floating charge shall rank with any other subsisting or future floating charges or fixed securities over that property or any part of it.
- (2) Where all or any part of the property of a company is subject both to a floating charge and to a fixed security arising by operation of law, the fixed security has priority over the floating charge.
- (3) Where the order of ranking of the floating charge with any other subsisting or future floating charges or fixed securities over all or any part of the company's property is not regulated by provisions contained in the instrument creating the floating charge, the order of ranking is determined in accordance with the following provisions of this section.
- (4) Subject to the provisions of this section—

- (a) a fixed security, the right to which has been constituted as a real right before a floating charge has attached to all or any part of the property of the company, has priority of ranking over the floating charge;
 - (b) floating charges rank with one another according to the time of registration in accordance with Chapter II of Part XII;
 - (c) floating charges which have been received by the registrar for registration by the same postal delivery rank with one another equally.
- (5) Where the holder of a floating charge over all or any part of the company's property which has been registered in accordance with Chapter II of Part XII has received intimation in writing of the subsequent registration in accordance with that Chapter of another floating charge over the same property or any part thereof, the preference in ranking of the first-mentioned floating charge is restricted to security for—
- (a) the holder's present advances ;
 - (b) future advances which he may be required to make under the instrument creating the floating charge or under any ancillary document;
 - (c) interest due or to become due on all such advances; and
 - (d) any expenses or outlays which may reasonably be incurred by the holder.
- (6) This section is subject to section 614(2) (preferential debts in winding up).

465 Continued effect of certain charges validated by Act of 1972

- (1) Any floating charge which—
- (a) purported to subsist as a floating charge on 17th November 1972, and
 - (b) if it had been created on or after that date, would have been validly created by virtue of the Companies (Floating Charges and Receivers) (Scotland) Act 1972,
- is deemed to have subsisted as a valid floating charge as from the date of its creation.
- (2) Any provision which—
- (a) is contained in an instrument creating a floating charge or in any ancillary document executed prior to, and still subsisting at, the commencement of that Act,
 - (b) relates to the ranking of charges, and
 - (c) if it had been made after the commencement of that Act, would have been a valid provision,
- is deemed to have been a valid provision as from the date of its making.

466 Alteration of floating charges

- (1) The instrument creating a floating charge under section 462 or any ancillary document may be altered by the execution of an instrument of alteration by the company, the holder of the charge and the holder of any other charge (including a fixed security) which would be adversely affected by the alteration.
- (2) Such an instrument of alteration is validly executed if it is executed—
- (a) in the case of a company, under its common seal or by an attorney authorised for such purpose by the company by a writing under its common seal;
 - (b) where trustees for debenture-holders are acting under and in accordance with a trust deed, by those trustees;

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- (c) where, in the case of a series of secured debentures, no such trustees are acting, by or on behalf of—
 - (i) a majority in nominal value of those present or represented by proxy and voting at a meeting of debenture-holders at which the holders of at least one-third in nominal value of the outstanding debentures of the series are present or so represented; or
 - (ii) where no such meeting is held, the holders of at least one-half in nominal value of the outstanding debentures of the series; or
 - (d) in such manner as may be provided for in the instrument creating the floating charge or any ancillary document.
- (3) Section 464 applies to an instrument of alteration under this section as it applies to an instrument creating a floating charge.
- (4) Subject to the next subsection, section 410(2) and (3) and section 420 apply to an instrument of alteration under this section which—
- (a) prohibits or restricts the creation of any fixed security or any other floating charge having priority over, or ranking *pari passu* with, the floating charge; or
 - (b) varies, or otherwise regulates the order of, the ranking of the floating charge in relation to fixed securities or to other floating charges ; or
 - (c) releases property from the floating charge ; or
 - (d) increases the amount secured by the floating charge.
- (5) Section 410(2) and (3) and section 420 apply to an instrument of alteration falling under subsection (4) of this section as if references in the said sections to a charge were references to an alteration to a floating charge, and as if in section 410(2) and (3)—
- (a) references to the creation of a charge were references to the execution of such alteration ; and
 - (b) for the words from the beginning of subsection (2) to the word " applies" there were substituted the words " Every alteration to a floating charge created by a company ".
- (6) Any reference (however expressed) in any enactment, including this Act, to a floating charge is, for the purposes of this section and unless the context otherwise requires, to be construed as including a reference to the floating charge as altered by an instrument of alteration falling under subsection (4) of this section.