

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 2 – Floating Charges

Registration and creation etc.

Section 45 – Effect of floating charges on winding up

136. The essence of a floating charge is that until some event, such as the company going into liquidation or the appointment of a receiver, the security right is inchoate and the company may dispose (even gratuitously) of assets within the scope of the charge and the acquirer will obtain ownership unencumbered by any security right.
137. This section does a number of things. It repeats the existing law dealing with attachment, or crystallisation, of the floating charge on a winding up, when the floating charge is converted into a fixed security over the assets then within its scope.
138. It also provides in subsection (2) that if there is an insolvency in another EU state which is the company's centre of main interests that will trigger the crystallisation of a Scottish floating charge only if a notice is registered in the Register of Floating Charges.
139. It also clarifies that liquidation for the purposes of section 45 covers both the meaning within the Insolvency Act 1986 and, in the situation outlined in subsection (7)(a), the opening of "insolvency proceedings" within the meaning of Article 2(a) of the EC Regulation on insolvency proceedings (EC No 1346/2000).
140. A floating charge similarly attaches or crystallises on the appointment of a receiver or the delivery of a notice by an administrator. The relevant statutory provisions on receivership and administration are in the Insolvency Act 1986. They are not affected by these reforms. The priority of debts as provided for in section 176A of the Insolvency Act 1986 is also preserved. Going into liquidation within the meaning of section 247(2) of the Insolvency Act 1986 encompasses the insolvent liquidation of assets of an overseas company – see sections 220 and 221 of that Act.