SUBMISSION FROM THE COMMITTEE OF SCOTTISH CLEARING BANKS

The Bankruptcy & Diligence etc (Scotland) Bill

The Committee of Scottish Clearing Bankers (CSCB) is the representative body of the four Scottish clearing banks (Bank of Scotland, The Royal Bank of Scotland plc, Clydesdale Bank PLC and Lloyds TSB Scotland plc). The Committee represents Scottish clearing banking in the financial structure of Britain and seeks to promote the industry by providing an authoritative voice on Scottish matters to ensure that they are adequately recognised and safeguarded.

In accordance with the Enterprise and Culture Committee’s thematic approach to consideration of the Bill, the CSCB has previously submitted evidence relating to Part 1: Bankruptcy. CSCB is pleased have the opportunity now to provide its comments and observations regarding the remaining parts, namely:

- Floating Charges
- Enforcement
- Diligence

Part 2 - Floating Charges

The Policy Memorandum which accompanies the Bill states in paragraph 312 that "the aim of the reform of the law of floating charges is to increase transparency, and provide a quick and simple process that will benefit the business community". This falls within the modernisation, restart and growth themes of the Bill. The CSCB endorses this principle, but has reservations as to whether the implementation of the changes proposed by the Bill will achieve this aim.

Having considered the position at length the Scottish Law Commission reported that the principal unsatisfactory features of the current law are:

- The period of 21 days allowed for registration of a floating charge creates an 'invisibility' period which makes the register unreliable for creditors, as a 'hidden' charge may have priority.
- The Register of Charges is unreliable as the particulars of charge may be inaccurate or out of date due to later changes in the security, and
- There is unnecessary duplication as some charges are registered at Companies House and in other specialist registers such as the Land Register for Scotland.

In light of the Scottish Law Commission's report, the Executive concluded that it is desirable to reform the law to remove uncertainty and to increase transparency, which would benefit the business community in Scotland. The Scottish Law Commission's recommendations, as outlined in paragraph 323 of the Policy Memorandum, are:

- A new register of floating charges set up and maintained by the Keeper of the Registers of Scotland.
- An option for an 'advance notice' which, if followed by registration of the charge within 21 days, would backdate the charge to the date of the notice.
- The text of the charge document itself, rather than just particulars, to be registered.
Registration to be essential to constitute a floating charge.

Floating charges generally to rank by date of registration.

Any variation, assignation or discharge of a floating charge to be registered before it will affect any third party interest.

The CSCB fully supports any move which will remove uncertainty, increase transparency and will benefit the business community in Scotland. However, from a secured creditor’s position, and indeed from a business supplier/customer point of view, the establishment of a new Register could be counterproductive. In this regard, we consider that it may be beneficial to explain to the Committee the arrangement that currently exists in Scotland for the registration of floating charges.

The Companies Act 1985 Section 410 applies to Scotland and provides details of those charges granted by a company which require to be registered with the Registrar of Companies in Edinburgh. In addition to a floating charge, the list includes a charge over land, a security over a ship or an aircraft or any share in a ship, a security over the book debts of a company, patents, trademarks and copyrights. Particulars of the charge are submitted to the Registrar of Companies together with a certified copy of the actual charge document.

At the moment, all the charges listed above, if granted by a Scottish company, require to be registered with the Registrar of Companies if they are to be effective against a liquidator, administrator or any creditor of the company. The Registrar of Companies maintains a register of all charges and issues a Certificate of Registration of any charge which he registers. The Register of Charges is a public register and consequently it is possible for all shareholders, creditors and prospective creditors of a company to search the Register of Charges in an effort to establish the current financial health of the company, i.e. whether its assets are charged to a bank or any other third party. This is of significant importance to a lender or potential lender and indeed may be equally important to a potential supplier to, or customer of, a company. At the moment therefore there is one public central register of all registered charges granted by Scottish companies.

Part 2 of the Bill, Section 31, envisages the establishment of a new Register to be known as the Register of Floating Charges. If this new Register is brought into force it will result in a floating charge being registered in the Register of Floating Charges and, unless Section 410 of the Companies Act 1985 is amended, it will remain necessary to register a floating charge with the Registrar of Companies. Consequently dual registration of a floating charge will become necessary resulting in additional work and expense. It is difficult to see how this will benefit the business community in Scotland.

Even if the requirement to register a floating charge with the Registrar of Companies is removed, an interested party would still have to search an additional register to discover the true financial position of a Scottish company. This inevitably creates a greater burden on business. The CSCB suggests that, to achieve the Scottish Executive’s objectives of reducing unnecessary burdens on business and creating certainty and transparency, this area of the law might be improved by requiring, as a pre-requisite to any change, the establishment of an electronic feed of all registrable charges into one of the existing
Registers. Electronic access, using a single search (say via Companies House), would then provide details of all registered charges, thus reducing the administrative burden on business of multiple registrations (to the benefit of both the company which has granted the charge and the company wishing to access another company’s financial position). At the same time, it would create greater transparency and hence certainty.

Section 33 of the Bill proposes that, provided the company agrees, an advance notice of the possible grant of a floating charge in favour of a third party may be registered in the Register of Floating Charges. That will provide the proposed grantee with a priority period of 21 days within which to register the floating charge in his favour. The CSCB welcomes the principle of an advance notice being capable of registration for the grant of a floating charge.

The CSCB agrees that there is scope for improving the law relating to floating charges in Scotland. However, the members of the CSCB and their customers are involved in considerable cross border transactions and, until it is known what changes will be made to the registration provisions for charges granted by companies incorporated in England and Wales, and by companies incorporated out with England and Wales over assets falling within the jurisdiction of the English courts, it would be premature to enact new legislation in Scotland which might be dependant for efficiency on a change or changes to the Companies Act 1985, which is a matter reserved to Westminster. The lack of synchronisation between the two jurisdictions would also add complexity and, by enacting this legislation ahead of time, Scotland could lose the opportunity to make some extremely useful changes which could make it easier for English registered companies to do business in Scotland and for Scottish registered companies to expand their business interests cross border. There is also a real risk that “black holes” may inadvertently be created when trying to get a single view of charges created by a Scottish registered company over assets located in England and Wales.

In addition, it does seem to us inappropriate to include provisions for the establishment of a new Register of Floating Charges, and changes in the law relating to floating charges, generally in a Bill dealing with the reform of bankruptcy and diligence. With the passage of time it is likely to become less conspicuous to both companies and lawyers alike.

While not forming any part of this Bill, the Committee should be aware of the Scottish Law Commission proposal that only floating charges and standard securities over land would require to be registered in a public register in Scotland with registration in Companies House being unnecessary. The loss of one central register, as currently maintained by the Registrar of Companies, containing details of all charges requiring registration under the Companies Act, would be a considerable loss to everyone dealing with a company. The loss of a central register of charges would result in searches being required in separate registers with additional expense and delay. Certain charges would cease to appear in any public register. If this were to come to fruition, there would be a substantial reduction in transparency which, in the view of the CSCB, would not benefit the business community in Scotland.

**Part 3 – Enforcement**

The CSCB notes with interest the creation of the new Scottish Civil Enforcement Commission and the establishment of the office of “messenger of court”. The CSCB generally supports the proposals contained in the Bill.
**Parts 4 to 11 - Diligence**
The CSCB welcomes the steps that have been taken to modernise the law of diligence as set out in **Parts 4 to 11 inclusive** of the Bill. The abolition of the diligences of adjudication for debt, maills and duties and sequestration for rent are noted. The creation of the new forms of diligence of land attachment, residual attachment, interim and money attachment are viewed with much interest. The CSCB will be interested to see how creditors will use these new forms of diligence in practice.

The CSCB would however wish to take this opportunity to comment on the following specific aspects.

**Part 4 – Land Attachment and Residual Attachment**
The new diligence of Land Attachment, which must be specific to a particular property, is a welcome replacement to the diligence of adjudication which has fallen into virtual disuse. It also provides protection to the debtor as it can only be enforced provided the creditor follows a very specific procedure and timetable and obtains the authority of the court.

The CSCB also welcomes the new diligence of Residual Attachment, which can be used to attach both heritable and moveable property, but only if it is transferable and is not attachable by or exempt from any other diligence. Once again, the debtor is protected by the procedures and timetable to be followed by the creditor.

**Part 5 – Inhibition**
The CSCB is pleased to note that the opportunity has been taken to clarify and to modernise the law in relation to inhibition.

The CSCB is also interested to note the introduction of two further new forms of diligence namely, Interim Attachment and Money Attachment. The CSCB does, however, have one concern arising from the diligence of Money Attachment.

Where a messenger of court attaches and removes cheques from a debtor, such cheques will be drawn in favour of the debtor and will invariably be crossed account payee only. In the circumstances, any Bank collecting such a cheque for the account of the messenger of court would lose the protection of Section 4 of the Cheques Act 1957 and Section 3 of the Cheques Act 1992. Consequently, the CSCB requests that a collecting Bank be indemnified by the Scottish Executive when asked to collect cheques attached by a money attachment order for a party other than the true owner.

**Part 6 – Diligence on the Dependence**
The CSCB is interested to note the new provisions which are being inserted into the Debtors (Scotland) Act 1987 by Sections 156 and 192 of the Bill. A new Section 15H deals with arrestments served on the dependence of an action and a new Section 73D with arrestments served in execution of a decree or document of debt. The CSCB, whose member Banks received between them in excess of 130,000 arrestments in the course of 2005, seek confirmation that responsibility for any calculations required in terms of the foregoing two sections and for specifying the amount actually sought under the arrestment should rest with the pursuing creditor. As the Committee will readily appreciate, the administrative burdens in dealing with arrestments, many of which are simply fishing exercises covering the entire Scottish branch network of the four member Banks, is considerable.
Ensuring that responsibility for specifying the actual sum seeking to be attached by an arrestment should rest with the creditor (as the only beneficiary of the procedure) is only reasonable and will greatly assist the members of the CSCB in carrying out their obligations to the Court.

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