



Knowledge Bank

Fixed and floating charges

Corporate Account
CA005

This Statement provides a guide to the characterisation of fixed and floating charges.

Fixed charges

A fixed charge attaches immediately to the charged asset. The type of assets that are usually secured under fixed charges are real property, heavy machinery, intellectual property and goodwill – assets that are not typically sold by the debtor in the ordinary course of business.

The most important characteristic of a fixed charge is that, from inception, it gives the lender control over the charged asset. Case law has established that without sufficient control by the lender, a purported fixed charge may in fact be characterised as a floating charge.

Whether a charge is fixed is a question of both fact and law; it is not dependent solely on the intention of the parties. A fixed charge will typically prevent the debtor from disposing of the charged asset without the lender's consent and will require the debtor to maintain the asset while it remains in the debtor's possession.

Floating charges

A floating charge is a charge on a (usually changing) class of assets belonging to the debtor. Assets typically secured by a floating charge are stock in trade, books debts and other assets where it is typical for them to be utilised in the ordinary course of business. It follows that the debtor will (until some future step is taken by the lender) carry on its business in the ordinary way in relation to that class of assets without the consent of the lender.

It is important for a lender to take a floating charge wherever possible, in addition to its fixed charges, as this acts as a catch-all mechanism to secure all the assets and undertaking of the debtor that cannot specifically be charged under fixed charges.

Book debts

The characterisation of a charge over book debts is a good example of the mix between law and fact in the determination process. A charge over book debts may on its face describe it as 'fixed', but the Court may not agree that it is. The Court's decision will depend on the level of control actually exerted by the lender over the debts, eg whether they are paid into a blocked account.

Why is the distinction between fixed and floating charges important?

1. A floating charge holder can appoint an administrator and may also appoint an administrative receiver if the floating charge was created before 15 September 2003
2. A fixed charge holder can only appoint a fixed charge receiver over the secured assets eg the charged real estate
3. On a debtor's insolvency, the holder of a fixed charge will get paid out of the proceeds of sale of the assets subject to that fixed charge before all other creditors. A floating charge holder only gets paid out after certain payments are made to other creditors which can greatly affect the amount it receives (see Corporate Account Statement CA007 on the order of priorities in administration and liquidation)

Further information

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