

WORKSHOP

ON

Changes in Company Law - eRegistration of Charges



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SUNFLOWER II, World Trade Center , Center 1, 30th Floor, Cuffe Parade, Colaba, Mumbai 400 005.



Indian Banks' Association

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Workshop Outline

This workshop is conducted with modules to impart participants, the knowledge and orientation about the MCA21 which is an eGovernance project of Ministry of Company Affairs. With the introduction of eFiling system under the MCA21, the erstwhile system of physical filing of Forms and Registration of documents by Public and Private Companies with Registrar of Companies in all the States in India has been discontinued in a phased manner. The ROC offices in Coimbatore, Pondicherry, Delhi, Bangalore, Hyderabad, Mumbai, Pune, Kochi have already implemented MCA21 during, 2006. Now the Companies or the Banks or the Financial Institutions are required to fill, file and digitally sign the Forms any documents online on MCA 21 web portal. The lending Institutions / Bank Executives dealing with the Companies right from the stage of documentation need to be clear about the new system of eFiling of Forms relevant to creation / modification / satisfaction of charges on the assets of the assisted concern, primarily to protect the lending institution's interest. This workshop also gives a orientation as to the new procedure for inspection or search of the documents filed with the Registrar of Companies of any state in India.

Facilitator:

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He is by profession a Company Secretary with over 20 years of experience worked in several organizations and consultant to many corporations in India, Australia, Canada and USA. He is a self-made webmaster who creates and maintains websites thus thoroughly conversant with online transactions and IT related aspects. He has rich experience of over 33 years in making presentations in electronic media and live public presentations in training programmes, workshops, seminars, conferences, professional meetings etc., on topics ranging from Communication skills to Motivation & Mentor programmes intended for Corporate Executives, Bank Staff & Students He has been Director & lead Facilitator for workshops on "Presentation Skills" & "Get @head with Soft Skills" being organized by www.editin.com He is *Secretary* of Southern India Regional Council of The Institute of Company Secretaries of India. He is a Rotary Club International Volunteer who implemented Rotary Projects in Australia & Singapore.

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OVERVIEW OF MCA 21

MCA21 Program

Keeping in tune with the e-Governance initiatives the world over, Ministry of Company Affairs (MCA), Government of India, has initiated the MCA21 project, which will enable an easy and secure access to MCA services in a manner that best suits the corporate entities and professionals besides the public. MCA21 is intended to achieve all the objectives of a versatile e-Governance project. The project has been named MCA21 as it aims at repositioning MCA as an organization capable of fulfilling the aspirations of its stakeholders in the 21st century. Rather than compelling the business community to physically travel to MCA offices, MCA services will be made available at the place of their choice, be it their homes or offices.

MCA21 is envisioned to provide anytime and anywhere services to businesses. It is a pioneering program being the first mission mode eGovernance project being undertaken in the country. This program builds on the GoI vision to introduce a Service Oriented Approach in the design and delivery of Government services, establish a healthy business ecosystem and make the country globally competitive. Adopting international best practices, MCA21 application will add immense value to the stakeholders through easy and secure access to MCA services in a manner that best suits the businesses and citizens. The following points highlight the project's invaluable importance:

- Enable the business community to register a company and file statutory documents quickly and easily.
- Public will get easy access to relevant records and get their grievances redressed effectively.
- Professionals will be able to offer efficient services to their client companies.
- ***Banks & Financial institutions will find registration and verification of charges easy.***
- MCA will ensure proactive and effective compliance with relevant laws and corporate governance.
- Employees will be enabled to deliver best of breed services.

MCA set up

The MCA mainly administers the Companies Act, 1956 and The Monopolies and Restrictive Trade Practices Act 1969. Besides, it also administers the following Acts:

- (a) The Competition Act, 2002
- (b) The Chartered Accountants Act, 1949
- (c) The Costs and Works Accounts Act, 1959
- (d) The Company Secretaries Act, 1980
- (e) The Partnership Act, 1932
- (f) The Societies Registration Act, 1860
- (g) The Companies (Donation to National Fund) Act, 1951

The MCA, which functions under overall direction and supervision of the Minister of Company Affairs, has a three tier organizational setup for administration of the Act, namely, the Headquarters at New Delhi, the Regional Directors at Mumbai, Kolkata, Chennai and Noida and the RoCs in States and Union Territories. The Official Liquidators who are attached to various High Courts functioning in the country are also under the overall administrative control of the Ministry. The Company Law Board, a quasijudicial body, has its Principal Bench at Delhi, an additional Principal Bench for Southern States at Chennai and four Regional Benches located at Delhi, Mumbai, Kolkata and Chennai. The four Regional Directors are incharge of the respective regions, each region comprising a number of States and Union Territories. They supervise the working of the offices of the RoCs and the Official Liquidators working in their regions. They also maintain liaison with the respective State Governments and the Central Government in matters relating to the administration of the Companies Act. Certain powers of the Central Government under the Act have been delegated to the Regional Directors. There is also an inspection unit attached to the office of every Regional Director for carrying out the inspection of the books of accounts of Companies under Section 209A of the Companies Act. RoCs appointed under Section 609 of the Companies Act and covering the various States and Union Territories are vested with the primary duty of registering companies in the respective States and the Union Territories and ensuring that such companies comply with statutory requirements under the Act. These offices function as registry of records, relating to the companies registered with them, which are available for inspection by members of public on payment of the prescribed fee. The Central Government exercises administrative control over these offices through the respective Regional Directors.

Program Scope:

MCA21 program will provide for anytime anywhere electronic services with speed and certainty to all the stakeholders. It will include:

- Design and development of application system
 - Setting up of IT infrastructure
 - Setting up the Digital Signature/PKI delivery mechanisms and associated security requirements
 - Setting up of Physical Front Offices (PFOs)
 - Setting up of temporary FOs for the peak periods to meet with the requirements and subsequent shutdown of temporary FOs at the end of such peak periods
 - Migrating legacy data and digitization of paper documents to the new system
 - Providing MCA services to all MCA21 stakeholders in accordance with the Service Oriented Approach
- Providing user training at all levels and all offices (Front and Back Offices)

The MCA21 is designed to automate processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 1956. The scope of MCA21 project covers only the offices of RoCs, Regional Directors and the Headquarters at New Delhi. It does not include other offices of MCA like Official Liquidators, Company Law Board / Tribunal and Courts. The project also envisages a cost-effective integrated software solution for computerizing various in-house functions like Human Resources Management, Payroll, Accounting and Finance for internal users (employees) of MCA. Permanent documents of existing companies like memorandum of association, articles of Association, current charge documents, are presently maintained in paper form across various Registrar of Companies (RoC) offices. These documents are being converted into electronic format and it is being carried out at the respective RoC offices as part of this project. The success of the service oriented approach, the most fundamental ingredient of this project, will depend greatly on analyzing and responding to the needs of all stakeholders.

To that extent, the project will develop a mechanism to constantly develop and improve the MCA21 system. It will be made possible by analyzing usage patterns and error/status messages as well as feedback from the customers comprising the corporates, professionals and the public.

Key Benefits of MCA21 Project

MCA21 seeks to fulfill the requirements of the various stakeholders including the corporates, professionals, public, financial institutions and banks, Government and the MCA employees. The key benefits of MCA21 project are as follows:

- (a) Online incorporation of companies online
- (b) Simplified and easy mode of filing of Forms/ Returns
- (c) Registration as well as verification of charges anytime and from anywhere
- (d) Inspection of public documents of companies anytime from anywhere
- (e) Customer & Corporate centric approach
- (f) Building up a centralized database repository of corporates operating in India
- (g) Enhanced service level fulfillment and customer relationship building
- (h) Total transparency through eGovernance
- (i) Timely redressal of investor grievances
- (j) Availability of more time for MCA employees for qualitative analysis of corporate information
- (k) Better compliance management
- (l) Customer centric approach
- (m) Increased usage of professional certificate for ensuring authenticity & reliability of the Forms / Returns

About MyMCA

www.mca.gov.in is designed to fully automate all processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 1956. This will help the business community to meet their statutory obligations. The major components involved in this comprehensive e-Governance project are Front Office and Back Office. From the customer perspective, the Front Office operations assume significance, which would be administered through the Front Office portal. The entire Back Office operations of the MCA would be automated so as to achieve the objective of a user-friendly computerized environment. MyMCA portal is the single point of contact for all MCA related services, which can be easily accessed over the Internet by all users. The project also envisages a cost-effective integrated software solution for computerizing various in-house functions like Human Resources Management, Payroll, Accounting and Finance for internal users (employees) of MCA. The re-engineered electronic forms, also called e-Forms, will be capable of helping the citizens in the process of filling the information electronically. Lifecycle of e-Forms, the key interface to most MCA transactions, will be automated from submission to the delivery of services requested therein. It will cover dissemination of e-Forms in a reliable manner, efficient filling of information by eliminating re-entering data submitted in the past, electronic payment for and delivery of services as requested in the e-Forms. The business community will be able to track the status of their e-filing. The capability to automate the e-Form processing will also be extended to the Back Offices to meet the service levels committed to the business community. The e-Forms and attached documents, all in electronic format, will automatically be assigned to the MCA staff and the progress tracked until the service is delivered to the citizens. Besides e-Form service delivery to the business community, the MCA system will include tools for the analysis of corporate data for proactive surveillance and prosecution resulting in efficient investor protection.

Services Available on www.mca.gov.in

The following services will be available under the MCA21 Project:

- ❖ Registration and incorporation of new companies
- ❖ Filing of Annual Returns and Balance Sheets
- ❖ Filing of forms for change of names/address/Director's details
- ❖ Registration and verification of charges
- ❖ Inspection of documents
- ❖ Applications for various statutory services from MCA
- ❖ Investor grievance redressal

Organization of RoC Office under MCA

The RoC office working from its present address will virtually become the Back Office of the Ministry. There are likely to be a number of companies/entities who may find it difficult to switch over to eFiling at the initial stage. Facilitation Centers known as Physical Front Offices (PFOs) are being setup at 53 locations throughout the country to provide requisite comfort for eFiling to such companies.

Front Office (FO)

The Front Office represents the interface of the corporate and public user with the MCA21 system. This comprises of Virtual Front Office and Physical Front Office. Virtual Front Office merely represents a computer facility for filing of digitally signed eForms by accessing the MyMCA portal through Internet. It also presupposes availability of related facilities to convert documents into PDF format and scanning of documents wherever required. When a company or user does not have these computer facilities, it can avail of these facilities at the designated facilitation centers, known as the Physical Front Offices.

Virtual Front Office (VFO)

Virtual Front Office facilitates online filing of the eForms using Internet. The system automatically does pre scrutiny of the eForms filed and indicates error messages in case of incomplete or invalid particulars. Upon successful submission, a Service Request Number (SRN) will be generated by the system for the user, which will be used for future correspondence with MCA. The system calculates the fee payable for the form and accepts online payment through credit cards and Internet banking. There is also an option to make offline payment at designated bank branches through challan generated by the system. In the latter case, the MCA system gets updated on the realizations made by the designated banks on a daily basis. Virtual Front Office is meant for electronically delivering services at a place and time convenient to the business community through the Front Office portal.

System requirements for VFO

The following are the system requirements for VFO:

- A Personal Computer
- Web Browser Internet Explorer, Netscape Navigator
- Internet access preferably Broadband
- Adobe Acrobat Reader 7.0.5 or above
- WinZip 8.0
- Scanner (for scanning of paper documents to be filed as attachments to eForm)
- Printer (for printing bank payment challan or service fee bill)

Thus, you have a Virtual Front Office in your home/office with the abovementioned facilities. You can even use a cyber café or kiosk equipped with above facilities as a Virtual Front Office.

Physical Front Office (PFO)

Physical Front Office replaces the existing RoC office counters. It is meant to serve as a facilitation center to facilitate filing of eForms, scanning attachments to eForms, generating challans for making payment of fees at the designated bank and finally, uploading the filled in digitally signed eForms. The Physical Front Offices will be designed to facilitate electronic delivery of services, similar to the type available at the Virtual Front Office, and will serve corporates who do not have access to computers and Internet. As part of MCA21, adequate number of Physical Front Offices, including Temporary Front Offices (TFOs), to cater to peak seasonal load, will be established throughout the country to serve better the interests of corporates and professionals. The details of likely Physical Front Offices are given in Appendix A. The finalised address of Physical Front Office in your city can be referred from MyMCA portal.

While encouraging customers to use Virtual Front Office for fulfilling their obligations as stipulated under the Companies Act 1956, Physical Front Offices would ensure a smooth transition to fully electronic delivery of MCA services. Members of the business community can walk into these offices and obtain services. All the services for scanning and uploading of eForms at PFOs would be available free of cost in the Physical Front Offices. Since these facilitation centers are being setup to facilitate eFiling during the transition period, these will remain operational for a period of three years only, by which time, it is expected that all clients will operate through Virtual Front Offices.

Back Office

The Back Office represents the office of RoCs, Regional Directors, and Headquarters and takes care of internal processing of the forms filed by the corporate user as per MCA norms and guidelines. The eForms will be routed dynamically to the concerned authority for processing depending upon the assigned role. All the eForms along with the attachments, will be stored in the electronic repository, which the staff of MCA can view depending upon the access rights.

What is an eForm?

An eForm is nothing but a reengineered conventional form proposed to be notified, and represents a document in electronic format for filing with MCA authorities through the Internet. This may be either a form filed for compliance or information purpose or an application seeking approval from the MCA.

What is the general structure of an eForm?

An eForm contains certain standardized features. Each eForm contains the form reference and the description as well as the particular section of the Companies Act or the relevant rules or regulations under which it is required to be submitted. It starts with the Corporate Identity Number (CIN), which works as a unique identifier of a company, in the case of an Indian Company and the Foreign Company Registration Number in the case of a Foreign Company that is required to be filled up. By entering the number, the company details to the extent these are available in static form in the database, are automatically filled in by using the prefill functionality. The eForm contains a number of mandatory fields which are required to be filled in. Certain other fields are non-mandatory in nature which may be filled in as may be relevant in any particular case. An eForm contains tool tips for context sensitive help. An instruction kit is available for each eForm, which contains details of the instructions for properly filling the eForm. An eForm may be filled in either online or offline. Online filling implies that the eForm is filled while being still connected to MyMCA portal through the Internet. Offline filling denotes that the eForm is downloaded into the user's computer and filled later without being connected to the Internet. An eForm may require certain mandatory attachments to be filed along with it. Optional attachments may also be filed with an eForm. The list of such attachments is displayed in the eForm. Next to attachment, there is a declaration that is sought from the person filing the eForm to the effect that the information given in the eForm and the attachments is correct and complete. Most of the eForms require the digital signature of the Managing Director or Director, Manager or Secretary of the company for successful filing/submission. Further, the digital signature of a third party may also be required in certain cases. In the case of an eForm for creation or modification of charges, such digital signature is also required from the Bank or Financial Institution. In certain cases, a certificate from the Chartered Accountant or Cost

Accountant or Company Secretary in wholetime practice is also required to authenticate the particulars contained in the eForm. For example, this requirement is mandatory in the case of an eForm for creation or modification of charges. There are builtin facilities to check the filledin eForm for requisite validations, to do prescrutiny and to modify the eForm when the same is required to be resubmitted. When the "Submit" button is pressed, the eForm gets uploaded into the MCA central document repository. Thereafter, the requisite fees as applicable for the eForm should be paid either on line or offline. Time stamping of eForms from a trusted source provides evidence that the transaction has occurred at a particular point of time. Once the eForm has been accepted and payment of fees has been acknowledged, a work item is created and assigned to the appropriate MCA employee based on pre defined assignment rules as part of MCA back office workflow automation. In the case of an eForm, the authorized officer affixes his/her digital signature for registering/ approving/ rejecting the same. After the processing of the eForm is completed, an acknowledgement email is sent to the user regarding its approval / rejection.

Charge Management

Companies are required to file particulars for registration of charge created or modified with the concerned RoC. The charge can be created on various types of assets, such as immovable properties, plant and machinery, fixed deposits or book debts. The charge can also be created either on entire series of debentures or on any issue in a series. The charge is created on assets of a company in favour of lenders, such as financial institutions or banks. In the case of satisfaction of charge, an eForm has to be filed with the RoC. It also includes filing of eForms for appointment and cessation of receiver and filing of accounts by receiver.

What is "Instruction Kit"?

An "Instruction Kit" contains the detailed instructions explaining how to fill an eForm. This will facilitate proper understanding of the eForm and filling of requisite details therein. An eForm can be downloaded either with or without the Instruction Kit.

Addendum to eForm

The user may have to submit some additional supporting documents that are not submitted during the eForm (application) filing but are required for the processing of the eForm. MCA may also ask the applicant to provide some additional documents in support of the eForm already filed so as to expedite the processing of the same. The users can initiate this on their own by checking the track transaction status on MyMCA portal or on being notified by MCA through email. Payment of fees is not required for filing an addendum.

The supporting documents that the applicant uploads, as an addendum, gets duly associated with the eForm that was submitted earlier with the given SRN. The normal process of filing an addendum is presented below:

- (a) applicant enters SRN for which document needs to be attached
- (b) The applicant attaches relevant document and clicks "Submit".
- (c) The system verifies that the status of entered SRN is "In Progress" and the submitted document gets accepted.

March 4, 2006

Dear CEO of the Bank/ FI,

The Ministry of Company Affairs is in the process of implementing a major e-Governance initiative known as MCA21. You represent one of the key stakeholders for the successful implementation of this ambitious programme.

2. The MCA21 system is designed to encompass a database which would be of immense value to your organisations in your further business operations. This database in particular relates to the creation/ subsistence of charges created against advances sanctioned and released by you to the corporate world.

3. A brief bulletin has been prepared containing the key features in so far as it relates to your business domain. I request you to go through this bulletin and take necessary action on your part at the earliest so as to enable us to help you. I hope you would find it useful.

Yours sincerely,

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To

All the CEOs of Banks and Financial Institutions

Bulletin for Banks/ FIs for operations under MCA21**1. About MCA21:**

As part of the Government's commitment to governance reforms, MCA21 program has been designated as the flagship e-Governance initiative of the Government of India under the National e-Governance Plan (NeGP). This outcome-based program from the Ministry of Company Affairs (MCA) aims at fulfilling the aspirations of its stakeholders in the 21st century through adoption of a service-centric approach. The bottom-line of this unique initiative is the improved speed and certainty in the delivery of MCA services. This improvement is primarily enabled through the mechanism of secure electronic Filing (e-Filing) for all the services provided by the Registrar of Companies (ROC) including incorporation of a company, annual filing, registration of charges and other event based filings.

2. Roll-out programme:

The pilot project was launched at Coimbatore on 18th Feb, 2006, followed by Pondicherry on the 27th February and Ernakulam on the 6th March, 2006. The next major milestone will be the launch at Delhi by Hon. Prime Minister of India on the 18th Mar, 2006. Various offices of the ROC and the Regional Directors (RDs) will progressively go-live during 2006. This would mean that the e-filing will be available on an anywhere, anytime mode after the national project roll-out has been completed.

3. Use of Digital Signatures:

Though e-filing requires the use of digital signature certificates as per the stipulation of law for electronic transactions, the Ministry has authorized ROC officials to digitally sign the documents (for facilitating e-filing) on behalf of the professionals/ company representatives who do not have digital signatures. However, this facility has been provided only till the **30th June, 2006** so as to give sufficient time to various stakeholders to obtain Digital Signatures by this date. Documents in physical form will not be accepted after this date. E-filing has helped significant amount of paper reduction at the back office and expected to enable quicker and predictable outcomes for service requests.

4. Significance of MCA21 for Banks and Financial Institutions:

MCA21, in particular, serves the interests of the Banks and Financial Institutions through the process of "Registration of Charges". Your attention is invited to this specific process which amounts to a sizable transaction volume each year of MCA. As you may have yourself experienced first hand, the Charge Registration information is an invaluable input for credit evaluation. Ministry is aware of the hardships experienced in this regard in obtaining accurate information in a timely manner. It is the belief of the Ministry that switching over to e- Governance mode will mitigate these difficulties. However, this change is expected to be only gradual.

5. Steps already taken:

The endeavour of this Ministry is to improve and refine the charge registration process and enhance the value that can be derived by the financial services industry. Towards this end, following measures have been implemented:

- (i) Digitization of more than 10 million pages related to all subsisting charges and established inter-linkage between the charge data within a given company (including creation of an Index of charges);
- (ii) Simplification and unification of charge related forms including adapting the same for electronic filing. These have been duly notified and have come into force from 28th Feb, 2006;
- (iii) Facility of authenticating these e-forms using digital signatures in accordance with the Information Technology Act, 2000;
- (iv) Cross-referencing of charge creation document at the time of filing a new charge document involving subsequent modification or satisfaction;
- (v) Introduction of a concise, structured yet comprehensive **Instrument of Charge** containing /evidencing basic information in place of diverse elaborate contracts.

6. Steps to be taken by the Banks & FIs:

What has been mentioned above is only a small step and there is much more effort needed to conform to some of the best known international practices. However, this exercise has to be carried out in close collaboration with the Banking & Financial Services Industry. You can catalyze and accelerate this exercise by adopting the following measures:

- (i) Ensure that newly notified e-forms are used henceforth. Please visit the new MCA portal **www.mca.gov.in** to obtain copies of the new e-forms and procedures for e-filing.
- (ii) Ensure that all e-forms that will henceforth be used for filing, are authenticated using a digital signature.
- (iii) Ensure that the authorized officers of your Bank or institution obtain Digital Signature Certificates before 30-Jun-2006 for authenticating all relevant e-forms for the purposes of registration of a charge with the ROC. These may be issued either by IDRBT or any one of the authorized agencies.
- (iv) Encourage your clients to register creation/modification/satisfaction of charges in a timely manner. In particular, encourage the charges to be satisfied as we have found a number of cases are probably closed and the same has not been done.
- (v) While Ministry has taken due care to ensure completeness and accuracy of data, it is very likely that there could be errors of omission and commission in an exercise of this enormity. Please review the existing charge data and highlight any discrepancies/errors to the concerned ROC, so that the same can be corrected to ensure the reliability of data.
- (vi) Proactively support the enhancement of the **Instrument of Charge** mentioned under para 5 and enforce this as a standard across all charge transactions this will facilitate us not only collation of data, but also explore the possibility for use of sophisticated data mining technology/tools (the current data is largely unstructured and unfit for analysis)
- (vii) Disseminate this information widely within your enterprise and facilitate quick adoption.

Your cooperation in this matter is much appreciated.

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REGISTRATION OF CHARGES

Introduction:

Under the scheme of the Companies Act, 1956 it is explicitly envisaged that maximum disclosures of the corporate affairs are made in the statutory records of the companies and the public documents with the offices of Registrars of Companies. The most vital disclosure relates to charges on the properties and undertakings of the companies. Filling and filing the particulars relating to the charges after properly understanding the requirements of Law and knowing the practices relating thereto, can facilitate smooth scrutiny and expeditious registration of the related documents.

Basics:

- Part V of the Companies Act, 1956, comprising sections 124 to 145, deals with Registration of Charges.
- Conditions to constitute a Charge:
 - (1) Charge is created after 1st April, 1914.
 - (2) It is created by a Company.
 - (3) It is a charge to which section 125 applies.
 - (4) It has conferred security on the company's property or undertaking.
- *What is Charge?*
 - The word Charge is not defined in the Companies Act.
 - Section 124 merely states the expression 'charge' includes mortgage.
 - Section 100 of the Transfer of Property Act, 1882 defines "mortgage"
 - These two provisions give a fair idea that *Charge is nothing but security of its property by the Company in favour of creditor with the intent of securing his debt.*

Distinction between "MORTGAGE " and "CHARGE"

The words "Mortgage", "Mortgagor", "Mortgagee", "Mortgage-money", "Mortgage-deed" and the types of mortgages have been explained in Section 58 of Transfer of Property Act, 1882.

A **mortgage** is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a **mortgagor**, the transferee a **mortgagee**; the principal money and interest of which payment is secured for the time being are called the **mortgage-money** and the instrument (if any) by which the transfer is effected is called a **mortgage-deed**.

Simple mortgage.

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

Where the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

Usufructuary mortgage.

Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

English mortgage.

Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Mortgage by deposit of title-deeds.

Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

Anomalous mortgage.

A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

CHARGE as defined in Section 100 of Transfer of Property Act, 1882

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

CHARGES - Important provision in Section. 125 of the Companies Act, 1956

- (1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the *instrument, if any*, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within thirty days after the date of its creation :

Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.

- (2) Nothing in sub-section (1) shall prejudice any contract or obligation for the repayment of the money secured by the charge.
- (3) When a charge becomes void under this section, the money secured thereby shall immediately become payable.
- (4) This section applies to the following charges :
- (a) a charge for the purpose of securing any issue of debentures;
 - (b) a charge on uncalled share capital of the company;
 - (c) a charge on any immovable property, wherever situate, or any interest therein;
 - (d) a charge on any book debts of the company;
 - (e) a charge, not being a pledge, on any movable property of the company;
 - (f) a floating charge on the undertaking or any property of the company including stock-in-trade;
 - (g) a charge on calls made but not paid;
 - (h) a charge on a ship or any share in a ship;
 - (i) a charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright.

- (5) In the case of a charge created out of India and comprising solely property situate outside India, thirty days after the date on which the instrument creating or evidencing the charge or a copy thereof could, in due course of post and if despatched with due diligence, have been received in India, shall be substituted for thirty days after the date of the creation of the charge, as the time within which the particulars and instrument or copy are to be filed with the Registrar.
- (6) Where a charge is created in India but comprises property outside India, the instrument creating or purporting to create the charge under this section or a copy thereof verified in the prescribed manner, may be filed for registration, notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.
- (7) Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a charge on those book debts.
- (8) The holding of debentures entitling the holder to a charge on immovable property shall not, for the purposes of this section, be deemed to be an interest in immovable property.

Judicial view on "mortgage" and "charge"

In *Raja Sri Shiva Prasad v. Beni Madhab* AIR 1922 Pat. 529, Das J. stated that the broad distinction between a "mortgage" and "charge" is :

"that whereas a charge only gives a right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property."

In other words –

- A "mortgage" effectuates transfer of property or an interest therein but there is no such transfer in "charge".
- In every "mortgage" there is "charge" but in "charge" there is no "mortgage".

Registration Of Charges:

- A transaction or an arrangement that amounts to a charge, requires registration under the Companies Act only if it satisfies the conditions laid down in Section 125
- Such charge should be one among the kinds enumerated in Sub-section (4) of Section 125. Needless to state, a mortgage of every kind is a charge that requires registration.

Object Of Registration:

- The object of Registration of a charge is to give public notice which can be achieved:
 - (1) by requiring the Companies to maintain record of charges and make it available for inspection to the members of the public.
 - (2) by requiring the Registrar of Companies to maintain record of the Charges filed by the companies and make it available for public inspection.
- The registration of a charge, thus is intended to give notice to people ***who may not otherwise be aware of it, particularly to persons who may advance money*** to the company, and it may also serve the purpose of preventing a fraudulent and belated claim of a charge in the event of liquidation.

Charges Requiring Registration:

Section 125 enumerates the kinds of charges which require registration. These are:

- (a) a charge for the purpose of securing any issue of debentures;
 - (b) a charge on uncalled share capital or the company;
 - (c) a charge on any immovable property, wherever situated, or any interest therein;
 - (d) a charge on any book debts of the company;
 - (e) a charge, not being a pledge, on any movable property of the Company;
 - (f) a floating charge on the undertaking or any property of the company including stock in trade;
 - (g) a charge on calls made but not paid;
 - (h) a charge on a ship or any share in a ship;
 - (i) a charge on goodwill, on a patent or license, on a trade mark, or on a copy right or a license under a copyright.
- A charge created without executing any instrument also requires registration. Execution of an instrument for creating a charge is not a condition precedent for the requirement of registration.
 - A resolution of the Board of Directors can be taken to be fact of creation of a Charge.
 - A charge created by operation of law or by an order of the court and not by a contract is not a charge created by the company. It therefore does not need registration as Section 125 is applicable only to the charges created by the company itself.
 - A charge on any movable property also requires registration (except a charge by way of pledge of movable property) vide clause (e) of sub- section(4). Thus, hypothecation of movable property is a charge that requires registration so long as it is not a pledge.
 - A charge on book debts requires registration vide clause (d).

- Pledge of promissory notes by endorsement thereof by a company in favour of its creditor does not require registration. If a transaction satisfies all the requirements of a valid pledge, it would be eligible for exemption from registration under clause (c) of sub-section (4) of section 125, even it is also in the nature of mortgage. The reason for exempting pledge from registration is that in pledge the debtor parts with the possession of the property and passes it on to the creditor which is a sufficient notice of creation of a charge and, therefore, no registration of such a charge is necessary.
- A pledge of fixed deposit receipts with a Bank for obtaining a loan does not require registration. The Department of Company Affairs is of the view that registration of pledge, though not mandatory, is permissible at the instance of the company or of any interested person.
- A charge on future debts will be void if it is not registered. However, absolute assignment of a future debt is not a charge and a document making such assignment does not require registration.

Consequences of Non-Filing:

- Charge requiring registration is void against the liquidator and any creditor of the Company if prescribed particulars are not filed with the Registrar of Companies (ROC) within thirty days of the date of creation of Charge.
- The words "Filing" and "Registration" are not synonymous and interchangeable *Filing* is the delivering of particulars of Charges to the ROC. The term *Registration* denotes the registration of the Charge by the ROC office in its records as per provisions of Companies Act, 1956.
- It is only the omission to file the particulars of a charge within 30 days that renders the charge void or within next 30 days with the permission of ROC.
- Charge is valid even if ROC does not register it or makes unreasonable delay in registering it, provided the particulars thereof have been filed duly within thirty days.

Filing defective particulars:

Regulation 17 of the Companies Regulations, 1956 provides that:

- ROC shall examine, or cause to be examined, every document received in his office
- If any such document is found to be defective or incomplete in any respect, the ROC shall direct the company to rectify the defect or complete and no such document shall be registered and recorded until the defect has been so rectified or the document has been completed as the case may be.
- ROC is thus, under an obligation to inform the Company about the defects.
- However, the document shall be treated as filed on the date on which it was initially filed and not on the date it was rectified.

Creation of Charge:

- Creation of Charge is an act of the parties, namely the Company and the creditor, by which a security on the Company's property or undertaking is conferred thereby.
- Charge is generally created by an instrument, the nature of it may vary from case to case.
- Charge which is created without any instrument is also registerable. Example is a mortgage by deposit of title deeds ie., equitable mortgage.
- Charge can be created orally and/or with a written document. It can even be created with a resolution of Board of Directors of the Company.
- It shall be the duty of a company to file with the Registrar for registration the particulars of every charge created by the company, and of every issue of debentures of a series, requiring registration under this Part; but registration of any such charge may also be effected on the application of any person interested therein.

Date of creation of Charge:

- The date mentioned in the instrument being the date of execution thereof would be taken to be the date of creation of Charge. The period of 30 days would start from such date.
- In the cases of mortgage of deposit of title deeds, it is the date on which the title deeds are actually deposited and not the date of the Memorandum of the deposit, even if the date of the memorandum is subsequent to the date of deposit of the title deeds.

Procedure for Filing of particulars of creation of Charge:

The Companies (Central Government's) General Rules and Forms, 1956 read with Sections 125, 127, 128, 130, 132, 135 and 138 of the Companies Act, 1956 provides the procedure to file the documents. The Ministry of Company Affairs vide its Notification No.GSR 56 (E) dated 12.2.2006 has issued the Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2006. Now, in place of physical filing of documents, the e-filing has been made mandatory to all incorporated companies whether private or public, listed or unlisted without any sectoral preferences.

- The prescribed particulars together with copy of the instrument creating the charge or modification thereof or satisfaction of charge the following Forms shall be filed with the ROC through electronic media or through any other computer readable media:
 - Form No. 8 : Creation of original Charge and Modification of charges
 - Form No.10 :Particulars for registration of charges for debentures. (both creation and modification covered)
 - Form No.13: Register of charges [merged with Form No.8 in the new system]
 - Form No. 17: Memorandum of complete satisfaction of charge

- A copy of every instrument evidencing any charge or modification of charge and required to be filed with the Registrar in pursuance of section 125, 127, 128 or 135 shall be verified as follows :
 - (i) Where the instrument or deed relates solely to property situate outside India, a copy shall be verified by a certificate either under the seal of the company, or under the hand of a responsible officer of the company, or under the hand of some person interested in the mortgage or charge on behalf of any person other than the company, stating that it is a true copy.
 - (ii) Where the instrument or deed relates, whether wholly or partly, to property situate in India, the copy shall be verified by a certificate of a responsible officer of the company stating that it is true copy or by a certificate of a public officer given under and in accordance with the provisions of section 76 of the Indian Evidence Act, 1872.
- Form 8 or Form 10 or Form 17 as the case may be, shall be signed on behalf of the company and the charge-holder. The electronic-form shall be authenticated by authorized signatories using digital signatures, as defined in the Information Technology Act, 2000.

Certificate of registration:

As per Section 132 of the Companies Act, 1956 The Registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part, stating the amounts thereby secured; and the certificate shall be conclusive evidence that the requirements of this Part as to registration have been complied with.

Penalties under Section 142 of Companies Act,1956:

If default is made in filing with the Registrar for registration the particulars—

- (a) of any charge created by the company;
- (b) of the payment or satisfaction of a debt in respect of which a charge has been registered under this Part; or
- (c) of the issues of debentures of a series;

requiring registration with the Registrar under the provisions of the Act, then, unless the registration has been effected on the application of some other person, the company, and every officer of the company or other person who is in default, shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues.

Subject as aforesaid, if any company makes default in complying with any of the other requirements of this Act as to the registration with the Registrar of any charge created by the company or of any fact connected therewith, the company, and every officer of the company who is in default, shall, without prejudice to any other liability, be punishable with fine which may extend to ten thousand rupees.