



Hong Kong Law

24 February 2014

KEY CHANGES UNDER THE NEW COMPANIES ORDINANCE PART FOUR – REGISTRATION OF CHARGES

Introduction

The New Companies Ordinance (Cap. 622) (the **New CO**) will come into force on 3 March 2014. Following commencement of the New CO, the current Companies Ordinance (Cap. 32)(the **Old CO**) will be retitled as the “Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)”. The core provisions affecting the operation of companies under the Old CO will be repealed, except those provisions relating to winding-up and insolvency of companies and prospectuses.

Charltons is preparing a series of newsletters summarizing the key changes to the company law framework under the New CO. In this fourth newsletter, we discuss key changes relating to the registration of charges by both Hong Kong companies and registered non-Hong Kong companies.

Registrable Charges

New CO references: section 334

Position under the Old CO

It is not clear whether the following categories of charges are registrable under the Old CO:

- mortgages over aircrafts (as bills of sale);
- instalments due, but not paid, on the issue price of shares;
- liens on subfreights (either as a charge on book debts or a floating charge);
- a charge over cash deposits (as a charge over book debts).



In addition, the Old CO requires registration of charges for the purpose of securing any issue of debentures, which overlaps with other categories of registrable charges. Typically, issues of debentures are supported by a floating charge, or a fixed charge that is registrable under other categories of registrable charges.

Key changes under the New CO

To remove uncertainty and dispense with redundant items, the following changes have been made under the New CO:



- a charge on an aircraft or any share in an aircraft is expressly made registrable;
- a charge on instalments due, but not paid, on the issue price of shares is also expressly made registrable;
- charges for the purpose of securing any issue of debentures are no longer registrable;
- it has been clarified that a shipowner's lien on subfreights shall not be regarded as a charge on book debts or as a floating charge and is therefore not registrable;
- it is stipulated that if a company maintains a deposit of money with another person, a charge on the company's right to repayment is not a charge on book debts of the company.

Practical considerations and recommended steps

The exclusion of a charge on a company's right to repayment (where that company maintains a deposit of money with another person), will exclude any bank account charge from the requirement to register, whether or not such charge is given to secure the obligations of the account holder itself or the obligations of a third party. This means that lenders looking to take security over bank accounts will no longer be able to rely on a company search to determine whether there are any existing charges affecting the relevant bank account.

Acceleration of Repayment Obligation

New CO references: section 337(6)

Position under the Old CO

Under the Old CO, where a charge becomes void for not being registered with the Registrar of Companies (**Registrar**) within the specified time limit, the money secured by such charge automatically becomes immediately payable.

Key changes under the New CO

Section 337(6) of the New CO replaces the "automatic" acceleration provision with a "discretionary" acceleration provision, giving a choice to the lender as to whether the secured amount is to become immediately payable.

Practical considerations and recommended steps

Hong Kong security documents often include a post-signing undertaking on the part of the grantor to register the security, although often the grantee will carry out the registration itself (or through its lawyers). In any event, under the terms of the security document, breach of an undertaking to register will typically constitute an event of default triggering immediate repayment of the secured liabilities (as well as enforcement of the relevant security).

Certified Copy of Charge to be Made Available for Public Inspection

New CO references: sections 333, 335, 336 and 338 to 340

Position under the Old CO

The Old CO requires an original of a charge instrument (if any) together with the prescribed particulars of the charge in a specified form to be delivered to the Registrar for registration. Currently only the prescribed particulars are made available for public inspection. The charge instrument itself is not available for public search (and is returned by the Registrar).

Key changes under the New CO

The New CO provides that both a certified copy of the charge instrument (if any) and the prescribed particulars of the charge are registrable and available for public inspection.

Practical considerations and recommended steps

As the contents of the charge will be publicly available, parties should consider if and how commercially sensitive information (for example, details of bank accounts) may be excluded from the charge instrument.

The availability for public inspection of a copy of the charge instrument will give rise to constructive notice of all the terms in the charge instrument, including negative pledge clauses, to those who may reasonably be expected to search the register, such as banks, financiers and relevant professionals.

The particulars of a charge required for registration under the New CO are to be contained in a specified form of "Statement of Particulars of Charge". The statement will contain fewer details than required under the Old CO, since a certified copy of the charge instrument itself will also be registered.

The copy of the charge may be certified by a director, company secretary or other authorized person (section 333(4) of the New CO).

Shortening Period for Delivery of Charge and Particulars from Five Weeks to One Month

New CO references: sections 335, 336 and 338 to 340

Position under the Old CO

The Old CO requires delivery of a charge instrument (if any) and its prescribed particulars to the Registrar for registration within five weeks.

Key changes under the New CO

Under the New CO, the period for delivery of the charge instrument and prescribed particulars is reduced to one month.

Practical considerations and recommended steps

Where a registrable charge created by the company is not registered in time, the charge will be void as against the liquidator and creditors (section 337(4) of the New CO).

Evidence of Debt Satisfaction or Release of Charge to be Made Available for Public Inspection

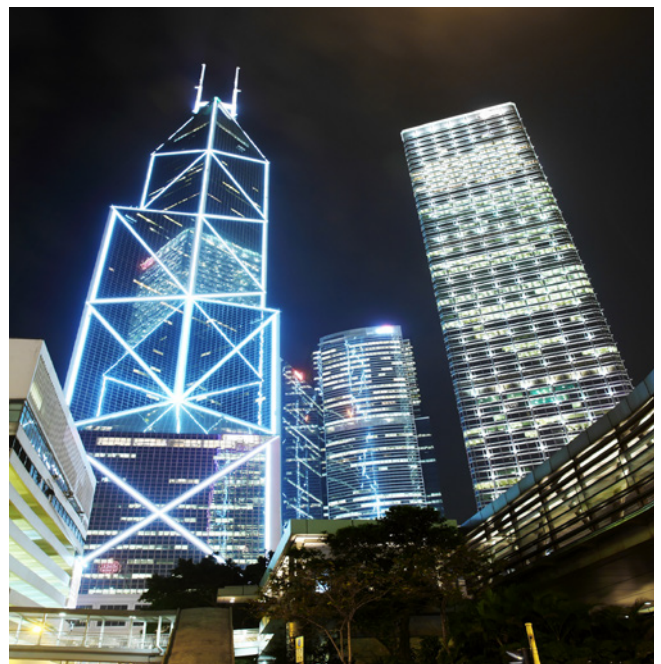
New CO reference: section 345

Position under the Old CO

Under the Old CO if a debt secured by a registered charge has been satisfied, or property or undertaking has been released from a registered charge, an application may be made to the Registrar for entering on the register a memorandum of satisfaction or release. Such applications must be accompanied by evidence of discharge (for example, a deed of release or discharge). Only the memoranda of satisfaction or release are open for public inspection, but the evidence of discharge is neither registered nor available for public inspection.

Key changes under the New CO

Under section 345(4) of the New CO, a certified copy of the evidence of discharge or release also has to be registered and made available for public inspection.



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