

Part 8

Registration of Charges

INTRODUCTION

Part 8 (Registration of Charges) of the new Companies Ordinance (Cap. 622) (“new CO”) contains provisions that deal with registration of charges by both Hong Kong and registered non-Hong Kong companies. It sets out the types of charges that require registration, registration procedures, consequences of non-compliance, and other related matters such as keeping and inspection of copies of charge instruments and registers of charges.

POLICY OBJECTIVES AND MAJOR CHANGES

2. Part 8 basically retains the registration regime under Part III of the Companies Ordinance (Cap. 32)¹(“Cap. 32”), with the following initiatives that aim at ensuring better regulation by enhancing disclosure and improving the registration system –

- (a) Updating the list of registrable charges (paragraphs 5 to 6);
- (b) Replacing the automatic acceleration of the repayment obligation with a choice given to the lender as to whether the secured amount should be immediately payable where a charge is rendered void for non-compliance with the registration requirements (paragraphs 7 to 8);

- (c) Requiring a certified copy of the charge instrument to be registered and made available for public inspection (paragraphs 9 to 10);
- (d) Shortening the period for delivery to the Registrar of Companies (“the Registrar”) of a certified copy of the charge instrument and the prescribed particulars from five weeks to one month (paragraphs 11 to 12);
- (e) Requiring a certified copy of the written evidence of debt satisfaction or release of a charge to be registered and made available for public inspection (paragraphs 13 to 15);
- (f) Clarifying the effect of a Court order to extend the time for registration as regards criminal liability already incurred (paragraphs 16 to 17); and
- (g) Empowering the Court to rectify the particulars in the registered charge instrument and evidence of discharge (paragraphs 18 to 19).

3. To modernise and clarify the law, Part 8 sets out specific provisions for registered non-Hong Kong companies to deal with charge-related issues. This is an improvement over section 91 of Cap. 32 which is a single lengthy and complicated section that sets out the applicability of relevant charge-related provisions under Part III of Cap. 32 to registered non-Hong Kong companies.

¹ Sections 80 to 91 of Cap. 32.

4. The details of the above changes in Part 8 are set out in paragraphs 5 to 19 below.

Updating the list of registrable charges (Section 334)

Position under Cap. 32

5. Under Cap. 32, the categories of charges listed under section 80(2) are required to be registered. There are some difficulties with the provision as follows –

(a) Charge on an aircraft or any share in an aircraft

There are uncertainties as to whether particular mortgages over aircrafts are registrable as bills of sale under section 80(2)(c) of Cap. 32².

(b) Instalments due, but not paid, on the issue price of shares

It is unclear whether a charge on calls made but not paid, registrable under section 80(2)(g) of Cap. 32, should also cover a charge on instalments due, but not paid, on the issue price of the shares as these instalments are not calls in the strict sense.

(c) Charges for the purpose of securing any issue of debentures

Charges for the purpose of securing any issue of debentures are registrable under section 80(2)(a) of Cap. 32. Typically, issues of debentures are supported by a floating charge or a fixed charge. Hence, this head is redundant and overlaps with other heads of registrable charges under section 80(2) of Cap. 32.

(d) Lien on subfreights

There are divergent judicial views as to whether a shipowner's lien on subfreights is registrable as a charge on book debts or a floating charge or whether it is a charge at all³.

(e) Cash deposits

A charge over cash deposits could arguably be registrable under section 80(2)(e) of Cap. 32 as a charge over book debts.

² Some such mortgages could fall within one or more of the exclusions from the definition of "bill of sale" and are therefore not registrable under section 80(2)(c).

³ There is judicial authority to support the principle that a shipowner's contractual lien on subfreights is a charge on book debts (*Re Welsh Irish Ferries Ltd* [1986] Ch 471) or a floating charge (*The Annangel Glory* [1988] 1 Lloyd's Rep 45) which is registrable under section 80(2)(e) or section 80(2)(f) of Cap. 32. On the other hand, it has also been said that a lien on subfreights is not a charge at all but merely a personal right to intercept freight before it is paid to the owner (Lord Millett in *Re Brumark Ltd: Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, at paragraph 41).

Position and key provisions in the new CO

6. To remove the ambiguities and dispense with redundant items, the following changes have been made in the new CO –

(a) Charge on an aircraft or any share in an aircraft

Section 334(1)(h) expressly provides that a charge on an aircraft or any share in an aircraft is registrable.

(b) Instalments due, but not paid, on the issue price of shares

Section 334(1)(f) expressly makes a charge on instalments due, but not paid, on the issue price of shares registrable.

(c) Charges for the purpose of securing any issue of debentures

Under the new CO, this head of registrable charge is removed.

(d) Lien on subfreights

As charterparties are usually negotiated by shipbrokers (not lawyers) and are of relatively short duration, requiring a lien to be registered is inconvenient from a commercial perspective. **Section 334(4)** clarifies 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.

(e) Cash deposits

Section 334(3)(b) stipulates 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. It is based on the fact that such charges are normally taken over credit balances with financial institutions in the form of charge-backs with the depository banks. Third party creditors would not be misled by the absence of registration since bank accounts are usually operated confidentially and it is reasonable to expect the depository bank to have a superior claim to the credit balance. Moreover, as a charge-back, such charges would have the effect of a set-off which of itself does not require registration.

Replacing the automatic acceleration of repayment obligation (Section 337(6))

Position under Cap. 32

7. Section 80(1) of Cap. 32 states that where a charge becomes void for not being registered with the Registrar within the specified time limit, the money secured by it would automatically become immediately payable. This statutory acceleration of repayment may create problems for banks, as the acceleration arises automatically.

Position and key provision in the new CO

8. **Section 337(6)** 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.

Requiring a certified copy of the charge instrument to be registered and made available for public inspection (Sections 335, 336 and 338 to 340)

Position under Cap. 32

9. Cap. 32 requires a charge instrument (if any) together with the prescribed particulars of the charge in a specified form⁴ to be delivered to the Registrar for registration. However, only the prescribed particulars are required to be registered and made available for public inspection⁵ by the Registrar. The charge instrument itself, which is delivered for the purpose of enabling the Registrar to verify the contents of the prescribed particulars, does not appear on the Register for public search.

Position and key provisions in the new CO

10. Under the new CO, more detailed information as to the charges would be made available to those who search the Register. **Sections 335(1) and (2), 336(1) and (2), 338(2), 339(3) and 340(2) and (3)** provide that both a

certified copy of the charge instrument (if any) and the prescribed particulars of the charge are registrable and available for public inspection⁶. The availability of a certified 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.

Shortening the period for delivery to the Registrar of a certified copy of the charge instrument and the prescribed particulars from five weeks to one month (Sections 335, 336 and 338 to 340)

Position under Cap. 32

11. Cap. 32 requires delivery of a charge instrument (if any) and its prescribed particulars to the Registrar for registration within five weeks. It is therefore possible that the prescribed particulars will only be visible on the public register at the end of the five-week period.

Position and key provisions in the new CO

12. To minimise the period during which the particulars of a charge could be invisible to outside parties, **sections 335(5), 336(6), 338(3), 339(4) and 340(5)** shorten the delivery period to one month.

⁴The prescribed particulars are contained in Form M1.

⁵Only those prescribed particulars as set out in section 83(1) of Cap. 32 are required to be entered in the public register kept by the Registrar and made available for public inspection.

⁶The 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 as required under Cap. 32, since a certified copy of the charge instrument itself will be registered. 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)), as is the case under section 80 of Cap. 32.

Requiring a certified copy of the written evidence of debt satisfaction or release of a charge to be registered and made available for public inspection (Section 345)

Position under Cap. 32

13. Under Cap. 32, if a debt secured by a registered charge has been satisfied, an application in the specified form (Form M2) may be made to the Registrar for entering on the Register a memorandum of satisfaction. Likewise, where a property or undertaking has been released from a registered charge or has ceased to form part of the company's property or undertaking, the Registrar will, upon application, enter on the Register a memorandum of release or cessation. Such applications have to be accompanied by evidence of discharge, usually in the form of a deed of release or discharge.

14. 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.

Position and key provision in the new CO

15. **Section 345(4)** provides that a certified copy of the evidence of discharge also has to be registered and made available for public inspection.

Clarifying the effect of an order made by the Court to extend the time for registration in respect of criminal liability already incurred (Section 346)

Position under Cap. 32

16. Under section 86(2) of Cap. 32, if the Court grants relief to extend the time for registration of a charge, the Court can direct that the relief will not relieve the company or its officers from the criminal liability incurred under section 81 of Cap. 32 for their failure to register. It is, however, unclear in section 86(2) whether in the absence of any court direction, the relief granted would automatically relieve the company and its officers from the criminal liability.

Position and key provisions in the new CO

17. To remove the abovementioned uncertainty, **section 346(4) and (5)** states that such criminal liability incurred⁷ would be extinguished provided that registration is effected within the extended time.

⁷ For offences under sections 337(2), 338(5), 339(6), 340(7), 341(7) or 343(1) of the new CO, or sections 81, 82 or 91(6) of Cap. 32.

Empowering the Court to rectify the particulars in the registered charge instrument and evidence of discharge (Section 347)

Position under Cap. 32

18. Section 86(1) of Cap. 32 allows the Court to rectify an omission or misstatement of the particulars of a charge or in the memoranda of satisfaction or release that have been registered.

Position and key provisions in the new CO

19. As the new CO will make a certified copy of the charge instrument (if any) and evidence of discharge registrable and open to public inspection, **sections 347(1)(a)(i) and (iii)** empower the Court to also rectify an omission or misstatement of the particulars in the registered charge instrument and evidence of discharge. **Section 347(4)** specifies that such powers of rectification will be subject to the common law rules and equitable principles applied to registration of documents, i.e. to the extent that the instrument has failed to accurately record the intention of the parties⁸.

TRANSITIONAL AND SAVING ARRANGEMENTS

20. In respect of registration of charges created before the commencement of the new CO, the general transitional provisions apply and the provisions of Cap. 32 are relevant. However to ensure a smooth transition in the registration process, it is considered necessary to have a cut off date after which all documents delivered to the Registrar comply with the requirements of the new CO. It is therefore provided that for a charge created before the commencement of the new CO but presented for registration after the expiry of 8 weeks from the commencement of Division 2 of Part 8 of the new CO, the new specified form together with a certified copy of the instrument creating the charge (i.e. the documents required to be registered under the new CO) should be delivered for registration. Detailed saving and transitional provisions are set out in **sections 62 to 75 of Schedule 11** to the new CO.

⁸The remedy of rectification is available not for the purpose of altering the terms of the agreement, but for that of correcting a document which does not reflect accurately the true agreement of the parties: *Agip SpA v Navigazione Alta Italia SpA* [1984] Lloyd's Rep 353 at 359.