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The New Companies Ordinance (Cap. 622) - Changes in the Regime of Registration of Charges

This circular seeks to inform you of the major changes in the regime of registration of charges upon commencement of the new Companies Ordinance, Chapter 622 of the Laws of Hong Kong (“the new CO”), on 3 March 2014.

Background

2. Part 8 of the new CO deals with the registration of charges. It basically retains the current regime set out in Part III of the Companies Ordinance (Chapter 32 of the Laws of Hong Kong) (“Cap. 32”) for both local companies and registered non-Hong Kong companies. However, there are some major changes as set out below, which are aimed at ensuring better regulation by enhancing disclosure and streamlining the registration system.

Overview

3. Major changes in the registration of charges regime under the new CO are as follows:

- (a) The list of registrable charges has been updated;
- (b) The automatic acceleration of repayment of monies secured by a charge if the charge becomes void against any liquidator and creditor for non-compliance with the registration requirements has been replaced such that the lender is given an option as to whether immediate repayment is required;

- (c) A certified true copy of the charge instrument as well as the specified form (containing the particulars of the charge) (“the Registration Documents”) will have to be delivered to the Registrar of Companies (“the Registrar”) for registration, and both will be placed on the public register and made available for inspection by members of the public;
 - (d) The period within which the Registration Documents must be delivered to the Registrar for registration is reduced from five weeks to one month; and
 - (e) A certified true copy of written evidence of debt satisfaction or release from a charge must be registered with a notification, in the specified form, of payment or satisfaction of the debt or release from the charge, and the certified copy of written evidence will also be available for public inspection.
4. Details of the major changes are set out at **Annex**.

Transitional Arrangements

5. In respect of the registration of charges created before the commencement of the new CO, the general transitional provisions apply and the provisions of Cap. 32 are relevant.

6. 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 must 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 eight weeks from the commencement of the new CO, a statement of particulars of charge in the new specified form, Form NM1, together with a certified true copy of the instrument creating or evidencing the charge (i.e. the Registration Documents required to be registered under the new CO) must be delivered for registration. Detailed saving and transitional provisions are set out in sections 62 to 75 of Schedule 11 to the new CO.

7. As for the registration of debt satisfaction or release from a charge, the provisions of Cap. 32 continue to apply to those applications for entries of satisfaction or release made before the commencement date of the new CO. Upon the commencement of the new CO, only the new specified form, Form NM2 (Notification of Payment / Satisfaction of Debt, Release from Charge, etc.), together with a certified true copy of evidence of discharge will be accepted for registration (section 69 of Schedule 11 to the new CO).

Enquiries

8. Enquiries concerning this circular should be directed to Mr Timothy Chan, Assistant Registry Manager (Charges and Liquidation), at (852) 2867 2611 / timothychan@cr.gov.hk.

9. This circular is intended to provide a general guide to the changes in the regime of registration of charges under the new CO. You are advised to seek professional advice in case of doubt.

Ms Ada LL CHUNG
Registrar of Companies

c.c.: CR HQ/ 8-1/6

The New Companies Ordinance (Cap. 622)
Major Changes in the Regime of Registration of Charges

Registrable Charges (section 334)

- It is expressly provided that the following charges are registrable under the new CO:-
 - (i) a charge on instalments due, but not paid, on the issue price of shares (section 334(1)(f)); and
 - (ii) a charge on an aircraft or any share in an aircraft (section 334(1)(h)).
- The reference in the list of registrable charges to a charge for the purpose of securing any issue of debentures is removed on the basis that such a charge is usually registered as floating charge or a fixed charge and thus retention of this as a separate head of registrable charge is redundant.
- It is clarified that:-
 - (i) a shipowner's lien on sub-freights is not registrable as a charge on book debts or as a floating charge and is therefore not registrable (section 334(4)); and
 - (ii) if a company maintains a deposit of money with another person (whether the money is deposited by the company or by any other person for the company's benefit), a charge on the company's right to repayment is not to be regarded as a charge on book debts of the company and is not registrable as such (section 334(3)(b)).

Replacing the automatic acceleration of repayment obligation

- Under Cap. 32, where a charge becomes void against the liquidator and any creditor because it is not registered with the Registrar of Companies ("the Registrar") within the specified time limit, the money secured by the charge automatically becomes repayable immediately to the lender. Under the new CO, this automatic repayment in such circumstances is replaced with an option for the lender to decide whether or not the monies secured by the charge should be required to be repaid immediately (section 337(6)).

Making a certified true copy of the charge instrument available for public inspection

- Under Cap. 32, only the particulars of the charge as set out in the specified form (Form M1) are available for public inspection.
- Under the new CO, the certified copy of the charge instrument itself will be put on the public register together with the new specified form (Form NM1) and both the specified form and the certified copy charge instrument will be made available for public inspection. **(Note: the availability of a certified copy of the charge instrument will give rise to constructive notice of all of 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.)**
- Only a certified true copy of charge instrument is required to be delivered for registration. If the original charge instrument is mistakenly delivered to the Registrar instead of the certified copy, the Registrar will not be responsible for any damage to the original instrument that may result from the document image scanning process or for the safe return of the original charge instrument to the presenter.

Shortening the period for delivery of the Registration Documents

- Generally under Cap. 32, particulars of every charge requiring to be registered should be delivered to the Registrar for registration within 5 weeks of the date of creation of the charge or, where the charge is created outside of Hong Kong on property situated outside of Hong Kong, within 5 weeks of the date on which a certified true copy of the instrument creating the charge could, if dispatched with due diligence, have been received in Hong Kong in due course of post. Under the new CO, the five-week period is shortened to **one month** (sections 335(5), 336(6), 338(3), 339(4) and 340(5)).

Requiring a certified true copy of the written evidence of debt satisfaction or release to be registered and made available for public inspection

- Section 345(4) of the new CO provides that where a company or registered non-Hong Kong company or the mortgagee or person entitled to the charge, notifies the Registrar of payment or satisfaction of the debt, or cessation or release of the property from the charge, the notification in the specified form (Form NM2) must be accompanied by a certified true copy of the evidence of discharge (usually in the form of a deed of release or discharge), and this will be put on the public register and made available for public inspection.

- Only the certified true copy of evidence of discharge is required to be delivered for registration. If the original evidence of discharge is mistakenly delivered to the Registrar instead of the certified copy, the Registrar will not be responsible for any damage to the original document that may result from the document image scanning process or for the safe return of the original document to the presenter.

Other Changes

- It is clarified that where an order is granted by the Court to extend the time for registration of the Registration Documents, any criminal liability incurred by the company or the responsible person for any breach of the specified provisions of the new CO will be extinguished, provided the registration is effected within the extended period of time set out in the Court order (section 346(4) and (5)).
- As the Registration Documents are on the public register, the power of the court to rectify an omission or mis-statement is extended to the certified copy of charge instrument or evidence of discharge (section 347(1)(a)(i) and (iii)). This power is subject to the common law rules and equitable principles relevant to rectification of documents, such that rectification may only be ordered if the instrument failed accurately to record the intention of the parties (section 347(4)).