New Hong Kong Companies Ordinance: Registration of charges

WHEN IN FORCE: 3 March 2014

COMPANIES AFFECTED: All companies

NEW PROVISIONS: Part 8 of new CO: ss334-347

1. WHICH ENTITIES MUST FILE CHARGES WITH THE COMPANIES REGISTRY?

Summary of changes

- Under the existing legislation, specified charges created by companies incorporated in Hong Kong and the acquisition by such companies of property subject to specified charges must be registered with the Companies Registry. For a non-Hong Kong Company registered under Part XI of the current Companies Ordinance, specified charges created on property in Hong Kong and the acquisition of property in Hong Kong subject to specified charges must also be registered.

- Under the new CO, no significant changes are made to the existing provisions on which entities must file charges.

Implications for practice

- As with existing practice, carrying out a company search at the Companies Registry will help determine whether a charge created or “acquired” by the company should be registered. If the relevant company is not registered at the Companies Registry, then registration of the charge is not required.

- If the company is registered at the Companies Registry, the next question is whether the relevant charge falls within the list of types of security that must be registered with the Companies Registry.

2. WHAT TYPES OF SECURITY MUST BE REGISTERED WITH THE COMPANIES REGISTRY?

Summary of changes

- Under the existing legislation, the following charges must be registered with the Companies Registry:
  
  - a charge for the purpose of securing any issue of debentures (but see below as to the changed position under the new CO);
– a charge on uncalled share capital of the company;

– a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

– a charge on land;

– a charge on book debts of the company (but see below as to clarifications made under the new CO);

– a floating charge;

– a charge on calls made but not paid;

– a charge on a ship or any share in a ship; and

– a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or licence under a copyright.

• Under the new CO, the following two new heads of charge are also registrable:

  – charges over an aircraft or any share in an aircraft; and

  – charges on instalments on the issue price of shares which are due but not paid.

• Under the new CO, charges for the purpose of securing an issue of debentures are no longer registrable.

• The new CO clarifies that charges over bank accounts and a shipowner’s lien on subfreights are not “charges on book debts” and are therefore not registrable.

3. HOW TO REGISTER CHARGES WITH THE COMPANIES REGISTRY

Summary of changes

• Under the existing legislation, the original charge instrument together with the prescribed particulars of the charge contained in the Form M1 must be submitted to the Companies Registry for registration. Only the prescribed particulars are available for public inspection.

• Under the new CO, both a statement of particulars of the charge created by the company and a certified copy of the instrument (if any) creating the charge must be delivered to the Companies Registry for registration. The charge instrument itself will be available for public inspection.

Implications for practice

• A certified copy (not an original) of the charge instrument must be filed along with the prescribed particulars of charge. Section 333(4) of the new CO explains that a “certified copy” may be certified by a director, company secretary or other authorized person.
• When drafting a charge instrument, parties should be aware that its contents will be publicly available. Commercially sensitive information should not be set out in the charge instrument.

• The registration of a charge instrument may give rise to constructive notice of all the terms in the charge instrument, including negative pledge clauses, on the part of those who may reasonably be expected to search the companies register, such as banks, financiers and relevant professionals. Market practice for secured financings will therefore involve due diligence against registered charge instruments in order for lenders to avoid being attributed with constructive notice of matters not known to them.

• Reinforcing the above, the Companies Registry has stated it is "more important than ever" for lenders to make enquiries and search the companies register for charges.

4. DEADLINE FOR REGISTRATION OF CHARGES

Summary of changes

• Under the new CO, the prescribed time for registration is shortened from five weeks to one calendar month.

5. CONSEQUENCES OF DEFAULT

Summary of changes

• Under the existing legislation, if a company fails to register particulars of a charge, the charge is void against the company's liquidator and creditors and the money secured by such charge is automatically accelerated and becomes immediately payable. In addition, the company and every officer in default are liable on summary conviction to a Level 5 fine, with an additional $1,500 fine for each day that the default continues.

• Under the new CO, as before, failure to register results in the charge being void. However, the automatic acceleration of the money secured by the charge as a consequence of failing to register is removed. The lender will, instead, determine whether or not the money (which was meant to be secured) becomes immediately payable. The company and every responsible person in default continue to be liable to a Level 5 fine, with the additional fine reduced from $1,500 to $1,000 for each day that the default continues.

6. EXTENSION OF TIME FOR REGISTRATION AND RECTIFICATION OF PARTICULARS

Summary of changes

• The new CO follows the existing legislation, in that the court may, on application by the company or a person interested in the charge, order an extension of time for registration or to rectify an omission or misstatement in the particulars of the charge, or accompanying instrument.

• Under the existing legislation, it is unclear whether s86(2) of the current Companies Ordinance means that a grant of relief by the Court automatically relieves the company and its officers from criminal liability.
The new CO clarifies that if the failure to register a charge is rectified within the extended time period as ordered by the Court, the liability incurred under the relevant offence provision will be extinguished.

7. TRANSITIONAL ARRANGEMENTS

- For the registration of charges created before the commencement date of the new CO, the provisions of the current Companies Ordinance and the general transitional provisions (ss62-75 of Schedule 11 to the new CO) apply.

- To ensure a smooth transition in the registration process, a cut off date has been included in the transitional provisions. The cut off date is 8 weeks from the commencement of the new CO, and is relevant only to a charge created before the commencement of the new CO but presented for registration out of time.
新香港《公司条例》：
押记的登记

实施日期：2014年3月3日
受影响公司：所有公司
新条文：新《公司条例》第8部：第334条至第347条

1. 哪个实体须向公司注册处登记押记？

变更概要

• 根据现行法例，在香港注册成立的公司所设立的指明押记以及该公司购入受指明押记所限的财产
  必须于公司注册处登记。就根据现有公司条例第XI部登记的非香港公司而言，就位于香港境内的
  财产设立的指明押记以及在香港境内购入受指明押记所限的财产也必须登记。

• 根据新《公司条例》，并没有对关于哪个实体必须登记押记的现有条文作出重大变更。

对实施的影响

• 一如现有惯例，在公司注册处进行公司查册将有助决定由公司设立或“收购”的押记是否须予登
  记。如相关公司并没有在公司注册处登记，则无须登记押记。

• 如公司在公司注册处登记，接下去的问题便是相关押记是否属于必须在公司注册处登记的抵押类
  别。

2. 甚么类别的抵押必须在公司注册处登记？

变更概要

• 根据现行法例，以下押记必须在公司注册处登记：
  – 为保证债权证的发行而设立的押记（但就新《公司条例》项下的变更状况请参阅下文）；
  – 就公司未催缴股本设立的押记；
  – 就一份文书设立或证明的押记，而该文书假使是由个人签立便须作为卖据登记；
  – 就土地设立的押记；
- 就公司账面债项设立的押记（就新《公司条例》项下的澄清请参阅下文）；
- 浮动押记；
- 就已催缴但未缴付的股款设立的押记；
- 就船舶或船只的任何份额设立的押记；及
- 就商誉、专利权或根据专利权发出的特许、商标或版权或根据版权发出的特许设立的押记。

根据新《公司条例》，以下两类新类别押记也可予登记：
- 就飞机或飞机的任何份额设立的押记；及
  - 就股份的发行价的到期应缴付但未缴付的分期付款设立的押记。

根据新《公司条例》，就为保证债权证券的发行而设立的押记不再可登记。

新《公司条例》澄清就银行账户设立的押记以及船主对转租运费享有的留置权并不是“就公司账面债项设立的押记”，因此不可登记。

3. 如何向公司注册处登记押记

变更概要

- 根据现行法例，原有押记文书连同载于M1表格内押记的订明详情，必须提交至公司注册处登记。只有订明详情可供公众查阅。

- 根据新《公司条例》，公司设立的押记的详情陈述以及设立押记的文书（如有）的经核证副本，必须交付公司注册处登记。押记文书本身将可供公众查阅。

对实施的影响

- 押记文书的经核证副本（并非原件）必须连同押记的订明详情存档。新公司条例第333 (4) 节解释， “经核证副本” 可以由董事、公司秘书或其它授权人士核证。

- 于起草押记文书时，各方应知悉有关内容将供公众查阅，因此不应在押记文书载述商业上属敏感的资料。

- 登记押记文书或会就押记文书的所有条款，包括限制抵押条款，对包括银行、融资方及相关专业人士在内的可能合理地预期在公司注册处查册的一方产生法律推定的知悉。因此，担保融资的市场惯例将涉及对登记押记文书进行尽职调查，务求使贷款人可避免就他们并不知道的事项被法律推定知悉。

- 补充上文所述，公司注册处已表明，贷款人就押记作出查询及对公司进行查册“较以前更为重要”。
4. 登记押记的期限
变更概要

- 根据《公司条例》，登记的订明时间由五个星期缩短至一个历月。

5. 违规的后果
变更概要

- 根据《公司条例》，未能登记押记会导致押记无效。然而，押记所保证的借款因未登记而自动提早偿还的规定已被取消。相反，贷款人将决定有关款项（原意旨在获得保证）是否将须立即偿还。违反有关规定的公司及每位负责人士继续获处第5级罚款，并可就该违规持续期间的每一日，另处罚款$1,000。

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6. 延长登记时间及更正详情
变更概要

- 新《公司条例》依循现行法例，即法庭可在公司或在押记中拥有权益的人士作出申请时，下令将登记的时间延长，或更正押记或随附文书详情的遗漏或错误陈述。

- 根据现行法例，不清楚现有公司条例第86(2)条是否意味法庭授予宽免自动免除公司及其高级人员任何刑事责任。

- 新《公司条例》阐明，如未能登记的押记可按法庭颁令的延长时间内修正，则根据相关违规条文产生的责任将会取消。

7. 过渡性安排
变更概要

- 就登记于新《公司条例》开始实施日期前登记的押记而言，现有的《公司条例》的条文及一般过渡性条文（新公司条例附表11第62条至75条）均适用。

- 为确保登记过程的顺利过渡，已在过渡性条文中规定了截止日期。截止日期是新公司条例开始实施起8个星期，并仅对新公司条例开始实施前所设立但未在合适时间显示登记的押记有关。