

PART 8

REGISTRATION OF CHARGES

Introduction

1. Part 8 deals with registration of charges by both Hong Kong and registered non-Hong Kong companies. It sets out the types of charges which require registration and provides for the registration procedures involved and the consequences of non-compliance. It also contains provisions to regulate matters associated with registration, such as requiring companies to keep, and allow inspection of, copies of instruments of charges and registers of charges.
2. Part 8 basically retains the current registration regime under Part III of the CO (sections 80 to 91), with modifications made to improve the registration system, taking into account the comments received during the topical public consultation conducted in the second quarter of 2008 (“topical consultation”)¹.

- The significant changes to be introduced under this Part are highlighted below:
 - (a) updating the list of registrable charges, such as expressly providing that a charge on an aircraft or any share in an aircraft is registrable and removing the requirement to register a charge for the purpose of securing any issue of debentures;**
 - (b) replacing the automatic acceleration of the repayment obligation with a choice given to the lender as to whether the secured amount is to become immediately payable where a charge is rendered void for non-compliance with the registration requirements;**
 - (c) in addition to the prescribed particulars of the charge, requiring the charge instrument to be registrable and available for public inspection;**

¹ The *Consultation Conclusions on “Company Names, Directors’ Duties, Corporate Directorship and Registration of Charges”* were issued in December 2008 and are available at www.fstb.gov.hk/fsb/co_rewrite.

- (d) shortening the period for delivery to the Registrar of the charge instrument and the prescribed particulars from 5 weeks to 21 days;
- (e) replacing the issue by the Registrar of a certificate of due registration with the issue of an acknowledgement of receipt; and
- (f) requiring written evidence of debt satisfaction/release of a charge to accompany a notification to the Registrar for registration of the debt satisfaction/release, thus rendering such documents to be available for public inspection.

Significant Changes

(a) Updating the list of registrable charges

Background

3. Under the current regime, only charges which fall within the categories as provided in section 80(2) of the CO are required to be registered. We suggest to make the following changes to the list:

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

The current list does not expressly include a charge on aircraft, though it may be argued that some charges on aircrafts are already made registrable as bills of sale under section 80(2)(c) of the CO. However, it is arguable that not all mortgages over aircrafts are necessarily registrable under section 80(2)(c)². We will expressly provide that a charge on an aircraft or any share in an aircraft is registrable.

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

Section 80(2)(g) of the CO provides for the registration of a charge on calls made but not paid. It has been argued that the registrability should also cover a charge on instalments due, but not paid, on the issue price of the shares although these instalments are not calls in the

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).

strict sense. We therefore propose that express provision should be made to clarify that a charge on such instalments is registrable.

(iii) Charge for the purpose of securing any issue of debentures

We consider that section 80(2)(a) of the CO requiring the registration of a charge for the purpose of securing any issue of debentures duplicates some other heads of registrable charges and is therefore redundant. Typically, issues of debentures are usually supported by a floating charge or a fixed charge that is registrable by virtue of some other categories of registrable charges. Accordingly, section 80(2)(a) of the CO will not be retained in the CB.

(iv) Lien on subfreights

There is judicial authority to support the principle that a shipowner's contractual lien on subfreights is a charge on book debts³ or a floating charge⁴ which is registrable under section 80(2)(e) or section 80(2)(f) of the CO. 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 owner⁵. We take into account that since charterparties are usually negotiated by shipbrokers and not by lawyers and are normally of a relatively short duration, requiring a lien to be registered is inconvenient from a commercial perspective. We will clarify that a shipowner's lien on subfreights does not fall within the category of a charge on book debts nor a floating charge on the company's property.

(v) Cash deposits

Although a charge over cash deposits could arguably be registrable as a charge on book debts under section 80(2)(e) of the CO, we will exclude such charges from this registrable head, the reason being that such charges are normally taken over credit balances with financial institutions, i.e. in the form of charge-backs with 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

³ *In re Welsh Irish Ferries Ltd* [1986] Ch 471.

⁴ *The Annangel Glory* [1988] 1 Lloyd's Rep 45.

⁵ Lord Millett in *Re Brumark Ltd: Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, at paragraph 41.

balance. Moreover, being in the nature of a charge-back, such charges would ordinarily have the effect of a set-off which, of itself, also does not require registration.

Proposal

4. **Clause 8.3(1)(h)** provides expressly that a charge on an aircraft or any share in an aircraft is registrable.
 5. **Clause 8.3(1)(f)** expressly makes a charge on instalments due, but not paid, on the issue price of shares to be registrable.
 6. **Clause 8.3(1)**, which contains the list of charges to be registrable under the CB, no longer specifically provides for the registration of a charge for the purpose of securing any issue of debentures.
 7. **Clause 8.3(4)** states that a shipowner's lien on subfreights shall not be regarded as a charge on book debts or as a floating charge.
 8. **Clause 8.3(3)(b)** stipulates that if a company deposits money with another person, a charge given by the company over its right to enforce repayment of the money is not regarded as a charge on book debts of the company.
- (b) Replacing the automatic acceleration of repayment obligation**

Background

9. Section 80(1) of the current CO states that where a charge becomes void for not being registered with the Registrar within the specified time limit, the money secured by it automatically becomes immediately payable. We note that this statutory acceleration of repayment may create problems for banks, as the acceleration arises automatically. We therefore propose to replace the "automatic" acceleration provision with a "discretionary" acceleration provision in the CB. The proposal received general support in the topical consultation.

Proposal

10. **Clause 8.6(6)** provides that when a charge becomes void should it be not registered with the Registrar within the specified time limit, the money secured by the charge becomes immediately payable at the option of the lender.
- (c) **In addition to the prescribed particulars of the charge, requiring the charge instrument to be registrable and available for public inspection**

Background

11. The present law requires the charge instrument⁶ (if any) together with the prescribed particulars of the charge in the specified form⁷, to be submitted to the Registrar for registration. However, only the prescribed particulars are required to be registered and made available for public inspection⁸ 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.
12. We note that it is desirable to make available to those who search the Register more detailed information as to the charges. We will therefore make both the charge instrument (if any) and the prescribed particulars of the charge registrable and available for public inspection. If the charge instrument is required to be registered, we believe that registration will 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 Register, such as banks, financiers and relevant professionals.

Proposal

13. The particulars of a charge required for registration under the CB are to be contained in a “statement of the particulars of a charge” which will be in specified form. The statement contains less details as compared with the

⁶ “Charge instrument” means the instrument by which a charge is created or evidenced. In the case of a charge in a series of debentures where the debenture holders of that series are equally entitled to the benefit of the charge, the charge instrument means the debenture containing the charge or the instrument of charge to which the debenture refers.

⁷ The prescribed particulars are contained in Form M1.

⁸ Only those prescribed particulars as set out in section 83(1) of the CO are required to be entered in the Register and made available for public inspection.

prescribed particulars under the CO, since the charge instrument itself will be registered. **Clauses 8.4(1), 8.4(2), 8.5(1), 8.5(2), 8.7(2), 8.8(3), 8.9(2) and 8.9(3)** require Hong Kong companies and registered non-Hong Kong companies to deliver to the Registrar for registration the statement of the particulars of the charge and the charge instrument (if any) under the circumstances stated in those provisions (i.e. where the company creates a registrable charge or acquires property subject to a registrable charge). Failure to deliver the statement of the particulars of the charge and the charge instrument (if any) within the specified registration period is an offence (**Clauses 8.6(2), 8.7(5), 8.8(6) and 8.9(7)**). Where a registrable charge created by the company is not registered in time, the charge is void as against the liquidator and creditors, as is the case under CO section 80 (**Clause 8.6(4)**).

(d) Shortening the period for delivery to the Registrar of the charge instrument and the prescribed particulars from 5 weeks to 21 days

Background

14. The CO currently requires a company to submit particulars of a charge and the charge instrument (if any) for registration within a period of five weeks⁹. It may therefore be possible that the particulars of a charge will only be visible on the Register after the expiration of the five-week period. We take the view that the period for the particulars of a charge to be invisible to outside parties should be minimized. As set out in the topical consultation conclusions, we will shorten the period for registration of the particulars of charge to 21 days, the same as in the UK.

Proposal

15. **Clauses 8.4(5), 8.5(6), 8.7(3), 8.8(4) and 8.9(5)** require the statement of the particulars of a charge and the charge instrument (if any) to be lodged for registration within 21 days. In the case of an issue of debentures in a series, a statement of particulars of each issue of the debentures must be submitted for registration within 21 days **Clause 8.10(4)**, and where the charge or the debentures involves the payment of commission, allowance or discount, a statement of the particulars of the commission, allowance or discount must also be delivered for registration within 21 days (**Clause 8.11(6)**).

⁹ For registration of a charge created by a company, the period of five weeks commences from the day after the day on which the charge is created. For registration of a charge existing on property acquired by a company, the period of five weeks commences from the day after the day on which the acquisition is completed.

(e) Replacing the issue of a certificate of due registration with the issue of an acknowledgement of receipt

Background

16. We consider that the procedure undertaken by the Registrar to verify the delivered particulars in the specified form against the charge instrument (if any) inevitably slows down the registration process. It should be the duty of the company, rather than the Registrar, to verify the particulars entered in the specified form. We recommend that the Registrar should be relieved from performing such a checking function in order to expedite the registration process. As a corollary to such a change, the Registrar should no longer be required to issue a certificate of due registration. A simple acknowledgement of receipt¹⁰ of the documents submitted for registration will instead be issued. It is not to be treated as conclusive evidence that all the registration requirements have been complied with.

Proposal

17. **Clause 8.13(2)** stipulates that the Registrar must issue a receipt acknowledging the receipt of the filed document(s) by the Registrar on the date of receipt for registration.

(f) Requiring written evidence of debt satisfaction/release of a charge to accompany a notification to the Registrar for registration of the debt satisfaction/release

Background

18. The current law provides a means whereby a charge that is released or discharged can be shown as discharged on the Register. If the debt secured by a registered charge has been satisfied, an application in the specified form¹¹ may be made to the Registrar for entering on the Register a memorandum of satisfaction. A similar application may also be made where the property or undertaking subject to a registered charge has been released from the charge or has ceased to form part of the company's property or undertaking. The Registrar will, in such event, enter on the

¹⁰ This document will not be called a "certificate", because at the time of issuing the document, the process that will have been undergone by the Registrar so far will in substance be an acknowledgement of receipt by the Registrar of the submitted document(s) for the purpose of registration on the date of receipt.

¹¹ Form M2.

Register a memorandum of release or cessation. Such applications should be accompanied by such evidence of discharge as the Registrar may require, which is usually the deed of release/discharge of a charge.

19. Presently, only the memoranda of satisfaction/release are open for public inspection. The evidence of discharge is neither registered nor available for public inspection. As we will make the charge instrument (if any) registrable, for consistency, we will also make the evidence of discharge registrable and open to public inspection as set out in the topical consultation conclusions.

Proposal

20. **Clause 8.14(4)** provides for the registration of the notification and the accompanying evidence of discharge¹².

Other Changes

(a) A certified copy of the charge instrument and written evidence of debt satisfaction/release of a charge to be delivered for registration

21. At present, the original of the charge instrument has to be delivered to the Registrar except where the charge is created by the company out of Hong Kong comprising property situate outside Hong Kong¹³ or the charge is existing on property acquired by the company¹⁴ in which case a copy would suffice.
22. Under the CB, only a certified copy of the charge instrument is required to be submitted to the Registrar for registration (**Clauses 8.4(1), 8.4(2), 8.5(1), 8.5(2), 8.7(2), 8.8(3), 8.9(2) and 8.9(3)**). For the written evidence of debt satisfaction/release of a charge, **Clause 8.14(3)(c)** also only requires a certified copy to be lodged.

¹² Under the current practice, the Registrar will only request for the production of the evidence of discharge if the application is made and signed by the company. Such practice will not be continued under the CB regime as the evidence of discharge should be registered and open for public inspection no matter who signs the application form.

¹³ Section 80(3) of the CO.

¹⁴ Section 82(1) of the CO.

(b) Extension of time for registration by the Court of First Instance (the “Court”)

23. Under the current law, if the Court grants relief to extend the time for registration of a charge, section 86(2) of the CO provides that the grant of such relief will, if the Court so directs, not have the effect of relieving the company or its officer of criminal liabilities already incurred under section 81 of the CO.
24. The effect of section 86(2) of the CO, in its current wording, is unclear as to whether a grant of such relief by the court will, in the absence of any court direction, automatically relieve the company and the officers from criminal liability.
25. In order to remove this uncertainty, **Clause 8.15(5)** states that unless the Court directs otherwise, any liability already incurred for an offence under **Clauses 8.6(2), 8.7(5), 8.8(6), 8.9(7), 8.10(8) or 8.12(1)** in relation to the registration of the charge or debenture is extinguished.

(c) Rectification of particulars in the registered charge instrument and evidence of discharge

26. Currently, section 86(1) of the CO allows the Court to rectify an omission or mis-statement of the registered particulars of a charge or in the memoranda of satisfaction/release. As the CB will make the charge instrument (if any) and evidence of discharge registrable and open to public inspection, the Court will also be empowered under the CB to rectify an omission or mis-statement of the particulars in the registered charge instrument and evidence of discharge (**Clauses 8.15(1)(b)(i) and 8.15(1)(b)(iii)**). Such powers of rectification, however, will be subject to the common law rules and equitable principles as applied in relation to rectification of documents by the Court **Clause 8.15(4)**¹⁵.

¹⁵ Under the general law, the court may rectify a document in particular circumstances where the document failed to record the intention of the parties accurately. The 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 Halia SpA* [1984] Lloyd’s Rep 353 at 359.

(d) Drafting of provisions concerning registered non-Hong Kong companies

27. The current CO only has one provision (section 91) which applies the rest of Part III to registered non-Hong Kong companies. The drafting approach under the CB is different where there are now express provisions dealing with registered non-Hong Kong companies for the purpose of clarity. The change of drafting approach does not itself alter the substance of the charge registration and other requirements imposed on registered non-Hong Kong companies, other than those changes highlighted above.

(e) Transitional provisions

28. Upon implementation of the CB, certain types of charges which are currently not registrable under the CO will become registrable, and vice versa. A revised registration mechanism, concerning matters such as the documents required to be lodged for registration and the time allowed for registration of charges, will also come into play. Transitional provisions are not currently included in the draft CB but they will be finalised and included in the CB that will be introduced in LegCo.