

**Bills Committee on
Companies (Amendment) Bill 2003**

**Follow-up actions arising from the discussion
at the meeting on 15 April 2004**

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 15 April 2004.

Fees relating to overseas companies

(a) To provide a chart setting out the current and the proposed fees relating to overseas companies and the corresponding fees (including current and proposed fees) for Hong Kong companies

2. A summary of fees payable under the Eighth Schedule of the Companies Ordinance (Cap. 32) for Company Registration/Incorporation is at Annex A. The rationale is that the new fees have been calculated on a revenue neutral basis. Whilst overseas companies will, in future, have to pay a higher fee (\$250 as opposed to the existing \$140) for the filing of an annual return, this will be offset by not being required to pay filing fees (\$20 per document) for the filing of individual documents.

3. From our statistics, we find that on average, an overseas company submits more than five documents in a year. The calculation is worked out on the basis of revenue collection. Accordingly, we could say that if an overseas company files 5 forms in one year, this would add up to a total of \$100 which, added to the old fee of \$140 for the filing of the existing annual return, is roughly equivalent to the proposed new fee of \$250.

4. The proposed sliding scale of late filing of annual returns is equivalent to the fees payable by private companies who file late whilst there is no higher fee payable by overseas companies who file late under the existing provisions which are dependent on the occurrence of a particular event prompting a filing obligation.

Registration of charges for overseas companies

(b) To clarify how far the proposed amendments in relation to registration of charges for overseas companies are based on the relevant

recommendations of the Standing Committee on Company Law Reform

5. The concept of property being "brought into Hong Kong" originated from the idea first proposed by the UK Company Law Review Steering Group Consultation Paper entitled Registration of Company Charges issued in October 2000 wherein it was stated, in para 3.68 thereof –

"(a) The registration requirement would only apply to charges given by oversea companies that had actually registered their place of business at Companies House (and had not given notice to the Registrar that they had ceased to have an established place of business in Great Britain or been deregistered);

(b) Such companies would be required to deliver to Companies House particulars of :

- (i) charges they create over property situated in Great Britain;
- (ii) charges that already exist over property in Great Britain which they acquire; and
- (iii) charges which already apply to property brought into Great Britain;

(c) Such companies would be required to register particulars of the charge within 21 days of its creation or the date of acquisition or bringing into Great Britain;

(d) There would be an exception from the registration requirement for property, otherwise subject to it, that was taken out of Great Britain before the expiry of the period set for registration i.e. 21 days."

6. This concept was followed in para 4.9 of the Report issued by the Sub-Committee appointed by the Standing Committee on Company Law Reform (SCCLR) to review the registration of companies Incorporated outside Hong Kong issued in May 2001 as follows –

"4.9 We therefore recommend that sections 91(1) and (3) of the

Companies Ordinance should be amended along the lines of the proposed amendments in the United Kingdom as follows:-

- the registration requirement would apply only to charges given by overseas companies registered under Part XI of the Companies Ordinance;
- such companies would be required to deliver to the Companies Registry particulars of:
 - (i) charges they create over property situated in Hong Kong;
 - (ii) charges that already exist over property in Hong Kong which they acquire; and
 - (iii) charges (whether fixed or floating charges) which already apply to property brought into Hong Kong;
- such companies would be required to register particulars of charges within 5 weeks of their creation or the date of acquisition of property or bringing it into Hong Kong;
- there would be an exception from the registration requirement for property, which would otherwise be subject to it, that was taken out of Hong Kong before the expiry of the period set for registration, i.e. 5 weeks.

Further, we recommend that sections 91(1) and (3) should be amended to qualify for the interpretation of "property in Hong Kong" to effect that ships and aircraft shall always be deemed to be situated in the jurisdictions in which they are registered."

7. The Sub-Committee's Report was endorsed by the SCCLR on 23 June 2001.

(c) To clarify the definition of "brought into Hong Kong" under proposed section 91 with illustrations in respect of the charges specified under section 80(2) of the Companies Ordinance, and to provide relevant common law regarding the interpretation of this expression

8. Although the UK Companies Act 1989 contained sections implementing the proposals made in their Report, they have never been brought into force. In drafting the provisions contained in this Bill, no definition of the phrase "brought into Hong Kong" was included in Section 91 as it was considered that the date upon which property the subject of a charge was brought into Hong Kong would vary according to the nature of the property in question and that this should be an issue best decided by the chargee who would be most familiar with the nature of assets forming the subject of charges. We note the concern of the Bills Committee and other parties such as the Hong Kong Association of Banks (HKAB) on the proposed concept of "brought into Hong Kong". We would review the concept of "brought into Hong Kong" and reconsider as to the appropriate criteria which should be used to trigger the registration of a charge by an overseas company.

9. Section 80(2) of the Companies Ordinance lists the various types of charges which are registrable under the Companies Ordinance as follows –

"(2) This section applies to the following charges-

- (a) a charge for the purpose of securing any issue of debentures;
- (b) a charge on uncalled share capital of the company;
- (c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;
- (d) a charge on land, wherever situate, or any interest therein, but not including a charge for any rent or other periodical sum issuing out of land; (Replaced 6 of 1984 s. 46)
- (e) a charge on book debts of the company;
- (f) a floating charge on the undertaking or property of the company;
- (g) a charge on calls made but not paid;
- (h) a charge on a ship or any share in a ship;
- (i) a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright."

10. It should be noted that the list of registrable charges in section

80(2) covers most of the common forms of charge over the property of a trading company but is by no means comprehensive and there are numerous common law decisions by which certain charges have been held to be registrable.

11. Section 80 provides that a charge created by the company and being a charge to which the section applies shall be invalidated unless registered. Thus, before a charge becomes registrable in the charges register, it must fall within the description of one of the listed heads of charge and arise out of an act of creation by the chargor company.

12. The charge creation test has been considered by the courts in several contexts as follows –

- (1) the contract or dealing entered into by the company must be interpreted or analysed to decide whether a charge in the sense of a security over the company's property was intended or has that legal effect;
- (2) agreements relating to security at a future time may be treated as not creating a charge in the present;
- (3) charges existing on property acquired by the company or taken as part of the acquisition dealing raise the issue whether they are created by the company;
- (4) title retention arrangements have in some cases been held to be in substance charges created through the assistance of contractual action by the company;
- (5) charges arising by operation of legal doctrine or legal process, even if related to company contracts, have been excluded as beyond the scope of the charges registration provisions because they are not created by the company.

13. Accordingly, the category of charges registrable under Section 80 goes far beyond the types of charges stated in Section 80(2) and to a large extent depends on the intention of the parties. For example, whether delivery of a certificate of title to land creates a charge depends on whether

the deposit of the documents of title is intended to have immediate effect as part of the security and thus has created an equitable mortgage. It has also been held in Pearse Farrell, Liquidator of Brian Tucker Ltd (in voluntary liquidation) v. Equity Bank Ltd (1990) 2IR 549 that, for a charge to arise, there must be some language of ear marking or appropriation of the fund or debt by the debtor, sufficient to entitle the creditor to take direct recourse against the fund or debt itself as equitable assignee. An indication directed to the creditor to satisfy himself out of a specified debt is thus the language of the charge.

14. There are no common law rules to our knowledge regarding the interpretation of the term "brought into Hong Kong" as this term has hitherto appeared neither in the Hong Kong legislation nor in the corresponding UK legislation. Common law decisions do, however, assist in relation to the situs of movable property which is generally held to be situated in the place where it actually lies. So far as corporeal property is concerned, the general rule is that the property is situated where it is found. An illustration of various kinds of properties is set out below –

(a) Ships and aircraft

Ships on the high seas have been held to be situated in law at their port of registry as opposed to where they are physically situated from time to time. This artificial situs is, however, displaced when a vessel is within territorial or national waters and will be replaced by the actual situs.

(b) Debts

A debt arising out of a simple contract is deemed to be situated in the place in which it is properly recoverable by action i.e. the country in which the debtor is resident or, in some cases, where the debtor is domiciled.

(c) Insurance policy proceeds

In the case of a debt due under a policy of insurance, the proceeds are deemed to be at the place where the policy money is made

payable by the policy.

(d) Specialty debts

A debt due on a specialty - i.e. an obligation secured by a contract under seal e.g. a bond, mortgage or a shareholder's right to a dividend or under a statute e.g. calls on a shareholder in a company formed by an Act of Parliament or an action to enforce a tenant's right of enfranchisement under the Leasehold Reform Act 1967 - is located where that instrument is situated.

(e) Securities transferable by delivery

Negotiable instruments and all bonds and securities transferable by delivery are located where the instrument or document is to be found.

(f) Location where the title is dependent on registration

Where title to an intangible movable, such as a share in a company or Government stock, depends upon registration, the intangible movable is situated in the place where the appropriate register is kept.

(g) Trust property

Where the terms of a trust give a beneficiary a beneficial interest in property, the situs of the interest will be the same as that of the property.

15. It should however be borne in mind that these common law rules must be considered in the context of section 80(2) in terms of which charges against properties of different natures will be accepted for registration under the Companies Ordinance.

(d) To confirm whether any evidence/supporting documents (including evidence of the date when the property subject to a charge was brought into

Hong Kong) are required for registering a charge where the relevant property is brought into Hong Kong after the creation of the charge; how the proposed arrangement compares to that for the registration of charges for Hong Kong companies

16. Under the existing provisions, the only evidence required for registering a charge created by both local and overseas companies is the instrument itself or a certified copy. As the Companies Registry is an office for the registration of charge documents, inter alia, and not a court of law, the only documentation required is that stipulated in Section 80(1) of the Companies Ordinance which requires particulars of the charge including those specified in subsection (1A) and the instrument, if any, by which the charge is created or delivered. The Companies Registry would be flooded with numerous supporting documents which are not registrable according to either the present or proposed wording of Part III of the Companies Ordinance if additional evidence and supporting documents were accepted for registration. The proposal for a new field to be added to the existing form M1 (the form used for reporting charge details to the Companies Registry in respect of both local and overseas companies) was suggested so as to both assist the Companies Registry in determining that the property of the subject of the charge had actually been brought into Hong Kong and thus the charge was registrable pursuant to the new Section 91. Information can also be provided to members of the public who search the charges register. Further, if it should be shown that property was not in fact located in Hong Kong as stated in the relevant form M1 as at a particular date, a breach of section 349 of the Companies Ordinance will render the presenter liable to prosecution for submission of a false statement in a document delivered to the Registrar.

(e) To clarify whether under proposed section 91, a non-Hong Kong company is obliged to register a charge if only part of the relevant property or only the title documents of the relevant property is brought into Hong Kong

17. A non-Hong Kong company would be obliged to register the charge if only part of the relevant property is brought into Hong Kong. For instance, if a charge is granted over 100 vehicles (and thus falls within the provision of Section 80(2)(f)), the charge is registrable regardless of whether one or all the vehicles is brought into Hong Kong. We would consider improving the wording of the proposed section 91 to further clarify the issue. As regards the second part of the question, the answer will depend on the nature of the property itself. If the physical location of the title document of a property determines the situs of the property itself (as in

the case of negotiable instruments and all bonds and securities transferable by delivery mentioned in para. 14(e)) and such title document is brought into Hong Kong, the company is obliged to register the charge under the proposed section 91.

(f) To review whether the proposed section 91 is sufficient to deal with situations where the relevant properties are brought into and out of Hong Kong from time to time and in-between these movements remain in Hong Kong for different periods of time

18. The intention behind the proposed wording of Section 91 is not to impose a registration requirement in respect of property which is moved in and out of Hong Kong on a frequent basis and remains in Hong Kong for only a very short period of time, subject to the five week requirement stipulated in subsections 91(3) and (4). Accordingly, it would not matter whether the charged property was moved in and out of Hong Kong on numerous occasions for very short periods of time within the 5 week period as the proposed wording of the exemption provided under Section 91(4) stipulates that the requirement to register shall not apply "if the relevant property **does not remain in Hong Kong** on the expiry of 5 weeks after certain specified dates".

(g) To meet with the Hong Kong Association of Banks and the Law Society of Hong Kong to discuss the proposed amendments in relation to registration of charges for overseas companies

19. We have contacted the HKAB and will arrange to meet with them in due course. The Law Society of Hong Kong has confirmed that they have no further comments on the Bill and does not think it necessary to meet with us. Moreover, they have not raised any comments in relation to registration of charges for overseas companies.

**Continuing obligation in respect of authorized representative
Return to be delivered to Registrar where documents, etc. altered**

(h) To review whether proposed section 335(1) adequately covers the situation specified under existing section 333A(2), which is proposed to be deleted

20. It is considered that Section 335(1) adequately covers the situation specified under the existing Section 333A(2) as, under the new provision, a company is obliged to deliver a return in the specified form containing particulars of any alteration in the name or particulars of the

authorized representative of the company. When considering the existing Section 333A(2), the Sub-Committee felt that it was not particularly user friendly for the provisions relating to the notification requirements in respect of an authorized representative to be contained in two separate sections and that it could be streamlined. It considered that the words "unforeseen reason" were unclear and could more usefully be replaced by the words "any other reasons". It was also felt that, in line with the corresponding provisions in Australian and Singaporean Company Law, both the company and the authorized representative should be allowed to notify the Registrar of the authorized representative ceasing to act on behalf of the overseas company. It is proposed that the relevant specified form should contain a field for completion of the reason for notification of the change in the authorized representative i.e. whether it was due to his resignation or had ceased to act.

Financial Services Branch
Financial Services and the Treasury Bureau
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Summary of Fees Payable under the Eighth Schedule of the Companies Ordinance (Cap. 32) for Company Registration/Incorporation

<u>Items</u>	<u>Oversea Company</u>		<u>Local Company</u>		
	<u>Proposed Fees</u>	<u>Existing Fees</u>	<u>Existing Fees</u>		
			<u>Having a Share Capital</u>		<u>Not having a Share Capital</u>
			Private Companies	All Other Companies	
	\$	\$	\$	\$	\$
For the issue of a certificate of registration / incorporation of a company	1,425	1,425	1,425 (Note 1)	1,425 (Note 1)	from 170 to 1,025 (Note 2)
Lodgment fee to be paid on delivery of documents	295	295	295	295	-
For registration of a prospectus	1,415	1,415	1,415	1,415	-
Registration of charges and related documents	from 40 to 340	from 40 to 340	from 40 to 340	from 40 to 340	from 40 to 340
For registering an annual return delivered to the Registrar					
If delivered within 42 days after the anniversary of registration / incorporation	250	140	105	140	105
If delivered more than 42 days after but within 3 months after the anniversary of registration / incorporation	1,200	140	870	1,200	105
If delivered more than 3 months after but within 6 months after the anniversary of registration / incorporation	2,400	140	1,740	2,400	105
If delivered more than 6 months after but within 9 months after the anniversary of registration / incorporation	3,600	140	2,610	3,600	105
If delivered more than 9 months after the anniversary of registration / incorporation	4,800	140	3,480	4,800	105
For registering any other document required to be delivered to the Registrar	N.A.	20	<	free of charge	>

Note

1) In addition to the registration fee, a company has to pay a capital fee of \$1 for every or part of \$1,000 of the nominal share capital subject to a maximum fee

of \$30,000 per case

- 2) The amount of the registration fees depend on the number of members as stated in the articles

