

**Response to the submission from
the Hong Kong Association of Banks**

- (1) The date upon which the subject of the 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 chargees who would be most familiar with the nature of their own particular businesses.

The Companies Registry ("CR") proposes to introduce a new field in the form used for reporting mortgage or charge details to the CR (Form M1). It will require the presentor to report the date on which the property in question was brought into Hong Kong. Whilst no particular evidence or declaration is to be required, the form will need to be signed by either the non-Hong Kong company or chargee concerned. Indeed, over 90% of the charges are reported to the CR by the chargee rather than the chargor.

- (2) The Form M1 will be accepted for registration in cases where the field for the "date of creation" of the charge has been completed by inserting the date of the charge instrument in question. Very often, the date of creation of the charge and of the instrument (or document) creating the charge will be the same. However, there are some cases where charges are considered by the chargee as having been created by action subsequent to the execution of the charging instrument, particularly where complicated financial arrangements are concerned. It is also possible that charges may be created by action or by oral agreement alone. Therefore, the HKAB's proposal for using the reference of the "date of document" may not be practicable.

If the non-Hong Kong company has created charges over property which is not yet in Hong Kong at the time of the charge, there is no need for the non-Hong Kong company registering such a charge when the property is not located in Hong Kong as this would contravene the principle of legislation not having extra-territorial effect. Neither the UK, Australia nor Singapore (they have similar provisions in relation to registration of charges affecting property which is brought in the jurisdiction) requires evidence of the date when the property subject to a charge was brought into the jurisdiction. The signature of the authorized person on the specified form (whether on behalf of the chargor/chargee) suffices.

It would only be in exceptional circumstances that a Form M1 would be rejected for registration: where the location of the charged property is unambiguously stated as being situated outside Hong Kong, the 5 week period from the date of creation or date of acquisition had already lapsed and the presenting party had not completed the field showing the date on which the property was brought into Hong Kong.

- (3) The basic rule for registration of a charge is governed by Section 80 of the Companies Ordinance (“CO”) which requires registration of charges within 5 weeks after the date of their creation. Section 91 extends the application of Part III of the CO to charges on property in Hong Kong of a non-Hong Kong company registered under Part XI. It is necessary to apply different provisions to the registration of charges on property owned by non-Hong Kong company to cater for the various scenarios pertaining to the property and charge in question. We consider that the decision to register and when to register will be a commercial decision for each company to take, having regard to the nature of the charge and of the company’s business.

It should be noted that both the existing and proposed Section 91 only requires registration of charges over property situated in Hong Kong. If banks enter into a charge over property in Hong Kong with a non-Hong Kong company under the proposed legislation, they may submit the charges for registration as they are now doing without changing their operating procedures. They may also decide whether or not to take advantage of the exemption offered by the new provision (Section 91(4)) if they are certain that the property will remain in Hong Kong for less than 5 weeks after the relevant date.

Under the proposed amendments, charges created by non-Hong Kong companies over intangible property will not normally be rejected from registration if the chargors or chargees decide to submit the same for registration.

In conclusion, the proposed amendments will not bring about drastic changes to the registration of charges. The major change regarding registration of charges is to impose a requirement that non-Hong Kong companies must be registered under Part XI before they submit charges to the CR for registration.

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