

Security interests in the BVI

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| Creation of Security and Governing Law

All British Virgin Islands companies are governed by the BVI Business Companies Act, 2004 (the "BCA") and are often referred to as "business companies" (a "BC").

In this briefing we discuss the creation of security interests over a BC's property. For information relating to the creation of security over shares in a BC, please see our briefing "BVI Shares Security."

A BC may, by an instrument in writing, create a charge over its property.

Recognising the international nature and usage of BCs, the BCA helpfully provides that the governing law of a charge created by a BC may be the law of such jurisdiction as may be agreed between the BC and the secured party, and that the charge shall be binding on the BC to the extent, and in accordance with, the requirements of that governing law.

This statutory recognition of the choice of law provides clear certainty in relation to a key and fundamental issue which could otherwise be uncertain if it were left to common law.

Requirements of the jurisdiction in which the secured assets are located (and, potentially, in the jurisdiction of incorporation of the secured party) with respect to perfection, validity and enforceability should of course also be considered when taking security.

| Registration of security

There are no filing or registration requirements in the BVI which affect the validity of a charge when a BC grants security over its property. However, particulars of the security interest created by a BC should be filed, in the approved form, with the BVI Registrar of Corporate Affairs (the "Registrar") in order to obtain a priority ranking for the secured party. This registration can be

made by either the BC (or a person authorised to act on its behalf) or the secured party (or a person authorised to act on its behalf).

Upon receipt of the filing mentioned above, the Registrar establishes (or updates) the public Register of Registered Charges (the “Public Register”) and issues a certificate of registration of charge. A copy is sent to the BC and to the secured party, although in practice, one original certificate is sent to the person who made the filing. The Registrar also states in the Public Register, and on the certificate of registration, the date and time on which the particulars of the security interest were registered. The certificate issued is conclusive proof that the filing requirements of the BCA have been complied with and that the security interest referred to in the certificate was registered on the date and time stated in the certificate.

There is no deadline for filing the particulars of the security interest with the Registrar. However, as a priority ranking is created from the time and date of filing with the Registrar, the filing should be completed immediately to minimise the risk of a subsequent competing charge holder taking priority. In addition, the BC is required to promptly register the security interest on its internally maintained register of relevant charges (the “Private Register”) and provide a certified copy of the same to the secured party.

Whilst the filing of the particulars of a charge in the Public Register is optional (although advisable for priority purposes), the entry of the security interest in the BC’s Private Register is mandatory under Section 162 of the BCA

Section 162 of the BCA provides that a BC shall keep a register of all relevant charges created by the BC showing:

- the date of its creation or, if the charge is a charge existing on property acquired by the BC, the date on which the property was acquired;
- a short description of the liability secured by the charge; a short description of the property charged;
- the name and address of the trustee for the security or, if there is no such trustee, the name and address of the chargee (the secured party);
- unless the charge is a security to bearer, the name and address of the holder of the charge; and
- details of any prohibition or restriction, if any, contained in the instrument creating the charge on the power of the BC to create any future charge ranking in priority to or equally with the charge.

A copy of the Private Register shall be kept at the BC’s registered office or at the office of its registered agent. A BC that fails to enter particulars of the charge in its Private Register commits an offence and is liable to a fine.

A BC must communicate any changes to the charges recorded in its Private Register to its registered agent within 14 days of the change occurring.

Determining existence of and information relating to security

As there is no requirement for copies of the underlying security documents or Private Register to be filed with the Registrar, the usual way in which to determine whether prior security interests have been granted by a BC is a combination of two information requests: first, conducting a search of the records of the BC publicly available at the Registry of Corporate Affairs to determine if any particulars of security interest have been filed publicly and the second, to request this information from the registered agent of the BC. The registered agent of the BC will only release this information upon receiving the consent of its client of record to do so.

Priority between security interests

Priority as between competing security interests created by a BC is determined (from a BVI law perspective only) by registration of the particulars of the security interest with the Registrar in the Public Register as noted above. Section 166 of the BCA provides that if a relevant charge has been registered with the Registrar in accordance with Section 163 of the BCA, it will have priority over; (i) a relevant charge that is subsequently registered with the Registrar in accordance with Section 163 of the BCA; and (ii) a relevant charge that is not registered with the Registrar in accordance with Section 163 of the BCA. As such, the public filing governs priority.

For BC's which were former International Business Companies (a "re-registered company"), following their automatic re-registration on 1 January 2007 pursuant to the BCA, the old regime under the International Business Companies Ordinance (Cap 291), relating to determination of priority among security interests does not apply to such companies. Instead, Paragraph 38 of Schedule 2 of the BCA provides that in the case of a re-registered company, security interests that were created by it before 1 January 2007 may be registered with the Registrar in accordance with Section 163 of the Act.

As to the priority of security interests created by a re-registered company prior to 1 January 2007 under the old regime (and not subsequently registered under the new regime), Section 167 of the BCA provides that charges created prior to 1 January 2007 shall continue to rank in the same order in which they would have ranked had Section 166 of the BCA not come into force. This means that any security interests registered in the Private Register of a re-registered company prior to 1 January 2007 will continue to enjoy a priority position as against any new security created by that company (whether particulars of that new security interest are filed in the Public Register or not).

Therefore, in order to determine the priority of security interests in respect of a re-registered company, both the Private Register of the re-registered company and the Public Register will need to be examined.

It is worth noting the exceptions to the above contained in Section 168 of the BCA. The order of priorities of charges can be varied by agreement or consent of the holder(s) of a charge. Also, a registered floating charge will be postponed to a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the BC to create any future charge ranking in priority to or equally with the floating charge

Consequences of non-compliance with registration requirements

Failure to file particulars of a security interest with the Registrar or to update its Private Register will not affect the validity of the security interest as against the BC or any liquidator or administrator on its insolvency, but may result in a loss of priority. An unregistered fixed security interest will generally rank behind registered security interests but before any subsequent unregistered security interests, statutory preferred creditors and the costs of a liquidator or administrator.

Release of security

A charge should be released in accordance with its terms and governing law. A notice of satisfaction or release of the charge should be registered in the BVI to update the BC's records.

The registered agent of the BC should not amend the BC's records to show the discharge of a security interest without proof of the secured party's release.

In order to register a release of a charge that has been registered in the Public Register, a BC is required to file a notice of satisfaction or release in the approved form, stating whether the charge has been paid or satisfied in full or whether the charge has ceased to affect the property, or any part of the property. Such notice of satisfaction or release may be filed by either the BC (or a legal practitioner in the BVI authorised to act on its behalf), or the registered agent of the BC, or a legal practitioner in the BVI acting on behalf of the chargee (the secured party). It is usual practice for a deed of release or letter to be signed by the secured party which accurately sets out a description of the security it purports to release and/or a description of the property of the BC that has ceased to be affected by the charge. We would recommend that, in order to ensure a smooth, timely process, the registered agent of the BC attends contemporaneously to the updating of the BC's own Private Register together with the filing of a notice of satisfaction or release of the charge with the Registrar.

In accordance with the BCA, following its approval of the filing of a notice of satisfaction or release of the charge, the Registrar will issue a certificate of discharge and send a copy to the BC and to the secured party. In practice, however, the Registrar tends to send one original certificate to the person who made the filing of the release. The Registrar, if satisfied that the notice of satisfaction or release of the charge has been correctly completed, states in the Public Register, and on the certificate issued, the date and time on which the notice filed was registered.

Recent Developments

Global markets are currently adapting to the unprecedented challenges that have been brought about by the recent pandemic and this includes making amendments to corporate and finance legislation and insolvency regimes.

The BVI has been able to continue its financial services business without interruption during this time due to its robust business continuity plan already in place due to the extreme weather that the BVI experiences from time to time. The BVI will continue to keep its corporate and insolvency regimes under review and the laws of the markets in which it operates.

The pandemic has also accelerated a raft of consensual restructurings and refinancings, including the facilitation and utilisation of coronavirus business interruption loan scheme facilities. This has brought about unique considerations with regards to security, guarantees and priority arrangements.

Ogier has a full service global corporate restructuring and corporate recovery team which spans across multiple jurisdictions and disciplines, which is well equipped to provide responsive and commercial solutions for clients.

For more information regarding restructuring and corporate recovery measures in the BVI, please refer to our recent publications or reach out to a member of our [Restructuring and Corporate Recovery team](#).

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