

Creating and registering security interests over assets of a BVI Business Company

Entering into financing transactions with BVI Business Companies (**BCs**) is a familiar part of the global financial services landscape given the use and presence of BCs. The ease of use of BCs in these types of transactions is facilitated to a large extent by the flexibility of the BVI Business Companies Act, 2004 (the **BCA**). As it is common for BCs to maintain their assets outside of the British Virgin Islands, the focus of this note will be on what should be done under the BCA in relation to the creation and registration by a BC of security over its foreign assets.

This note only addresses the security registration regimes required under the BCA and does not purport to address any of the specific asset based registration regimes which also apply to certain types of security created over certain specific asset types (ie security over shares in a BC, registered ships and aircraft, or land within the BVI).

Creation of security

Under the BCA, a “charge” is defined as, “any form of security interest, over property, wherever situated, other than an interest arising by operation of law”. Subject to its memorandum and articles of association, section 161(1) of the BCA allows a BC to create a charge over its property by way of an instrument in writing and while there is no statutorily prescribed form which the security document creating the charge must take, it is clear that the governing law of the relevant document may be agreed between the BC and any other parties thereto and insofar as this complies with any governing law requirements, this will be acceptable for BVI law purposes. Within the context of cross border asset backed financing transactions, this is particularly useful as it permits factors other than the domicile of the chargor to drive governing law considerations. The statutory framework of the BCA in relation to the choice of law allows for a degree of certainty in these types of arrangements that common law could not provide.

Registration of security

The BCA prescribes that a BC must keep a register of charges which records details of the security interests created by it, details of any variations to those interests and details of when those interests are eventually released. However, the filing or registration requirements in the BVI have no bearing on the validity of a security document or the security interests created thereunder. The relevant filings serve to (i) protect and determine priority under BVI law in the case of public registration and (ii) comply with statutory obligations in the case of private registration. So far as the procedural requirements go, it should be noted that the actual security document need not be filed. Rather, in accordance with the BCA, entries to a BC’s privately maintained register of charges need only contain the following details:

- 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 charge;
- 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.

Where a BC creates a security interest over its own assets, there are two separate and distinct registrations which need to be considered under the BCA:

- there is a public registration in the register of registered charges maintained by the BVI Registrar of Corporate Affairs (the **Registrar**) under section 163 of the BCA; and
- there is a private registration in the register of charges maintained by the BC (or its registered agent) at its registered office or at the office of its registered agent under section 162 of the BCA.

Under BVI law, only the private registration is mandatory and if a BC fails to enter particulars of a security interest in its register of charges, it can be subject to a fine of US\$5000.

In relation to public registration, particulars of any security interest created by a BC may be filed, in the approved form, with the Registrar. Public registration can be made by the registered agent or a BVI lawyer acting on behalf of the BC or the secured party. The usual process is for an application to be made by submitting a "Form R401" containing the details of the security document to the Registry of Corporate Affairs together with the applicable filing fee using the BVI Financial Services Commission's online filing system (VIRRGIN).

There is no legally prescribed time limit within which particulars of a security interest must be registered with either the Registrar or in the BC's own register of charges, however, since priority is determined in accordance with the date of registration in the register of registered charges, security interests should be registered promptly after they are created in order to establish a priority ranking.

Priority

Even though it is not mandatory under BVI law and is not necessary for the enforceability of security interests, it is typically a condition of financing and other transactions where a BC grants security over its assets for such filings to be made with the Registrar. Such filings are driven by the desire of secured parties to ensure that the priority of their security interests is preserved and ranks ahead of any other potential competing security under BVI law. Ensuring that any public filing is made as soon as possible following granting of the security effectively minimises the risk of a subsequent competing charge holder taking priority over the same assets.

Registering security interests in the public register will give it priority over (i) all security interests which are registered against a BC in the public register subsequently; and (ii) all security interests which are created by the BC after the "commencement date" under the BCA which go unregistered. (The commencement date is defined as either the date upon which a BC (a) was formerly registered under older companies' legislation in the BVI or (b) was formally re-registered as a BC under the BCA). Where relevant, there are specific rules which apply to security interests created prior to the commencement date and given their complexity you should speak to your usual Harneys contact for further advice on this area.

While public registration does go some way towards addressing the question of priority it should be borne in mind that (i) the priority of security interests can be varied with the consent of the holders of the relevant charges and (ii) the priority of a registered floating charge is postponed to a subsequently registered fixed charge (but not an unregistered fixed charge) unless the floating charge contains a restriction (a "negative pledge") on the power of the BC to create any future charge ranking in priority to or equally with the floating charge.

Once public registration is complete the Registrar will stamp the Form R401 and issue a certificate of registration. This certificate confirms the date and time the security interests were registered and once complete, the Registrar will send out the stamped Form R401 and the corresponding certificate of registration to both the BC and the secured party as conclusive proof that the registration has been done.

Variation of security

In some instances, where particulars of security interests have been registered and the parties later agree to vary the terms of the security requirements, relevant details of any such variation or amendment to the existing security documentation can and should be registered. As with initial security registrations, any such filings can be made a registered agent or a BVI lawyer acting on behalf of the BC or the secured party can attend to the filing of particulars of any a variation. As with the initial registrations, public filing of the relevant variation is done by completing and filing the necessary forms with the Registrar, who, upon processing of the application for variation, will issue a certificate of variation that again confirms a date and time stamp for registration of the variation.

Release of security

A notice of satisfaction or release (either in whole or in part) should also be filed with the Registrar where any security interests over the assets of a BC have been released or discharged (whether partially or in whole) in accordance with the terms and governing law of the relevant security documents. In keeping with best practice, no registered agent or BVI lawyer should amend the BC's public or private registers to reflect any discharge of any registered security interests without written evidence of release/discharge of those interests by the relevant secured party. This means that where a notice of release or notice of satisfaction is to be filed on behalf of the BC by its registered agent or a duly instructed BVI lawyer, the notice of release or notice of satisfaction must be signed by/on behalf of the secured party or application for release or satisfaction must be accompanied by the notice (which must in turn be supported by a statutory declaration verifying the matters stated in the notice). Ideally, the BC's private register should be updated contemporaneously with the public register but in practice, this tends to follow.

Once the notice of release (or partial release) or notice of satisfaction has been filed, the Registrar processes the application for de-registration, issues a certificate of release (or partial release) or a certificate of satisfaction confirming the date and time of the de-registration of the relevant security interests and forwards a copy of the relevant certificate to each of the BC and the secured party.

Commentary

Harneys can assist in respect of all aspects of security registration, including the drafting of the relevant security particulars to be entered in the public register of registered charges and private register of charges, assisting with variations and ultimately with the release and/or de-registration of the relevant security interests. While this may be a fairly simple process, failure to attend to any necessary filings could have serious repercussions for both the BC and the secured party and, where this constitutes a contractual condition, should be done as a matter of course to ensure good corporate governance protection for all stakeholders.



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