

British Virgin Islands New regime for charges

Harney Westwood & Riegels
Tortola

The new BVI Business Companies Act (Act) introduces a new regime for the creation, registration and priority of charges that differs considerably from the position under the IBC Act.

The new regime applies to a charge defined as "any form of security interest, over property, wherever situated, other than an interest arising by operation of law." It is not clear whether retention of title in respect of goods, or finance leases, are intended to be caught within the definition, but it is clear from the definition that the security interest must be over property, including future property, and therefore negative-pledge clauses would not be within its terms.

Creation of security

The Act provides that, subject to its memorandum and articles, a company may, by instrument in writing, create a charge over its property. The requirement of an instrument in writing is made mandatory and, as a matter of BVI law at least, it is not possible to create consensual security by other means, for example, by deposit of shares together with their transfer forms signed in blank.

Company's register of charges

Under the Act the company must keep a register of charges created by it on or after the commencement date, that is, January 1 2005. However, there is no time limit within which they must be entered on the register and failure to register particulars of a charge does not affect its validity or enforceability.

Optional registration in the Register of Registered Charges

This is a new feature introduced by the legislation. A charge created on or after January 1 2005 can be registered with the Registrar of Corporate Affairs in a Register of Registered Charges (Register) that the Registrar must keep in relation to each company. Failure to register does not affect either the validity or the enforceability of the charge, but registration does affect the priority of charges created on or after January 1 2005.

Procedural aspects of registration

The application for registration can be made either by the company or the chargee. If the Registrar is satisfied that the requirements as to registration have been met, the particulars of the charge will be registered in the Register. A certificate of registration of the charge will be issued and sent to the company and to the chargee.

The company or the chargee may also register variations in the terms of the charge. If a charge registered in the Register ceases to affect the property of the company, the company must file a notice specifying that the property has ceased to be affected by the charge.

Priorities

The Act is clear as to priorities for companies first incorporated under it because any charge created after January 1 2005 that is registered in the Register has priority over a subsequently registered charge and over an unregistered charge created on or after January 1 2005.

The situation is more complex for companies initially incorporated under the IBC Act that subsequently become companies incorporated under the Act. There are two distinct time periods to consider. Security interests created before January 1 2005 will retain their existing ranking. Security interests created on or after January 1 2005 by an IBC have the potential to cause some uncertainty at the point at which the IBC is reregistered under the new Act due to a lacuna in the current drafting of the Act that could potentially leave a priority gap if the position is not properly considered and addressed. Clearly this uncertainty will be at its most acute at the beginning of 2007 when all then existing IBCs will automatically be reregistered under the Act. The position should be manageable and will in any case be temporary because the Amendment Act that government is committed to enact by the end of 2005 should address any problematic issues. Pending this the usual covenant packages contained in all relevant security documents will provide a degree of comfort in that a combination of representations as to priority, negative pledges and further assurance provisions should enable secured creditors to adequately protect their position in most cases.

A further possibility is that the potential priority gap together with the advantages of a creditor-driven registration regime will lead to secured creditors requiring IBCs to

reregister under the new Act at the time they enter into substantial transactions before 2007.

These priority rules are subject to two qualifications: the priorities can be varied by express consent of the charge holders or agreement between chargees, and registered floating charges are postponed to a subsequently registered fixed charge unless the floating charge contains a negative pledge clause.

The priority system in the new Act is not intended to be exhaustive, for it does not deal with the priority of security arising by operation of law. The interaction between this priority system and other priority systems, for example, in relation to real property in the BVI or maritime matters, should also be dealt with in the Amendment Act.