

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

Entering into security 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 which is governed by a foreign law.

Given the constraints of this note, security interests which are created over specific types of assets such as security over shares in a BC, registered ships and aircraft, or land within the BVI, all of which have separate asset based security registration regimes, would require their own discussion at a later time or may be found elsewhere on our website.

Creation of security

Subject to its memorandum and articles of the association, section 161(1) of the BCA allows a BC to create a charge over its property by an instrument in writing. A charge, being any form of security interest over property, wherever situated and an instrument in writing is the security document dealing with the asset. The BCA does not prescribe the form of the security document or what provisions must be included, so long as it conforms to the requirements of the foreign law. This is particularly useful given the global use of BCs, as it allows the governing law of a charge to be a jurisdiction agreed between the BC and the secured party and following on from this the security document will be binding on the BC based on the requirements of the agreed governing law. 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 do not affect the validity of a security document or the security interests created thereunder. It should also be noted that there is no requirement for the actual security document to be filed as the register of charges is only required to reflect certain information contained in that document. Details of the approved form are set out in Section 162 of the BCA and provide 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
- 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 Company creates a security interest over its own assets, there are two different registrations which need to be considered under the BCA:

- There is a public registration in the register of registered charges maintained by the Registrar of Corporate Affairs under section 163 of the BCA; and
- There is a private registration in the register of charges maintained by the Company (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. If a Company fails to enter particulars of a security interest in the 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 BVI Registrar of Corporate Affairs (the **Registrar**). Public registration can be made by the BC, its 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, security interests should be registered promptly after they are created in order to establish a priority ranking.

Priority

Even though it is not mandatory, public registration should be undertaken as its fundamental purpose is that it gives the security interest priority under the BCA from the time and date of filing with the Registrar. This effectively minimises the risk of a subsequent competing charge holder taking priority over the same asset. To be clear, public registration only affects priority of the security interests as failure to register will not otherwise affect the validity of a security interest. Nor is registration necessary to ensure that the security interest is enforceable against third parties or any liquidator in the event of the BC’s insolvency.

Registering a security interest in the public register will give it priority over (i) all security interests which are registered against the Company in the public register subsequently; and (ii) all security interests which are created by the Company after the “commencement date” which are not registered. (The commencement date is defined as either (a) the date upon which a BC was formerly registered under older companies’ legislation in the BVI or was formally re-registered as a BC under the BCA). 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 to address 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 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 was 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 a security interest has been registered and the parties later agree to vary the terms of the security requirements, such a variation or an amendment to the security undertaking can and should be registered. Here again the BC, its Registered Agent or a BVI lawyer acting on behalf of the BC or the secured party can attend to the filing of a variation. As with the initial registration the variation is done by completing and filing the necessary forms with the Registrar, who will issue a certificate of variation that again confirms the date and time on which the variation was registered.

Release of security

A notice of satisfaction or release (either in whole or in part) should also be filed with the Registrar where a security interest over the assets of a BC has been released in accordance with the terms of the security documents and the governing law. The registered agent of the BC or BVI lawyer acting for 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. This means that where a notice of release 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 the notice must be supported by a statutory declaration verifying the matters stated in the notice. The registered agent of the BC should also attend to the updating of the BC's own private register of charges together with the filing with the Registrar.

Once the notice of release or notice of satisfaction has been filed, the Registrar 'de-register' the relevant register entry and issue a certificate of release or a certificate of satisfaction confirming the date and time of the de-registration and send a copy to the BC and to the secured party.

Commentary

Harneys can assist on 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 interest. While this may be a fairly simple process, failure to attend to necessary filings could have serious repercussions for both the BC and the secured party and should be done as a matter of course to ensure good corporate governance protection for all stakeholders.



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