

Creation of security by a BVI limited partnership

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One of the major advantages of the BVI as an international financial centre is that its legislation provides a simple, flexible and robust regime for secured financing transactions that is attractive to lenders.

In most cases, the assets of a BVI limited partnership (LP) will be located outside the BVI. This guide examines the key BVI aspects of the creation by a BVI LP of security over its foreign assets under foreign law.

Security basics

The Limited Partnership Act, 2017 (the **LP Act**) states that, subject to the limited partnership agreement of the relevant LP:

- an LP with legal personality may, by instrument in writing, create a charge over the assets of the partnership; and
- the assets of a limited partnership without legal personality may be the subject of a charge, whether or not the general partners of the LP, or any of them, are BVI companies or other types of body corporate.

The term 'charge' is defined broadly to mean any form of security interest, over an asset, wherever situated, other than an interest arising by operation of law and includes a floating charge.

Instrument in writing

Whilst the LP Act requires that security over the assets of an LP with legal personality be created by instrument in writing, the LP Act does not require a security document relating to foreign assets to be in any particular form or to contain any prescribed provisions.

Governing law

The LP Act allows a charge over an LP asset to be governed by foreign law, giving the parties freedom to choose any law they consider appropriate to govern it. Any such charge will be binding on the LP and the general partners in accordance with the governing law.

No stamp duty

No BVI stamp duty is payable on the creation of security by an LP, or any transfer on the enforcement of the security, over any of its foreign assets.

No formalities

The security document does not need to be notarised or apostilled.

No perfection requirements

There are no perfection requirements under BVI law where an LP creates security over its foreign assets under a security document governed by foreign law.

First steps

Before taking security over an LP's assets, the security taker should:

- review the LP's limited partnership agreement to ensure that there are no provisions that prohibit the creation of, or might hinder or impair the enforcement of, security over its assets;
- search the records maintained by the Registrar of Limited Partnerships (the **Registrar**) in respect of the LP; and
- review the LP's register of charges, or obtain confirmation that it has not created any security over its assets.

Register of charges

Duty to keep register

An LP must keep a register of all charges created over the LP's assets. The original or a copy of an LP's register of charges must be kept at its registered office or (if different) the office of its registered agent. The register of charges is a private record and is not open to inspection by the public.

Where a charge is created or a change occurs in the details of a registered charge, notice must be forwarded to the LP's registered agent within 14 days of the change occurring.

If an LP fails to comply with the obligations mentioned above, the LP and each general partner commits an offence and, on conviction, will be liable to a fine of up to US\$5,000, but the validity of the security or the admissibility in evidence of the security document will not be affected.

Details to be recorded

For each charge created over LP assets, the LP must record in its register of charges:

- the date and time of registration of the charge;
- the date on which the security interest was created or (if the LP acquired an asset subject to an existing security interest) the date on which the asset was acquired;
- a short description of the liability secured by the security interest;
- a short description of the secured asset;
- the name and address of the trustee for the security holders or (if there is none) each security holder;
- the name and address of the security taker; and
- details of any prohibition or restriction in the security document on the power of the LP to create any future security interest ranking in priority to, or equally with, the security interest.

Registration

Registering particulars of security

The LP Act provides a system under which particulars of security created by an LP over its assets may be registered with the Registrar. The particulars are registered in the Register of Registered Charges for the LP, which is maintained by the Registrar. An LP's Register of Registered Charges is open to inspection by the public.

The security document itself is not filed or registered. Only the particulars relating to the security interest and the security document that are specified in the LP Act and the Limited Partnership Regulations, 2018 are registered. This is done by completing and filing the necessary form with the Registrar using the BVI Financial Service Commission's online filing system.

Registering particulars of security is an optional, rather than a mandatory, registration. However, a properly advised security taker will, when taking security over an asset of an LP with legal personality¹, require the registration to be made because:

- under the LP Act, the priority of competing security interests created over the same asset by an LP with legal personality is determined by the date and time on which particulars of the security interests were registered; and
- it puts third parties on notice of the existence of the security interest and, under the LP Act, a person is taken to have notice of any particulars of security that have been registered by the Registrar.

It is also in the interests of an LP with legal personality to make the registration because the security document or (where relevant) the underlying credit agreement will normally include a representation that the security interest is first ranking and/or there will be an event of default if the security interest ceases to be first ranking.

It is possible for LPs without legal personality to apply to register particulars of a security interest in the Register of Registered Charges, although the provisions of the LP Act dealing with priority and constructive notice of registered charges (as described above) do not apply to LPs without legal personality. It remains to be seen whether lenders lending to LPs without legal personality will wish to take advantage of this registration regime in practice. Without legal personality, an LP cannot legally own assets and the relevant assets will be owned by the general partner(s) of the LP, who hold such assets on trust for the LP. It is, accordingly, the general partner(s) of the LP, acting in such capacity, who must grant any security interest in the assets. The question of priority would then depend upon the type of vehicle and jurisdiction of formation applicable to each general partner.

Who may register particulars?

The LP, a general partner, the security taker or a BVI lawyer acting on behalf of the LP or the security taker may make an application to register particulars of security.

If the security taker is located outside the BVI, the particulars must be accompanied by a written notice stating the name and address of a person located in the BVI who is authorised on behalf of the security taker to receive documents from the Registrar.

By when must particulars be registered?

The LP Act does not specify a time by which particulars of security must be registered, however, the security taker should register particulars as soon as possible after the security interest is created to ensure that a later security interest is not registered before it.

Failure to register particulars

If the security taker fails to register particulars of security:

- neither the validity and enforceability, nor the admissibility in evidence, of the security document will be affected; but
- if an LP with legal personality creates a later security interest over the same asset and particulars of the later security interest are registered, under the LP Act, the security interest will rank after the later security interest.

Certificate of registration

Once particulars of a security interest have been registered, the Registrar will:

- issue a certificate of registration which confirms the date and time on which the particulars were registered; and
- send a copy of the certificate of registration to each of the LP and the security taker.

¹ For more information, please see our guide on BVI limited partnerships under the Limited Partnership Act, 2017 [BVI limited partnerships under the Limited Partnership Act, 2017](#)

The certificate of registration is conclusive proof of the date and time on which the particulars were registered.

Variation of particulars

Registration

Where particulars of security created by an LP are registered and the terms of the security are later varied by the parties, the variation can (and should) be registered by the Registrar in the LP's Register of Registered Charges. This is done by completing and filing the necessary form with the Registrar using the BVI Financial Service Commission's online filing system.

Who can register?

Again, the LP, a general partner, the security taker or a BVI lawyer acting on behalf of the LP or the security taker may register a variation to particulars of security.

Certificate of variation

Once the variation has been registered, the Registrar will:

- issue a certificate of variation which confirms the date and time on which the variation was registered; and
- send a copy of the certificate of variation to each of the LP and the security taker.

The certificate of variation is conclusive proof of the date and time on which the variation was registered.

Release of security

Notice of satisfaction or release

Where a security interest over assets of an LP registered in the Register of Registered Charges has been released (in whole or part), a notice of satisfaction or release specifying the assets that have been released may be filed with the Registrar.

A general partner, the registered agent of the LP or a BVI lawyer acting on behalf of the general partner or security taker may file a notice of satisfaction or release. If the notice is filed by or on behalf of the LP, it must be signed by the security taker (or a registered agent or BVI lawyer acting on behalf of the security taker) or accompanied by a statutory declaration verifying the matters stated in the notice.

In addition to filing the notice of satisfaction or release, it will also be necessary for the LP to record the release in its internal register of charges.

Certificate of release

Once the notice of satisfaction or release has been registered, the Registrar will:

- issue a certificate which confirms the date and time on which the release was registered; and
- send a copy of the certificate to each of the LP and the security taker.

From the date and time stated in the certificate, the earlier security interest is taken not to be registered in respect of the assets specified in the notice.

Priority under the LP Act

The principal purpose of registering particulars of security created over the assets of an LP with legal personality with the Registrar is that the registration provides the security interest with priority over any later registered or unregistered security interest over the same asset from the date and time of registration. This general position is subject to the following exceptions:

- a security taker may consent or agree to vary the priority of the security taker's security interest; and
- a registered floating security interest will rank after a later registered fixed security interest (but not after an unregistered later fixed security interest) unless the floating security interest prohibits or restricts the LP from creating any future security interest ranking in priority to, or equally with, the floating security interest.

In the case of an unregistered security interest, the common law priority rules continue to apply. The general position under the common law, which is subject to a number of exceptions, is that priority between competing security interests is determined by the dates on which the security interests were created.

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