

Creation of security by a BVI company

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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.

With the exception of shares or other securities issued by another BVI company, in most cases the assets of a BVI company will be located outside the BVI. This guide examines the key BVI aspects of the creation by a BVI company of security over its foreign assets under foreign law.

For information about creating security over the shares in a BVI company, refer to our guide entitled '[Taking security over shares in a BVI company](#)'.

Security basics

The BVI Business Companies Act, 2004 (as amended) (the **Act**) gives a BVI company (a **Company**) the power (subject to its memorandum and articles of association) to create security over its assets to secure an obligation owed by it or another person.

Instrument in writing

The basic requirement of the Act is that a Company must create security over its assets by an instrument in writing. The Act does not require a security document relating to foreign assets to be in any particular form or prescribe any provisions that must be included in it.

Governing law

The Act allows a security document to be governed by foreign law and gives the parties the freedom to choose any law they consider appropriate to govern it. The security document will be binding on the Company in accordance with, and the remedies available to the chargee (being the recipient of the security) will be determined by, the chosen law.

Stamp duty

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

Formalities

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

Perfection requirements

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

First steps

Before taking security over a Company's assets, the chargee should:

- review the Company's memorandum and articles of association to ensure that there are no provisions that prohibit it from creating, or might hinder or impair the enforcement of, security over its assets;
- search the records maintained by the BVI Registrar of Corporate Affairs (the **Registrar**) in respect of the Company; and
- review the Company's register of charges or get confirmation that it has not created any security over its assets.

Register of charges

Duty to keep register

A Company must keep a register of charges which records details of each security interest created by it.

The original or a copy of a Company'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.

If there is any change to the existing security interest or details of such security interest recorded in the Company's register of charges which is kept at the office of its registered agent, the Company must provide details of the change to its registered agent within 14 days of the change.

If the Company fails to comply with the obligations mentioned above, it 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 security interest created by it, a Company must record in its register of charges:

- the date on which the security interest was created or (if the Company 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 any trustee for the security or, if there is none, the chargee;
- except in the case of an issue of bearer debt securities, the name and address of the chargee; and
- details of any prohibition or restriction in the security document on the power of the Company to create any future security interest ranking prior to, or equally with, the security interest.

Registration

Registering particulars of security

The Act provides a system under which particulars of security created by a Company over its assets may be registered with the Registrar. The particulars are registered in the Register of Registered Charges for the Company that is maintained by the Registrar. The Company'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 Act are registered. This is done by completing and filing the necessary form with the Registrar using the BVI Financial Services Commission's online filing system.

Registering particulars of security with the Registrar is an optional, rather than a mandatory, registration. However, a properly advised chargee will require the registration to be made because:

- under the Act, the priority of competing security interests created over the same asset 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 Act, a person is taken to have notice of any particulars of security that have been registered with the Registrar.

It is also in the interests of the Company to make the registration because the security document or (where relevant) the 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.

Who may register particulars?

Only the Company or a registered agent or a BVI lawyer acting on behalf of the Company or chargee may register particulars of security.

If the chargee is located outside the BVI, the particulars should include the name and address of a person located in the BVI who is authorised on behalf of the chargee to receive documents from the Registrar.

By when must particulars be registered?

The Act does not specify a time by which particulars of security must be registered, however, a chargee 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 chargee 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 the Company creates a later security interest over the same asset and particulars of the later security interest are registered, under the Act, the security interest will rank after the later security interest.

Certificate of registration

Once particulars of security 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 Company and the chargee.

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 a Company 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 Company's Register of Registered Charges. This is done by completing and filing the necessary form with the Registrar using the BVI Financial Services Commission's online filing system.

Who can register?

Again, only the Company or a registered agent or a BVI lawyer acting on behalf of the Company or chargee may register a variation to particulars of security.

If the chargee is located outside the BVI, the variation should include the name and address of a person located in the BVI who is authorised on behalf of the chargee to receive documents from the Registrar.

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 Company and the chargee.

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 the assets of a Company 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.

The Company or a registered agent or a BVI lawyer acting on behalf of the Company or chargee may file a notice of satisfaction or release. If the notice is filed by or on behalf of the Company, it must be signed by the chargee or a registered agent or a BVI lawyer acting on behalf of the chargee 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 Company to record the release in its 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 Company and the chargee.

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

Priority under the Act

The principal purpose of registering particulars of security with the Registrar is that it gives the chargee priority under the Act from the date and time of registration.

The general position regarding priority under the Act is that where particulars of security for a security interest created by a Company over an asset are registered, that security interest will have priority over any later registered or unregistered security interest over the same asset. The general position is subject to the following exceptions:

- a chargee may consent or agree to vary the priority of the chargee'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 Company 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.

Special rules apply to security interests created prior to the commencement of the Act by a Company that was originally incorporated under the International Business Companies Act 1984 (now repealed) and re-registered under the Act.

Contacts

A full list of contacts specialising in Banking and Finance can be found [here](#).