

Legal Briefings

Legal Briefing: Creation of a security interest by a BVI business company and registering it in the British Virgin Islands

British Virgin Islands (“**BVI**”) business companies (“**BVI Companies**” and each a “**BVI Company**”) are widely utilized in structuring cross-border finance transactions. One of the key reasons for this is that the BVI provides a flexible and well-tested regime for secured financing transactions that is attractive to borrowers and lenders alike. The process for creating and registering security in the BVI is also straightforward and will not typically impact the timeframe of a proposed transaction.

In this Briefing, we address certain of the key BVI law points pertaining to the creation and protection of security by a BVI Company over its assets. For details with respect to the creation of security over BVI shares, please refer to our separate Legal Briefing entitled “Granting and protecting security over shares in a BVI business company”.

This Briefing does not consider the additional steps that may be necessary for the purposes of creating and protecting security over specific asset classes, such as BVI registered ships, or land located in the BVI.

1. Creation of security

Subject to its memorandum of association and articles of association (the “**M&A**”), section 28 of the BVI Business Companies Act (as amended) (the “**BCA**”) expressly permits a BVI Company to create security over any of its assets for the purposes of securing an obligation owed by it to another person. The BCA does not provide that the security document must be in any particular form, but it should be in writing and be signed by, or with the authority of, the BVI Company.

BVI law recognizes various forms of security over assets, including legal mortgages, equitable mortgages, charges and assignments by way of security. The type of security interest that is created will depend on the type of asset to be secured.

2. Execution formalities and regulatory approvals

BVI law does not prescribe a particular mode of execution with respect to security over the assets of a BVI Company and it is not necessary for such security to be certified, notarized or apostilled to make the security valid or enforceable from a BVI law perspective.

It is important to review the M&A of the relevant BVI Company to ensure compliance with any applicable signing formalities.

No regulatory approvals are necessary to create valid and enforceable security as a matter of BVI law in respect of security that is created over a BVI Company's assets.

3. Stamp duty and taxes

No stamp duty or taxes are payable with respect to the creation of security over the assets of a BVI Company or upon any transfer thereof in an enforcement as a matter of BVI law so long as the assets do not comprise land in the BVI, or shares in a subsidiary that has an interest in land in the BVI.

4. Governing law

The BCA expressly contemplates that security over the assets of a BVI Company may be governed by BVI or foreign law.

In cross-border finance transactions, it is relatively common for the governing law of a security document over the assets of a BVI Company to be aligned with the governing law of the principal finance documents or the *lex situs* of the secured asset. One advantage of adopting a foreign governing law clause in a security document is that it may make available certain additional remedies (such as appropriation) which are not available under BVI law. Care should however be taken to ensure that there are no conflicts of law issues where a security document is governed by foreign law. English, New York, Hong Kong and Singapore law are frequently adopted to govern security over the assets of a BVI Company and no major conflicts of law issues are likely to arise.

Where the security document is governed by foreign law, the security document must comply with the requirements of its governing law and the remedies available to a secured party are governed by that governing law and the terms of the security document.

5. Security deliverables

The BVI Company will typically be required to deliver the following documents to the secured party under the terms of the relevant security document and/or the other finance documents:

- i. a certified copy of its register of charges showing the security created over the secured assets (see further below);
- ii. a copy of the stamped particulars of charge and certificate of registration of charge issued by the BVI Registrar of Corporate Affairs (the "**Registrar**") with respect to the security created over the secured assets (see further below); and
- iii. a copy of the board resolutions of its board of directors authorizing:
 - a. its entry into and execution of the security document;
 - b. the filing of the relevant particulars of charge with the Registrar; and
 - c. the updates to be made to its register of charges.

6. Security protection steps

Register of charges

Pursuant to the BCA, a BVI Company must record particulars of the security created over any of its assets in its register of charges. The register of charges must include:

- i. the date of creation of the charge;
- ii. a short description of the liability secured by the charge;
- iii. a short description of the property charged;
- iv. the name and address of the secured party;
- v. the name and address of the holder of the charge; and
- vi. details of any prohibition or restriction, if any, contained in the security document on the power of the BVI Company to create any future charge ranking in priority to or equally with the security.

There is no statutory timeframe within which the register needs to be updated. However, a well-advised secured party will request that the register is updated promptly so that third parties that inspect it are on notice of the security. In addition, where a change occurs in the relevant charges or in the details of the charges required to be recorded in a BVI Company's register of charges, the BVI Company must, within 14 days of the change occurring, transmit details of the change to its registered agent. Any such variations and releases of charge should also be reflected in the register of charges.

Private Registration: A copy of the register of charges must be kept at the registered office of the BVI Company or at the office of its registered agent and is a private record that is not open to inspection by the public.

A BVI Company which does not comply with the aforementioned provisions commits an offence and is liable on summary conviction to a fine of US\$5,000. However, this does not invalidate the validity, enforceability or the admissibility in evidence of the charge.

Register of registered charges

Registration of charges

A BVI Company (or a BVI legal practitioner authorized to act on its behalf) or the secured party (or a person authorized to act on its behalf) may lodge an application with the Registrar to register a charge created by the BVI Company by making a filing, specifying the particulars of charge, in the approved form. The security document itself is not filed or registered as part of the application. Whilst registration is not mandatory and does not affect the validity, enforceability or the admissibility in evidence of the charge, it is almost always completed in practice because it protects the priority of the charge as explained below and puts third parties on constructive notice of the existence of the security.

Once the Registrar is satisfied that all of the registration requirements have been complied with, it will register the charge in the BVI Company's register of registered charges and issue a certificate of registration confirming the date and time of registration. The Registrar will also send a copy of the certificate to the BVI Company and the secured party. The certificate of registration of charge is conclusive proof that the registration requirements have been complied with and that the charge referred to in the certificate was registered on the date and time stated in the certificate.

Public Registration: The BVI Company's register of registered charges maintained by the Registrar is a public record that is open to inspection by the public.

Variation of registered charges

Where there is a variation in the terms of a charge registered under the BCA, the BVI Company (or a BVI legal practitioner authorized to act on its behalf) or the secured party (or a person authorized to act on its behalf) may (and should) lodge an application for a variation of charge with the Registrar by making a filing in the approved form. The document varying the charge is not itself filed or registered as part of the application. Once the variation has been registered, the Registrar will update the BVI Company's register of registered charges and issue a certificate of variation confirming the date and time of variation. The Registrar will also send a copy of the certificate to the BVI Company and the secured party. The certificate of variation of charge is conclusive proof that the variation referred to in the certificate was registered on the date and time stated in the certificate.

Satisfaction or release of registered charges

Where all liabilities secured by a charge registered under the BCA have been paid or satisfied in full, or a charge registered under the BCA has ceased to affect the property or any part thereof, a notice of satisfaction or release in the approved form may (and should) be lodged with the Registrar. Such notice may be filed by the BVI Company (or a BVI legal practitioner authorized to act on its behalf) or the secured party (or a person qualified to act as the registered agent of a BVI Company, or a BVI legal practitioner, acting on behalf of the secured party). If the notice of satisfaction or release is filed by or on behalf of the BVI Company, it must be signed by the secured party (or a BVI registered agent, or a BVI legal practitioner, acting on behalf of the secured party) or be accompanied by a statutory declaration in the approved form verifying the matters stated in the notice. The document releasing the charge is not itself filed or registered as part of the application. Once the release has been registered, the Registrar will update the BVI Company's register of registered charges and issue a certificate of satisfaction or release confirming the date and time on which the notice was filed. The Registrar will also send a copy of the certificate to the BVI Company and the secured party.

Priority of registered charges

The general rule is that a registered security interest will have priority over any later registered or unregistered security interest over the same asset. The exceptions to this rule are as follows:

- i. a secured party may consent or agree to vary the priority of its security interest;
- ii. a registered floating charge is postponed to a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the BVI Company to create any future charge ranking in priority to or equally with the floating charge; and

- iii. a different regime applies to a security interest that was created by a company that was originally incorporated under the International Business Companies Act 1984 and re-registered under the BCA.

The common law rules of priority continue to apply with respect to any unregistered security interests. In general terms, these rules specify that priority between competing security interests is determined by the dates on which the relevant security interests were created.

Further Assistance

This publication is not intended to be a substitute for specific legal advice or a legal opinion. If you require further advice relating to the matters discussed in this Briefing, please contact us. We would be delighted to assist.

- E: gary.smith@loebsmith.com
- E: robert.farrell@loebsmith.com
- E: ivy.wong@loebsmith.com
- E: elizabeth.kenny@loebsmith.com
- E: cesare.bandini@loebsmith.com
- E: vivian.huang@loebsmith.com
- E: faye.huang@loebsmith.com

SERVING CLIENTS GLOBALLY



About Loeb Smith Attorneys

Loeb Smith is an offshore corporate law firm, with offices in the British Virgin Islands, the Cayman Islands, and Hong Kong, whose Attorneys have an outstanding record of advising on the Cayman Islands' law aspects and BVI law aspects of international corporate, investment, and finance transactions. Our team delivers high quality Partner-led professional legal services at competitive rates and has an excellent track record of advising investment fund managers, in-house counsels, financial institutions, onshore counsels, banks, companies, and private clients to find successful outcomes and solutions to their day-to-day issues and complex, strategic matters.



- Investment Funds
- Banking & Finance
- Insolvency/Restructuring
- Mergers & Acquisitions
- Capital Markets
- Corporate
- Private Equity
- Corporate & Liquidation
- Commercial Litigation