

Article

Granting of Guarantees by British Virgin Islands Companies

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Corporate guarantees are commonly provided by British Virgin Islands (BVI) companies. The BVI statutory regime makes the provision of such guarantees simple and efficient. Corporate guarantees should therefore generally be considered by lenders when structuring security packages involving BVI companies.

BVI law provides a high degree of protection for lenders, who may rely upon and enforce guarantees granted by BVI companies without concerns as to corporate benefit or issues surrounding the authority of the company, provided that the guarantee is signed by a director of the BVI company or a person held out as having authority to enter into the guarantee on behalf of the BVI company.

Issues to be considered by BVI guarantors

From the perspective of a company granting an inter-group guarantee, there are two key issues to be considered, that of corporate benefit and whether the guarantee will constitute a distribution (each of which is dealt with simply under BVI law and will not affect the validity of the guarantee):

Corporate benefit

One issue which is commonly raised in respect of inter-group guarantees is the question of "corporate benefit" as the company granting the guarantee is often not the direct beneficiary of the financing proceeds and as such, the arrangement presents no direct benefit to the company providing the guarantee. This can create issues in some jurisdictions as: (i) common law corporate principles dictate that any activity of a company must present a benefit to the company; and (ii) the directors of the company granting the guarantee have a fiduciary duty to exercise their authority and power in the best interests of the company and for a proper purpose.

BVI companies however have clear power and capacity to grant inter-company guarantees. Section 28 of the BVI Business Companies Act, as amended (the "Act") provides:

- that BVI companies have full capacity to carry on or undertake any business or activity, do any act or enter into any transaction "irrespective of corporate benefit"; and
- an express power for BVI companies to guarantee a liability or obligation of any person and secure any obligations by mortgage, pledge or other charge of any of its assets for that purpose.

The memorandum and articles of association of a BVI company may also provide that where the BVI company is a wholly owned subsidiary, the directors may act in the best interests of the parent even where that action may not be in the best interests of the BVI company itself. Where these clauses are not present in the memorandum and articles it is prudent for guarantees given for obligations of a third party to be approved by a shareholder resolution.

Is an upstream guarantee a distribution?

Under the Act a "distribution" is widely defined and includes the incurring of a debt for the benefit of a member. The effect of this language is arguably to cause guarantees granted in favour of members (for instance, a parent company) to fall with the definition of "distribution". Directors should therefore ensure that the necessary solvency test in relation to distributions is considered and specifically set out in the resolutions approving the giving of the upstream guarantee. The solvency test for this purpose is that:

- (i) the value of the company's assets exceed its liabilities; and
- (ii) the company is able to pay its debts as they became due.

Failure to satisfy the solvency test in the case of a distribution could result in the recovery of any funds paid out on the guarantee from the relevant member or director (but will not affect the validity of the guarantee itself).

We are here to help

Tailored professional advice should be sought in respect of the individual circumstances of the transaction being contemplated. Please feel free to reach out to your usual Conyers contacts with any questions regarding the provision or enforcement of guarantees by or against BVI companies.

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