



## Article

# Granting and Enforcing Security over Assets of British Virgin Islands Companies

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One of the key roles of BVI vehicles in international finance transactions is the provision of security (either BVI entities granting security over their own assets or security being granted over the shares of a BVI company). The process for granting and registering security in the BVI is straightforward and will not negatively impact the timeframe of a proposed transaction. In this article we address some of the key issues and processes regarding security over the assets of a BVI company.

## Form of Security Interests

Where security is granted over the assets of a BVI company, this may take the form of a fixed or floating charge. The form and documentation for such security will typically be determined by the law of the jurisdiction in which the assets are located.

## Governing Law

BVI law governed charges over assets are relatively rare as BVI companies rarely have assets in the BVI itself and it is often preferable for the security to be governed by the law of the jurisdiction in which the assets are located. There are however no issues or restrictions on BVI law governed charges over assets being entered into where appropriate.

## Negative Pledges

Typically security documents include a negative pledge whereby the chargor is restricted from creating or permitting to subsist any security interests over the secured assets other than the security pursuant to the finance documents. While such a negative pledge will give a contractual remedy for breach, where the chargor is a BVI company such pledge may also be publicly registered in the BVI (see "registration of security" below) which will serve to give actual notice of the negative pledge to any person who views the register of charges of the BVI company.

## Statutory Formalities and Requirements

There are no required formalities, such as notarisation or apostilling, and there are no perfection requirements as a matter of BVI law in order to make a charge or other security interest over the assets of a BVI company valid or enforceable. Further, no stamp duty is payable in the BVI on the creation or enforcement of the security (other than in the very rare instances where the BVI company or any of its subsidiaries owns an interest in land located in the BVI).

## Registration of Security

Although there are no filing or registration requirements in the BVI which affect the validity of a charge, the BVI Business Companies Act 2004, as amended (the "BC Act") provides a robust security registration system that enables a secured party to register a charge

and secure its priority. When a BVI company creates a security interest over its assets there are two different registrations which need to be considered:

- (i) the private register of charges, maintained by the BVI company (or its registered agent) at its registered office under section 162 of the BC Act; and
- (ii) the public register of charges, maintained by the BVI Registrar of Corporate Affairs (the “**Registrar**”) under section 163 of the BC Act.

### **Private Register of Charges**

Section 162 of the BC Act requires all BVI companies to maintain a register of all relevant charges created by the company, a copy of which must be kept at the company’s registered office or at the office of the registered agent of the company. Details of the private register of charges will only be disclosed in a certificate of incumbency/registered agent’s certificate and will not be revealed by a company search. There is no deadline for updating the private register of charges, although failure to comply with the obligation set out in section 162 of the BC Act is an offence and a company would be liable on summary conviction to a fine of US\$5,000.

### **Public Register of Charges**

Section 163 of the BC Act provides for the creation of a public register of charges by filing an application to register a relevant charge with the Registrar. It is not mandatory for a company to file such an application and failure to do so will not affect the validity of the security created by the charge. A secured party should however insist upon this registration as it is the public register of charges (rather than the private register of charges) which determines priority of security under BVI law: charges which are registered in accordance with section 163 of the BC Act take priority over those which are not registered. Charges which are so registered also have priority over charges which are subsequently registered (subject to any intercreditor arrangements which have been entered into) other than registered floating charges which will rank behind a subsequently registered fixed charge (unless the floating charge contains a prohibition or restriction on the power of the company to create any future charge ranking in priority to or equally with the charge).

An application to register a charge with the Registrar is made by filing an application specifying the particulars of the charge, in the approved form, and may be made by:

- (i) the company or a legal practitioner in the BVI authorised to act on its behalf; or
- (ii) the chargee or a legal practitioner in the BVI authorised to act on its behalf or the registered agent of the company.

Once the Registrar is satisfied that all registration requirements have been complied with it will register the charge on the BVI company’s public register and will issue a certificate of registration of the charge, confirming the date and time of the registration. This certificate provides conclusive proof that the registration requirements of the BC Act have been complied with.

The public register of charges will be available for public inspection and will be disclosed in any company search carried out in respect of the company. As is the case for the private register of charges maintained under section 162 of the BC Act, there is no deadline for updating the public register under section 163 of the BC Act. However, as priority of the security is determined based on the date and time of the public filing with the Registrar, this filing should be completed immediately to minimise the risk of a subsequent competing charge taking priority.

Please note that a different regime applies in respect of BVI companies incorporated under the International Business Companies Act, 1984 (“**IBC Companies**”). Please contact us for further information should your transaction involve security granted by, or over the assets of, an IBC Company.

### **Variations and Release of a Registered Charge**

Where there is a variation in the terms of a charge registered on the public register of charges, an application for variation of the charge should be filed with the Registrar. Once the obligations secured by the security are repaid in full and the security released or discharged, it is important that any security registrations which have been put in place in the BVI are removed, as outstanding security registrations can lead to delays in future transactions. Where a charge is to be released, a notice of satisfaction or release should be filed with the Registrar.

### **Enforcement**

Enforcement remedies will depend on the choice of governing law. Secured creditors of BVI entities will however be outside of the scope of the BVI insolvency regime.

Pursuant to a BVI law governed charge the secured creditor will have two primary statutory remedies, being: (i) the right to sell the assets; and (ii) the right to appoint a receiver / administrative receiver. Both of these remedies are exercisable out of court in accordance with the terms of the charge. The charge should specify that the statutory out of court enforcement rights are exercisable

immediately (or following such other period as is agreed) upon the occurrence of the relevant default/enforcement event; if the charge is silent as to this, lengthy default cure periods may apply, preventing enforcement in the interim.

In respect of foreign law security, the BC Act provides that the remedies available to the chargee will be governed by the relevant foreign law and the instrument creating the charge. In practical terms this means that the enforcement of the foreign law security should be conducted in accordance with the relevant foreign law. BVI law advice should however be obtained prior to any enforcement steps being taken.

In addition to the ability for creditors to apply to the BVI courts for the appointment of a receiver, the BVI offers a number of solutions in relation to the appointment of receivers and administrative receivers. The appointment of a receiver outside of the BVI may be filed in the BVI, making use of a streamlined recognition process. In addition, a secured creditor under a floating charge has the right to appoint an administrative receiver. This is an important right in terms of enforcement. It is often advisable for a floating charge to be granted by a BVI company in addition to any specific fixed security which is being contemplated in order to ensure that the right to appoint an administrative receiver is obtained.

## Use of Restricted Purposes Companies

If for some reason (legal or commercial) granting security over an asset is not possible, a restrictive purposes company can be used to facilitate quasi-security by limiting the purposes of the company to incurring the specific secured obligations and holding the relevant assets. The creditor can be confident that there can be no other claims against the company (and therefore the asset) which could compete or have priority. We are aware of a number of examples of limited partnership interests in private equity funds, which typically have restrictions in respect of security, being “secured” in this way.

## We are here to help

As noted above, tailored professional advice should be sought in respect of the individual circumstances. Please feel free to reach out to your usual Conyers contacts with any questions regarding granting or enforcement of security by or over BVI companies.

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