

GUIDE TO SECURITY REGISTRATION IN THE BRITISH VIRGIN ISLANDS

BVI companies are known globally for their ease of use and flexibility. They form a major part of many international transactions and are regularly used as holding companies. Often times, they have to provide security over their assets for financing either as part of a group structure or as a stand alone company, and one of the main questions asked by lenders when providing financing is, how do they register their security and secure priority status if the company goes bust? The regime which regulates the creation, registration and priority of charges in the BVI is set out in the BVI Business Companies Act, 2004, as amended (the “Act”) which regulates all companies in the BVI. The registration regime applies to a charge which is defined as “any form of security interest, over property, wherever situated, other than an interest arising by operation of law”.

1. Creation of a charge

The Act provides that, subject to its memorandum and articles, a company may, by instrument in writing, create a charge over its property. The Act also provides that the governing law of a charge created by a company may be the law of such jurisdiction that may be agreed between the company and the chargee and the charge shall be binding on the company to the extent, and in accordance with, the requirements of the governing law. The clarity provided with respect to the choice of governing law takes away many of the issues which would usually arise from a situs, conflict of laws or comity perspective.

2. Private registration

Under the Act, a company must keep a register of all relevant charges created by it at its registered office or at the office of its registered agent. Such registration is private since information held at the registered office or at the office of the registered agent is not publicly available. There is no time limit within which particulars of a charge must be entered on the register and failure to register particulars of a charge does not affect its validity or enforceability. The register of charges should contain the following information:

- (a) if the charge is a charge created by the company, the date of its creation or, if the charge is a charge existing on property acquired by the company, the date on which the property was acquired;
- (b) a short description of the liability secured by the charge;
- (c) a short description of the property charged;
- (d) the name and address of the trustee for the security or, if there is no such trustee, the name and address of the chargee;
- (e) unless the charge is a security to bearer, the name and address of the holder

of the charge; and

- (f) details of any prohibition or restriction, if any, contained in the instrument creating the charge on the power of the company to create any future charge ranking in priority to or equally with the charge.

A company that has created a security and fails to keep a register of charges is liable on summary conviction to a fine.

3. Public registration and priority

The Act also provides that a charge may be publicly registered in the Register of Registered Charges maintained by the Registrar of Corporate Affairs. Either the company or the chargee or a person authorized to act on their behalf can apply to the Registrar for registration, and there is no time limit for making such an application. Public registration is not mandatory, and failure to register does not affect the charge's validity or enforceability even as against a liquidator or other creditors including secured creditors. Public registration will, however, have an impact on priority.

Public registration will affect priority for charges created on or after the "relevant date", which is either: (a) in the case of a company formed under older legislation, the date on which the company is re-registered under the Act; (b) in all other cases, 1 January 2005. After the relevant date, a registered charge takes priority over an unregistered charge, as well as over a charge subsequently registered. Charges created on or after the relevant date which are not registered rank in the order they would have done had the registration section in the Act not come into effect. Charges created before the relevant date will continue to enjoy the priority they did, and if they would have taken priority over a charge created on or after that date, they will continue to take such priority. The priority rules can be varied by agreement or consent. The main exception to the order of priorities under the Act relates to registered floating charges: these rank after a subsequently registered fixed charge unless the floating charge contained a negative pledge clause.

Upon registration of a charge in the Register of Registered Charges, the Registrar will issue a certificate of registration which will state the date and time of registration.

For further information please contact Kerry Anderson at kanderson@onealwebster.com, Vanessa King at vking@onealwebster.com or Christopher Simpson at csimpson@onealwebster.com.

This Guide is general in scope and is not intended to be comprehensive. It is not a substitute for legal advice.

March 2010