

A Comparative Analysis of Security Registration Requirements in Offshore Jurisdictions

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This article compares the laws of five offshore jurisdictions – Bermuda, Cayman Islands, Jersey, Mauritius and the British Virgin Islands (BVI) – concerning the registration of charges created over assets of companies (not including charges over land within the offshore territories, ships or aircraft). We review the impact, if any, of registration on the determination of the order of priority of competing charges.

DUTY TO REGISTER

In Cayman, Mauritius and the BVI, companies have a duty to register charges over their assets. Registration may be effected by private registration at the registered office of a company or by public registration at the relevant companies registry.

In Jersey, there is no requirement for the registration of charges over the assets of Jersey companies (with the exception of local land),

whether privately or publicly. In Bermuda, the public registration of a charge to establish priority over the charged security is provided for under the Bermuda Companies Act 1981 (“**BCA**”) but is not mandatory.

Public registration of a charge is not possible in Jersey and Cayman. A charge may be publicly registered by the filing of particulars of the charge (in Mauritius and the British Virgin Islands) or a copy of the charging document with the prescribed registration form (in Bermuda) and the payment of the prescribed registration fee. While the public registration of a charge is optional under the BVI Business Companies Act 2004, as amended (“**BVIBCA**”) and the BCA, such registration is mandatory under the Mauritius Companies Act 2001 (“**MCA**”), which further provides that any company that fails to register a

charge with the Registrar of Companies of Mauritius may be subject to criminal prosecution.

In Cayman, Mauritius and the BVI, a charge may be privately registered by the filing of particulars of the charge on a private register of charges maintained at the registered office of the company or (in the case of the BVI) at the office of the company's registered agent. Under the Cayman Islands Companies Law (2007 Revision) ("CICL") and the BVIBCA, the private registration of charges is mandatory and any failure to comply with this statutory requirement renders the company (in the case of the BVI) or its directors or officers (in the case of Cayman) liable to a penalty of KY\$100 and US\$5000, respectively. Under the MCA, a company has a duty to keep a pledge register on which particulars of shares and debentures of the company that are the subject of a pledge must be entered. Any failure on the part of a Mauritian company to fulfill this duty may lead to its criminal prosecution.

Although both methods of registration provide notice to third parties of the existence of the charge, public registration is generally preferable as a company's public register of charges may be inspected for a nominal fee. A company's private register of charges, on the other hand, is only available for inspection by third parties with the company's consent (except in Cayman where a company's private register of charges must be available for inspection by any creditor or member of the company at all reasonable times). For this reason, the mandatory requirement for the public registration of a charge under the MCA best serves the need of secured creditors to have notice of competing charges, whether such charges are pre-existing or are created subsequent to the date of creation of their security interests.

The MCA, however, lacks a special feature of the BVIBCA and the BCA whereby a charge may be registered with the Registrar of Corporate Affairs of the BVI and the Registrar of Companies of Bermuda, respectively, at the instance of the chargee (in the case of the BVIBCA) and "any interested party" (in the case of the BCA) without the involvement or permission of the company whose assets have been charged. This statutory

right for the chargee or interested party to register a charge can prove quite useful to a secured creditor, particularly where the charging company fails to comply with its statutory duty (if any) to register the charge notwithstanding the resultant penalties (if any).

PROCEDURE AND COSTS

Registering a charge in each of the jurisdictions (except Jersey) involves the filing of particulars of the charges or a copy of the charge document either at the relevant companies registry or on the company's private register of charges. These procedures are straightforward and do not attract significant fees, except in the case of Mauritius where the cost of a public registration of a charge averages US\$1500. Such fees often deter the registration of charges in Mauritius. Another drawback of the MCA is a requirement for the registration of charges within 28 days of creation by the company. There are no similar time limits on the registration of charges in Bermuda, Cayman or BVI.

DETERMINATION OF PRIORITY AS BETWEEN COMPETING CHARGES

In BVI and Bermuda, the public registration of a charge establishes its priority in relation to other charges over the same assets. The priority of a charge created after the commencement date of the BVIBCA and the BCA is determined by the date on which the charge was registered on the public register of charges. Such charge takes priority over subsequently registered charges (of a similar type) as well as all unregistered charges over the same assets. Where a charge was created prior to the commencement date of the BVIBCA or where a charge was created after the commencement date of the BVIBCA but has not been registered, priority is established according to the rules of priority that applied before such legislation came into force. In Bermuda, charges created before 1 July 1983 shall continue to have the priority they had prior to that date, irrespective of whether they were subsequently registered under the provisions of the BCA. Therefore, even though the public registration of a charge in Bermuda establishes such priority as discussed above, there is no statutory requirement to register that charge, with the result that a charge may be

legally created but will not have priority as determined by the BCA.

Under the BVIBCA, the priority of charges may, notwithstanding the above-mentioned principles, be determined by way of agreement or concession between competing chargees. The same legislation further provides that a registered floating charge is postponed to a subsequently registered fixed charge unless the floating charge contains a negative pledge clause prohibiting the creation of further charges ranking equally or in priority. No similar provisions are found in the companies legislation of Bermuda, Cayman or Mauritius.

Under Mauritian law, the priority of a charge is established by a procedure known as inscription, which is governed by the Mauritius Registration Duty Act (“**MRDA**”). The MRDA stipulates that a charge (as defined thereunder) must be inscribed at the Office of the Conservator of Mortgages within 20 days of its creation, failing which penalty fees amounting to 50 per cent of the registration duty shall become payable. Inscribed charges rank in the order of their inscription.

In Jersey, the issue of priority of charges over intangible moveable assets is settled under the Security Interest (Jersey) Law 1983, which stipulates that charges shall take priority in the order of their creation, unless otherwise agreed. As such, it is not necessary for a Jersey company, a chargee or any interested third party to take any action in order to secure the priority of a charge following its creation.

Cayman is the only jurisdiction in which the priority of a charge is determined according to common law principles. Disputes regarding the priority of competing charges therefore require the adjudication of the Cayman courts on a case-by-case basis.

SUMMARY

Although the security registration regime of each jurisdiction mentioned herein provides secured creditors with some measure of protection for their security interests, there is certainly scope for improvement in each instance.

While there is an obligation upon companies in Cayman to enter any security charges in their private registers of mortgages of charges, such registers do not stand as conclusive evidence of either the existence or the priority of charges.

In Jersey, such priority is established in respect of charges over intangible moveable property according to their date of creation but the absence of a statutory requirement to register said charges makes the task of determining the existence of competing charges less clear-cut.

The duty to register and inscribe charges under Mauritian law creates a two-tiered process for the purpose of providing third parties with notice and establishing priority that results in additional work and higher costs for Mauritian companies.

In Bermuda, both notice and priority of a charge are established by means of public registration under the BCA. However, the BCA makes public registration optional in relation to charges and as a consequence, there are no punitive measures provided under that Act.

Overall, the BVIBCA provides the best response to the shortcomings of corresponding legislation in Bermuda, Mauritius and Cayman by imposing a duty on BVI companies to register charges privately while making the public registration of charges by a BVI company or a chargee not only possible but relevant to the determination of priority. However, the security registration regime in the BVI may be streamlined and thus simplified by further amending the BVIBCA to make the public registration of charges the sole mandatory registration requirement thereunder both as a means of providing third parties with notice and determining priority.

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