

BVI corporate guarantees

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Many corporate groups utilise BVI companies in their corporate structure. When designing security packages to support financing, both the borrower and the lender should not overlook the ability to obtain an inter-group corporate guarantee or third party charge from a BVI company. Corporate guarantees are likely more common in BVI than other jurisdictions as a result of the obliging statutory environment in which BVI companies operate.

Corporate Benefit

Corporate guarantees bring into focus the issue of "corporate benefit" as third party guarantees often present no direct benefit to the company. There is express power to guarantee in the BCA which is very broad indicating a power to guarantee an obligation or liability of any person and to secure such obligations by a mortgage, pledge or charge of corporate assets. This statutory power clearly grants to a BVI company the power and capacity to issue third party guarantees.

Director Obligations

An issue that arises with these types of guarantees relates to a director's obligation to act in what the director believes to be the best interest of the company. In the case of a guarantee given to support a shareholder's obligation, if the memorandum and articles of association permit (or are amended to permit) the directors can act in the best interest of the shareholder (rather than the company) where the company is a wholly owned subsidiary. Where these clauses are not present in the memorandum and articles of association, authorization should be by way of director resolution in an inter-corporate guarantee situation with the indirect benefit to the company or group set out. If it is an obligation of an unrelated third party a members' resolution is recommended.

Distributions

One other possible issue that arises with respect to guarantees in relation to member debts and obligations is that under the BCA a "distribution" is widely defined^[1] and includes the incurring of a debt for the benefit of a member. The definition continues on to indicate that the obligation assumed on behalf of the member must be "in relation to the shares held" which may or may not be the case in relation to the guarantee. In any event, this is broad language and has not been judicially considered. One interpretation of this language is to cause guarantees given in favour of members (for instance, a parent company) to fall within the definition of "distribution". Given this, a prudent approach is to ensure that the necessary solvency test^[2] in relation to distributions is satisfied with respect to guarantees given for members. The solvency test for this purpose means that

- there are no reasonable grounds for believing that the value of the company's liabilities exceed its assets; and
- there are no reasonable grounds for believing that the company was unable 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^[3].

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Voidable Transactions

Finally, the last issue to consider here is that in an insolvent liquidation a liquidator may view such inter-corporate guarantees as transactions at an undervalue, where the company did not directly receive any benefit of the financing. In which case a liquidator may either prevent a payment from being made on the guarantee or attempt to set aside any payments already made on the guarantee. In the case of guarantees, any resolution approving it should also contain the relevant solvency test to avoid falling foul of the voidable transaction provisions.

Conclusion

Obtaining corporate guarantees or third party charges from BVI companies is not uncommon and in any transaction where a corporate guarantee is sought, it is important that the authorization and approval of that guarantee is well thought out and designed to address the issues raised above.

[1] Section 56

[2] Sections 56 & 57

[3] Section 58