

BRIEFING NOTE

2021

Guide: Enforcing security over shares in a BVI business company

British Virgin Islands (“BVI”) business companies are widely utilized in structuring cross-border finance transactions. One of the key reasons for this is that the BVI provides a flexible and well-tested regime for secured financing transactions that is attractive to borrowers and lenders alike.

In this brief guide, we address certain of the key BVI law points pertaining to the enforcement of an equitable mortgage over shares (the “**Secured Shares**”) in a BVI business company (the “**Secured Company**”). An equitable mortgage is the most popular form of security over Secured Shares in a Secured Company.

For details regarding the creation and protection of security over Secured Shares in a Secured Company, please refer to our guide entitled “Granting and protecting security over shares in a BVI business company”.

1. Security deliverables and power of attorney

The terms of a well-drafted BVI law governed security document with respect to Secured Shares in a Secured Company and the principal finance document will usually require the security provider to deliver the following documents to the secured party to assist with an enforcement:

- i. any original share certificate(s) with respect to the Secured Shares in the Secured Company;
- ii. an undated share transfer form with respect to the Secured Shares in the Secured Company – the secured party may date this and insert details of the transferee in an enforcement for the purposes of transferring the Secured Shares to itself or a nominee;
- iii. an undated resignation letter from each director of the Secured Company – the secured party may date these in an enforcement for the purposes of removing the existing directors of the Secured Company;
- iv. a letter of authorization from each director of the Secured Company authorizing the secured party to date each undated letter of resignation upon the occurrence of a default under the security document;
- v. an irrevocable proxy with respect to the Secured Shares in the Secured Company in favor of the secured party – this can assist the secured party in taking control of the Secured Company before a transfer of Secured Shares in the Secured Company has been completed;
- vi. a letter of instruction to the Secured Company’s registered agent containing, among other things, directions to register a transfer of Secured Shares in the Secured Company upon the occurrence of a default under the security document;
- vii. a letter of acknowledgement from the registered agent with respect to the instructions contained in the letter of instruction;



- viii. if the security provider is a BVI business company, a certified copy of its register of charges showing the security created over the Secured Shares in the Secured Company - refer to our guide entitled "Granting and protecting security over shares in a BVI business company" for further details;
- ix. if the security provider is a BVI business company, a copy of the stamped particulars of charge and certificate of registration of charge with respect to the security created over the Secured Shares in the Secured Company - refer to our guide entitled "Granting and protecting security over shares in a BVI business company" for further details;
- x. a certified copy of the Secured Company's register of members annotated to show the security created over the Secured Shares in the Secured Company if commercially agreed - refer to our guide entitled "Granting and protecting security over shares in a BVI business company" for further details;
- xi. a copy of the Secured Company's register of members annotated to show the security created over the Secured Shares in the Secured Company stamped by the BVI Registrar of Corporate Affairs (the "**Registrar**") if commercially agreed - refer to our guide entitled "Granting and protecting security over shares in a BVI business company" for further details;
- xii. if the security provider is a BVI business company, a copy of the board resolutions of its board of directors authorizing:
 - a. its entry into and execution of the security document;
 - b. the filing of the relevant particulars of charge with the Registrar; and
 - c. the updates to its register of charges;
- xiii. a copy of the board resolutions of the Secured Company authorizing:
 - a. its entry into and execution of the security document (if it is a party);
 - b. its register of members to be annotated and the filing thereof with the Registrar (if commercially agreed); and
 - c. a transfer of Secured Shares in the Secured Company upon the occurrence of a default under the security document; and
- xiv. a resolution passed by the Secured Company with respect to certain changes to its M&A, if required - refer to our guide entitled "Granting and protecting security over shares in a BVI business company" for further details.

A well-drafted share mortgage will include an irrevocable power of attorney granted by the security provider in favor of the secured party enabling it to date and complete the share transfer form in respect of the Secured Shares in the Secured Company and the other documents requiring completion on enforcement.

2. Enforcement rights and remedies

Section 66 of the BVI Business Companies Act, 2004 (the "**Act**") expressly contemplates that security over Secured Shares in a Secured Company may be governed by BVI or foreign law. One advantage of adopting a foreign governing law clause in a security document is that it may make available certain additional remedies (such as appropriation) which are not available under BVI law.

BVI law governed equitable share mortgage

Statutory enforcement rights and remedies

Where the security document is governed by BVI law, subject to any limitations or provisions to the contrary therein, the Act specifies that the secured party is entitled to the following remedies in the event of a default by the security provider until such time as the security has been discharged:

- i. the right to sell the Secured Shares in the Secured Company; and



- ii. the right to appoint a receiver who may:
 - a. vote the Secured Shares in the Secured Company;
 - b. receive distributions in respect of the Secured Shares in the Secured Company; and
 - c. exercise other rights and powers of the security provider in respect of the Secured Shares in the Secured Company.

These remedies may be expressed to become exercisable immediately on a default occurring in the applicable security document. If no such timeframe is specified, the default provisions in the Act apply which specify that the remedies are not exercisable until:

- i. a default has occurred and has continued for a period of not less than 30 days, or such shorter period as may be specified in the security document; and
- ii. the default has not been rectified within 14 days or such shorter period as may be specified in the security document from service of the notice specifying the default and requiring rectification thereof.

Power of sale

In addition to the statutory power of sale set out above, a secured party will usually also acquire a power of sale:

- i. as a matter of common law;
- ii. where the security document is made by way of deed, by virtue of an implied statutory right of sale; and
- iii. as a matter of contract pursuant to the terms of the security document.

It is not necessary to obtain a court order to exercise the power of sale, though it may be preferable to do so in certain circumstances. For example, if the secured party wishes to buy the Secured Shares in a Secured Company or sell them to a third party in a depressed market, a court order may protect the secured party from a claim that it did not receive the best price reasonably obtainable.

Receivership

In addition to the statutory power to appoint a receiver set out above, a secured party will usually also acquire a right to appoint a receiver:

- i. where the security document is made by way of deed, by virtue of an implied statutory right to appoint a receiver; and
- ii. as a matter of contract pursuant to the terms of the security document.

Appointing a receiver pursuant to a contractual right set out in the security document is the most common method of enforcing share security and is an out of court procedure. In contrast, appointing a receiver pursuant to the rights set out in statute requires a court order.

Once a receiver has been appointed, it can vote and sell the Secured Shares in a Secured Company, as well as receive any distributions from the Secured Shares. A receiver will usually remove the Secured Company's existing directors once appointed and liquidate the Secured Company's underlying assets to facilitate repayment of the debt.

Taking possession

The secured party may also take possession of the Secured Shares in a Secured Company by becoming registered as the legal owner of the Secured Shares. It can do this by dating and completing the share transfer form and presenting it to the Secured Company's registered agent for the purposes of updating the Secured Company's register of members. It can then also exercise any shareholder rights that become available.



Foreclosure

If the secured party acquires legal title to the Secured Shares in a Secured Company, it also has a right of foreclosure. This remedy extinguishes the security provider's legal and beneficial title to the Secured Shares in the Secured Company but not its obligation to pay any secured and unpaid sums. Foreclosure involves a time-consuming and costly court process and is not usually exercised in practice given its draconian nature.

Foreign law governed share security document

Where the share security document is governed by foreign law, the Act specifies that the:

- i. share security document must comply with the requirements of its governing law to be valid and binding on the Secured Company;
- ii. remedies available to a secured party are governed by the governing law and the terms of the share security document; and
- iii. rights between the secured party as a member of the Secured Company and the Secured Company are governed by the Secured Company's M&A and the Act.

3. Application of proceeds of enforcement

Subject to any provisions to the contrary in the security document, all amounts that accrue from the enforcement of the security document are applied in the following order of priority:

- i. firstly, in paying the costs incurred in enforcing the security document;
- ii. secondly, in discharging the sums secured by the security document; and
- iii. thirdly, in paying any balance due to the security provider.

4. Stop notices and stop orders

If the secured party has concerns that the security provider may transfer the Secured Shares in the relevant Secured Company to a third party or pay a distribution with respect to them in breach of the terms of the security document before any enforcement action has been completed, it may be possible to obtain a stop notice or a stop order.

Stop notices

A stop notice does not require a court hearing and is obtained from the Registrar of the High Court (the "**Registrar of the Court**"). Upon a successful application, the Registrar of the Court issues a stop notice requiring 14 days' notice to be given to the secured party before any transfer of Secured Shares in the relevant Secured Company or any payment of a distribution with respect to them can occur.

Stop orders

A stop order prohibits the transfer of Secured Shares in the relevant Secured Company or any payment of a distribution with respect to them. This requires an order of the court.

5. Rectification of the register of members

To the extent that the registered agent of a Secured Company is uncooperative in updating the register of members of that Secured Company to reflect a transfer of Secured Shares, the secured party may apply to court to rectify the register on the grounds that there has been an unreasonable delay in entering it as a new shareholder.



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