

Enforcing security over shares in a BVI company

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When taking security over shares in a BVI company it is common to take security by way of an equitable mortgage and/or a charge over the shares. This guide examines the enforcement rights available to a mortgagee (being the recipient of the security) under an equitable share mortgage.

For more information on the issues to consider when taking security over shares in a BVI company please refer to our guide entitled '[Taking security over shares in a BVI company](#)'.

Ancillary documents and security protection

As part of the security package and to assist with enforcement (whichever enforcement route is taken), a BVI law governed equitable share mortgage will normally require the mortgagor (being the security provider) to deliver the following documents to the mortgagee in respect of the secured shares (**Secured Shares**) in a BVI company (the **Company**):

- the original share certificates (or, where share certificates are in electronic form or do not exist at all, a written confirmation that share certificates have not been issued);
- a share transfer form signed in blank but not dated;
- a signed but undated deed of appointment of irrevocable proxy and power of attorney in favour of the mortgagee;
- if the Company is (directly or indirectly) wholly-owned by the mortgagor:
 - a signed but undated letter of resignation from each director of the Company; and
 - a signed and dated letter from each director authorising the mortgagee to date the resignation letter and deliver it to the Company if the security has become enforceable;
- if the Company is not a party to the equitable share mortgage, a letter of undertaking from the Company to the mortgagee under which the Company agrees to take certain actions to facilitate the share mortgage;
- a resolution of the directors of the Company authorising its entry into and execution of the security document (if it is a party);
- a resolution signed by the mortgagor (in its capacity as shareholder of the Company) making any changes to the Company's memorandum or articles of association required by the mortgagee;
- if the mortgagor is a BVI company, a certified copy of its register of charges showing the creation of the security over the Secured Shares;
- a certified copy of the Company's register of shareholders including an annotation showing the creation of the security over the Secured Shares; and
- a notice from the Company's registered agent under which it:
 - acknowledges the security created over the Secured Shares; and
 - undertakes that, once it has received notice from the mortgagee that the security has become enforceable, it will register any transfer of the Secured Shares pursuant to the enforcement of the security.

Once the security becomes enforceable under the terms of the security document, the security document will give the mortgagee the right to:

- insert the name and address of the mortgagee (or its nominee) and date the share transfer form. This enables the mortgagee to begin the process of transferring the Secured Shares to itself or its nominee and, in doing so, take control of the Secured Shares;
- date the proxy and power of attorney. This can assist the mortgagee in taking control of the Company before a transfer of the Secured Shares has been completed; and
- date the letters of resignation of the directors. This enables the mortgagee to remove the existing directors of the Company and, together with the powers provided under the security document and the proxy and power of attorney, appoint new directors.

At this time, the registered agent must register any transfer of shares and resignation of a director relating to the security document when requested by the mortgagee.

Updating the register of shareholders is the final step in securing control of the Secured Shares.

Enforcement rights

Where the security document is governed by BVI law, a mortgagee may have up to four primary remedies available:

- power of sale;
- receivership;
- taking possession; and
- foreclosure.

The BVI Business Companies Act 2004 (as amended) (the **Act**) provides that where the security document is governed by BVI law, in the case of default by the mortgagor, the mortgagee is entitled (subject to any limitations or provisions to the contrary in the security document) to the following remedies:

- the right to sell the Secured Shares; and
- the right to appoint a receiver who may:
 - exercise the voting rights attached to the Secured Shares;
 - receive distributions in respect of the Secured Shares; and
 - exercise other rights and powers of the mortgagor in respect of the Secured Shares, including the power to sell them.

The above remedies are not exercisable by the mortgagee unless:

- a default has occurred and has continued for a period of not less than 30 days (or any shorter period as specified in the security document); and
- the default has not been rectified within 14 days (or any shorter period as specified in the security document) of the mortgagee giving the mortgagor notice specifying the default and requiring it to be rectified,

however, the Act allows a security document to provide that the mortgagee may exercise the power of sale or the power to appoint a receiver immediately once a default has occurred.

If the Company is in insolvent liquidation at the time of enforcement, the mortgagee may only transfer the Secured Shares with the approval of the High Court.

Power of sale

The power of sale may arise in four circumstances:

- a power of sale arising under common law;
- where the security document is made by way of deed, by virtue of an implied statutory right of sale;
- the statutory right of sale as provided under the Act; and
- a contractual right of sale set out in the security document, although it is usually the contractual right which is relied upon.

It is not necessary to obtain a court order to exercise the power of sale (under any of the above circumstances), although a judicial sale may be preferable if:

- the mortgagee wishes to buy the Secured Shares; or
- the mortgagee is concerned that there is a depressed market for a sale of the Secured Shares, as, in each case, the sale would then be court approved. This would protect the mortgagee from claims that the sale is not a true sale or that it did not receive the best price reasonably obtainable.

The mortgagee generally has a duty to obtain the best price reasonably obtainable on sale, but this does not require the sale to be carried out by any particular method (eg by auction) or within a set time frame.

Receivership

The most common method of enforcing share security is by appointing a receiver.

The power to appoint a receiver may arise in a number of circumstances:

- where the security document is made by way of deed, by virtue of an implied statutory right to appoint a receiver;
- the statutory right to appoint a receiver under the Act; and
- a contractual right set out in the security document.

A receiver must be appointed by an order of the court if the right of appointment is based in statute.

Where there is a contractual right to appoint a receiver and the security document provides that a receiver may be appointed out of court (which all properly drafted security documents should do), then the receiver may be appointed out of court. This is the route typically taken in practice.

Once a receiver is appointed it can vote and sell the Secured Shares, as well as receive any dividends or other proceeds flowing from the Secured Shares. Typically, a receiver, once appointed, will remove the directors (in the manner described above) and proceed to liquidate the Company's underlying assets to either repay the debt directly or distribute the proceeds.

Taking possession

Where a share security has been granted by way of mortgage, the mortgagee is able to take possession of the Secured Shares.

A mortgagee under a legal mortgage will already be in possession of the Secured Shares, as the legal owner of the Secured Shares. A mortgagee under an equitable mortgage may be registered as the legal holder of the Secured Shares at any time (not necessarily upon the security becoming enforceable, though this is the market practice).

Once the mortgagee is in possession of the Secured Shares, it can exercise its power of sale and any other shareholder rights available. The deliverables referred to above (see 'Ancillary documents and security protection') serve to make the process of taking possession as streamlined and efficient as possible.

Foreclosure

Foreclosure is only available to mortgagees who hold legal title to the Secured Shares and is the most draconian, and therefore the least utilised, method of enforcement. It effectively extinguishes the mortgagor's title, leaving the Secured Shares legally and beneficially owned by the mortgagee.

Two court orders are necessary to foreclose on the Secured Shares. This court process is time consuming and costly, and the courts are typically reluctant to grant foreclosure orders.

Stop notices and stop orders

Stop orders and stop notices can be used where the mortgagee is concerned that the mortgagor may seek to transfer the Secured Shares or a distribution may be paid on the Secured Shares in breach of the security document before an enforcement action has been completed.

Stop notices

A stop notice is obtained from the BVI Registrar of the High Court (the **Registrar**) and does not require a court hearing. Once an application is made, the Registrar should issue a stop notice requiring 14 days' notice to be given to the applicant of the stop notice before any transfer of shares or any payment of distribution on shares by the Company.

Stop orders

A stop order is obtained from the court. If the court grants the stop order, the order will prohibit any transfer of shares or any payment of distribution on shares by the Company.

Foreign law governed

The Act states that where the security document is governed by foreign law:

- it must comply with the requirements of the foreign law to be valid and binding on the Company;
- the remedies available to the mortgagee are governed by the foreign law and the terms of the security document; and
- the rights between the mortgagor or mortgagee (as a shareholder of the Company) and the Company continue to be governed by the Company's memorandum and articles of association and the Act.

Generally speaking, the mortgagee will prefer to have all transaction documents governed by the laws of a jurisdiction with which the mortgagee is familiar and that are suitable for the transaction. One of the primary advantages of permitting the security document to be governed by foreign law is that it allows the mortgagee greater certainty over the rights and obligations and the remedies available. Another is that the foreign law may give the mortgagee remedies (such as a right of appropriation under English law) that are not available under BVI law.

Rectification of the register of members

The majority of enforcement actions require the register of shareholders to be updated. If the registered agent is reluctant to update the register, in addition to the mortgagee enforcing its direct contractual rights under the registered agent undertaking described above, it is possible under the Act to make an application to court to 'rectify' the register on the grounds that there has been an unreasonable delay in entering the details of the new shareholder.

Stays and delays to enforcement

In general, there are no stays or delays to enforcement in the BVI: liquidation does not affect the right of a mortgagee to enforce their security and there are no administration orders similar to the United Kingdom or US Chapter 11 type provisions.

The only potential moratorium period is set out in the provisions dealing with administration orders under the Insolvency Act 2003 (as amended). However, these provisions are not yet in force and there appears to be no plan to bring these into force in the foreseeable future.

Contacts

A full list of contacts specialising in Banking and Finance can be found [here](#).