

Taking security over shares in a BVI company

GUIDE

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Introduction

One of the major advantages of the BVI as an international financial centre is that its legislation provides a simple, flexible and robust regime for secured financing transactions that is attractive to lenders.

Share security is a feature of many financing transactions. This guide examines the creation of security over registered shares in a BVI company.

Security basics

The BVI Business Companies Act (as amended) (the **Act**) allows security to be created over shares (the **Secured Shares**) in a BVI company (a **Company**).

Requirements under the Act

The basic requirements under the Act are that the:

- security must be created in writing;
- security document must be signed by the mortgagor (being the security provider); and
- security document must clearly indicate the:
 - intention to create security over the Secured Shares; and
 - amount secured or how that amount is to be calculated.

In practice (as described further below), the security will typically be created under the terms of a security document in the form of a charge or an equitable mortgage.

Security document

In addition, the security document should also:

- specify (either directly or by reference to another document) the defaults that entitle the mortgagee (being the recipient of the security) to enforce the security;
- specify the mortgagee's enforcement powers and remedies;
- include a power of attorney; and
- include the Company as party so that it can undertake to (among other things):
 - ensure that any transfer of the Secured Shares under the security document will be registered immediately on presentation of the signed share transfer form;
 - note the creation of security over the Secured Shares in its register of shareholders; and
 - if required, file a copy of its register of shareholders containing the security note with the BVI Registrar of Corporate Affairs (the **Registrar**).

Stamp duty

No BVI stamp duty is payable on the creation of security over the Secured Shares or (assuming that neither the Company nor any of its subsidiaries owns land in the BVI) any transfer of the Secured Shares on the enforcement of the security.

Formalities

The security document does not need to be notarised or apostilled.

First steps

Before taking security over the Secured Shares, the mortgagee should:

- inspect the Company's register of shareholders to:
 - ensure that the mortgagor is the registered holder of the Secured Shares;
 - ensure that there is no evidence of any existing security over the Secured Shares; and
 - determine whether the Secured Shares are fully paid;
- review the Company's memorandum and articles of association to ensure that there are no provisions that prohibit the creation of security or might hinder or impair the enforcement of the security (eg

restrictions on share transfers, a lien in favour of the Company, pre-emptive rights or directors' discretion to refuse to register share transfers);

- search the Company's records maintained by the Registrar; and
- (if the mortgagor is a body corporate) search its publicly available records and (if applicable) any register recording security created by it over its assets.

Regulatory approvals

No regulatory approvals are required to create or enforce security over the Secured Shares unless the Company is a regulated person (eg a bank, mutual fund, broker, insurer or other licensed entity in the BVI). Where the Company is a regulated person, the prior approval of the BVI Financial Services Commission is required to the:

- creation of the security over the Secured Shares; and
- sale of the Secured Shares to the proposed buyer on enforcement of the security.

The BVI Financial Services Commission will only approve of the sale of the Secured Shares to the proposed buyer if it is satisfied that the proposed buyer will satisfy the fit and proper criteria specified in the Regulatory Code (as amended).

Governing law of security document

The Act permits the security document to be governed either by BVI law or foreign law.

BVI law

The security document is most often governed by BVI law and, as stated above, usually takes the form of an equitable mortgage or a charge. A mortgagee will generally not wish to take a legal mortgage over the Secured Shares to ensure that the mortgagee is not treated as the parent of the Company under the Act and/or to avoid potentially consolidating the Company onto the mortgagee's balance sheet.

Where the security document is governed by BVI law, a number of provisions in the Act will apply unless they are disapplied or modified in the security document.

Remedies available

The Act states that, if a default occurs under the security document, the mortgagee may:

- (subject to the terms of the security document) sell the Secured Shares; or
- appoint a receiver in respect of the Secured Shares who may (subject to the terms of the security document):
 - exercise the voting rights attached to the Secured Shares;
 - receive distributions in respect of the Secured Shares; and
 - exercise any other rights and powers of the mortgagor in respect of the Secured Shares.

The mortgagee may exercise the power to sell, and the right to appoint a receiver in respect of, the Secured Shares without obtaining a court order.

In addition to the remedies available under the Act, if the security is an equitable mortgage, the mortgagee has a right of foreclosure. This remedy extinguishes the mortgagor's right to the Secured Shares but not the mortgagor's obligation to pay any unpaid sum secured by the security document and can only be exercised by obtaining a court order. This remedy is rarely utilised in practice.

Enforcement

The Act allows the security document to specify that the mortgagee may exercise a power of sale or 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 prior approval of the High Court.

Application of proceeds of enforcement

Unless the security document states otherwise, the proceeds of enforcement of the security will be applied in the following order of priority:

- **first** in paying the enforcement costs;
- **second** in paying the sums secured by the security document; and
- **third** in paying the balance (if any) to the mortgagor.

Foreign law

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

- security document must comply with the requirements of the foreign law to be valid and binding on the Company;
- remedies available to the mortgagee are governed by the foreign law and the terms of the security document; and
- 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 the 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 which 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 mortgagee's rights, obligations and remedies. Another is that the foreign law may give the mortgagee remedies (like a right of appropriation under English law) that are not available under BVI law.

Despite the flexibility afforded by the Act, it is possible that conflicts of law issues may arise where the security document is governed by a foreign law (e.g. if the foreign law does not recognise BVI legal concepts or the converse), so careful consideration should be given to the choice of foreign law. No significant conflict issues are likely to arise where the governing law is New York law, English law, Hong Kong law or the law of another common law jurisdiction.

Security deliverables

The mortgagor will normally be required by the security document or (where relevant) the loan agreement to deliver the following documents to the mortgagee:

- the original share certificates (if any) for the Secured Shares;
- a share transfer form for the Secured Shares signed in blank;
- an irrevocable proxy for the Secured Shares in favour of the mortgagee;
- if the Company is (directly or indirectly) wholly owned by the mortgagor:
 - a signed and undated resignation from each director of the Company; and
 - a letter from each director authorising the mortgagee to date the resignation form and deliver it to the Company if a default occurs under the security document;
- a resolution of the directors of the Company authorising its entry into and execution of the security document;
- 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 (see 'Registrations, notations and filings' below);
- a certified copy of the Company's register of shareholders showing the creation of the security over the Secured Shares (see 'Registrations, notations and filings' below); 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.

Registrations, notations and filings

Particulars of security

If the mortgagor is a BVI company, it:

- must record particulars of the security created over the Secured Shares in its register of charges; and
- should register particulars of the security created by the security document with the Registrar.

Registering particulars of the security created over the Secured Shares with the Registrar is an optional, rather than a mandatory, registration. However, a properly advised mortgagee will require the registration to be made because:

- under the Act, the priority of competing security interests created over the same asset is determined by the date and time on which particulars of the security interests were registered with the Registrar; and
- it puts third parties on notice of the existence of the security and, under the Act, a person is taken to have notice of any particulars of security that have been registered with the Registrar.

It is also in the interests of the mortgagor to make the registration because the security document or (where relevant) the loan agreement will normally include a representation that the security is first ranking and/or there will be an event of default if the security ceases to be first ranking.

For more information about the register of charges and registering particulars of security for a BVI company, refer to our guide entitled '[Creation of security by a BVI company](#)'.

Memorandum and articles of association

If the mortgagee requires any changes to be made to the Company's memorandum or articles of association to facilitate the creation or enforcement of the security, the Company must register amended and restated memorandum and/or articles of association with the Registrar.

Preferably, this should be done before the security document is signed, but it is more commonly done within a few working days of signing. Unlike other jurisdictions, the changes will not be effective from the time the resolution is passed and will only become effective once the amended and restated memorandum and/or articles of association are registered with the Registrar.

Register of shareholders

The Act permits (and a properly advised mortgagee will require) the Company to include in its register of shareholders:

- a statement that security has been created over the Secured Shares;
- the name of the mortgagee; and
- the date on which the statement and mortgagee's name are entered in its register of shareholders.

The mortgagee may also require the Company to file with the Registrar a copy of its register of shareholders including the security note mentioned above. If the Company does so, it must file an amended register each time any changes are made to the register (including a transfer of shares on enforcement of security) until it files a notice electing to cease filing changes with the Registrar.

Although noting the security created over the Secured Shares in the Company's register of shareholders and filing a copy of the annotated register of shareholders with the Registrar has no technical legal effect, it has the practical effect of putting third parties on notice of the existence of the security. However, as the filing with the Registrar also places the ownership of the legal title to the Secured Shares as a matter of public record, it is not uncommon to see mortgagor's resist this additional step.

Stop notices and stop orders

If the mortgagee is concerned that any Secured Shares will be transferred or a distribution will be paid on the Secured Shares in breach of the security document, the mortgagee may apply to the High Court for a stop notice or a stop order.

A stop notice is a notice from the Registrar of the High Court requiring the Company and/or the mortgagor to give 14 days' notice to the mortgagee before any Secured Shares are transferred or any

distribution is paid on the Secured Shares. A stop order is an order from the High Court prohibiting the Company from registering a transfer of the Secured Shares or paying a distribution on the Secured Shares.

Contacts

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

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2023 MOURANT OZANNES ALL RIGHTS RESERVED