

BRIEFING NOTE

2021

Guide: Granting and protecting 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. The process for creating and registering security in the BVI is also straightforward and will not typically impact the timeframe of a proposed transaction.

In this brief guide, we address certain of the key BVI law points pertaining to the creation and protection of security over shares (the “**Secured Shares**”) in a BVI business company (the “**Secured Company**”).

1. Creation of security

Section 66 of the BVI Business Companies Act, 2004 (the “**Act**”) expressly permits the creation of security over Secured Shares in a Secured Company. The Act provides that the security does not need to be in any specific form, but that:

- i. it must be in writing;
- ii. the security document must be signed by, or with the authority of, the security provider; and
- iii. the security document must clearly indicate the intention to create security over the Secured Shares in the relevant Secured Company and the amount secured or how that amount is to be calculated.

BVI law recognizes various forms of security over assets, including equitable mortgages and charges which are most commonly taken over Secured Shares in a Secured Company.

2. Execution formalities and regulatory approvals

BVI law does not prescribe a particular mode of execution with respect to security over Secured Shares in a Secured Company and it is not necessary for such security to be certified, notarized or apostilled to make the security valid or enforceable from a BVI law perspective. That being said, in practice, a security document with respect to Secured Shares in a Secured Company is customarily executed as a deed.

From an execution standpoint, it is important to review the memorandum of association and articles of association (the “**M&A**”) of the relevant security provider and the relevant Secured Company, to the extent it is a party to the security document, to ensure compliance with any applicable signing formalities.

Unless security is being taken in a Secured Company which is a “regulated person”, such as a bank or a mutual fund, no regulatory approvals are necessary to create valid and enforceable security as a matter of BVI law.



3. Stamp duty and taxes

No stamp duty or taxes are payable with respect to the creation or enforcement of security over Secured Shares in a Secured Company as a matter of BVI law so long as the Secured Company and its subsidiaries do not have an interest in land, or any shares, debt obligations or other securities of any body corporate which has an interest in land, in the BVI.

4. Governing law of the security

Section 66 of the Act expressly contemplates that security over Secured Shares in a Secured Company may be governed by BVI or foreign law.

In cross-border finance transactions, it is relatively common for the governing law of a security document over Secured Shares in a Secured Company to be aligned with the governing law of the principal finance documents. 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. Care should however be taken to ensure that there are no conflicts of law issues where a security document is governed by foreign law. English, Hong Kong and Singapore law are frequently adopted to govern security over Secured Shares in a Secured Company and no major conflicts of law issues are likely to arise.

BVI law governed security document

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 can 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.

The secured party may also take possession of the Secured Shares in the Secured Company, subject to redemption by the security provider upon the settlement of the debt.

If the secured party acquires legal title to the Secured Shares in the 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.

For further details regarding the enforcement of security over Secured Shares in a Secured Company, please refer to our guide entitled "Enforcing security over shares in a BVI business company".

Foreign law governed security document

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



- i. 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 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.

5. 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.

6. Security deliverables

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;
- iii. an undated resignation letter from each director 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;
- 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 referenced 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 (see further below);
- 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 (see further below);
- 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 - see further below);
- 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 - see further below);
- 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 stamped by the Registrar, if required (see further below).

7. Security protection steps

Register of charges of a BVI security provider

Pursuant to section 162 of the Act, if the security provider is a BVI company, it must record particulars of the security created over any Secured Shares in a Secured Company in its register of charges. The register of charges must include:

- i. the date of creation of the charge;
- ii. a short description of the liability secured by the charge;
- iii. a short description of the property charged;
- iv. the name and address of the secured party;
- v. the name and address of the holder of the charge; and
- vi. details of any prohibition or restriction, if any, contained in the security document on the power of the security provider to create any future charge ranking in priority to or equally with the security.

There is no statutory timeframe within which the register needs to be updated. However, a well-advised secured party will request that the register is updated promptly so that third parties that inspect it are on notice of the security. In addition, where a change occurs in the relevant charges or in the details of the charges required to be recorded in a BVI company's register of charges, the BVI company must, within 14 days of the change occurring, transmit details of the change to its registered agent. Any such variations and releases of charge should also be reflected in the register of charges.

Register of registered charges of a BVI security provider

Registration of charges

Pursuant to section 163 of the Act, if the security provider is a BVI company, the security provider (or a BVI legal practitioner authorized to act on its behalf) or the secured party (or a person authorized to act on its behalf) may lodge an application with the Registrar to register a charge created by the security provider by filing an application, specifying the particulars of charge, in the approved form. The security document itself is not filed or registered as part of the application. Whilst registration is not mandatory and does not affect the validity, enforceability or the admissibility in evidence of the charge, it is almost always completed in practice because it protects the priority of the charge as explained below and puts third parties on notice of the existence of the security.

Once the Registrar is satisfied that all of the registration requirements have been complied with, it will register the charge in the security provider's register of registered charges and issue a certificate of registration confirming the date and time of registration. The Registrar will also send a



copy of the certificate to the security provider and the secured party. The certificate of registration of charge is conclusive proof that the registration requirements have been complied with and that the charge referred to in the certificate was registered on the date and time stated in the certificate.

The security provider's register of registered charges is a matter of public record.

Variation of registered charges

Where there is a variation in the terms of a charge registered under section 163 of the Act, the security provider (or a BVI legal practitioner authorized to act on its behalf) or the secured party (or a person authorized to act on its behalf) may (and should) lodge an application for a variation of charge with the Registrar by filing an application in the approved form. The document varying the charge is not itself filed or registered as part of the application. Once the variation has been registered, the Registrar will update the security provider's register of registered charges and issue a certificate of variation confirming the date and time of variation. The Registrar will also send a copy of the certificate to the security provider and the secured party. The certificate of variation of charge is conclusive proof that the variation referred to in the certificate was registered on the date and time stated in the certificate.

Satisfaction or release of registered charges

Where all liabilities secured by a charge registered under section 163 of the Act have been paid or satisfied in full, or a charge registered under section 163 of the Act has ceased to affect the property or any part thereof, a notice of satisfaction or release in the approved form may (and should) be lodged with the Registrar. Such notice may be filed by the security provider (or a BVI legal practitioner authorized to act on its behalf) or the secured party (or a person qualified to act as the registered agent of a BVI company, or a BVI legal practitioner, acting on behalf of the secured party). If the notice of satisfaction or release is filed by or on behalf of the security provider, it must be signed by the secured party (or a BVI registered agent, or a BVI legal practitioner, acting on behalf of the secured party) or be accompanied by a statutory declaration in the approved form verifying the matters stated in the notice. The document releasing the charge is not itself filed or registered as part of the application. Once the release has been registered, the Registrar will update the security provider's register of registered charges and issue a certificate of satisfaction or release confirming the date and time on which the notice was filed. The Registrar will also send a copy of the certificate to the security provider and the secured party.

Priority of registered charges

The general rule is that a registered security interest will have priority over any later registered or unregistered security interest over the same asset. The exceptions to this rule are as follows:

- i. a secured party may consent or agree to vary the priority of its security interest;
- ii. a registered floating charge is postponed to a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the security provider to create any future charge ranking in priority to or equally with the floating charge; and
- iii. a different regime applies to a security interest that was created by a company that was originally incorporated under the International Business Companies Act 1984 and re-registered under the Act.

The common law rules of priority continue to apply with respect to any unregistered security interests. In general terms, these rules specify that priority between competing security interests is determined by the dates on which the relevant security interests were created.

Register of members of the Secured Company

Section 66 of the Act permits a Secured Company to annotate its register of members to include:

- i. a statement that security has been created over the Secured Shares;
- ii. the name of the secured party; and



- iii. the date on which the statement and secured party's name are entered in its register of members.

Section 43A of the Act also permits a Secured Company to file a copy of its register of members with the Registrar. If it does so, the Secured Company is bound by the contents of the copy register until such time as it files a notice electing to cease changes with the Registrar. Prior to filing any such notice, the Secured Company must continue to file any changes to its register of members with the Registrar.

Although it is optional to annotate a Secured Company's register of members with details of any security that has been created or to file the same with the Registrar, these steps put third parties that inspect the register on notice of the security. Therefore, a secured party usually insists on this. Most Secured Companies typically push back on the public filing in particular as they do not want legal title to the Secured Shares to become a matter of public record.

M&A of the Secured Company

A secured party will usually request the Secured Company to make certain changes to its M&A to ensure, among other things, that there are no restrictions on the transfer of Secured Shares in the Secured Company which may impede enforcement action. Any changes to the Secured Company's M&A should be made by passing shareholder resolutions and the amendments take effect once the amended M&A and/or the amendment resolutions (as applicable) have been filed with the Registrar. It is therefore important for a secured party to obtain a stamped copy of the amended M&A and/or the amendment resolutions (as applicable).

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice, please contact:

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