

Article

Granting and Enforcing Security over Shares of British Virgin Islands Entities

Author: Rachael Pape, Associate

One of the key roles of BVI vehicles in international finance transactions is the provision of security (either BVI entities granting security over their own assets or security being granted over the shares of a BVI company). The process for granting and registering security in the BVI is straightforward and will not negatively impact the timeframe of a proposed transaction. In this article we address some of the key issues and processes regarding security over the shares or limited partnership interests of a BVI entity.

Form of security interests

By far the most common form of security interest in relation to the shares of a BVI company is an equitable mortgage or share charge. An equitable security interest does not involve the transfer of legal title of the shares of a BVI company, although its terms should provide that in certain circumstances (typically not until the occurrence of an agreed enforcement event) the equitable mortgage or share charge can be converted to a legal mortgage.

Governing Law

In keeping with one of its overall aims to give flexibility for corporate transactions and structuring, the BVI Business Companies Act, as amended (the "BC Act") specifically allows the governing law of an equitable mortgage or share charge to be either BVI law or foreign law. We would generally recommend, in the case of security over the shares of a BVI company, that the equitable mortgage or share charge is governed by BVI law.

There are occasionally specific reasons and advantages to using a foreign law governed equitable mortgage or share charge. The clearest example as to when foreign law security should be considered is where it is desirable that as a final remedy the secured party be able to take outright ownership of the shares for its own benefit in full or part satisfaction of the secured liabilities. Other than through a court order for foreclosure (which, as a court based remedy, is rarely sought or obtained as secured creditors generally prefer quicker and less costly out of court enforcement options) a BVI law governed share charge or mortgage does not provide such a remedy, and ultimately only the proceeds of the charged shares will be available to the secured party upon enforcement. However, appropriation under English law (through the Financial Collateral Arrangements (2) Regulations, 2003) does provide such an out of court, self-help remedy, allowing title to the shares to be appropriated by the secured party, with the value of the shares being determined in accordance with the terms of the security document with any balancing amount being paid by the secured party to the former shareholder who granted the security.

Statutory formalities and requirements

The BC Act imposes only minimal requirements for security to be taken over shares of BVI companies. The mortgage or charge can be in any form, and governed by any law, provided that it:

- is created in writing;
- is signed by or with the authority of the shareholder of the shares which are to be mortgaged or charged; and

- clearly indicates: (i) the intention to create a mortgage or charge; and (ii) the amount secured or how that amount is to be calculated (typically the latter, achieved through reference to amounts due under the finance documents pursuant to a definition of “Secured Liabilities”, “Secured Obligations” or similar).

There are no other required formalities such as notarisation or apostilling, and there are no perfection requirements as a matter of BVI law in order to make the mortgage or charge valid or enforceable. Further, no stamp duty is payable in the BVI on the creation or enforcement of the equitable mortgage or share charge (other than in the very rare instances where the shareholder, the BVI company whose shares are being charged or any of their respective subsidiaries owns an interest in land located in the BVI).

Share register notations

Although not strictly a form of security registration, where security has been granted over shares of a BVI company, secured parties typically require the BVI company to make an annotation on its register of members confirming:

- that the shares are charged;
- the name of the chargee; and
- the date on which the statement and name were entered in the register of members.

The making of such an annotation on the register of members is not mandatory and does not have any specific statutory effect, however the making of such an annotation will give actual notice of the security interest to any person who views the register of members and there is a strong argument that such an annotation would provide constructive notice of the security interest to any person dealing with the shares. The annotated register of members may also be filed with the BVI Registrar of Corporate Affairs (the Registrar), the effect of which is to make the register of members available for public inspection and therefore increase the range of persons with actual notice of the security interest. Once a BVI company has filed its register of members with the Registrar, however, it is bound by the contents of this public register of members until the company files a notice confirming that it will no longer maintain a public register of members. The Registrar must be notified of any changes to the company’s register of members (e.g. any future share issues, transfers, redemptions etc.) and each time a change is made the company must file an updated register of members with the Registrar. It should also be noted that any register of members filed with the Registrar will remain a public document (albeit historical) and cannot be removed from the company’s records.

Security over limited partnership interests

Lenders are becoming increasingly aware of the ability to take security over limited partnership interests in the context of banking and finance transactions. Taking security over limited partnership interests can be useful in a variety of finance transactions, whether the security is being granted by the borrower or a third party. The BVI Limited Partnership Act 2017 contains a clear and simple framework that facilitates this.

The written consent of the general partners is generally required in order for a limited partner to assign, transfer or grant a security interest over, or otherwise dispose of, all or any part of its partnership interest; however, this requirement can be modified or excluded under the limited partnership agreement. Where consent is required, it is important that the general partner gives consent not only to the initial grant of the security interest, but also to any enforcement action that the lender may decide to take (which may include an outright transfer of the limited partnership interest requiring the admission of a third party as a new limited partner). In addition, subject to the terms of the limited partnership agreement, written notice of the grant of a security interest over the whole or any part of a limited partnership interest must be given to the limited partnership. The notice may be given by the grantor (limited partner) or grantee (lender) of the security interest. The notice must contain certain prescribed information, namely: (i) the date of the security agreement; (ii) the parties to the security agreement; (iii) the identity of the grantor and grantee; and (iv) the partnership interest (or part thereof) that is subject to the security interest.

Enforcement

In respect of foreign law governed security, the BC Act provides that the remedies available to the mortgagee/chargee will be governed by the relevant foreign law and the instrument creating the mortgage or charge, save that the rights of the mortgagor or mortgagee as a shareholder of the BVI company whose shares are subject to security will remain governed by BVI law pursuant to the BVI company’s memorandum and articles of association and the BC Act. In practical terms, this means that the enforcement of the foreign law security should be conducted in accordance with the relevant foreign law, but any resulting transfer of shares of the BVI company upon enforcement and any exercise of rights by the secured creditor as a shareholder of the BVI company should be effected in accordance with BVI law and the BVI company’s memorandum and articles of association. BVI advice should therefore be obtained prior to any enforcement steps being taken.

In the case of a BVI law governed equitable mortgage or share charge, the secured creditor will have two primary statutory remedies, being: (i) the right to sell the shares; and (ii) the right to appoint a receiver (including a streamlined recognition process for in the BVI courts for receivers appointed outside of the BVI), making use of who can vote, receive dividends and/or sell the shares. Both of these remedies are exercisable out of court in accordance with the terms of the equitable mortgage or share charge. There is also the possibility of applying to court for an order for foreclosure, provided that the security is a mortgage (which for these purposes includes a charge with the ability to convert the charge to a legal mortgage), but this is rarely sought (please see “Governing Law” above). An equitable mortgage or share charge should specify that the statutory out of court enforcement rights are exercisable immediately (or following such other period as is agreed) upon the occurrence of the relevant default/enforcement event; if the equitable mortgage or share charge is silent as to this, lengthy default cure periods may apply, preventing enforcement in the interim.

In practice, a chargee or mortgagee should ensure that certain ancillary documents are provided to it at the time of entry into the equitable mortgage or share charge which will, on the occurrence of an enforcement event, allow the secured party to take immediate control of the BVI company whose shares are mortgaged/charged including voting the shares on behalf of the shareholder, effecting the resignation of the directors of the BVI company and arranging for the shares to be transferred to the chargee/mortgagee. These ancillary documents are relatively standard and include:

- undated share transfer form(s);
- original share certificates (if any – BVI law does not require share certificates to be issued);
- a proxy to allow the secured creditor to vote the shares following an enforcement event;
- signed and undated letters of resignation from the directors and officers of the BVI company and a letter from each director and officer authorising the lenders to date the letters of resignation upon an enforcement event;
- (if the BVI company is not party to the relevant share charge) an irrevocable undertaking from the BVI company whose shares are charged to, among other things, register transfers of shares to the secured creditor or its nominee upon enforcement; and
- an undertaking from the registered agent of the BVI company to, among other things, keep the original register of members until the security is released and to update the same in accordance with the instructions of the secured creditor upon enforcement of the security. While registered agent undertakings are increasingly being accepted as part of market practice, commercial reality may mean that it is not possible to obtain such an undertaking for a particular transaction, in which case alternative options are available to address the relevant concerns.

Although usually included in the equitable mortgage or share charge, rather than as a separate ancillary document, a power of attorney should also be granted by the security provider to enable the secured creditor to execute and complete documents on the security provider’s behalf upon enforcement.

We are here to help

As noted above, tailored professional advice should be sought in respect of the individual circumstances. Please feel free to reach out to your usual Conyers contacts with any questions regarding granting or enforcement of security by or over BVI companies.

Author:

Rachael Pape
Associate
rachael.pape@conyers.com
+1 284 852 1114

Other Contacts:

Robert Briant
Partner
robert.briant@conyers.com
+1 284 852 1100

Anton Goldstein
Partner
anton.goldstein@conyers.com
+1 284 852 1119

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

For further information please contact: media@conyers.com