

## Taking security over shares in a British Virgin Islands company (a 'Company')

### QUESTIONS AND ANSWERS

**Q1.** *Is it possible to take security over shares in a Company?*

**A1.** Yes. British Virgin Islands ("BVI") law permits security to be taken over shares in BVI Companies, and this is a relatively common feature of secured financing involving Companies.

**Q2.** *Are there any specific filing requirements, restrictions, or other similar provisions of BVI law which would be applicable?*

**A2.** If the shares in the Company are in bearer form, it is a mandatory requirement of BVI law that the share be deposited with a custodian licensed to hold bearer shares by the Financial Services Commission; if they are not so deposited, then a security interest over such shares will, under BVI law, not be valid or enforceable. Where the shares are in registered form, the person taking security will ordinarily wish to take possession of the share certificates.

There are no mandatory filing requirements relating to documents conferring security over shares in Companies. BVI law does permit a notation to be made in the share register of the Company relating to the security, and this provision is frequently utilised to ensure that any person reviewing the share register has notice of the security interest, but it is not mandatory. Only the Company itself can insert the details in the share register, so ideally the security document should contain an obligation to procure this. Share registers are not ordinarily open to public inspection in the BVI, and sometimes security documents provide that the share register must be publicly filed after the notation is made to ensure the widest class of persons possible has notice of the security interest.

A document creating security over shares in a Company is not normally subject to stamp duty in the BVI.

If the shareholder granting the security is also a BVI entity, then there may be registration regimes that apply to it relating to the creation of security generally.

**Q3. *Does the security document need to be governed by BVI law?***

A3. No, BVI law specifically provides that a document conferring security over shares may be governed by a foreign law. However, difficult conflicts of laws issues may arise if a foreign law is chosen to govern the security document which has concepts unrecognised by BVI law, or if the foreign law does not recognise certain concepts of BVI law. There is usually little difficulty providing for a security document to be governed by the laws of another common law jurisdiction with laws similar to the BVI, such as England, Hong Kong or Singapore.

**Q4. *Can a security interest be enforced without appearing before the BVI courts?***

A4. Generally speaking, yes. If the security document is governed by a foreign law, then the means of enforcement is determined by that foreign law. It is probably unlikely that any foreign law will require an application to be made to the BVI courts.

If the security document is governed by BVI law, then a number of possible remedies are open to the party holding the security. The most common remedy is to appoint a receiver who can vote the shares, receive dividends and (if they can find a market) sell the shares. Receivers can be appointed out of court. A power of sale can also be exercised without recourse to the court. However, to exercise a right of foreclosure, an application to the court is needed.

**Q5. *How can the person taking security verify free and marketable title to the shares?***

A5. Under BVI law this can be difficult. Because there is no requirement to file documents in relation to the creation of security over shares, it is not usually possible to determine from publicly available documents whether any existing security interests have been created over shares in a Company.

However, one should obviously always inspect the share register to see if any security interests are recorded there. It is also important to review the memorandum and articles of association of the Company carefully, as a Company will often confer a “first and paramount lien” on itself over its shares, and such a lien would normally take priority over any subsequent security interests.

It is also important to try to establish that the shares in the Company have been fully paid up.

**Q6. *Does the person taking security need to review the constitutional documents of the Company?***

A6. Yes. Although it is a relatively simple matter to take security over shares in a Company, often a Company will contain provisions in its constitutional

documents which can potentially frustrate someone trying to enforce security over shares. For example, a provision commonly found in the constitutional documents of Companies provides that shares can only be transferred pursuant to a resolution of the board of directors. If the directors decline to pass a resolution, it is very difficult to exercise a power of sale over shares in the Company. Similarly, being able to convert shares from registered to bearer form can have severe consequences for the validity of any security over those shares. The memorandum and articles of association should always be studied particularly carefully.

**Q7. *Can you create an equitable mortgage over shares in a Company by mere deposit of the share certificates?***

A7. There is no decided authority on this point in the BVI, but based on English case law in relation to similar statutory provisions in the United Kingdom, our view is that a mere deposit of share certificates will not constitute an equitable mortgage over shares in a Company.

**Q8. *Are there other documents that are usually obtained when taking security over shares in a Company?***

A8. Assuming that all of the shares in the Company are being charged, it is quite common to ask for signed but undated letters of resignation from each director of the Company, and a letter authorising the security holder to put those letters into effect. It is also advisable that if any new directors are appointed after the security has been granted, then resignation letters should be procured from them as well.

Signed and undated instruments of transfer should be taken in respect of registered shares. The security document should specifically authorise the security holder to put these into effect.

**Q9. *Does the security document need to be notarised, or apostilled, or executed in a specific fashion?***

A9. There is no requirement that a security document relating to shares in a Company has to be notarised or apostilled. Although security documents are commonly executed as a deed (i.e. under seal) there is no requirement that this be done.

However, the security document does need to be in writing, and it does need to specify (i) the intention to create a security interest, and (ii) the amount secured by the security interest or how that amount is to be calculated.

*The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.*

## FURTHER INFORMATION

Please contact any of the following Harneys lawyers if you require additional information on the registration of security in the British Virgin Islands.

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