

# How to enforce security in the BVI - outside of court

How to enforce security in the BVI out of court will depend on your security type. For this guide, we focus on the out of court enforcement of security granted over shares in a company.

## How do you create security over shares in a BVI company?

The BVI Business Companies Act 2004 (as amended) (the **Act**) allows security to be created over shares in a BVI company. This can be done by either a legal mortgage, equitable mortgage, or charge.

Section 66(1) of the Act provides for the mortgage or charge to be in writing signed by, or with the authority of, the registered holder of the shares to which the mortgage or charge relates (the **chargor**).

Section 66(5) of the Act sets out the remedies that can be used by the secured party in the event of a default on the debt over which the security is given. Specifically, subject to the terms of the security documents itself:

- the power of sale under section 66(5)(a)
- the power to appoint a receiver under section 66(5)(b)

Both remedies can be exercised without a court order, per the terms of the security document, as explained further below.

In some rare cases, the security holder may have valid reasons to retain control of the shares rather than sell the shares or appoint a receiver. BVI law does not prohibit such retention of the shares, though the security holder must be aware that the shares will be subject to redemption by the mortgagor upon the settlement of the debt should it be paid.

## What is the timing for enforcement of security?

Section 66(7A) of the Act provides that where BVI law is the governing law of the mortgage or charge, if the instrument creating the mortgage or charge specifically provides, the remedies referred to in section 66(5) of the Act will be exercisable immediately upon default occurring.

However, if the security document is silent on the power of sale or power to appoint a receiver being exercisable immediately on default, then section 66(7) of the Act specifies that the remedies in section 66(5) of the Act are not exercisable until an event of default has (i) been ongoing for not less than 30 days, or (ii) not been rectified within 14 days of the security holder giving notice of the default and requiring it to be remedied.

## How can a security holder take possession of the shares?

To exercise the remedies above, the security holder must own the shares. Usually, where security has been granted by way of a legal mortgage over shares, the security holder will already be the legal owner and, therefore, in possession of the shares.

This is not usually the case regarding a security holder who has been granted security through an equitable mortgage or charge. However, a security holder who has been granted security over shares by equitable mortgage or charge can be registered as the legal holder of the shares at any time, and this does not expressly have to be after a default occurs. Usually, when an equitable mortgage or charge over the shares is provided, the security holder will be provided with a pack of documents along with the security document, which will allow for the transfer of shares to take place by those documents being completed dated, and delivered to the registered agent.

These documents include:

- undated share transfer form(s) signed by the chargor
- original share certificates (if any – BVI law does not require share certificates to be issued)
- a proxy to allow the security holder to vote the shares following an enforcement event
- signed and undated resignation letters from the company's directors, with a letter from each director authorising the security holder to date the resignation letters upon an enforcement event
- an irrevocable undertaking from the company whose shares are charged to register transfers of shares to the secured creditor or its nominee upon enforcement
- an undertaking from the company's registered agent to, among other things, keep the original register of members until the security is released and to update the same following the instructions of the secured creditor upon enforcement of the security
- not already part of the security document itself, a power of attorney granted by the chargor to enable the security holder to execute and complete documents on the chargor's behalf upon enforcement

## How does the power of sale arise?

The power of sale may arise in the following circumstances, none of which necessitate an application to court for an order allowing the sale:

- under the statutory right of sale under section 66(5)(a) of the Act
- by an implied statutory right of sale under the Conveyancing and Law of Property Act (**Cap 220**), where the security document is made by way of deed
- a power of sale arising under common law
- an express contractual right of sale set out in the security document

Commonly, a security document will have an express provision providing for the power of sale. This contractual provision is relied upon when enforcing security in most cases. This power of sale is subject to any limitations or conditions in the security document. Still, if expressly provided for, the security holder can sell the shares.

Following section 66(5)(a), the right to sell the shares is available to the security holder as and when it chooses, subject to an obligation to the chargor to act in good faith and obtain the best price reasonably obtainable on the day. The security holder must not merely aim to recover the amount of the debt due. Any surplus proceeds must be remitted to the chargor. In the event of a breach of the duty of good faith, the chargor can apply to the court to prevent or reverse the sale. However, this duty of good faith does not require the sale to be carried out by any particular method or within a set time frame.

## When would a security holder appoint an out of court receiver?

The most common method of enforcing security over shares is to appoint an out of court receiver. This power can arise under:

- the statutory right to appoint a receiver under section 66(5)(b) of the Act, where the security document is governed by BVI law
- an implied statutory right under Cap 220, where the security document is executed as a deed
- an express contractual right in the security document

A receiver may only be appointed out of court under an express contractual right to do so; a court order is required to appoint a receiver under a statutory power. However, virtually all properly drafted security documents provide an express right and this out of court contractual route is the most typical. It is usually also quicker and cheaper than a court appointment.

The Insolvency Act 2003 (the **IA 2003**) requires an out of court appointment of a receiver to be in writing. The appointment takes effect upon receipt of written notice of the appointment by the receiver, provided they accept it before the end of the next business day.

Once appointed, a receiver can vote and sell the shares, receive any dividends or redemption proceeds, and exercise other rights attached to the shares. Where the company holds assets, typically the receiver will vote the shares to replace the board of directors (usually putting a nominee corporate director in place). The new director then sells the company's underlying assets and distributes the proceeds by dividends or repays the debt.

A receiver exercising a power of sale of shares owes a duty to obtain the best price reasonably obtainable at the time of sale (IA 2003, s129)

## Conclusion

We hope this guide helps you understand out of court enforcement of security in the BVI. If you have any further questions, please get in contact with Claire Goldstein or Christopher Pease.

## Key contacts



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