

# GUIDE TO TAKING SECURITY IN THE BRITISH VIRGIN ISLANDS

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## PREFACE

This Guide summarises the process of taking security in the British Virgin Islands (**BVI**) under the BVI Business Companies Act, 2004 (as amended) (the **Act**). The BVI is an overseas territory of the United Kingdom offering the benefits of a well-established legal system, neutral tax treatment and a creditor-friendly insolvency regime.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have in relation to taking security under the law of BVI generally; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of our team, using the [contact information](#) provided at the end of this Guide.

### **Appleby**

British Virgin Islands  
January 2016

## 1. INTRODUCTION

This Guide focuses on the framework for taking security under the Act, which has two main aspects: (1) taking security over the property of a BVI company and (2) taking security over the shares issued by a BVI company (which may or may not be the property of another BVI company).

## 2. TAKING SECURITY OVER THE PROPERTY OF A BVI COMPANY

Under the Act, a BVI company may, subject to its constitutional documents (memorandum and articles of association), by an instrument in writing, create a charge (meaning any form of security interest other than an interest arising by operation of law) over any of its property situated in any part of the world. The governing law of the charge may be the law of any jurisdiction and the charge will be binding on the company to the extent it is binding under, and in accordance with the requirements of, the chosen governing law.

Security granted by a BVI company pursuant to a charge must be recorded in its private register of charges which is required under the Act to be kept by each BVI company and may also be registered in a publicly available register of charges. Additional or alternative requirements may apply to certain types of property, such as real property situate in the BVI or ships and aircraft, and to certain BVI companies, such as regulated entities. These are outside the scope of this Guide. A BVI legal practitioner should be consulted in relation to any security granted by a BVI company.

### 2.1 Private Registration of Charges

Under section 162 of the Act, a BVI company must keep, at the company's registered office or at the office of its registered agent, a register of all relevant charges created by the company (its **Private Register**) showing in respect of each charge:

- the date of its creation;
- a short description of the liability secured by the charge;
- a short description of the property charged;
- the name and address of the trustee for the security or, if there is no trustee, the name and address of the chargee;
- unless the charge is a security to a bearer, the name and address of the holder of the charge; and

details of any prohibition or restriction contained in the instrument creating the charge on the power of the company to create any future charge ranking in priority to or equally with the charge.

A BVI company must transmit particulars of any changes to the charges or to the details of such charges, recorded in the Private Register, to that company's registered agent within 14 days of the change occurring. This is to enable the registered agent to update the Private Register in a timely manner.

### 2.2 Public Registration of Charges

Although not mandatory, an application may be made under section 163 of the Act by the chargor company itself (or a legal practitioner in the BVI authorised to act on its behalf) or by the chargee (or a person authorised to act on its behalf) to the BVI Registrar of Corporate Affairs (the **Registrar**) to register the charge in the publically available register of charges maintained by the Registrar (called the **Register of Registered Charges**). The application is essentially a summary of the particulars of the charge, incorporating the details listed above in respect of the Private Register, in a form approved by the

Registrar. An application on behalf of the chargee may only be filed by a person qualified to act as a registered agent in the BVI or a legal practitioner in the BVI.

Provided the registration requirements of the Act have been complied with (by filing the relevant forms and paying the registration fee), the Registrar will register the charge in the Register of Registered Charges and issue a certificate of registration.

### 2.3 Priority of Charges

There is no time limit within which details of a charge must be entered on a BVI company's Private Register or the Register of Registered Charges. Failure to enter details on either register does not affect either the validity or the enforceability of a charge, though a BVI company that fails to make the necessary entries in its Private Register commits an offence and is liable on summary conviction to a fine of USD5,000.

However, registration of a charge in the Register of Registered Charges determines the priority of charges created on or after the "commencement date" (discussed below) by a BVI company, subject to certain exceptions discussed below.

A charge created on or after the commencement date on property of a BVI company that is registered in the Register of Registered Charges has priority over:

- (a) a charge created on or after the commencement date on the property that is subsequently registered in the Register of Registered Charges; and
- (b) a charge created on or after the commencement date on the property that is not registered in the Register of Registered Charges.

Charges created on or after the commencement date that are not registered in the Register of Registered Charges rank among themselves in the order that they would have ranked had the Act not come into force. Charges created prior to the commencement date continue to rank in the order that they would have ranked had the Act not come into force and, where they would have taken priority over a charge created on or after the commencement date, they continue to take priority after the commencement date. An important corollary of this is that, for any BVI company incorporated under any company statute that pre-dates the Act, the Register of Registered Charges will not necessarily disclose all security that they may have granted.

Under the Act, "**commencement date**" means:

- for a BVI company incorporated, continued or registered under the Companies Act [Cap 285] of the British Virgin Islands or the International Business Companies Act [Cap 291] of the British Virgin Islands, the date that such company was re-registered as a BVI business company under the Act;
- for a company that was continued into the BVI under the Act, the date of its continuation; or
- in any other case, 1 January 2005.

Therefore the priority of charges is relatively straight-forward for BVI companies established under the Act which came into force on 1 January 2005. For other BVI companies, the priority of registered and unregistered charges is more complicated and outside the scope of this Guide. In such circumstances, advice on the priority of relevant charges should be sought from a BVI legal practitioner.

The order of priorities of charges is subject to (i) any express consent of the holder of a charge that varies the priority of such charge in relation to other charges that it would otherwise have priority over, or (ii) any agreement between chargees that affects the priorities in relation to the charges held by the respective

chargees. Also, 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 company to create any future charge ranking in priority to or equally with the floating charge.

## 2.4 Variation or Release of Charges

An application to vary the terms of a registered charge may be filed with the Registrar following initial registration of such charge by (or on behalf of) either the company as chargor or the chargee and, provided the requirements of the Act have been complied with, the Registrar will register the variation and issue a certificate of variation of the charge to the company and the chargee.

If (a) all liabilities secured by a charge registered on the Register of Registered Charges have been paid or satisfied in full; or (b) a charge registered on the Register of Registered Charges has ceased to affect the property, or any part of the property, of a BVI company, a notice of satisfaction or release may be filed with the Registrar which must:

- (a) state whether the charge has been paid or satisfied in full or whether the charge has ceased to affect the property, or any part of the property, of the company; and
- (b) if the charge has ceased to affect the property, or any part of the property of the company, specify the property of the company that has ceased to be affected by the charge and stating whether this is the whole or part of the company's property.

A notice of satisfaction or release may be filed by or on behalf of the company or the chargee. If the notice is filed by or on behalf of the company it must be signed by or on behalf of the chargee or accompanied by a statutory declaration verifying the matters stated in the notice.

Provided the requirements of the Act have been complied with, the Registrar will register the notice and issue a certificate of the satisfaction, release or partial release of the charge to the company and to the chargee.

## 3. TAKING SECURITY OVER SHARES ISSUED BY A BVI COMPANY

It is common for a borrowing company to provide security over the shares in companies of the borrowing group, which may include BVI companies. Taking security over the shares of a BVI company is expressly facilitated by provisions in the Act but is subject to the provisions of the memorandum and articles of association of such BVI company and the terms of the instrument creating the mortgage or charge over such shares. If the shareholder providing the security is also a BVI company then the framework described above for the registration and priority of charges over the property of a BVI company will also apply.

### 3.1 Statutory Framework for Security of Shares

#### (a) Form of instrument

Under the Act, there is no prescribed form for a mortgage or charge of shares of a BVI company but it must:

- be in writing signed by holder of the shares to which the mortgage or charge relates;
- clearly indicate the intention to create a mortgage or charge; and
- clearly indicate the amount secured by the mortgage or charge or how the amount is to be calculated.

(b) **Governing Law**

The governing law of a mortgage or charge of shares of a BVI company may be the law of the BVI or the law of another jurisdiction.

Where the governing law of a mortgage or charge is not BVI law:

- the mortgage or charge must comply with the requirements of its governing law in order for the mortgage or charge to be valid and binding on the company; and
- the remedies available to the mortgagee or chargee are governed by the governing law and the terms of the mortgage or charge.

Alternatively, where the governing law of a mortgage or charge of shares is BVI law, in the case of a default by the mortgagor or chargor, the mortgagee or chargee is entitled to the following remedies:

- subject to any limitations or provisions to the contrary in the mortgage or charge, the right to sell the shares; and
- the right to appoint a receiver who, subject to any limitations or provisions to the contrary in the mortgage or charge, may (i) vote the shares, (ii) receive distributions in respect of the shares, and (iii) exercise other rights and powers of the mortgagor or chargor in respect of the shares, until such time as the mortgage or charge is discharged.

Unless the terms of a BVI law governed mortgage or charge provide that the remedies available are exercisable immediately on a default occurring, the remedies will not be exercisable until (i) a default has occurred and has continued for at least 30 days (or such shorter period set out in the mortgage or charge), and (ii) the default has not been rectified within fourteen days (or such shorter period set out in the mortgage or charge) from service of the notice specifying the default and requiring rectification.

(c) **Annotation of register of members**

Under the Act, a notation of the share security and the chargee's interest in the shares may be made in the register of members of the BVI company the shares of which have been charged noting that the shares are mortgaged or charged, indicating the name of the mortgagee or chargee, and noting the date on which the statement and name were entered in the register of members. This is not compulsory, however, and the terms of the mortgage or charge must require annotation of the register of members by the company issuing the shares if this is sought by the mortgagee or chargee. It should be noted that once the register of members of a BVI company has been registered by the Registrar, the company is bound by the contents of such register until changes to it are filed with the Registrar or the company elects to cease registration of changes to its register of members.

(d) **Application of proceeds**

Subject to the terms of the instrument creating a mortgage or charge of shares of a BVI company setting out a different application of proceeds, under the Act all proceeds from the enforcement of the mortgage or charge must be applied:

- first, towards the costs of enforcing the mortgage or charge;
- second, to discharge the amounts secured by the mortgage or charge; and
- third, to pay any balance due to the mortgagor or chargor.

### 3.2 Terms of the Mortgage

Taking legal security over shares requires the transfer of the charged shares to the chargee and entry of the chargee in the chargor's register of members as the holder of title to the charged shares. As a result, an equitable mortgage of shares is more commonly used to take security over shares of a BVI company, as this does not require transfer of legal title. In addition to setting out the defaults that trigger a mortgagee's rights to enforce the security and a mortgagee's enforcement powers and remedies, the terms of an equitable mortgage of shares of a BVI company often include some or all of the following provisions.

(a) **Delivery of instrument of transfer and director resignations**

An equitable mortgage over shares of a BVI company usually requires the mortgagor, at a minimum, to deliver to the mortgagee signed and undated instruments of transfer for the mortgaged shares, existing share certificates in relation to the mortgaged shares and undated resignation letters signed by the directors of the company, all to be held pending a default under the mortgage. The directors should also provide written authorisation to the mortgagee to date their respective resignation letters and deliver them to the company issuing the mortgaged shares if a default occurs.

(b) **Filing of annotated register of members**

In addition to requiring that the register of members of company the shares of which are mortgaged be annotated as set out in 3.1 above, the mortgagee will often require that such annotated register be filed with the Registrar. The Act does not require the register of members of a BVI company to be filed with the Registrar. However, a BVI company may voluntarily file for registration by the Registrar its register of members (thus making the register of members available to the public). The Act is silent as to the legal effect of the entry of the notation on the register of members but it may be deemed to be constructive notice to third parties who inspect the register.

(c) **Amendment of memorandum and articles of association**

Annotation of the register of members may also be used to trigger restrictions on certain actions of the company issuing the shares. A mortgagee may require that the memorandum and articles of association of the company issuing the mortgaged shares be amended to protect its security interest including:

- to prohibit the company from taking certain actions, such as voluntary liquidation (see 4 below) or amending its memorandum and articles of association, without the consent of the mortgagee so long as shares are mortgaged; and
- to remove the right of directors of the company to refuse the transfer of its shares or to require the transfer of any mortgaged shares on enforcement.

(d) **Proxy and Power of Attorney**

The terms of the mortgage may also grant to the mortgagee a proxy in relation to the mortgaged shares and a power of attorney to undertake certain actions for and on behalf of the mortgagor.

(e) **Registered Agent Acknowledgement**

The entry of the name of a holder of shares in a BVI company's register of members is *prima facie* evidence of the title of such holder to such shares and the register of members of a BVI company is usually kept by the company's registered agent. Thus, under the terms of the mortgage, the mortgagee may require that the registered agent of the BVI company issuing the shares

acknowledges the security and agrees to update the register of members if a transfer of shares occurs pursuant to a default and enforcement of the security under the mortgage.

4. **REGISTERED CHARGES DO NOT PRECLUDE CERTAIN CORPORATE ACTIONS**

The Act provides that where a BVI company has a charge registered over its property under section 163 of the Act, this will not preclude the company from proceeding with:

- voluntary liquidation of the company (in these circumstances, the liquidator is bound to give effect to the rights and priority of the claims that the secured creditor holds); and
- continuation of the company out of the BVI and into a foreign jurisdiction under section 184 of the Act (in these circumstances a declaration is required stating that either the chargee has consented or not objected to the continuation or that the chargee's security interests under the charge will not be diminished or otherwise compromised by the outgoing continuation).

For more specific advice on taking security in the British Virgin Islands, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).