

# The Enforcement of Share Security in Bermuda, the British Virgin Islands, the Cayman Islands and Jersey

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In financing transactions it is common for companies of the borrowing group to provide some sort of security, such as security over the shares in companies of the borrowing group, including offshore entities, either by taking legal or equitable security over the shares. The usage of equitable security is much more common, and as a result this article will focus on enforcement of equitable share security. Given the present financial conditions lenders are becoming concerned about potential defaults in such transactions and the possibility of enforcing such security. The method of enforcement of the security will vary depending upon the jurisdiction, however, in the case of the five jurisdictions covered in this article, the terms of the share security will usually set forth and govern the enforcement methods.

Common terms in share security to protect creditors will require the chargor, at a minimum, to deliver signed and undated instruments of transfer for the secured shares, existing share certificates in relation to the secured shares and undated resignation letters signed by the directors. Often offshore entities provide in their memorandum and articles of association / bye-laws for the directors of the company, the right to refuse the transfer of shares and if this is the case, these provisions should have been altered as a condition of the share security (or at least, obtain formal confirmation that the directors will not refuse the transfer of shares on enforcement). Upon enforcement, the creditor ought then to be able to date the instruments of transfer and the director's resignation letters, enabling the creditor to become the shareholder of the charged shares (once the register of members is amended to reflect the new shareholder) and to appoint new directors.

However, this assumes that no action has been taken by the directors of the company to intentionally frustrate the share charge (if so, court proceedings may be necessary).

In Bermuda, it is possible to file the share charge in the public register, as a charge over “Bermuda property”, and this can be carried out by the creditor’s representatives. The British Virgin Islands (“BVI”) and the Cayman Islands allow for a notation of the share security and the chargee’s interest against the entry of the chargor in the register of members of the offshore entity. Further, in the BVI this notation can be filed with the Companies Registry. These methods are all desirable to assist in establishing priority of the share security. These notations and filings can only be carried out by the offshore entity, therefore it is vital to have wording in the share charge/pledge requiring the offshore entity to attend to the notations and registrations and provide the creditor with documentary evidence that they have been carried out.

Another common term in share security is the ability for the creditor to appoint a receiver upon specified events of default, so the receiver can manage the affairs of the offshore entity. The powers of the receiver will be established by the terms of the share charge and will normally include the power to sell the secured shares. In Bermuda both the Conveyancing Act 1983 (the “1983 Act”) and the Companies Act 1981 (the “1981 Act”) contain provisions in relation to receivers. The 1983 Act implies a statutory power for a chargee to appoint a receiver, but this can be overridden by an express contrary intention in the share charge and may be varied or extended. The 1983 Act also sets out the receiver’s powers and duties (which can also be varied and extended by the share charge). The 1981 Act contains provisions regulating the activities of receivers, which are very general in nature and establishes a number of filing and notice requirements in relation to the administration of a receiver. Pursuant to the BVI Business Companies Act 2004, a receiver is required to give notice to the Registrar of Corporate Affairs upon appointment, who will make a note of the appointment in the Register of Charges kept by the Registrar of Corporate Affairs.

Further, the BVI Insolvency Act 2003 sets out who is excluded from being a receiver. In the Cayman Islands there are no statutory requirements for the appointment of a receiver, however under Cayman immigration law, non-Caymanians are not permitted to engage in gainful employment in Cayman without a work permit. This may affect the ability of any receiver to carry out their duties or exercise their powers in Cayman, but would not prevent them from appointing an agent or joint receiver in Cayman.

In most common financing transactions there is no issue of exchange controls, as the majority of companies subject to the share security will be exempted companies, apart from Bermuda. The Exchange Control Regulations 1973 permits the transfer of shares of Bermuda exempted companies subject to the consent of the Bermuda Monetary Authority (the “BMA”). A chargee will require prior permission from the BMA to transfer the charged shares in the event of enforcement of the security. The BMA has given general permission for the granting of any charge over securities of a Bermuda exempted company (and for the transfer of any such securities upon enforcement of such charge) to a licensed bank or other licensed lending institutions in certain approved jurisdictions. However the BMA needs to be notified prior to or as soon as practicable after the enforcement of the security. If a company fails to notify the BMA, the BMA may exclude the company from the general permission.

The position in Jersey for the enforcement of share charges is slightly different from the other four jurisdictions. All security interest agreements over intangible assets in Jersey must comply with certain formalities set out in the Security Interest (Jersey) Law 1983 (the “Security Law”). According to the Security Law, share security can be taken either by possession of certificates of title or by assignment of title with appropriate notice given to the company issuing the shares. As is the case with the other jurisdictions, creditors normally prefer taking possession of the share certificates of the Jersey company, along with the other protection methods as have already been described. According to the Security Law, before the power of sale can be exercised by the chargee, notice of the event of

default must be given to the chargor. If the default is capable of remedy, the chargee must give the chargor fourteen days grace to remedy the default. On a sale, the chargee must take “all reasonable steps” to exercise the power of sale “within a reasonable time” and “for a price corresponding to the value on the open market”. This can be problematic if there is no ready and established market for the shares. The Security Law also sets out the order in which the sale proceeds must be applied. Essentially after the costs and expenses of the sale and the discharge of any prior security interests, the chargee may discharge the secured obligations and any subsequent security interest before accounting for the balance to the chargor.

Inevitably with the economic downturn enforcement actions will become more common as borrowers start to default on their loan obligations. The steps to be taken for enforcement and protecting a lenders interest as detailed above will help to ensure, if defaults do occur, the lenders will

be able to enforce their security and recover monies effectively.

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