

Taking security over shares in a Cayman Islands exempted company

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Introduction

One of the major advantages of the Cayman Islands as an international financial centre is that it provides a simple, flexible and robust regime for secured financing transactions that is attractive to lenders.

Share security is a feature of many financing transactions. This guide examines the creation of security over shares in a Cayman Islands exempted company.

Security basics

Unlike certain other leading international financial centres, the Cayman Islands does not have a statutory regime that governs the granting, perfection or enforcement of security over the shares (the **Secured Shares**) in an exempted company incorporated in the Cayman Islands (a **Company**).

As a result, the methods of taking security over Secured Shares derive from English common law.

Under the laws of the Cayman Islands, the *situs* of shares of a Company depends on the location in which its register of members is held. If a Company's register of members is maintained outside of the Cayman Islands then the laws of that foreign jurisdiction may affect how security should be taken over those shares.

Security document

The Companies Law (2020 Revision) (the **Companies Law**) is silent on the requirements for the creation of share security. Nevertheless, the basic requirements are:

- security must be created in writing;
- security document must be signed by the mortgagor or chargor (being the security provider, the **mortgagor**); and
- security must clearly indicate the:
 - intention to create security over the Secured Shares; and
 - amount secured or how that amount is to be calculated.

In practice, the security will typically be created under the terms of a security document in the form of a charge or equitable mortgage.

In addition, the security document should also:

- specify (either directly or by reference to another document) the defaults that entitle the mortgagee or chargee (being the recipient of the security, the **mortgagee**) to enforce the security;
- specify the mortgagee's enforcement powers and remedies;
- include a power of attorney; and
- include the Company as party so that it can undertake to (among other things):
 - ensure that any transfer of the Secured Shares under the security document will be registered immediately on presentation of the signed share transfer form; and
 - note the creation of security over the Secured Shares in its register of members.

Stamp duty

No stamp duty is payable on the creation of security over the Secured Shares or any transfer of the Secured Shares on the enforcement of the security unless the security document or any ancillary documents are executed in, or brought into, the Cayman Islands.

Formalities

The security document does not need to be notarised or apostilled.

First steps

Before taking security over the Secured Shares, the mortgagee should:

- inspect the Company's Memorandum and Articles of Association (the **Articles**) to ascertain whether:
 - the Articles afford the Company's directors discretion over registration of transfers;
 - there are any provisions within the Articles that prohibit the creation of security;

- there are any provisions in the Articles that may hinder or impair the enforcement of the security; and
- the Company itself has a lien over the Secured Shares for any amounts due from a member of the Company which could take priority over any subsequent security interests;
- inspect the Company's register of members to:
 - ensure that the mortgagor is the registered holder of the Secured Shares;
 - ensure that there is no evidence of any existing security over the Secured Shares; and
 - determine whether the Secured Shares are fully paid.

Regulatory approvals

No regulatory approvals are required to create or enforce security over the Secured Shares unless the Company is a regulated entity in the Cayman Islands.

Governing law of security document

Cayman Islands law

Cayman Islands law permits the security document to be governed by either Cayman Islands law or foreign law.

The security document is most often governed by Cayman Islands law and, as stated above, usually takes the form of an equitable mortgage or charge. A mortgagee will generally not wish to take a legal mortgage over the Secured Shares to ensure that the mortgagee is not treated as the parent of the Company under the Companies Law and/or to avoid potentially consolidating the Company onto the mortgagee's balance sheet.

Remedies available

If a default occurs under a Cayman Islands law security document, the mortgagee may:

- (subject to the terms of the security document) sell the Secured Shares;
- appoint a receiver in respect of the Secured Shares who may (subject to the terms of the security document):
 - exercise the voting rights attached to the Secured Shares;
 - receive distributions in respect of the Secured Shares; and
 - exercise any other rights and powers of the mortgagor in respect of the Secured Shares.

The mortgagee may exercise the power to sell, and the right to appoint a receiver in respect of the Secured Shares without obtaining a court order.

In addition to the remedies above, if the security is an equitable mortgage, the mortgagee has a right of foreclosure. This remedy extinguishes the mortgagor's right to the Secured Shares but not the mortgagor's obligation to pay any unpaid sum secured by the security document and can only be exercised by obtaining a court order. This remedy is rarely utilised in practice.

Application of proceeds on enforcement

Unless the security document states otherwise, the proceeds of enforcement of the security will be applied in the following order of priority:

- **first** in paying the enforcement costs;
- **second** in paying the sums secured by the security document; and
- **third** in paying the balance (if any) to the mortgagor.

Security deliverables

The mortgagor will normally be required by the security document or (where relevant) the loan agreement to deliver the following documents to the mortgagee:

- the original share certificates (if any) for the Secured Shares;
- a share transfer form for the Secured Shares signed in blank;

- an irrevocable proxy for the Secured Shares in favour of the mortgagee;
- if the Company is (directly or indirectly) wholly owned by the mortgagor:
 - a signed and undated resignation from each director of the Company; and
 - a letter from each director authorising the mortgagee to date the resignation form and deliver it to the Company if a default occurs under the security document;
- a resolution of the directors of the Company authorising its entry into and execution of the security document;
- a resolution signed by the mortgagor (in its capacity as shareholder of the Company) making any changes to the Company's Articles required by the mortgagee;
- if the mortgagor is a Cayman Islands company, a certified copy of its register of mortgages and charges showing the creation of the security over the Secured Shares (see 'Registrations, notations and filings' below);
- a certified copy of the Company's register of members showing the creation of the security over the Secured Shares (see 'Registrations, notations and filings' below); and
- a notice from the Company's registered office provider under which it:
 - acknowledges the security created over the Secured Shares;
 - undertakes that it will not issue any restriction notices (as defined in the Companies Law) with respect to the Secured Shares; and
 - undertakes that, once it has received notice from the mortgagee that the security has become enforceable, it will register any transfer of the Secured Shares pursuant to the enforcement of the security.

Registrations, notations and filings

Particulars of security

The Cayman Islands does not maintain a public filing regime, however, where a security interest is created by a Company, it is necessary for the security interest to be entered in the Company's internal register of mortgages and charges. The Company's register of mortgages and charges must be maintained at its registered office in the Cayman Islands.

There are no express statutory time limits in which a security interest must be entered in a Company's register of mortgages and charges and a failure to register a security interest will not affect its validity. Similarly, registering a security interest does not create priority. In practice, security interests should be registered promptly on creation and preferably, should be updated on the day of closing.

Although a Company's register of mortgages and charges is not a publicly filed document, it is open to inspection by any creditor or member of the Company at any time.

Articles

If the mortgagee requires any changes to be made to the Articles to facilitate the creation or enforcement of the security, the Company must:

- pass a special resolution to approve the changes to the Articles; and
- forward a copy of the special resolution within fifteen days to the Registrar of Companies in the Cayman Islands.

Preferably, this should be done before the security document is signed. The changes to the Articles will be effective from the time the resolutions are passed.

Register of Members

A properly advised mortgagee will require the Company to include in its register of members:

- a statement that security has been created over the Secured Shares;
- the name of the mortgagee; and
- the date on which the statement and mortgagee's name are entered into its register of members.

Although noting the security created over the Secured Shares in the Company's register of members has no technical legal effect, it has the practical effect of putting third parties on notice of the existence of the security.

Stop notices

If the mortgagee is concerned that any Secured Shares will be transferred in breach of the security document, the mortgagee may apply to the Grand Court of the Cayman Islands for a stop notice.

A stop notice is a notice from the Registrar of the Grand Court to the Company preventing the Company from registering any transfer of the Secured Shares until fourteen days after it has given the mortgagee notice of the proposed transfer.

Contacts

To find out more, please get in touch with your usual Mourant contact, or alternatively, a full list of contacts specialising in Banking and Finance can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2020 MOURANT OZANNES ALL RIGHTS RESERVED