

Enforcing security over shares in a Cayman Islands exempted company

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Security over shares issued by a Cayman Islands exempted company is commonly taken by way of an equitable mortgage and/or a charge over the shares. This guide examines the enforcement rights available to a mortgagee (being the recipient of the security) under an equitable share mortgage.

For more information on the issues to consider when taking security over shares in a Cayman Islands exempted company please refer to our guide titled '[Taking security over shares in a Cayman Island exempted company](#)'.

Ancillary documents and security protection

As part of the security package and to assist with enforcement (whichever route is taken), a Cayman Islands law governed equitable share mortgage will normally require the mortgagor (being the security provider) to deliver the following documents to the mortgagee in respect of the secured shares (**Secured Shares**) issued by a Cayman Islands exempted company (the **Company**):

- the original share certificates (or, where share certificates are in electronic form, a written confirmation that share certificates have not been issued);
- a share transfer form signed in blank but not dated;
- a signed but undated deed of appointment of irrevocable proxy and power of attorney in favour of the mortgagee;
- if the Company is (directly or indirectly) wholly owned by the mortgagor:
 - a signed but undated letter of resignation from each director of the Company; and
 - a signed and dated letter from each director authorising the mortgagee to date the resignation letter 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 memorandum or articles of association required by the mortgagee;
- if the mortgagor is a Cayman Islands exempted company, a certified copy of its register of mortgages and charges showing the creation of the security over the Secured Shares¹;
- a certified copy of the Company's register of members including an annotation showing the creation of the security over the Secured Shares; 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 restrictions notice (as defined in the Beneficial Ownership Transparency Act (as amended) (the **BOT Act**)) with respect to the Secured Shares; and

¹ If the mortgagor is not incorporated in the Cayman Islands, separate legal advice in respect of the mortgagor's jurisdiction of incorporation should be sought.

- 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.

Once the security becomes enforceable under the terms of the security document, the security document will give the mortgagee the right to:

- insert the name and address of the mortgagee (or its nominee) and date the share transfer form. This enables the mortgagee to begin the process of transferring the Secured Shares to itself or its nominee and, in doing so, take control of the Secured Shares;
- date the proxy and power of attorney. This can assist the mortgagee in taking control of the voting rights and other powers attached to the Secured Shares before a transfer of the Secured Shares has been completed; and
- date the letters of resignation of the directors. This enables the mortgagee to remove the existing directors of the Company and, together with the powers provided under the security document and the proxy and power of attorney, appoint new directors.

At this time, the registered office provider should register any transfer of shares and resignation of a director relating to the security document when requested by the mortgagee.

Updating the register of members is the final step in confirming transfer of the legal title of the Secured Shares.

Enforcement rights

Where the security document is governed by Cayman Islands law, a mortgagee may (subject to the terms of the security document) have recourse to the following primary remedies:

- power of sale;
- receivership;
- taking possession; and
- foreclosure.

The security document usually provides for the methods of enforcement if a default occurs. A mortgagee can generally enforce security granted by a Company without the need to bring any action in the Grand Court of the Cayman Islands (the **Court**) (with the exception of foreclosure, see 'Foreclosure' below).

Where a restrictions notice has been issued with respect to the Secured Shares, the BOT Act provides that where such shares are subject to a pre-existing security interest granted to a third party who is not affiliated with the Company, the restrictions notice shall not take effect.

Power of sale

An express power of sale in respect of the Secured Shares is typically included in the security document, as there is no statutory security enforcement remedy under Cayman Islands law that implies a power of sale.

The power of sale can be exercised in the mortgagee's own interests, ie the mortgagee is not obliged to exercise such power on behalf of the mortgagor. The mortgagee can exercise the power of sale in respect of the Secured Shares as and when it wishes after the security become enforceable. There is no requirement that the sale be carried out by any particular method (eg by auction) or in a set time frame. However, the power of sale is subject to:

- the mortgagee's duty to act in good faith and take reasonable steps to obtain the best price reasonably obtainable at the time of the sale; and
- the prohibition on selling the Secured Shares to the mortgagee itself (although a sale to a connected party (eg a group entity) may be permissible if the sale is at arm's length).

Receivership

The most common method of enforcing share security is by appointing a receiver. The power to appoint a receiver may be set out as a contractual right in the security document, or a receiver may also be appointed by an order of the Court upon the application of the mortgagee. However, it is usually the

contractual right which is relied upon in practice, and there are no specific statutory provisions in Cayman Islands law governing how a receiver is appointed or requiring the registration of such appointment.

Once a receiver is appointed, its power to deal with the Secured Shares will be as expressly provided for in the security document. Typically, a Cayman Islands law governed security document will give the receiver the powers to vote, take possession of and sell the Secured Shares, as well as receive any dividends or other proceeds flowing from the Secured Shares. Typically, a receiver, once appointed, will remove the directors (in the manner described above) and proceed to liquidate the Company's underlying assets to either repay the debt directly or distribute the proceeds.

Taking possession

Where a share security has been granted by way of mortgage, the mortgagee is able to take possession of the Secured Shares.

A mortgagee under a legal mortgage will already be in possession of the Secured Shares, as the legal owner of the Secured Shares. A mortgagee under an equitable mortgage may be registered as the legal holder of the Secured Shares at any time (not necessarily upon the security becoming enforceable, though this is the market practice).

Once the mortgagee is in possession of the Secured Shares, it can exercise its power of sale and any other shareholder rights available. The deliverables referred to above (see 'Ancillary documents and security protection') serve to make the process of taking possession as streamlined and efficient as possible.

Foreclosure

If the share security is taken by way of an equitable mortgage, the mortgagee also has a right of foreclosure. This remedy involves an application to the Court for an order that the mortgagor ceases to have any interest or right in respect of the Secured Shares (but not the mortgagor's obligation to pay any unpaid sum secured by the security document) and the mortgagee can deal freely with the Secured Shares and exercise any right in respect of the Secured Shares. This remedy is rarely used in practice.

Stop notices

Stop notices can be used where the mortgagee is concerned that the mortgagor may seek to transfer the Secured Shares or a distribution may be paid on the Secured Shares in breach of the security document before an enforcement action has been completed.

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.

Foreign law governed

It is possible to secure shares in a Cayman Islands company using foreign law governed security documents. For commercial reasons, the mortgagee may sometimes prefer to have all transaction documents governed by the laws of a jurisdiction with which the mortgagee is familiar and that is suitable for the particular transaction. Where the security document is governed by foreign law, the remedies available to the mortgagee are governed by that foreign law and the terms of the security document.

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. If the security document is executed in, or brought into, the Cayman Islands (eg in connection with court proceedings), stamp duty is payable at a capped amount of CI\$500 (or US\$600).

Rectification of the register of members

As the majority of the enforcement actions require the register of members to be updated then, if the registered office provider is reluctant to update the register, in addition to the mortgagee enforcing its direct contractual rights under the registered office provider undertaking described above, it is possible to

make an application to the Court to 'rectify' the register on the grounds that there has been an unnecessary delay in entering the details of the new shareholder.

Stays and delays to enforcement

In general, there are no stays or delays to enforcement in the Cayman Islands: liquidation does not affect the right of a mortgagee to enforce their security and there are no administration orders similar to the United Kingdom or US Chapter 11 type provisions.

If a winding up order has been made in respect of a Company, a mortgagee is still entitled to enforce its security without the leave of the Court and without reference to the liquidator, although a Court order is required for any other transfer of shares or alteration in the status of such Company's members.

Contacts

A full list of contacts specialising in Banking and Finance can be found [here](#).