

Snapshot: enforcement of security in the BVI

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In relation to a secured party enforcing its rights under a mortgage or charge of shares in a BVI company, the secured party will typically exercise its rights under BVI law to sell the shares or to appoint a receiver in respect of them. Such rights may generally only be exercised after a default has occurred and has continued (without rectification for 14 days following notice of the default) for a period of at least 30 days. These time periods can be shortened by contractual agreement in the relevant security document.

If the right to sell the shares secured pursuant to a mortgage or charge of shares in a BVI company is exercised, whether by the secured party or an appointed receiver, such seller is under an obligation to the chargor of the security to act in good faith and to obtain the best price reasonably obtainable on the day it exercises its power of sale (ie the seller must not merely aim to recover the amount of the debt due). If the sale proceeds are sufficient to discharge the secured obligations in full, the secured party or an appointed receiver would be obliged to return any surplus sale proceeds to the chargor of the security.

In respect of non-BVI law governed security over assets of a BVI company, the BVI has not adopted the UNCITRAL Model Law. This means that:

- a. a foreign insolvency proceeding (in respect of a BVI company) has no direct recognition in the BVI;
- b. the existence of a foreign insolvency proceeding in respect of a BVI company does not prevent the members, or the BVI court, appointing a BVI liquidator (and the BVI liquidation will be the primary insolvency proceedings); and
- c. only officeholders from certain countries (UK, USA, Australia, Canada, Finland, Hong Kong, Japan, Jersey and New Zealand) can seek BVI court assistance (either at common law or under the Insolvency Act, 2003 (the **BVI IA**)).

The commencement of a BVI liquidation, and the resulting moratorium, does not in any way restrict the rights of a secured creditor to enforce their security.

Any assistance given to a foreign office holder is subject to the BVI IA in that the assistance given to a foreign office holder cannot "affect the right of a secured creditor to take possession of and realise or otherwise deal with the property of the debtor over which the creditor has a security interest", and will (subject always to the foregoing) try to mirror, where possible, the equivalent BVI insolvency process.

As an example, on the assumption that a secured party takes an English law governed debenture (all/substantially all asset security) from a BVI company, if such document includes a right to appoint an English law administrator, then as long as any assistance requested of the BVI courts from such English office holder does not affect the right of a secured creditor to take possession of and realise or otherwise deal with the property of the BVI company over which the creditor has a security interest, then the BVI courts may (subject to the distinctive set of facts of the case at the time) offer assistance as it deems appropriate, noting that as there is no ability under BVI law to put a BVI company into a BVI administration process, a foreign office holder requesting such assistance of the BVI courts, may struggle.

In contrast, if a secured party appoints an administrative receiver in England (if such power exists under the English law debenture), then if such administrative receiver was to seek assistance of the BVI courts, the BVI courts may (subject to the distinctive set of facts of the case at the time) offer assistance as it deems appropriate. This would potentially be less problematic as the concept of administrative receivership exists in the BVI and it's an insolvency process the BVI courts are familiar with.

For more information on this topic, please contact our BVI banking and finance team.

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