



# Global Financial Collateral

**A Guide to Security Interests in Securities,  
Securities Accounts and Deposit Accounts  
in International Transactions**

Penelope L. Christophorou  
Celeste Boeri Pozo  
Editors



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# British Virgin Islands



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## **Highlights**

- British Virgin Islands law does not lay out a specific regime for taking security interests over securities, securities accounts, or deposit accounts. In most financing transactions involving debt securities that are governed by British Virgin Islands law or equity securities issued by a British Virgin Islands business company, the parties will use a British Virgin Islands law security agreement. That is not mandatory, and British Virgin Islands courts, in general terms, uphold the applicability of freely chosen foreign laws. That said, if the entity creating the security interest is incorporated or established in the British Virgin Islands and if the collateral consists of either securities or cash that are held in an account in the British Virgin Islands, there are advantages to ensuring that the documentation for that security interest is governed by British Virgin Islands law.
- No matter which law is chosen by the parties to govern the contractual relationship, the British Virgin Islands courts will in most cases apply the *lex situs* to any “proprietary” issues. The *lex situs* is the law of the

place where the collateral is (or is deemed to be). Any issues of procedure relating to a security interest (no matter the governing law) will usually be governed by British Virgin Islands law if enforcement is being sought in the British Virgin Islands (the so-called *lex fori* or law of the forum).

## **P. Preliminary: Securities as Collateral**

*P.1 What constitutes a “security” under the law of the British Virgin Islands for purposes of creating and perfecting a security interest?*

British Virgin Islands law recognizes no consolidated law of creation or perfection of security interests, and there is consequently no uniform definition of “securities” that are capable of being taken as collateral. The key question is whether or not the rights conferred on the pledgor by the relevant asset are transferable and commercially valuable. Many types of securities are commonly provided as collateral, including shares and debt securities, commercial paper, notes, and certificates of deposit (both bearer and registered).

There is no concept of perfection as a matter of British Virgin Islands law. A security agreement creates a valid and enforceable security interest upon execution.

It is possible to create security over certain rights in a partnership or limited partnership. Loan participations may be provided as collateral under British Virgin Islands law. Since there is no definition of “securities,” it is not relevant whether the rights or participations are considered to be “securities.”

*P.2 Are debt securities treated differently from equity securities under the law of the British Virgin Islands for purposes of creating and perfecting a security interest in such securities?*

Debt securities and equity securities are not treated differently. Debt securities can be subject to the same range of security interests as equity securities.

*P.3 Under what circumstances is intercompany debt a “security” under the law of the British Virgin Islands?*

There is no uniform definition of “security” in British Virgin Islands law.

## **1. Collateral Consisting of Directly Held Certificated Securities**

*1.1 Choice of law: What law would a court in the British Virgin Islands apply to (i) the creation and perfection of a security interest, (ii) the effect of perfection, and (iii) the exercise of remedies against collateral securing such interest, in the following circumstances?*

*a. The issuer is organized under the law of the British Virgin Islands and the certificates are located in the British Virgin Islands*

British Virgin Islands law has different choice-of-law rules for different issues. A court will first characterize the issues and then apply the choice-of-law rules for each issue. The issues will be categorized as contractual, proprietary, or procedural.

### **Applicable Law: Contractual Issues**

British Virgin Islands law provides that the law chosen by the parties is the law applicable to contractual obligations. If the law chosen is the law of the State of New York, then the British Virgin Islands courts would apply that law to determine contractual questions (seeking expert evidence on what the law of the State of New York means).

### **Applicable Law: Property Issues**

British Virgin Islands law provides for the *lex situs* (i.e., the jurisdiction where the collateral actually is or where British Virgin Islands law deems it to be) to govern proprietary issues, including the creation, perfection, and priority of security interests.

Transferable shares in companies that are not dematerialized in a book-entry system are located where the shareholder register is located or where the issuer is incorporated (usually they are the same). The location of any security certificates is not relevant.

For bearer securities, the jurisdiction where they are physically located will be the governing law.

#### Applicable Law: Issues of Substance/Procedure

Issues of procedure will generally be decided by reference to British Virgin Islands law if enforcement action is being brought in the British Virgin Islands courts. It is possible that a court may characterize certain issues relating to the enforcement of remedies under a security agreement as procedural.

#### Creation

Issues relating to the creation of security will be characterized as proprietary and so will generally be determined with reference to the *lex situs* of the security in question.

#### Register of Charges

All British Virgin Islands business companies are required to keep a register of charges pursuant to section 162 of the BVI Business Companies Act, 2004 (BVIBC Act).<sup>1</sup>

#### Priority

Issues concerning the priority of a security interest will be characterized as proprietary and so will generally be determined in accordance with the *lex situs* of the security in question.

The British Virgin Islands business company or secured party (termed a secured party under British Virgin Islands law) may elect to register the security interest (or charge, using British Virgin Islands legal terminology) with the Registrar of Corporate Affairs. While there is no concept of perfection in the British Virgin Islands, section 166 of the BVIBC Act provides that in the event that a relevant security interest on property of a British Virgin Islands business company is registered under the BVIBC Act, it has priority over a relevant security interest subsequently registered under the BVIBC Act and a relevant security interest on property that is not registered under the BVIBC Act.<sup>2</sup> For particulars of the registration process, see section 1.5.

#### Remedies

Generally, British Virgin Islands courts will only enforce security over assets located in the British Virgin Islands. So the claimant must either (a) be able to enforce its secured claim over assets located in the British Virgin Islands or (b) be able to enforce a New York judgment for the secured debt by recognition in the state where the assets are located.

If assets are located in the British Virgin Islands, the available remedies for a secured party should in principle be a matter for the governing law of the security agreement. Nevertheless, enforcement remedies are often treated as procedural and therefore decided by the law of the courts where the action is brought. In practice a British Virgin Islands court would not normally grant remedies that are not available locally. The response to section G.6 describes the primary enforcement processes in British Virgin Islands law.

*b. The issuer is organized under the law of the British Virgin Islands and the certificates are located in an Other Jurisdiction*

British Virgin Islands law has different choice-of-law rules for different issues. A court will first characterize the issues and then apply the choice-of-law rules for each issue. The issues will be categorized as contractual, proprietary, or procedural.

#### Applicable Law: Contractual Issues

British Virgin Islands law provides that the law chosen by the parties is the law applicable to contractual obligations. If the law chosen is the law of the State of New York, then the British Virgin Islands courts would apply that law to determine contractual questions (seeking expert evidence on what the law of the State of New York means).

#### Applicable Law: Property Issues

British Virgin Islands law provides for the *lex situs* (i.e., the jurisdiction where the collateral actually is or where British Virgin Islands law deems it to be) to govern proprietary issues, including the creation, perfection, and priority of security interests.

Transferable shares in companies that are not dematerialized in a book-entry system are located where the shareholder register is located or where



the issuer is incorporated (usually they are the same). The location of any security certificates is not relevant.

For bearer securities, the jurisdiction where they are physically located will be the governing law.

#### Applicable Law: Issues of Substance/Procedure

Issues of procedure will generally be decided by reference to British Virgin Islands law if enforcement action is being brought in the British Virgin Islands courts. It is possible that a court may characterize certain issues relating to the enforcement of remedies under a security agreement as procedural.

#### *c. The issuer is organized under the law of an Other Jurisdiction and the certificates are located in the British Virgin Islands*

If the certificates located in the British Virgin Islands relate to bearer securities then the creation, perfection, and priority requirements will be determined by British Virgin Islands law, and a claimant will be able to enforce over the collateral in the British Virgin Islands courts.

If the relevant shares are registered securities the *lex situs* will be in the Other Jurisdiction in which the issuer is incorporated or has its shareholder register, and the laws of that jurisdiction will be applicable in respect of creation, perfection, and priority requirements, as well as any remedies sought by the secured party.

#### *1.2 Choice of law: Other instances where the law of the British Virgin Islands may apply*

There are none.

#### *1.3 Perfection and required steps to enforce a security interest against third parties under the law of the British Virgin Islands*

There is no concept of perfection in the British Virgin Islands.

#### Registration with the Registrar of Corporate Affairs

Section 162 of the BVIBC Act requires a British Virgin Islands business company to maintain a register of all relevant security interests created by the company (a Register of Charges).<sup>3</sup> Any charging document should include an obligation of the business company to include the security interest on its Register of Charges.

Further, the business company or secured party may elect to register the security interest with the Registrar of Corporate Affairs. While there is no concept of perfection in the British Virgin Islands, section 166 of the BVIBC Act provides that in the event that a relevant security interest on property of a business company is registered under the BVIBC Act, it has priority over a relevant security interest subsequently registered under the BVIBC Act and a relevant security interest on property that is not registered under the BVIBC Act.<sup>4</sup> The security interest may be registered by either the business company or the secured party by filing an application in the approved form together with the fee, which is currently US\$200. Notwithstanding the foregoing, security interests created prior to the commencement date shall continue to rank in the order in which they would have ranked had section 166 of the BVIBC Act not come into force and, where they would have taking priority over a security interest created on or after the commencement date, they shall continue to take such priority after the commencement date. For these purposes, commencement date means January 1, 2005, or in the case of an international business company incorporated under the International Business Companies Act, the date that such company was reregistered as a business company under the BVIBC Act.

Where a change needs to be made to an existing registered security interest that is registered with the Registrar of Corporate Affairs, application for variation is to be made to the Registrar of Corporate Affairs by either the secured party or the business company in the approved form. Upon receipt of an application to vary, the Registrar of Corporate Affairs will provide a certificate of variation to the business company and the secured party. Such certificate is conclusive proof that the variation was registered on the date and time stated on the certificate. Where a security interest ceases (or partially ceases) to affect a business company's property, the business company shall file a notice to that effect

in the approved form, signed by the secured party, and the Registrar of Corporate Affairs will register the notice and issue a certificate of discharge.

### Share Pledge

Generally, it is advisable that any security interest over the shares of a business company be recorded on the register of members (the Register of Members) of the company and that a copy of the Register of Members be filed with the Registry of Corporate Affairs. While this filing does not necessarily establish priority pursuant to any statutory provision set out in the BVIBC Act (as is the case for a security interest over the assets of the business company itself), the public filing of the Register of Members with the security interest recorded helps to prevent any third party from obtaining priority pursuant to the common law and equitable principles whereby, as between competing equitable interests, the first in time prevails, unless the holder of the second interest advanced funds without notice of the first and obtains legal title. The public filing of the Register of Members assists in ensuring that no third party can obtain legal title to the shares without having been deemed to have notice of the prior security interest.

#### *1.4 Effect of an enforceable security interest against third parties and priority under the law of the British Virgin Islands*

If the issuer is incorporated in the British Virgin Islands, the effect of the registration of a security interest is to make the security effective against company liquidators or administrators, trustees in bankruptcy, and other secured creditors. The registration of a security interest gives other potential secured creditors constructive notice of the security interest's existence, so priority is determined by the date of registration of the security interest rather than the date of its creation.

There are certain common law principles relating to the respective priorities of one type of security interest over another—such as that a person who acquires a legal interest in good faith and without notice takes priority over the holder of an equitable interest—but in practice the potential consequences of losing priority means that these principles are

rarely relied on as advisors to the secured party will ensure that any security interest is swiftly registered.

## **2. Collateral Consisting of Directly Held Uncertificated Securities**

*2.1 Choice of law: What law would a court in the British Virgin Islands apply to (i) the creation and perfection of a security interest, (ii) the effect of perfection, and (iii) the exercise of remedies against collateral securing such interest, where the issuer is organized under the law of the British Virgin Islands*

British Virgin Islands law has different choice-of-law rules for different issues. A court will first characterize the issues and then apply the choice-of-law rules for each issue. The issues will be categorized as contractual, proprietary, or procedural.

### **Applicable Law: Contractual Issues**

British Virgin Islands law provides that the law chosen by the parties is the law applicable to contractual obligations. If the law chosen is the law of the State of New York, then the British Virgin Islands courts would apply that law to determine contractual questions (seeking expert evidence on what the law of the State of New York means).

### **Applicable Law: Property Issues**

British Virgin Islands law provides for the *lex situs* (i.e., the jurisdiction where the collateral actually is or where British Virgin Islands law deems it to be) to govern proprietary issues, including the creation, perfection, and priority of security interests.

Transferable shares in companies which are not dematerialized in a book-entry system are located where the shareholder register is located or where the issuer is incorporated (usually they are the same). The location of any security certificates is not relevant.

### **Applicable Law: Issues of Substance/Procedure**

Issues of procedure will generally be decided by reference to British Virgin Islands law if enforcement action is being brought in the British Virgin Islands courts. It is possible that a court may characterize certain issues relating to the enforcement of remedies under a security agreement as procedural.

## *2.2 Choice of law: Other instances where the law of the British Virgin Islands may apply*

British Virgin Islands law has different choice-of-law rules for different issues. A court will first characterize the issues and then apply the choice-of-law rules for each issue. The issues will be categorized as contractual, proprietary, or procedural.

### Applicable Law: Contractual Issues

British Virgin Islands law provides that the law chosen by the parties is the law applicable to contractual obligations. If the law chosen is the law of the State of New York, then the British Virgin Islands courts would apply that law to determine contractual questions (seeking expert evidence on what the law of the State of New York means).

### Applicable Law: Property Issues

British Virgin Islands law provides for the *lex situs* (i.e., the jurisdiction where the collateral actually is or where British Virgin Islands law deems it to be) to govern proprietary issues, including the creation, perfection, and priority of security interests.

Transferable shares in companies which are not dematerialized in a book-entry system are located where the shareholder register is located or where the issuer is incorporated (usually they are the same). The location of any security certificates is not relevant.

### Applicable Law: Issues of Substance/Procedure

Issues of procedure will generally be decided by reference to British Virgin Islands law if enforcement action is being brought in the British Virgin Islands courts. It is possible that a court may characterize certain issues relating to the enforcement of remedies under a security agreement as procedural.

### *2.3 Perfection and required steps to enforce a security interest against third parties under the law of the British Virgin Islands*

There is no concept of perfection in the British Virgin Islands.

### *2.4 Effect of an enforceable security interest against third parties and priority under the law of the British Virgin Islands*

If the issuer is incorporated in the British Virgin Islands, the effect of the registration of a security interest is to make the security effective against company liquidators or administrators, trustees in bankruptcy, and other secured creditors. The registration of a security interest gives other potential secured creditors constructive notice of the security interest's existence, so priority is determined by the date of registration of the security interest rather than the date of its creation.

There are certain common law principles relating to the respective priorities of one type of security interest over another—such as that a person who acquires a legal interest in good faith and without notice takes priority over the holder of an equitable interest—but in practice the potential consequences of losing priority means that these principles are rarely relied on as advisors to the secured party will ensure that any security interest is swiftly registered.

A security interest over uncertificated securities which is noted on Register of Members assists in ensuring that no third party can obtain legal title to the shares without having been deemed to have notice of the security interest.

## **3. Collateral Consisting of Assets Credited to a Securities Account**

*3.1 Securities account as collateral: Under the law of the British Virgin Islands, (i) would a securities account to which securities are credited constitute a category of collateral separate from the underlying securities themselves and (ii) can assets other than securities be credited to a securities account (e.g., cash)?*

An account holder's rights against the securities account provider can be the subject of a security interest separate from the securities themselves, but usually one security document would deal with both.

The types of assets that can be deposited into a securities account will depend on the terms of the securities account prescribed by the particular provider. Accordingly, the securities account may provide for cash to be credited to the account.

*3.2 Choice of law: What law would a court in the British Virgin Islands apply to (i) the creation and perfection of a security interest, (ii) the effect of perfection, and (iii) the exercise of remedies against collateral securing such interest, in the following circumstances?*

*a. The securities account is located in, or is maintained by a broker/intermediary located in, the British Virgin Islands (or where the law of the British Virgin Islands governs the account, if relevant)*

The British Virgin Islands choice of law would be broadly the place where the account is located, which would be the jurisdiction where the office is located at which the account is maintained.

*b. The securities account is located in, or is maintained by a broker/intermediary located in, the British Virgin Islands, and an Other Jurisdiction's law governs the account agreement*

The law governing the account agreement is not relevant if the account is located in the British Virgin Islands. The location of the account would be included in the security agreement. The location would be the jurisdiction of the office in which the account is maintained.

*3.3 Choice of law: Other instances where the law of the British Virgin Islands may apply*

*a. For example, if the securities account is not maintained by a broker/intermediary located in the British Virgin Islands, but the issuer of securities credited to the securities account is organized under the law of the British Virgin Islands, would the law of the British Virgin Islands apply?*

If the securities account is not maintained by a broker/intermediary located in the British Virgin Islands, but the issuer of securities credited to the securities account is organized under British Virgin Islands law, it is unlikely that British Virgin Islands law applies. The governing law would be the jurisdiction of the office of the broker/ intermediary at which the pledgor's account is maintained.

*b. Similarly, if the securities account is not maintained by a broker/intermediary located in the British Virgin Islands, but if there exists an intermediary in the holding system between the issuer and the pledgor's own direct intermediary who is located in the British Virgin Islands, would the law of the British Virgin Islands apply, and if so, to what extent?*

If the securities account is not maintained by a broker/intermediary located in British Virgin Islands, but if there exists an intermediary in the holding system between the issuer and the pledgor's own direct intermediary who is located in British Virgin Islands, the British Virgin Islands choice of law would be broadly the place where the account is located. The location of the amount would be included in the security agreement. The location would be the jurisdiction of the office of the broker/intermediary at which the pledgor's account is maintained.

*3.4 Perfection and required steps to enforce a security interest against third parties under the law of the British Virgin Islands*

There are none.

*3.5 Effect of an enforceable security interest against third parties and priority under the law of the British Virgin Islands*

A secured party may wish to register the financial collateral arrangement with the Registrar of Corporate Affairs in order to ensure its priority.

## **4. Collateral Consisting of a Deposit Account**

*4.1 Deposit account as collateral: Under the law of the British Virgin Islands, does a deposit account constitute a separate category of*



*collateral and, if so, what kinds of assets can be credited to a deposit account?*

British Virgin Islands law does not distinguish separate “categories” of collateral (although real estate is subject to some specific rules). To create a security interest over a deposit account, such account is usually subject to a mortgage or a security interest, coupled with an assignment of rights against the deposit account.

*4.2 Choice of law: What law would a court in the British Virgin Islands apply to (i) the creation and perfection of a security interest, (ii) the effect of perfection, and (iii) the exercise of remedies against collateral securing such interest, in the following circumstances?*

*a. The deposit account is located in, or is maintained by a bank located in, the British Virgin Islands (or where the law of the British Virgin Islands governs the account, if relevant)*

British Virgin Islands law has different choice-of-law rules for different issues. A court will first characterize the issues and then apply the choice-of-law rules for each issue. The issues will be categorized as contractual, proprietary, or procedural.

#### Applicable Law: Contractual Issues

British Virgin Islands law provides that the law chosen by the parties is the law applicable to contractual obligations. If the law chosen is the law of the State of New York, then the British Virgin Islands courts would apply that law to determine contractual questions (seeking expert evidence on what the law of the State of New York means).

#### Applicable Law: Property Issues

British Virgin Islands law provides for the *lex situs* (i.e., the jurisdiction where the collateral actually is or where British Virgin Islands law deems it to be) to govern proprietary issues, including the creation, perfection, and priority of security interests.

For proprietary issues relating to a pledge of a bank account, the bank account will be deemed to be located in the jurisdiction of the branch where the account is maintained.

### Applicable Law: Issues of Substance/Procedure

Issues of procedure will generally be decided by reference to British Virgin Islands law if enforcement action is being brought in the British Virgin Islands courts. It is possible that a court may characterize certain issues relating to the enforcement of remedies under a security agreement as procedural.

*b. The deposit account is located in, or is maintained by a bank located in, the British Virgin Islands, and an Other Jurisdiction's law governs the account agreement*

The law governing the account agreement is not relevant if the account is located in the British Virgin Islands.

*4.3 Choice of law: Other instances where the law of the British Virgin Islands may apply*

There are none.

*4.4 Perfection and required steps to enforce a security interest against third parties under the law of the British Virgin Islands*

There are none.

*4.5 Effect of an enforceable security interest against third parties and priority under the law of the British Virgin Islands*

Section 162 of the BVIBC Act requires a British Virgin Islands business company to maintain a Register of Charges.<sup>5</sup> Any charging document should include an obligation of the business company to include the security interest on its Register of Charges. There is no filing to be made in the BVI if the pledges is not a British Virgin Islands business company.

Further, the business company or secured party may elect to register the security interest with the Registrar of Corporate Affairs. While there is no concept of perfection in the British Virgin Islands, section 166 of the BVIBC Act provides that in the event that a relevant security interest on property of a business company is registered under the BVIBC Act, it has priority over a relevant security interest subsequently registered under the

BVIBC Act and a relevant security interest on property that is not registered under the BVIBC Act.<sup>6</sup> The security interest may be registered by either the business company or the secured party by filing an application in the approved form together with the fee of what is currently US\$100. Notwithstanding the foregoing, security interests created prior to the commencement date shall continue to rank in the order in which they would have ranked had section 166 of the BVIBC Act not come into force and, where they would have taking priority over a security interest created on or after the commencement date, they shall continue to take such priority after the commencement date. For these purposes, commencement date means January 1, 2005, or in the case of an international business company incorporated under the International Business Companies Act, the date that such company is reregistered as a business company under the BVIBC Act.

Where there is change in the terms of an existing registered security interest which is registered with the Registrar of Corporate Affairs, application for variation is to be made to the Registrar of Corporate Affairs by either the secured party or the business company in the approved form. Upon receipt of an application to vary, the Registrar of Corporate Affairs will provide a certificate of variation to the business company and the secured party. Such certificate is conclusive proof that the variation was registered on the date and time stated on the certificate. Where a security interest ceases (or partially ceases) to affect a business company's property, the business company shall file a notice to that effect in the approved form, signed by the secured party, and the Registrar of Corporate Affairs will register the notice and issue a certificate of discharge.

If the pledgor of the bank account is incorporated in the British Virgin Islands, the effect of the registration of a security interest is to make the security effective against company liquidators or administrators, trustees in bankruptcy, and other secured creditors. The registration of a security interest gives other potential secured creditors constructive notice of the security interest's existence, so priority is determined by the date of registration of the security interest rather than the date of its creation.

There are certain common law principles relating to the respective priorities of one type of security interest over another—such as that a person who acquires a legal interest in good faith and without notice takes priority over the holder of an equitable interest—but in practice the potential consequences of losing priority means that these principles are rarely relied on as advisors to the security taker will ensure that any security interest is swiftly registered.

## **G. General Issues**

### *G.1 Corporate authority issues for the pledgor that may arise under the law of the British Virgin Islands*

British Virgin Islands previously recognized a doctrine of ultra vires, under which companies were empowered to restrict the activities they were capable of undertaking. However, under the BVIBC Act (which applies to new and existing companies), a company's capacity to contract is unrestricted unless any restrictions are specifically set out in the company's constitutional documents. In addition, in cases where a person is dealing with a company in good faith, the power of the directors to bind the company, or authorize others to do so, is deemed to be free of any limitation under the company's constitution.

Nevertheless, it is considered good practice when dealing with Companies Act companies to examine the constitutional documents of the company and to request board minutes, which specifically authorize the transaction in question. Where applicable, power of attorneys should also be examined.

In addition, the BVIBC Act, inter alia, provides the following:

- A director of a British Virgin Islands business company, in exercising powers or performing duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company. A director of a wholly owned subsidiary may, if expressly permitted to do so by the memorandum or articles of the company, act in a manner which he believes is in the best interests of the holding company, even

though it may not be in the best interests of the company. A director of a subsidiary that is not wholly owned may, if expressly permitted by the memorandum or articles of the company, and with the prior agreement of the shareholders (other than the holding company), act in a manner which he believes is in the best interests of the holding company even though it may not be in the best interests of the company. In joint ventures between shareholders, a director may, if expressly permitted by the memorandum or articles of the company, act in a manner which he believes is in the best interests of a member or members, even though it may not be in the best interests of the company.<sup>7</sup>

- A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes the BVIBC Act or the memorandum or articles of association of the company.<sup>8</sup>
- A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances, taking into account the nature of the company, the nature of the decision, and the position of the director and the nature of the responsibilities undertaken by him or her.<sup>9</sup>
- A transaction entered into by a company in respect of which a director is interested is voidable by the company unless
  - the director's interest was disclosed to the board prior to the company entering into the transaction,
  - the transaction was entered into in the ordinary course of the company's business and on usual terms and conditions,
  - the material facts of the interest of the director in the transaction are known by the members entitled to vote at a meeting and the transaction is approved or ratified by a resolution of members, or
  - the company received fair value for the transaction.<sup>10</sup>

Counterparties to British Virgin Islands Business companies should satisfy themselves that the directors have fulfilled their statutory duties under the BVIBC Act. It is generally accepted that it will be sufficient for board minutes to state that the directors have taken the relevant factors into

account in carrying out their duty; however, more detailed records may be required for significant or unusual transactions.

*G.2 Jurisdiction of pledgor: Do any of your answers to sections 1–4 above change if the pledgor is organized under the law of the British Virgin Islands or any particular Other Jurisdiction, or if the pledgor’s chief executive office is located in the British Virgin Islands?*

None of the responses to sections 1–4 above change if the pledgor is organized under the law of the British Virgin Islands or any particular Other Jurisdiction, or if the pledgor’s chief executive office is located in the British Virgin Islands.

*G.3 Circumstances requiring an additional security agreement or additional provisions: Under what circumstances would you recommend either (i) executing an additional security agreement stated to be governed by the law of the British Virgin Islands, the jurisdiction of formation of the issuer, or in the case of certificated securities, the jurisdiction where the certificates are located, or (ii) incorporating specific provisions in a security agreement governed by the law of the applicable U.S. State?*

The answer turns on the particular facts and issues arising and would be determined by transaction. There is no British Virgin Islands legislation which addresses this point. However, as a matter of practice if the pledgor were organized in British Virgin Islands, it would be prudent for there to be additional British Virgin Islands security documents. In addition, if a security, securities account, or deposit account is viewed to be located in British Virgin Islands, and therefore the proprietary aspects of the pledge are governed by British Virgin Islands law, it would be prudent for there to be additional British Virgin Islands security documents.

*G.4 Creation, perfection, and priority of a security interest in proceeds under the law of the British Virgin Islands*

Where there are identifiable proceeds from the sale of the collateral in breach of the security agreement, the secured party (as the holder of a beneficial interest in the collateral) acquires a claim in respect of the

proceeds of the collateral. Usually, the proceeds of dividends will be paid to the secured party upon enforcement. The secured party may choose to “adopt” the sale of the collateral and make a claim to the proceeds “in any form most favorable” to the secured party.<sup>11</sup>

In these circumstances, the secured party may authorize the disapplication of the collateral as a secured loan to the pledgor, secured against the proceeds of the sale of collateral acquired by the pledgor. Thus the beneficiary claims an equitable lien or charge over the proceeds of the sale of the collateral and has a right to possession of the proceeds of the sale of the collateral. To the extent the pledgor fails to make good the value of the collateral with the proceeds, the secured party may claim against the pledgor for any deficiency.

Alternatively, the secured party may choose to “falsify the account,” meaning he denies any proprietary interest in the proceeds of that transaction, instead seeking a personal remedy against the pledgor for the value of the collateral. If the secured party denies any proprietary interest, the claim will be unsecured.

#### *G.5 Rehypothecation of collateral under the law of the British Virgin Islands*

A right to sell, pledge, or rehypothecate is uncommon in British Virgin Islands security agreements because it implies that full title transfer has occurred. Usually a pledgor will create a security interest in favor of the creditor but retain ownership and possession of the asset (legal mortgages are rare).

#### *G.6 Exercise of remedies under the law of the British Virgin Islands*

The main methods of enforcing a security interest in the British Virgin Islands are as follows:

##### Taking Possession

If the secured party has a legal mortgage (where legal or beneficial title but not possession has been transferred to it) it is entitled to take possession as a means of protecting its security interest (i.e., to prevent the

pledgor from dealing with it). There would be a direction from the pledgor as part of the closing deliverables permitting this enforcement remedy.

### Selling the Collateral

A secured party will be permitted to sell the collateral if it has a power of sale either under express provisions in the security document or under statute or common law. A statutory power of sale applies to all mortgages and security interests made by deed and arises when the secured debt has become due. The sale may be conducted privately or by public auction and there is no need to apply to a court.

In relation to a pledge, there is an implied power of sale when the pledgor is in default. The power of sale is subject to reasonable notice having been given to the pledgor. A lender exercising the power of sale is subject to various duties, including the duty to

- act in good faith,
- take reasonable steps to obtain a proper price for the asset,
- obtain the best price reasonably obtainable,
- act with reasonable skill and care, and
- act fairly toward the borrower.

As long as the lender complies with these duties, a court will not interfere in the sale merely because the borrower objects. As a result of the duties, a lender cannot sell the assets to itself without permission of the court. Additionally, if the secured party were to sell the collateral to a company it held shares in, both the secured party and the purchasing company would need to show that the sale was made in good faith and reasonable precautions were taken to obtain the best price reasonably obtainable at the time of the sale.

### Appointing a Receiver, Who Then Tells the Collateral

A receiver would take a security interest in the assets, realize them (by selling), and apply the money in repayment of the secured debt. A secured party would need to have either an express power to appoint a receiver in the security document or a statutory power.



A receiver's primary duty is to the secured party that appointed him, but he must act in good faith and deal fairly and equitably with the pledgor. A receiver is subject to the same duties in selling the collateral as described above.

### Foreclosure and Appropriation

If the secured party wants to retain the collateral (perhaps because it is worth more than the secured debt) there are two options:

- Foreclosure Where a security interest is granted over an asset the pledgor retains the right to recover the asset on full repayment of the secured debt. If the secured party wishes to retain the collateral he will need to extinguish this right (called the "equity of redemption") using a court procedure called foreclosure. It is a two-stage process and the pledgor must be given time to pay after the first stage. The court can order that the collateral be sold in any foreclosure action.
  - The right to foreclose arises once the secured liabilities have become repayable.
  - In practice foreclosure proceedings are extremely rare.
- Appropriation and Right of Use If the security interest in question is a financial collateral arrangement (meaning a mechanism which enables corporate entities to take and enforce their security interest), free from a number of restrictions and formalities which apply to other forms of security interests, the secured party may be able to retain the collateral without having to obtain a foreclosure order. If the document establishing the security interest provides the secured party with a right to appropriate the collateral, this power may be exercised without a court order. Similarly, if the financial collateral arrangement so provides, the secured party is to have the right to use and dispose of the collateral. The secured party must value the collateral in accordance with the relevant provisions agreed between the parties in the security interest and in any event in a commercially reasonable manner. If the collateral is worth more than the secured obligations, the secured party must account to the collateral provider for any difference.

Pending exercise of one of the powers described above, there may also be some ancillary steps that are necessary or desirable, including dividends.

Giving notice to the issuer of the securities that future payments or dividends are to be paid to the secured party.

Applying to court for a “stop notice,” which is an order given by the high court to the issuer of securities that the person serving the notice has an interest in the securities and preventing those securities from being dealt with before the person has an opportunity to assert his claim.

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1 BVI Business Companies Act (No. 16 of 2004) § 162.

2 *Id.* § 166.

3 *Id.* § 162.

4 *Id.* § 166.

5 *Id.* § 162.

6 *Id.* § 166.

7 *Id.* § 120.

8 *Id.* § 121.

9 *Id.* § 122.

10 *Id.* § 125.

11 Alternatively, the secured party may choose to “falsify the account,” meaning he denies any proprietary interest in the proceeds of that transaction, instead seeking a personal remedy against the pledgor for the value of the collateral.