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Collas Crill explains...Taking security over shares in a Guernsey company

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Where a Guernsey company borrows money or participates in a group financing, the lender's security package will frequently involve taking security over the Guernsey company's shares.

This guide looks at the key things you need to know about taking security over the shares in a Guernsey company.

Words in bold text are defined at the end of this guide.

Preliminary steps

A **security taker** should take the following preliminary steps before taking security over the **secured shares**.

- Inspect the **issuer's** register of shareholders to make sure:
  - the **security giver** is the registered holder of the **secured shares**;
  - there is no evidence of any existing security interest over the **secured shares**; and
  - the **secured shares** are fully paid.

If the **issuer** has any nominee shareholders then the declaration(s) of trust will also need to be reviewed.

- Review the **M&A** (including any amending resolutions and any shareholders' agreement that may be in place) to determine whether there are any provisions that will adversely impact on its security interest over the **secured shares** (e.g. any prohibition on the creation of security, pre-emption rights, restrictions on transfer of shares etc) that need to be amended or disapplied.
- Agree a form of security notice and security acknowledgement.
- Carry out:
  - a search at the Guernsey Companies Registry; and
  - a litigation search at the Greffe (being the registry office of the Guernsey courts),

against the **issuer** and the **security giver** if it is a Guernsey company, to make sure there is no evidence the **issuer** or the **security giver** is insolvent or subject to any insolvency or similar proceedings.

Security basics

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The **Law** sets out a statutory framework for creating security interests over Guernsey intangible movable assets, like the **secured shares**.

Under the **Law**, a security interest is any interest in the **secured shares** created under a security agreement which secures the payment or performance of an obligation.

A security interest over the **secured shares** may only be created by a security agreement between the **security giver** and **security taker**. Under the **Law**, such security agreement must specify events of default.

Under the **Law**, security may be granted over the **secured shares** by:

- **Possession**. The **security taker** (or a person on its behalf) taking physical possession of the share certificate(s) for the **secured shares or**
- **Assignment**. The **security giver** assigning its rights and title to the **secured shares** to the **security taker**.

In practice, a **security taker** will take both forms of security. It will usually allow the **security giver** to continue to exercise voting rights and collect dividends unless an event of default has occurred.

Perfection

A security interest over secured shares created by possession and/or assignment requires possession and notice to be given to the issuer (See **Security deliverables** below). Failure to obtain possession or to serve notice will render the relevant security interest ineffective.

Security deliverables

The **security giver** will normally be required by the security agreement to deliver the following documents to the **security taker**:

- the original share certificate(s) for the **secured shares**;
- share transfer form(s) for the **secured shares** signed in blank;
- a special resolution signed by the **security giver** (in its capacity as shareholder of the **issuer**) making any changes to the **M&A** required by the **security taker**; and
- a certified copy of the **issuer's** register of shareholders which has a note of the security interest created over the **secured shares** in favour of the **security taker**.

In addition the **security giver** will be required to:

- give a notice to the **issuer** advising the **issuer** that it has created a security interest over the **secured shares**; and
- ensure the **issuer** gives an acknowledgement to the **security taker** acknowledging the notice from the **security giver**.

Registration

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There is no public register of security interests in Guernsey.

Priority

Subject to any agreement of a secured party for the postponement of its rights, priority between security interests in the same secured shares is determined by the order of creation of those security interests.

Enforcement

Remedy

The Law provides the security taker with a power of sale and application.

If a security interest over **secured shares** becomes enforceable, the **security taker** may use its power of sale under the **Law** to sell the **secured shares** in order to satisfy the secured obligations set out in the security agreement. A power of application must be exercised on the same basis.

Process

The **Law** allows the **security taker** to enforce its security interest if:

- an event of default under the security agreement occurs; and
- it gives a notice to the **security giver** specifying the event of default.

There is no specified timeframe under the Law in which notice needs to be given prior to an enforcement.

Duties

On enforcing its security interest in **secured shares**, the **security taker** must take all reasonable steps to ensure the sale of the **secured shares** is made:

- within a reasonable time period; and
- for a price corresponding to the value on the open market at the time of the sale or, where there is no open market value, the best price reasonably obtainable.

Insolvency of security giver

The **Law** states that the power of the **security taker** to sell or otherwise act in relation to **secured shares** is not affected by:

- the **security giver** becoming insolvent or being subject to an administration order; or
- its property becoming subject to insolvency or similar proceedings in Guernsey or elsewhere.

Terms used

issuer means the company which issued the **secured shares**.

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Law means The Security Interests (Guernsey) Law, 1993.

M&A means the **issuer's** memorandum and articles of incorporation.

security giver means the person who creates a security interest over the **secured shares** (i.e. the shareholder of the **issuer**).

secured shares means the shares in the **issuer** in certificated form over which the **security giver** creates a security interest.

security taker means the person in whose favour a security interest is created over the **secured shares**.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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