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New Security Interests (Jersey) Law: changes to Jersey law and market practice

Bruce MacNeil
Ogier

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Jersey entities are often established as acquisition or holding vehicles for banking and finance, corporate and real estate transactions, and as investment funds and special purpose vehicles. When lending to corporate groups including Jersey entities, secured parties usually take Jersey law security over the available Jersey situs assets, including the securities issued by Jersey entities, any Jersey bank accounts and other intangible movable property in Jersey.

The Security Interests (Jersey) Law 2012 (New Law) came into full force and effect on 2 January 2014, following a lengthy consultation and drafting process. The New Law replaced the Security Interests (Jersey) Law 1983 (1983 Law) for security over intangible movable property in Jersey. Professor Sir Roy Goode was the consultant engaged by the States of Jersey on the New Law project. For a summary of the main differences between the 1983 Law and the New Law, please see box: *The 1983 Law and the New Law: a brief comparison*.

The Explanatory Note to the New Law states:

- The central objective of the New Law is to provide Jersey with a simplified, modern, efficient legal regime for the creation, perfection, priority and enforcement of security interests in intangible movable property.
- The New Law is designed to give Jersey one of the most up-to-date legal regimes in the field of finance so as to enhance Jersey's attractiveness to local and foreign investors.

The New Law is derived in part from the New Zealand Personal Property Securities Act 1999, and reflects a simplified form of the personal property securities approach adopted in the US, Canada, Australia and New Zealand. Accordingly, the case law of these jurisdictions is likely to be relevant as well as persuasive on future New Law Jersey cases.

Against this background, this article examines:

- When the New Law applies.
- Attachment.
- Perfection.
- Registration.
- Priority and subordination.
- Enforcement.
- Transitional provisions.

WHEN DOES THE NEW LAW APPLY?

The New Law applies to Jersey law security interests over intangible movable property created on or after 2 January 2014. Subject to limited exceptions, the 1983 Law continues to apply to Jersey law security interests over intangible movable property created before 2 January 2014.

Jersey generally follows English common law conflict of laws principles, applying the law of the jurisdiction where the assets are situated (*lex situs*) to security.

Article 4 of the New Law identifies which intangible movable property is capable of being subject to a security interest under the New Law. These rules require a Jersey connection for the New Law to apply, such as a security interest over:

- Investment securities listed on a register maintained in Jersey or by a Jersey company.
- Bank accounts or securities accounts maintained in Jersey.
- Rights in a partnership established under Jersey law (including limited partnerships).
- Contract rights under any contract governed by Jersey law (or any contract governed by foreign law with obligations owed by a Jersey obligor).
- Any other intangible movable property situated in Jersey.

Therefore, where security is to be taken over intangible movable property with a Jersey connection under Article 4 of the New Law, it is generally recommended that the parties enter into a security agreement that is governed by Jersey law, and that also complies with the requirements of the New Law.

Article 5 of the New Law permits parties to agree with each other that, notwithstanding that any intangible moveable property is not of a type described in Article 4 of the New Law, the provisions of the New Law will apply in their relations with each other to a purported security interest over such property, wherever in the world such property is situated. This could, in principle, allow parties to agree that the New Law will apply to a security agreement providing for a security interest over intangible movable property situated outside Jersey.

However, the impact of Article 5 is likely to be limited because such an agreement will generally not be enforceable against any third party (including, without limitation, any insolvency official) not party to such agreement. For intangible movable property situated outside Jersey, the

laws of the jurisdiction where the intangible moveable property is situated must be considered to determine whether the courts of that jurisdiction would recognise the validity and enforceability of a purported security interest granted under Article 5 of the New Law.

The New Law does not purport to apply to foreign law security, except to provide that a Jersey person is deemed to have capacity to give foreign law security over property situated outside Jersey. In particular, the Security Interests (Applications of Law: Exceptions) (Jersey) Order 2013 provides that the New Law will not apply to a security interest created and perfected under a foreign law where the collateral is contract rights under a Jersey law governed contract, or contract rights against a Jersey obligor under a foreign law governed contract. Therefore, the requirements of the New Law, including registration, generally do not apply to foreign law security over property situated outside Jersey, whether granted by a Jersey person or not.

The New Law does not impact on any rights of set-off, save in one limited circumstance (*see below, Priority and subordination: Priority for control security*).

Although the New Law includes provisions on assignments of receivables by Jersey persons, such provisions are outside the scope of this article.

ATTACHMENT

The effect of attachment of a security interest is that it becomes enforceable against the grantor and with respect to the collateral. The formal requirements for attachment are that each of the following are satisfied:

- Value has been given in respect of the security agreement (for example, a loan or agreement to lend). The value must be sufficient for a *contrat à titre oneréux* (an onerous, as opposed to a gratuitous, contract) and can include an antecedent liability. It is unnecessary that value is given to the grantor; the New Law expressly permits third party security.
- The grantor has rights in the collateral, or the power to grant rights in the collateral. These rights must generally be proprietary in nature.
- One or both of the following are satisfied:
  - the secured party (or someone on its behalf other than the grantor/obligor) has possession or control of the collateral; and/or
  - the security agreement is in writing, signed by the grantor, and contains a description of the collateral sufficient to enable it to be identified.

Possession

The attachment of a security interest by possession is only relevant to documentary intangibles. These are negotiable instruments and negotiable investment securities which are transferable by delivery, or by delivery and endorsement. A secured party has a security interest by possession when it, or someone on its behalf other than the grantor, takes possession of the negotiable instrument or the certificate representing the negotiable investment security.

Control

Attachment of a security interest through control is only available for certain categories of collateral. The most relevant are as follows:

- Bank accounts maintained by an account bank in Jersey; defined in the New Law as deposit accounts.
- Custody accounts maintained by an intermediary, such as a custodian, in Jersey; defined in the New Law as securities accounts.
- Certificated investment securities of a Jersey issuer, or which are registered in Jersey.

Control can be obtained:

- In the case of a deposit account by any of the following:
  - the account being transferred into the name of the secured party;
  - the account bank agreeing with the grantor and secured party to act on the secured party's instructions directing the disposition of funds in the account;
  - the account being assigned (by way of security) to the secured party and notice of the assignment being given to the account bank;
  - the secured party being the account bank.
- In the case of a securities account by any of the following:
  - the account being transferred into the name of the secured party;
  - the intermediary agreeing with the grantor and secured party to act on the secured party's instructions directing the disposition of investment securities in the account;
  - the secured party being the intermediary.
- In the case of an investment security by any of the following:
  - the secured party being registered as the holder of the security;
  - the secured party taking possession of the certificate representing the security.

Control can be taken by a person on behalf of the secured party. It is market practice for secured parties to take control over specific collateral, using the above methods, on the date the relevant security agreement is entered into. For example, share/unit certificates must be provided to the secured party, or its lawyers, at completion and the forms of security notices and acknowledgements must be negotiated and agreed with the Jersey account bank/custodian in advance so they can be entered into at completion.

Description

The attachment of a security interest through description is applicable to all types of intangible movables, including those that can also be secured by possession or control. A security interest attaches when the security agreement is in writing, signed by or on behalf of the grantor and contains a description of the collateral sufficient to enable it to be identified. The description can refer to specific collateral, or can identify collateral by type or by reference to all present and future intangible movable property.

The fact that the New Law now permits a security interest in the nature of a hypothec or charge means that a secured party can now take security over all the grantor's present and future intangible movables, including after-acquired property, without a transfer of possession, control or title to the secured party. This allows greater flexibility in terms of a debenture-style approach for a fluctuating pool of assets.

PERFECTION

Effect of perfection

The effect of perfection of a security interest under the New Law is that, subject to the provisions of the New Law, it becomes enforceable against third parties (for example, other creditors, purchasers of the collateral and insolvency officials).

The New Law provides that a security interest is perfected when both of the following conditions are satisfied:

- The security interest has attached.
- Any further steps required under the New Law for perfection have been completed.

Method of perfection

The steps for perfection depend on the nature of the collateral and the manner of attachment as follows:

- Where a security interest has attached by possession or control, this has the effect of also perfecting the security interest (although the security interest can also be perfected by registration).
- All other security interests, subject to certain exclusions, can only be perfected by registration of a financing statement in the Jersey Security Interests Register (SIR). Therefore registration can be used to perfect a security interest in any type of collateral, but will be of particular importance for a security interest over collateral which cannot be perfected through possession or control (for example, a security interest over contract rights, or all present and future intangible movable property).

Perfection of a security interest by possession, control or registration continues only while such possession, control or registration is maintained, unless it is continuously perfected by another one of these methods.

Failure to perfect

If a security interest is not perfected:

- It is void as against the Viscount (a Jersey court official) or liquidator on the insolvency of the grantor.
- It will rank after all perfected security interests.
- The ability to enforce the security interest against proceeds may be lost.
- A person who acquires the collateral for value will take free of the security interest, unless such security interest was created or provided for by a transaction to which that person was a party.
- The secured party may lose its right to receive notice of any enforcement by another secured party with a security interest in the same collateral.

After-acquired property

The New Law allows a security interest to attach to intangible movable property on acquisition by the grantor (defined in the New Law as after-acquired property), without the need for any specific appropriation by the secured party. This requires the security agreement to provide expressly for a security interest in such after-acquired property and, where relevant, the description of the collateral in the financing statement registered in the SIR to refer to such after-acquired property.

Right of use

Where the secured party permits a grantor to have some degree of authority to deal with the collateral prior to an event of default, there were concerns under the 1983 Law that this could adversely affect the validity of the security.

The New Law expressly provides that, if the security agreement so provides, a grantor can, without invalidating the security interest:

- Substitute equivalent collateral or withdraw excess collateral.
- Deal with collateral without a duty to account for the proceeds or to replace the collateral.

Proceeds

The New Law allows a security interest in collateral to extend to proceeds, being defined as intangible movable property in the hands of the grantor derived directly or indirectly from a dealing in that collateral. A dealing requires some element of disposition or conversion of the original collateral; interest and dividends are not proceeds. The security interest will also continue in the original collateral in the hands of the acquirer, and subsequent acquirers, unless the secured party expressly or impliedly authorised the dealing. This is also subject to the provisions in the New Law on third parties taking free of security in certain circumstances.

REGISTRATION

When to register

There was no register of security interests created under the 1983 Law, either public or maintained at the registered office of the grantor. Under the New Law, Jersey is the first major offshore financial centre to introduce a public security register. Registration is critical where the security interest in the collateral cannot be perfected by possession or control (for example, a security interest over contract rights, or all present and future intangible movable property).

Even where the security interest is capable of being perfected by possession or control, market practice is that lenders usually also perfect their security by registration for the following main reasons:

- To protect against the loss of possession or control of the collateral (for example, if share certificates are lost or misplaced).
- To ensure continuous perfection of security over proceeds of collateral (if the collateral is transferred or otherwise dealt with).
- To have the benefit of having the security interest on a publicly-searchable register (even though this will not constitute constructive notice from a legal perspective).

When not to register

Registration may be commercially undesirable in certain circumstances. An example is where there are confidentiality concerns, given that the name of the grantor is a key element of any registration and, unlike in the UK, the names of grantors who are individuals will appear on the register. In these circumstances, the secured party could, depending on the nature of the collateral, rely solely on a security interest which has attached and been perfected by possession or control of the collateral.

It is unnecessary to register the following security interests:

- Security interests created under the New Law which attach and are perfected by possession or control of the collateral (although registration may still be desirable).
- Foreign law security over property situated outside Jersey (whether granted by a Jersey person or not).
- Continuing security interests created under the 1983 Law which are not amended after the New Law comes into force (*see below, Transitional provisions*).

The Security Interests (Registration and Miscellaneous Provisions) (Jersey) Order 2013 provides that any provision of the New Law that requires, permits or refers to registration will not apply in relation to a security interest over the trust property of a trust (other than a Jersey property unit trust (JPUT)) which falls within the definition of a "prescribed unit trust" in the Order) where the grant of the security interest is by the trustees of that trust. The Order reflects concerns raised by the trust industry over confidentiality. Therefore Jersey law security interests granted by trustees (other than JPUT trustees) are generally non-registrable.

Timing of registration

There is no time limit for registering. Unlike in the UK, a registration in the 21-day period following the creation of the security interest is not backdated to be effective from the date of creation. Therefore, registration will need to be built into the completion mechanics to ensure timely perfection from the outset, as secured parties are likely to require that registration is completed either shortly before or on the date that the security agreement is entered into.

A prospective secured party can register a financing statement for its security interest before a security agreement has been entered into; for example, shortly before completion. This will generally require grantor consent for data protection and confidentiality reasons.

Access to SIR

The SIR is accessible through the website of the Jersey Financial Services Commission (*https://sir.jerseyfsc.org*). Detailed guidelines for the use of the SIR are available on the website.

The SIR permits:

- Online registration of financing statements and financing change statements in respect of security interests.
- Online searching of the SIR.
- Downloading and printing copies of financing statements.
- The delivery of change demands by the grantor requiring the secured party to amend financing statements.

Content of financing statement

The financing statement must include:

- Details of the grantor: name, registered office, address for service (if different), contact name, email address, telephone number and date of birth (if an individual) or registered number (if a body corporate).
- Details of the secured party: name, registered office, address for service (if different), contact name, email address, telephone number and date of birth (if an individual) or registered number (if a body corporate).
- Description of the collateral. This will either be all present and after-acquired intangible movable property, or specific collateral following the definition of collateral in the security agreement. There is the option of checking a box to include proceeds in the registration.
- Period of registration (*see below, Period of registration*).
- Contact details for service of communications generated through the SIR.

The security agreement itself is not registered, and details of its provisions do not appear on the SIR.

Care should be taken to ensure that the details in the financing statement are accurate. A financing statement which has a defect, irregularity, omission or error that is "seriously misleading" may be invalid. Therefore it is market practice for the grantor to indemnify the secured party and its representatives against any loss or liability resulting from the financing statement being seriously misleading due to inaccurate registration information provided by the grantor.

In particular, a secured party should obtain copies of official identification documents or constitutional documents to ensure that the grantor's name and any registration number are correctly inputted. Otherwise the registration is likely to be invalid.

These documents include passports, birth certificates or driving licences (for an individual), or certificates of incorporation (for a body corporate). Notably, a subsequent change in the name of the grantor after the date of the registration does not invalidate a registration; although the secured party may still wish to update the registration to reflect the grantor's change of name for the sake of good order.

Financing change statements

These are needed to reflect any change to the information provided in the original financing statement, for example, if the original registration is subject to renewal or discharge.

A financing statement or financing change statement is taken to be registered at the time when a registration number, date and time are assigned by the SIR and the statement is stored and capable of being searched in the SIR. The date and time stamp may prove to be an important factor where there are competing security interests in the same collateral. A printed search report issued by the registrar will be admissible as evidence and will be (in the absence of evidence to the contrary) proof of the registration.

Verification statement

On registration of a financing statement, a verification statement is automatically produced and delivered by e-mail to the secured party. This sets out:

- The financing statement registration number.
- The filing reference number.
- Grantor PIN (needed to serve a change demand).
- Date and time of registration and expiry.
- Data entered in a financing statement.

The e-mail with the verification statement attached sent to the contact entered on the financing statement for the secured party will contain the secured party PIN. As this is required to file any financing change statements, it should not be disclosed to the grantor or any other party.

The secured party is required to deliver a copy of the verification statement to the grantor within 30 days. However this may be waived by written agreement and is usually waived in the security agreement. The grantor can request that the secured party provide details of the grantor PIN at any stage.

Period of registration

Registration will be effective for a default period of ten years beginning on the date of registration or, more commonly, for any period not exceeding 99 years specified in the financing statement or financing change statement (subject to renewal or discharge). Given there is

a maximum registration fee (*see below, Fees*), it is generally market practice to register for the maximum period of 99 years. A registration can be renewed by registering a financing change statement at any time while the registration is still effective.

Searches of the SIR

Any person can search the SIR, although usually SIR searches are run by the secured party or its lawyers before and at completion to check that the search results are clear.

It is possible to search the SIR against:

- A financing statement registration number.
- A financing statement type.
- Registration and expiry date.
- A grantor's name.
- If the grantor is an individual, his date of birth.
- If the grantor is a body corporate, its registered number.

It is not possible to search against the names of secured parties or against collateral. However, these details will be discoverable by ordering a copy of a specific financing statement after carrying out searches. Searches against a grantor's name should be by reference to official identification documents or constitutional documents, and should cover all prior names. The name searches can be: "Begins With", "Contains", "Exact Match" or "Advanced". An "Advanced" search or a "Contains" search is more flexible but can return a larger number of positive search results which may need to be narrowed down.

A search will not reveal:

- Continuing security interests created under the 1983 Law.
- Security interests only created and perfected by possession or control.
- Security interests granted by trustees of a trust (other than JPUT trustees) acting as trustees in respect of the trust property of that trust (*see above, Registration: When not to register*).
- Whether any security interest is a purchase money security interest.
- Foreign law security interests created by Jersey grantors.

Therefore, enquiries still need to be made of the grantor and any counterparty in respect of any existing security that has not been publicly registered.

Fees

The applicable fees are set out on the SIR website. In summary, these are:

- Registration: GB£8 per year of registration up to a maximum fee of GB£150 for a 99-year registration.
- Discharge: no fee.
- Amendment of registration: GB£8 (if other than expiry date).
- Extension of period of registration: fees for registration apply.
- Global change of multiple registrations (other than expiry date): GB£100.
- Search: free to view search results (with limited data) and GB£4 to obtain a copy of a financing statement.
- Filing of change demand: GB£25.

PRIORITY AND SUBORDINATION

General rules on priority

The general rules on priority are:

- A perfected security interest has priority over an unperfected security interest in the same collateral.
- A security interest perfected by control generally has priority over a security interest perfected by registration.
- Priority among perfected security interests in the same collateral is determined by the order in which they were perfected, whether by registration, possession or control or otherwise under the New Law.
- Priority among unperfected security interests in the same collateral is determined by the order in which they attached.
- When a security interest is transferred, it maintains the same priority that it had immediately before the transfer.
- A security agreement may provide that the secured obligations include further advances, so that the priority of the original security is maintained for such further advances.

Priority for control security

However, there are certain exceptions to the general rules on priority. In particular, special rules apply for deposit accounts at an account bank, securities or custody accounts at an intermediary (such as a custodian) and certificated investment securities, where security can attach and be perfected by control. In summary:

Deposit accounts. The following applies:

- A security interest which has attached and been perfected by control under Article 3(3)(a) of the New Law (the deposit account is transferred into the name of the secured party with the written agreement of the grantor and the account bank) has priority over all other security interests in the deposit account. In addition, this security interest also overrides the account bank's right of set-off.
- A security interest which has attached and been perfected by control under Article 3(3)(d) of the New Law (where the secured party is the same legal entity as the account bank) has priority over all other security interests in the deposit account, other than as set out in the paragraph above.
- All other control security interests have priority over all other security interests in the deposit account other than as set out in the two paragraphs above (so that, as a general principle, security interests attached and perfected by control have priority over security interests perfected by registration).

Securities accounts. The following applies:

- A security interest which has attached and been perfected by control under Article 3(4)(a) of the New Law (where the securities account is transferred into the name of the secured party with the written agreement of the grantor and the intermediary) has priority over all other security interests in the securities account.

- A security interest which has attached and been perfected by control under Article 3(4)(c) of the New Law (where the secured party is the same legal entity as the intermediary) has priority over all other security interests in the securities account, other than as set out in the paragraph above.
- All other control security interests have priority over all other security interests in the securities account other than as set out in the two paragraphs above (so that, as a general principle, control security interests have priority over security interests perfected by registration).

Certificated investment securities. A security interest which has attached and been perfected by control (whether by the secured party having possession of the certificates of title or by being the registered holder) takes priority over all other security interests in the investment securities.

Contractual subordination

The ability to create a security interest in the nature of a hypothec/charge under the New Law without any transfer of possession, control or title to the secured party means that it is substantially easier to create first and second ranking security interests under the New Law.

A secured party can agree with another secured party to subordinate its security interest. The agreement is effective without registration, but registration is recommended to ensure that a transferee of a subordinated security interest is bound by the subordination agreement, whether or not the transferee accedes to it. As the junior secured party will register the subordination, care should be taken to ensure that it is contractually bound to register the subordination and prohibited from amending or discharging the registration without the prior consent of the senior secured party.

Purchase money security interests

A security interest that is a purchase money security interest (PMSI) has priority over another security interest in the same collateral. However, this is subject to the special rules applicable for deposit accounts, securities accounts and certificated investment securities. A PMSI is defined as being a security interest taken in collateral by a seller to secure the obligation to pay the purchase price of the collateral, or by a financier to secure an obligation to repay money lent to the grantor for the purpose of an acquisition of the collateral.

The rationale behind the PMSI is to avoid credit providers or suppliers which provide finance to debtors to acquire specific assets (such as inventory) still ranking after general credit providers who have taken security perfected by registration over all property (including after-acquired property). In the absence of subordination agreements with all creditors, a credit provider or supplier may choose not to proceed.

Taking free

Unperfected security. A person who acquires collateral for value takes the collateral free of an unperfected security interest in the collateral. The exception to this is where the unperfected security interest was created or provided for by a transaction to which the person was a party. This underlines the importance of perfection.

Obligor-initiated payment. A creditor who receives payment of a debt owing by an obligor through an obligor-initiated payment takes that payment free of any security interest in the funds paid or the bank account from which payment was made. This applies whether or not the creditor had knowledge of the security interest at the time of the payment, unless the creditor is acting in collusion with the obligor to defeat the rights of the secured party.

An "obligor-initiated payment" is defined as a payment made by the obligor through the use of a negotiable instrument, an electronic funds transfer, or a debit, transfer order, authorisation or similar written payment mechanism executed by the obligor when the payment was made.

Therefore, if a secured party permits the grantor to operate a bank account prior to an event of default, and the grantor gives instructions to the account bank to make a payment to a third party, such payment will be made free of the security interest unless the secured party can show some collusion on the part of the payee.

Investment securities. If a person gives value for a certificated investment security and takes possession of the certificate of title, that person takes the investment security free of any security interest in the investment security, even if it knew of such security interest.

If a person gives value for an investment security held with an intermediary and the investment security held with the intermediary is transferred to a securities account held in the person's name with the same or another intermediary, that person takes the investment security free of any security interest in the investment security even if it knew of such security interest.

However, these provisions do not apply if, at the time when the person agrees to acquire the investment security, the person knows that the acquisition would be in breach of the security agreement that created the security interest.

ENFORCEMENT

Enforcement under the 1983 Law

Under the 1983 Law, the powers of a secured party on enforcement were limited to a power of sale, although a power of appropriation was available where the collateral was money or represented by a negotiable instrument or moneys held in a bank account. In addition, the 1983 Law required a 14-day statutory grace period before exercise of the power of sale where the event of default complained of was capable of remedy.

Powers of enforcement

The New Law has introduced a wider range of enforcement powers, as follows:

- Appropriating the collateral.
- Selling the collateral.
- Taking any of the following actions:
  - taking control or possession of the collateral;
  - exercising the rights of the grantor in relation to the collateral;
  - instructing any person who has an obligation in relation to the collateral to carry out such obligation for the benefit of the secured party; and
  - applying any remedies provided for by the security agreement to the extent that such remedies do not conflict with the New Law.

These powers become exercisable when an event of default has occurred as provided for in the security agreement, and the secured party has served written notice on the grantor specifying the event of default. The powers of enforcement can be exercised more than once after an event of default and in respect of all or part of the collateral.

It is market practice for the enforcement trigger and other provisions in Jersey law security agreements to be conformed to the equivalent provisions in foreign law security agreements for the same transaction. This may potentially include the parties agreeing to contractually exclude or extend certain of the above statutory enforcement powers.

Notice of appropriation or sale

A secured party must give 14 days' written notice of an appropriation or sale of the collateral to:

- The grantor. However, this can be waived and it is market practice for security agreements to include such a waiver.
- Any person who, at least 21 days before the appropriation or sale, has either registered a financing statement at the SIR in respect of a security interest in the collateral, or given the secured party notice of a proprietary interest in the collateral. It follows that, if no such registration or notice has been made or given, there is no person to whom notices of appropriation or sale need be given. Further, if the third party has only made such registration or given such notice to the secured party in the seven days prior to the date on which the secured party would otherwise have had to give notices of appropriation or sale, again, no such notice need be given. In these cases, appropriation or sale can happen immediately.

In addition, on a sale (but not an appropriation), the requirement to give 14 days' written notice does not apply to the extent that:

- The collateral is a quoted investment security (which includes those held in a securities account).
- The secured party believes on reasonable grounds that the collateral will decline substantially in value if not disposed of within 14 days.
- The Royal Court of Jersey orders that no notice need be given.

Duties on appropriation or sale

On an appropriation, a secured party must take all commercially reasonable steps to determine the fair market value of the collateral at the time of appropriation, and must act in all other respects in a commercially reasonable manner in relation to the appropriation.

On a sale, a secured party must take all commercially reasonable steps to obtain fair market value of the collateral at the time of sale. The secured party must act in all other respects in a commercially reasonable manner in relation to the sale and must enter into any agreement in relation to the sale on commercially reasonable grounds.

These provisions only apply on an appropriation or sale, and not on the other enforcement actions (although there may be general obligations applicable where the collateral is dealt with). Subject to these duties, there are no limitations on the method of appropriation or sale.

In the recent English case of *Barclays Bank PLC v Unicredit Bank AG & Another* (*[2014] EWCA Civ 302*), the Court of Appeal considered the meaning of "commercially reasonable". This case may be relevant to the interpretation of the duties of the secured party on appropriation or sale. What is reasonable is likely to be determined objectively, taking into account, for example, the nature of the collateral, its liquidity, the existence (or not) of a market for the collateral in a sale and the time it takes the secured party to make preparations with regard to the sale or appropriation.

Statement of account and distribution of surplus

Upon an appropriation or sale, the secured party must within 14 days produce a statement of account showing:

- The gross value realised on the appropriation or the gross proceeds of sale.
- The secured party's reasonable costs in connection with the appropriation or sale.
- The amount of any other reasonable expenses incurred by the secured party in enforcing the security agreement after the event of default.
- The net value of the collateral or proceeds of sale.
- The surplus. This is defined as the amount by which the net value of the collateral or net proceeds of sale (after deducting the secured party's reasonable costs) exceeds the amount or monetary value of the obligations owed to the enforcing secured party.

The statement of account must be sent to the grantor and any other person who has a subordinate security interest in the collateral and has registered a financing statement in the SIR, or who has given the secured party notice of a proprietary interest in the collateral.

The surplus must then be distributed by the secured party in the following order:

- Any person who has a subordinate security interest in the collateral and has registered a financing statement in the SIR.
- Any person who has given the secured party notice of a proprietary interest in the collateral.
- Finally, the grantor.

Given that this puts the onus on the secured party to deal with subordinate secured parties and other interested parties, it may be preferable for an enforcing secured party to pay the surplus into the Royal Court of Jersey so that it can deal with claims for distribution of the surplus.

On an appropriation or sale, all security interests subordinate to that of the enforcing secured party are extinguished. Any appropriation or sale remains subject to any senior security interest. It would be difficult for a junior secured party to enforce its security effectively without the co-operation of the senior secured party.

Redemption and reinstatement

The grantor and any person to whom notice of an appropriation or sale must be given can redeem the collateral in full, by paying the obligations secured by the security interest and paying a sum equal to the reasonable costs and expenses of the secured party in enforcing the security agreement after the event of default. The effect is that the redeeming person takes the collateral free of the security interest.

The grantor can reinstate the security agreement, by paying any arrears or otherwise remedying the event of default and paying a sum equal to the reasonable costs and expenses of the secured party in enforcing the security agreement after the event of default. The effect is that the security interest is reinstated on the footing that it was on prior to the event of default. However this right can be waived by agreement in writing and it is market practice for security agreements to include such a waiver.

If the secured party has entered into an agreement to sell the collateral on enforcement or taken some other irrevocable action in respect of the collateral after an event of default, the rights of redemption and reinstatement cease.

Effect of grantor's bankruptcy

The New Law provides that the grantor becoming bankrupt (as defined in Article 8 of the Interpretation (Jersey) Law 1954), or the grantor or its property becoming subject, whether in Jersey or elsewhere, to any other insolvency proceedings, will not affect the power of a secured party to appropriate or sell, or otherwise act in relation to, collateral under the New Law.

However, the New Law provides that, in the case of the bankruptcy of the grantor of a security interest, the security interest is void as against the Viscount or liquidator (as applicable) and the grantor's creditors unless the security interest is perfected before the grantor becomes bankrupt. A perfected security interest can still potentially be challenged by the Viscount or a liquidator, as applicable, as a transaction at an undervalue or preference under the insolvency provisions of the Companies (Jersey) Law 1991 or the Bankruptcy (*Désastre*) (Jersey) Law 1990.

TRANSITIONAL PROVISIONS

Continuing security interests under the 1983 Law

Under the transitional provisions, a security interest created under the 1983 Law which was still in effect when the New Law came into force will continue to be effective under and governed by the 1983 Law, rather than the New Law. Further, the continuing security interest will have priority over any security interest under the New Law in the same collateral, unless otherwise agreed between the secured parties. This ensures continuing grandfathering for security interests created under the 1983 Law.

A consequence of this is that the following provisions of the 1983 Law continue to apply to continuing security interests:

- The remedies on enforcement are limited to the power of sale, save in respect of money, negotiable instruments or moneys held in a bank account, where a power of appropriation is available. In addition, the statutory 14-day grace period before the power can be exercised (where the event of default complained of is capable of remedy) will apply.
- The Viscount can apply to the Royal Court of Jersey for an order vesting in him the rights of the secured party in the collateral.

Amendment to the collateral

However, if new collateral is added to a continuing security interest under the 1983 Law, the security interest over the new collateral may become subject to the New Law. This will be the case if both:

- The parties who entered into a security agreement that created a continuing security interest then enter into another agreement which purports to extend the continuing security interest to new collateral.
- The agreement that created the continuing security interest did not envisage the new collateral as forming part of the original collateral.

Amendment to the secured obligations

Generally, an amendment of the underlying secured obligations, as opposed to the collateral, does not give rise to a continuing security interest becoming subject to the New Law. However, care should be taken if the amendment to the secured obligations is so fundamental (for example, substantially increasing or extending the secured obligations) that entirely new obligations are created (following the English case of *Triodos Bank NV v Dobbs* (*[2005] EWCA Civ 630 CA*). In these circumstances, arguably new security is created and it would be necessary to repaper the security under a New Law security agreement. Where the secured obligations are all monies from time to time owed by the grantor to the secured party, this should not be a concern.

New Law security agreements

If the New Law applies due to the transitional provisions, or because the security is created on or after 2 January 2014, the contractual provisions of the relevant security agreement should be reviewed to check for compliance with the New Law. In particular, the agreement should be checked to ensure that it:

- Provides for valid attachment and perfection in a manner consistent with the New Law.
- Includes waivers under the New Law for such things as the obligation to give the grantor 14 days' notice of an appropriation or sale, or to provide a grantor with copies of any verification statement following a registration.
- Allows the full range of enforcement powers and ancillary actions permitted under the New Law.

Where New Law security is being provided due to an amendment to the secured obligations, market practice is to leave the existing 1983 Law security in place, as it will be unaffected by any hardening period concerns under insolvency legislation.

CONCLUSIONS

The New Law represents a major development in the Jersey law of security over intangible movable property. The second stage of the New Law will be to extend its provisions to cover tangible movable property (for example, inventory, equipment and consumer goods) although the draft legislation for this is subject to ongoing consultation.

So far there has been a relatively smooth transition to the New Law, with the main developments in market practice relating to perfection and registration. It is now market practice for lenders to perfect their security by control over specific collateral whenever possible, usually as well as perfecting their security by registration at (or shortly before) completion. In addition, it is now possible to secure a wider range of assets than was possible under the 1983 Law, and lenders have generally welcomed the more flexible enforcement options under the New Law.

Under the New Law, Jersey's security legislation has been modernised to reflect legal concepts from other jurisdictions such as New Zealand, Australia, Canada and the US. It will be interesting to see how market practice continues to develop under the New Law and if other offshore financial centres follow suit with similar legislation.

THE 1983 LAW AND THE NEW LAW: A BRIEF COMPARISON

	1983 Law	New Law
Scope of collateral	• Certificated securities (including shares, units, debentures and bonds). • Bank accounts. • Custody assets. • Other intangible movable property capable of assignment (such as contractual rights).	• Investment securities (including shares, units, debentures and warrants). • Bank accounts. • Securities accounts. • Contractual rights. • Receivables. • All present and future intangible movable property from time to time (similar to a floating charge).
Creation/attachment/ perfection	Security interest agreement complying with the 1983 Law, as well as: • Possession of certificates of title to collateral. • Assignment of title to collateral and giving of notice; or • Control of bank accounts. No concepts of attachment or perfection (only creation).	Security interest agreement complying with the New Law, as well as: • Attachment by control of collateral or description/ identification of collateral; and • Perfection by control (according to the statutory definition) of collateral and/or public registration on the Jersey Security Interests Register. Attachment makes security enforceable against the grantor, whereas perfection makes security enforceable against third parties/during insolvency and ensures priority.
Third party security	Third party security (that is, security granted in support of the obligations of a third party) is not expressly contemplated under the 1983 Law. This issue was usually dealt with by including a limited recourse guarantee or covenant to pay in the security interest agreement.	The New Law expressly permits third party security.
Rights to deal	The 1983 Law did not expressly provide for the grantor having rights to deal with the collateral (for example, secured accounts).	The New Law expressly provides that security is not affected by the grantor having rights to deal with the collateral, substitute equivalent collateral or withdraw excess collateral.
Registration	No public registration of security.	Registration of security on an online register open to public searches. Public registration of New Law security at or just before completion has become the usual method for perfecting security.
Enforcement	Power of sale was the only enforcement remedy, other than appropriation of monies in a bank account (each requiring 14 days' notice before enforcement of security where the event of default was capable of remedy).	Wider enforcement remedies, including: • Power of appropriation. • Power of sale; and • Ancillary actions, such as taking possession or control of collateral or exercising contractual rights. No 14-day notice period before enforcement of security (assuming this is contracted out of).

Practical Law Contributor Profiles

Bruce MacNeil, Partner
Ogier
T +44 1534 514 394
F +44 1534 514 444
E bruce.macneil@ogier.com
W www.ogier.com

Professional qualifications. England and Wales, 2003; Attorney, New York, US, 2009; Jersey, Advocate, 2013

Areas of practice. Banking and finance; corporate and commercial; derivatives; restructuring and insolvency; structured finance.

Recent transactions

- Advising Eurohypo on the amendment and restatement of GB£800 million and GB£400 million facilities with Jersey property unit trust and company obligors.
- Advising AIB on security and insolvency issues for the EUR945 million debt restructuring of Independent News & Media.
- Advising Barclays on the sale of Breedon Holdings Limited and the refinancing of GB£134 million facilities.
- Advising Circle Holdings plc, the Jersey holding company for the Circle UK healthcare group, on its AIM listing.