The Security Interests (Jersey) Law 2012- Enforcement...

Insights - 05/01/2022

The Security Interests (Jersey) Law 2012 (the **SIJL**) came into force on 2 January 2014, changing the way in which security is created, perfected and enforced over Jersey intangible movable property. This briefing note is one of a series relating to the SIJL, dealing with enforcement of security interests.

Enforcement under the 1983 Law

Under the Security Interests (Jersey) Law 1983 (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 under the SIJL

The SIJL provides for a wide 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 respect of the collateral to carry out such obligation for the benefit of the secured party
- applying any remedies provided for by the security agreement to the extent that such

remedies do not conflict with the SIJL

In practice, the most widely exercised enforcement powers under the SIJL are sale and appropriation. Jersey law does not have the concept of receivers enforcing security and enforcement must be completed by the secured party (or its nominees/agents). An enforcement sale involves the secured party selling the collateral to a third party, whereas appropriation involves the secured party taking full ownership of the collateral in return for reducing the secured obligations by the value appropriated.

Under Article 43 of the SIJL, these powers became exercisable upon (a) the occurrence of an event of default as provided for in the security agreement and (b) the secured party serving written notice on the grantor specifying the event of default. The powers can be exercised more than once after an event of default and in respect of all or part of the collateral.

In *Albion Energy Limited v Energy Investments Global Limited* and *Heritage Oil Limited [2020] JRC 147A*, a secured party applied for orders under Article 52 of the SIJL to enable it to enforce its security interest over shares in the grantor's subsidiary in respect of a debt which arose under a share purchase agreement. The Royal Court of Jersey confirmed that the doctrine of merger, whereby a cause of action is extinguished once a court has given judgment on it so that the claimant cannot bring further proceedings for the same cause of action, is part of Jersey law. However, the principle behind the doctrine of merger does not extend to the enforcement of security after a judgment for the secured debt is obtained. The secured party was entitled to choose to obtain a judgment for the outstanding secured debt in England and then enforce its security interest securing the debt under the SIJL. Contrary to the allegations of the grantor, this was not contrary to Article 8 of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

Pre-enforcement steps

Typical pre-enforcement steps for a secured party (taken prior to serving written notice of default under Article 43 of the SIJL) include:

- completing a security review and ensuring that the security is perfected by way of registration and control, for example through possession of share certificates and written agreement with the account bank
- taking title to secured shares through instructing the corporate administrators to update the register of members (leaving beneficial ownership of such shares with the grantor)
- exercising voting rights in respect of secured shares, for example to change the board of directors of the company
- giving instructions to third parties in respect of the collateral, for example instructing the account bank to block the secured accounts

When exercising pre-enforcement rights, the secured party should be careful to avoid exercising such rights in a manner which would be deemed to be an enforcement by way of appropriation or sale (in which case, the statutory duties described below would apply). The secured party should also be careful to avoid exercising its rights in a manner which would constitute a clog on the equity of redemption, i.e. the right of the grantor to redeem the collateral upon discharge of the secured obligations. However, it is not necessary for the secured party to obtain valuations of the collateral before exercising pre-enforcement rights.

In practice, any notices should be served in accordance with the provisions of the transaction documents and third parties (e.g. corporate administrators and account banks) may have KYC or other requirements which need to be satisfied before they will comply with instructions from the secured party, which may impact on timing.

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 standard for Jersey security agreements to include such a waiver
- any person who, at least 21 days before the appropriation or sale has either (a) registered a financing statement at the Jersey Security Interests Register (the **SIR**) in respect of a security interest in the collateral or (b) 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

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, 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.

Therefore the secured party should obtain valuations of the collateral before proceeding with

enforcement by way of appropriation or sale. The Jersey courts have recently considered the duty of a secured party to take all commercially reasonable steps to determine the fair market value of the collateral prior to a sale or appropriation.

In *Re Bayswater Road (Holdings) Limited [2019] JRC 102*, the Royal Court concluded that the secured party had taken all commercially reasonable steps to obtain a fair market value for the collateral prior to the sale of the borrower's shares as: (i) the secured party had repeatedly attempted to sell the underlying property owned by the borrower; and (ii) an independent valuer had confirmed that it was unlikely that an offer for the property would be made that would exceed the proposed purchase price of the borrower's shares (which was a lot less than the debt owed).

The Royal Court further clarified the position on the secured party's duty to take all commercially reasonable steps to determine the fair market value of the collateral at the time of an appropriation in *Kidd and Ors v All Service Group Holdings [2019] JRC221*). This case suggests that a secured party should not rely on only a single valuation, especially if the value of the collateral may be more than the outstanding debt. In addition, the court confirmed that a grantor of security has the right to challenge the secured party's proposed appropriation upon receiving the statement of account.

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 sale.

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 by 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, and
- 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 (a) has a subordinate security interest in the collateral and has registered a financing statement in the

SIR, or (b) has given the secured party notice of a proprietary interest in the collateral.

Any 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 for it to deal with claims for distribution.

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.

Insolvency and enforcement

Unlike some other jurisdictions, in Jersey there is no moratorium on enforcement of security following the commencement of insolvency proceedings. Article 56 of the SIJL provides that if the grantor of a perfected security interest becomes bankrupt or subject to Jersey or foreign insolvency proceedings, that shall not affect the power of the secured party to appropriate or sell the collateral, or otherwise act in relation to collateral in connection with enforcement. This is subject to Article 59 of the SIJL, which provides that unperfected security becomes void upon insolvency. It is market standard for Jersey security agreements to include a security power of attorney which is irrevocable, facilitates the exercise of powers by the secured party and survives insolvency.

Other briefing notes in this series cover the following topics:

- attachment and perfection
- taking free of security
- priority
- registration
- transitional provisions

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