

Secured Lending in Guernsey

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Introduction

Guernsey entities continue to be popular in asset-holding structures and, accordingly, lenders are regularly asked to put in place financing arrangements involving Guernsey entities. This briefing is intended to provide an overview of the mechanism under Guernsey law for the creation and enforcement of security over certain Guernsey situated assets, such as the shares in a Guernsey company, certain contract rights and monies in a Guernsey situs bank account.

Where security is being taken over Guernsey situated assets, it is recommended that this is created using a security agreement governed by Guernsey law. For intangible moveable property (such as the shares of a Guernsey company, rights in a contract or monies in a Guernsey bank account), this means complying with the provisions of the Security Interests (Guernsey) Law, 1993 (the **Security Law**).

For the purposes of the Security Law, a security interest agreement must contain provisions regarding the collateral sufficient to enable its precise identification at any time. As such, the Guernsey security regime does not lend itself to taking security over a fluctuating pool of assets, nor does Guernsey law readily recognise the concept of a floating charge. Therefore, it is only possible to secure future intangible moveables situated in Guernsey where such assets can be precisely identified and described in the security agreement.

It should be noted that Guernsey law does not restrict the creation by a Guernsey entity of foreign law security over non-Guernsey situs assets.

Depending on the type of assets to be secured, the Security Law provides for creation of security by (i) control, (ii) possession and/or (iii) assignment.

Security generally

Security in Guernsey in respect of any intangible moveable property (other than a lease) should be created pursuant to the Security Law, which sets out the formalities for a Guernsey security

agreement, including that the agreement must, amongst other things, be in writing, contain provisions regarding the collateral which are sufficient to enable it to be precisely identified at any time (as noted above) and specify the events which are to constitute events of default.

Shares

A security interest over the shares in a Guernsey company may be created pursuant to the Security Law by:

- (a) Possession: the secured party takes possession of relevant share certificates; and/or
- (b) Assignment: the secured party (or some person on its behalf) has title to the shares and where that title has been acquired by way of assignment.

In respect of security by way of possession, security is created upon the secured party (or someone on its behalf other than the debtor or someone on behalf of the debtor) having possession of the original share certificates in relation to the shares, pursuant to a security interest agreement. The secured party (or someone on its behalf other than the debtor or someone on behalf of the debtor) must have, and must retain, possession of the original share certificates for so long as the secured liabilities under the corresponding loan agreement are outstanding. If possession of the original share certificates is lost, the security may terminate.

To create security by way of assignment, express notice in writing of that assignment must be given by or on behalf of the secured party to the person from whom the person assigning the rights would have been entitled to claim the collateral (i.e. the company whose shares are being secured). Such express notice must satisfy the requirements set out in the Security Law. Until such express notice has been given there will not be an effective assignment of title to the shares and security by assignment will not be created.

Contract rights

A security interest in rights under a contract (other than a lease) is created where the secured party (or some person on its behalf) has title to such rights pursuant to a security agreement and where that title has been acquired by way of assignment. As noted above, the creation of security by way of assignment requires express notice in writing to be served on the relevant counterparty. This is particularly useful to create a security interest in respect of intercompany loans.

Bank accounts

Control: where the secured party is also the account bank (and where the grantor of the security is also the bank account holder), security over the relevant bank account is created where the secured party has control of the account pursuant to a security agreement.

Assignment: where the account bank and the secured party are different entities, security over the relevant bank account is created where the secured party (or some person on its behalf) has title to the account and where that title has been acquired by way of assignment. As noted above, the creation of security by way of assignment requires express notice in writing to be given to the account bank.

Enforcement

Statutory power of sale or application

If an event of default (as defined in the security agreement) occurs and notice is given to the debtor specifying the event of default, the statutory power of sale or application arises in respect of the relevant collateral.

Exercise of power of sale or application

Where the power of sale or application is exercised, whilst there is no requirement for the relevant secured assets being sold to be sold on the open market (i.e. by way of public auction), the secured party is under an obligation to take all reasonable steps to ensure that the sale is made within a reasonable time, and for a price corresponding to the value on the open market at the time of sale of the assets or, where there is no open market value, the best price reasonably obtainable. Any power of application must be exercised on the same basis and any proceeds of such application are applied in the same way as the proceeds of any sale (see below).

Application of proceeds

The Security Law sets out the order in which the proceeds of a sale or application must be applied, with the payment of costs and expenses of the sale ranking in priority to the application of other proceeds.

Enforcement in practice

Enforcement of the security would, in practice, typically involve:

- (a) Shares: the sale of the shares of the relevant company to a third party purchaser in accordance with the sale mechanics outlined above;
- (a) Contract rights: the secured party stepping in to the shoes of the debtor in relation to the relevant contract to either take the benefit of the contract or to sell its rights under the contract to a third party purchaser; and/or
- (b) Bank accounts: the secured party accessing the monies in the account for the purposes of discharging the debt owed to it.

Conclusion

Many aspects of Guernsey law are similar to English law and, as such, will be familiar to lenders in the United Kingdom. However, there are material differences between Guernsey law and the laws of the United Kingdom in relation to the creation and enforcement of security over Guernsey situated assets. This briefing is intended to provide a high level summary of such differences and the issues relevant to a finance provider in respect of financing arrangements involving Guernsey entities.

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