Security Interests (Jersey) Law 2012: changes to Jersey law and market practice

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ttributes to Jersey law and market practice

Jersey entities are often established as acquisition or holding vehicles for banking, corporate or real estate transactions, and as investment funds and special purpose vehicles. When lending to structures involving 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 1983 (1983 Law) governing security over intangible movable property in Jersey generally worked well, but had become increasingly outdated in the context of modern banking and finance transactions.

The 1983 Law has been replaced by the Security Interests (Jersey) Law 2012 (New Law) which came into full force and effect on 2 January 2014, following a lengthy consultation and drafting process. The States of Jersey engaged Professor Sir Roy Goode as its consultant on this project. For a summary of the main differences between the 1983 Law and the New Law, please see the table at the end of the article (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 this field and thereby 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. Therefore, the case law of those jurisdictions is likely to be relevant in future Jersey cases relating to the New Law. 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 (ex 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).
• 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 which is governed by Jersey law and which complies with the requirements of the New Law.

Article 5 of the New Law permits two or more persons who are party to a security agreement that provides for a security interest outside the scope of Article 4 to agree that, in their relations with each other, the New Law will apply to the agreement. 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 the agreement will only affect the relations between the parties, as opposed to third parties (including insolvency officials).

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. The value must be sufficient for a contrat à titre onéreux (an onerous, as opposed to a gratuitous, contract) and may include an antecedent liability. It is not necessary that value is given by 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 should 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 (namely 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 by way of control is only available in respect of certain categories of collateral. The most relevant are as follows:

• Bank accounts maintained by an account bank (defined in the New Law as deposit accounts).

• Custody accounts maintained by an intermediary, such as a custodian (defined in the New Law as securities accounts).

• Certificated investment securities.

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;
  - title to the account being assigned 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.

Description

The attachment of a security interest by way of description is applicable to all types of intangible moveables, including those that can also be secured by possession or control. Security attaches when a security agreement in writing signed by or on behalf of the grantor 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 moveables (including after-acquired property) without a transfer of possession, control or title to the secured party, allowing greater flexibility in terms of a debenture-style approach in respect of 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 in respect of a security interest over collateral which cannot be perfected by way of possession or control.

Perfection of a security interest by possession, control or registration continues only while such possession, control or registration is maintained (unless 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, both:
• 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 would 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 for collateral where the security interest cannot be perfected by possession or control (for example, a security interest over contractual rights, or all present and future intangible movable property).

Even where the security interest is only capable of being perfected by possession or control, market practice is that lenders usually still perfect their security by registration for the following main reasons:
• 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 not necessary 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)), 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 by the date that the security agreement is entered into.

It is possible for a prospective secured party to register a financing statement in respect of 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 this 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, address or registered office, and date of birth (if an individual) or registered number (if a body corporate).
- Details of the secured party: name, address or registered office, 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 in ensuring 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. 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 is 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.

**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 registrable 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 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 often 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. 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, details of these 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 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.
- Discharge: no fee.
- Amendment of registration: GB£8 (if other than expiry date).
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 will be 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 they accede to it). A practical matter is that the junior secured party will register the subordination, so 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 (but subject to the special rules applicable in respect of 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 respect of 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 on the occurrence of an event of default as provided for in the security agreement and 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.

**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, 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 "commericially reasonable". It is likely that this will be relevant to the interpretation of the duties of the secured party on appropriation or 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 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 parties who entered into a security agreement that created a security interest were the grantor and the secured party. The grantor is the person who has a security interest in the collateral and has registered a financing statement in the SIR, or has given the secured party notice of a proprietary interest in the collateral. The remedies on enforcement will be limited to the power of a secured party to appropriate or sell, or otherwise act in relation to, collateral and its proceeds. 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 may redeem the collateral in full, by paying 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 could 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 will be 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 reaper 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:
Analysis

- 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.

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Qualified. England and Wales, 1995; Jersey, 1999
Areas of practice. Banking and finance; corporate and commercial; derivatives; restructuring and insolvency; structured finance.
Recent transactions
- Advising The Royal Bank of Scotland plc in relation to a GBR70 million facility made available to Threadneedle UK Opportunities Property II LP (an English limited partnership with Jersey property unit trust limited partners).
- Advising Moorfield Real Estate Fund II on the GBR54 million acquisition of units in the SkyPark Jersey property unit trust.
- Advising Gatehouse Bank plc on the Islamic financing for the acquisition of the BT Group plc Regional Headquarters in Leeds and certain property at Slade Park, Oxford using Jersey holding companies and cell companies.

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 GBR800 million and GBR400 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 GBP134 million facilities.
- Advising Circle Holdings plc, the Jersey holding company for the Circle UK healthcare group, on its AIM listing.
## THE 1983 LAW AND THE NEW LAW: A BRIEF COMPARISON

<table>
<thead>
<tr>
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<th>1983 Law</th>
<th>New Law</th>
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<tbody>
<tr>
<td><strong>Scope of collateral</strong></td>
<td>• Certificated securities (including shares, units, debentures and bonds).</td>
<td>• Investment securities (including shares, units, debentures and warrants).</td>
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<td></td>
<td>• Bank accounts.</td>
<td>• Bank accounts.</td>
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<td></td>
<td>• Other intangible movable property capable of assignment (such as contractual rights).</td>
<td>• Securities accounts.</td>
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<td>• Contractual rights.</td>
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<td>• Receivables.</td>
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<td></td>
<td></td>
<td>• All present and future intangible movable property from time to time.</td>
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<td><strong>Creation/attachment/perfection</strong></td>
<td>Security interest agreement complying with the 1983 Law, together with:</td>
<td>Security interest agreement complying with the New Law, together with:</td>
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<td>• Possession of certificates of title to collateral.</td>
<td>• Attachment by either possession or control of collateral or description of collateral.</td>
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<td>• Control of bank accounts.</td>
<td>• Perfection by either possession or control of collateral or public registration.</td>
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<tr>
<td></td>
<td>No statutory concepts of attachment or perfection (only creation).</td>
<td>Attachment makes security enforceable against the grantor, whereas perfection makes security enforceable against third parties and ensures priority over unperfected security.</td>
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<td><strong>Third party security</strong></td>
<td>Security granted by the security provider 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.</td>
<td>The New Law expressly permits third party security.</td>
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<td><strong>Right to deal</strong></td>
<td>The 1983 Law did not expressly provide for the grantor having rights to deal with collateral (for example, secured accounts).</td>
<td>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.</td>
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<tr>
<td><strong>Registration</strong></td>
<td>No public registration of security.</td>
<td>Registration of security on an online register open to public searches.</td>
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<td>Public registration of New Law security at or just before completion has become the usual method for perfecting security.</td>
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<td><strong>Enforcement</strong></td>
<td>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).</td>
<td>Wider enforcement remedies, including:</td>
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<td>• Power of appropriation.</td>
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<tr>
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<td></td>
<td>• Power of sale; and</td>
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<td>• Ancillary actions, such as taking possession or control of collateral or exercising contractual rights.</td>
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<td>No 14 day notice period before enforcement of security (assuming this is contracted out of).</td>
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