

Security Interests (Jersey) Law 2012

This note provides a brief summary of the principal features of the Security Interests (Jersey) Law, 2012 and highlights some key considerations when creating security interests under Jersey law.

Overview

The Security Interests (Jersey) Law, 2012, as amended (the “New Law”) came into force on 2 January 2014 and superseded the Security Interests (Jersey) Law 1983 (the “Old Law”).

Why the New Law?

The Old Law has successfully fulfilled its role over the past three decades in facilitating numerous secured financing transactions.

However, it was felt necessary to modernise Jersey’s security regime. This was to overcome certain limitations and to provide a leading international finance centre such as Jersey with one of the most up-to-date legal security regimes in modern banking and financing transactions and, therefore, enhance the Island’s attractiveness to both local and foreign investors.

The key features of the New Law

The New Law:

- lists the types of intangible movable property to which it applies;
- identifies three main methods of taking a security interest - by control, by possession and by description of the collateral subject to registration (with the introduction of the concepts of “attachment” and “perfection”);
- expressly permits third party security;
- allows for the taking of “debenture style” security over all intangible movables acquired from time to time by the debtor;
- widens the powers of enforcement of a secured party’s rights;
- provides clarification as to the level of control the grantor has to exert over the collateral;
- allows for the removal or reduction by agreement of the 14 day statutory grace period upon enforcement;
- introduces a searchable on-line public register of security interests (the “Security Interests Register”); and
- includes transitional provisions preserving the status of security interests created under the Old Law.

The nature of a security interest under the New Law

A security interest is an interest in “intangible” property that is created pursuant to a security agreement and secures payment or performance of an obligation.

Four conditions must be satisfied for the New Law to apply:

- a proprietary interest must be created in an asset in favour of the secured party;
- the asset must be intangible property;
- the proprietary interest must arise by agreement between the parties; and
- the proprietary interest must secure payment or performance of an obligation.

How to create a security interest under the New Law

There are two steps for the creation of a security interest under the New Law: attachment and (where necessary) perfection. The order in which attachment and perfection take place is irrelevant.

A security interest “attaches” to collateral when the following conditions are satisfied:

- value has been given in respect of the security agreement;
- the grantor has rights in the collateral or power to grant rights to the secured party; and
- the secured party or someone on its behalf has “possession” or “control” of the collateral; and/or the security agreement is in writing, signed and sufficiently identifies the collateral.

When a security interest attaches to the collateral, it becomes enforceable against the grantor only. For the security interest to become enforceable against third parties, such as the Viscount (a court appointed officer that oversees a *désastre*, a form of bankruptcy in Jersey), a liquidator and creditors, it must be “perfected”.

A security interest is “perfected” when the following conditions are satisfied:

- the secured party has possession or control of the collateral; or
- the registration of a “financing statement” (see further below under Registration) is made in respect of the collateral.

Possession and control simultaneously produce attachment and perfection. It is not necessary therefore in this instance to register a financing statement for “financial collateral” (e.g. bank accounts) or “documentary intangibles” (e.g. shares) but it may be prudent to do so.

Registration of a financing statement is the only way of perfecting a security interest in certain forms of intangible property, such as intellectual property, income rights and receivables.

Perfection may be automatic, continuous and temporary.

Some key considerations

- **Registration:** A significant feature of the New Law is the provision for electronic registration of security interests and assignments of receivables on the Security Interests Register.

Initial registration is made by filing a financing statement. Subsequent changes may then be made by filing a “financing change statement” (together, the “Statements”).

The Statements may relate to one or more security agreements or assignments of receivables. They may also be registered before or after a security interest is entered into, an assignment of receivables occurs or a security

interest has attached.

The registration of the Statements is effective until:

- the registration is removed or discharged;
- the period for registration (if any) in the Statements expires; or
- ten years from the date of registration (if no period of registration is provided for).

■ **Priority:** The New Law establishes a clear set of priority rules. However, as a general rule, the first of the following will have priority:

- registration of a financing statement;
- possession or control of collateral; or
- temporary perfection of collateral.

■ **Enforcement:** The New Law greatly improves the enforcement remedies available to the secured party. Under the Old Law, the only remedy available was to exercise a power of sale. Under the New Law, enforcement may be exercised in any of the following ways:

- appropriating the collateral or proceeds;
- selling the collateral or proceeds; or
- taking any of the following ancillary actions:
 - (i) taking control or possession of the collateral or proceeds;
 - (ii) exercising any rights of the grantor in relation to the collateral or proceeds;
 - (iii) instructing any person who has an obligation in relation to the collateral or proceeds to carry out the obligation for the benefit of the secured party; or
 - (iv) applying any enforcement remedy that the security agreement provides for that is not in conflict with the New Law.

The secured party may sell the collateral by auction, public tender, private sale or another method. If the collateral is to be appropriated or sold, the secured party must take all commercially reasonable steps to determine the fair market value of the collateral and act in a commercially reasonable manner. The secured party may also buy any collateral it sells. Bespoke enforcement powers can exist as the New Law permits the parties to agree any other remedy to the extent that it does not conflict with the New Law. Where consistent, more than one enforcement step can be taken.

Under the Old Law, where the event of default is capable of remedy, the power of sale is only exercisable after the expiry of a 14 day notice period. Under the New Law, the parties can agree that following service of a notice, the secured party is able to sell or appropriate the collateral immediately.

- **Redemption:** Subject to certain conditions, the New Law provides for a right to redeem a security interest.
- **Reinstatement:** The New Law provides that a grantor may reinstate a security agreement. This basically involves the grantor remedying the event of default and paying the associated costs. The parties, however, may agree that the right of reinstatement will not apply.
- **Excluded interests and transactions:** The New Law states that it does not apply to certain interests (for example, liens or rights of set-off) and excludes interests created or provided by certain transactions (for example, a “repo”).
- **Subordination agreements:** The New Law confirms that subordination agreements do not create security interests unless expressly provided for in the subordination agreement itself.
- **Third party security and “debenture” style security:** the New Law clarifies the position regarding third party security and permits debenture style security.
- **Bankruptcy:** The secured party’s power or appropriation of sale is not affected by the grantor’s bankruptcy or the grantor or the grantor’s property being subject to insolvency proceedings in Jersey or elsewhere (irrespective of whether or not the secured party holds title to the collateral). Subject to the general rules relating to preferences, transactions at an undervalue, pauline actions or extortionate credit transactions, a grantor’s bankruptcy only invalidates a security interest or assignment of receivables if “unperfected” at the time of the grantor’s bankruptcy.

- **Transitional provisions:** Any Jersey security agreements entered into before the New Law came into force will continue to be governed by the Old Law (as long as new collateral is not added to the security agreement and the secured obligations are not substantially increased or fundamentally changed). A security interest created under the Old Law will have priority over a security interest created under the New Law over the same collateral (unless agreed otherwise).
- **Tangible movables:** It is envisaged that the New Law will at some stage be updated to extend to tangible movable property.

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