



Banking



Corporate

The New Security Interests (Jersey) Law 201- (the "New SIL") (yet to come into force)

An executive summary



The new Security Interests (Jersey) Law 201- (yet to come into force) (the “**New SIL**”) was approved by the States Assembly on 19 July 2011 and has been sent to the Privy Council for approval. The New SIL is a long-awaited revision of the current Security Interests (Jersey) Law 1983 and is likely to come into force in the first quarter of 2012. Whilst it still provides for the creation of security interests in intangible movable property (such as bank accounts, shares, bonds or contractual rights) the New SIL gives greater clarity and flexibility to the process of granting and taking security in Jersey and legislates on points on which the existing law is silent.

Key features of the draft law provide that it:

(a) specifies when compliance with the New SIL is obligatory

The New SIL only applies to security interests created over intangibles, examples being shares in a Jersey company, rights under a contract where the obligor is a Jersey person or company, a bank account maintained in Jersey or a negotiable instrument situated in Jersey. Security over such intangible movable property will only be capable of being created under Jersey law in accordance with the New SIL.

The New SIL does not deal with security over tangible things.

(b) confirms that third-party security can be taken

The current law leaves scope for doubt whether Party C can take security from Party A for Party B’s obligations, without also taking a guarantee or parallel debt obligation from Party A. This has been clarified so that direct ‘third party security’, as this is known, is now expressly permitted.

(c) defines when a security interest is created (attachment) and what is required to ensure the validity and priority of that security interest against other claims (perfection)

A security interest can only arise by agreement. It arises upon ‘attachment’, which means the security interest is enforceable against the grantor of that security interest.

‘Perfection’ is necessary in order to establish the validity and priority of a secured party’s claim against those of third parties. This is particularly important in an insolvency of the grantor of the security. The method of perfection depends upon the kind of collateral over which security is granted. In some cases, attachment also constitutes perfection. An

important change brought in by the New SIL, however, is that it creates a public, searchable, on-line register of ‘financing statements’. ‘Perfection’ can be achieved by registration.

(d) sets out priorities

The basic rules are:

- (1) Perfected security interests have priority over unperfected security interests.
- (2) For two perfected security interests, priority goes to the first to register a financing statement, take possession of the collateral, or take control of the collateral.
- (3) For two unperfected security interests, priority goes to the first to ‘attach’ to the collateral.

(e) confirms you can enter into an agreement to take security over property before the property is acquired

Party A may take a security interest in the shares Party B holds in Company X at the date of the security agreement, together with any additional shares in Company X that Party B may acquire.

Alternatively, Party B may have no shares in Company X at the date of the security agreement, but can grant a security interest over any such shares Party B may acquire.

(f) includes proceeds of collateral

The New SIL expressly provides that a security interest in collateral can extend to the proceeds of that collateral, including insurance proceeds.

(g) permits “whole undertaking” security interests where the debtor is free to deal with collateral

Security under the New SIL will not extend to tangible goods. However, one should be able to identify the collateral as “all present and future intangible movable property” of the grantor. A valid security interest would “attach” to such collateral, but in order to be valid and obtain priority protection vis-à-vis other creditors, the secured party will need to ‘perfect’ its security interest in the manner applicable to each asset type.

Jersey does not recognise a 'floating security interest' corresponding to an English floating charge. However the New SIL helpfully says that attachment of a security interest is not affected if a secured party permits a grantor to retain the right to deal with collateral without a duty to account for the proceeds or replace collateral.

(h) widens the enforcement powers available to secured parties

Existing law limits the powers of the secured party on enforcement to (i) appropriation of money; and (ii) sale of the collateral. These remedies remain, but they have been extended in scope and enhanced by the following powers:

- appropriating other types of collateral (not just money) and applying them in satisfaction of secured obligations;
- taking control or possession of collateral;
- exercising any of the rights of the grantor in relation to collateral including voting rights and/or the right to receive dividends/income (although you can also control these prior to default, by contract);
- instructing any other person (such as the person who owes money under a contract with the grantor of the security where the grantor's rights against the person are the collateral) to carry out its obligation for the benefit of the secured party (e.g. pay the money to the secured party or to its order, instead of to the grantor).

The New SIL also permits parties to agree upon any other remedy to the extent that it does not conflict with the New SIL. Enforcement powers can therefore be tailored to fit the parties and the collateral.

In addition, whilst the New SIL requires - in most cases - 14 days' notice to be given to the grantor before enforcement action is taken, the parties are free to negotiate a different notice period, or to remove it.

(i) strengthens the position of the secured party when the grantor is insolvent

The New SIL states that where the grantor is bankrupt or subject to insolvency proceedings in Jersey or elsewhere, that fact shall not affect the secured party's enforcement powers. This is a very important change as it clears away the more complex provisions in existing legislation and puts the secured party in a much stronger position -

but perfection is essential. Note that a security interest can still be challenged as a 'transaction at an undervalue' or a 'preference'.

(j) includes transitional provisions dealing with existing Jersey security agreements

The current law will continue to apply to security agreements entered into under the current law, notwithstanding the passing of the New SIL. Unless the secured party agrees otherwise, an existing security interest shall have priority over any new security interest created under the New SIL in the same collateral.

There is no requirement to register a financing statement in respect of existing security agreements unless that security agreement is amended, meaning:

- adding an obligation not previously secured;
- altering the terms on which an obligation is secured;
- extending or reducing the duration of the security interest; or
- adding to or modifying the collateral.

If it is amended, the existing security agreement will become subject to the new legislation, so it will be important to ensure that it attaches and is perfected. Secured parties may also wish to amend existing documents to take advantage of the new enforcement powers under the New SIL or to disapply the 14-day notice period.

(k) also deals with absolute (non-security) assignment of receivables

The New SIL also contains provisions on perfection and priority of assignments of receivables. It also overrides any provision in a contract that prohibits or restricts assignment.

For further reading, you may also like to look at our more detailed paper on this topic which can also be found on our website.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. This briefing is not intended as legal advice and should not be relied upon as such. We strongly recommend that you take specific legal advice on your situation or proposed course of action.

Contact us

For further detail, information or professional advice, please contact your usual contact at Carey Olsen or any of the lawyers below.

47 Esplanade St Helier Jersey JE1 0BD
Tel: +44 (0)1534 888900 Fax: +44 (0)1534 887744
www.careyolsen.com



Alex Ohlsson, Partner
alex.ohlsson@careyolsen.com
Telephone: +44 (0)1534 822251



Nicholas Crocker, Partner
nicholas.crocker@careyolsen.com
Telephone: +44 (0)1534 822409



Marcus Pallot, Partner
marcus.pallot@careyolsen.com
Telephone: +44 (0)1534 822427



Peter German, Partner
peter.german@careyolsen.com
Telephone: +44 (0)1534 822372



Robin Smith, Partner
robin.smith@careyolsen.com
Telephone: +44 (0)1534 822264
