

Focus on: the Security Interests (Jersey) Law 2012

Briefing Summary: The Security Interests (Jersey) Law 2012 (the “2012 Law”) has a wide scope, allows flexibility in the methods of taking and perfecting security, and affords secured parties wide enforcement powers and protection in insolvency. The 2012 Law also deals with non-security assignments of “receivables” as defined, but these are outside the scope of this note.

Service Area: Banking and Finance, Structured Finance and Securitisation

Location: Jersey

Created Date: 13 September 2024

Scope of the 2012 Law

Asset classes

In summary, the 2012 Law enables security interests to be taken in all asset classes usually encountered:

- documentary intangibles (i.e. negotiable instruments and negotiable investment securities) situated in Jersey;
- investment securities (e.g. shares/units/debt securities) listed on a register maintained in Jersey, or maintained by a Jersey company or individual;
- securities accounts with an intermediary where the account is maintained in Jersey;
- deposit accounts (bank accounts) maintained in Jersey;
- intellectual property created under Jersey law (but not registered IP);
- other Jersey security interests;
- trust property where the trust is governed by Jersey law;
- trust property that is situated in Jersey (whether or not the trust is not governed by Jersey law);
- contract rights under a Jersey law contract;
- contract rights against a Jersey company or individual under a foreign law contract;
- rights and interests of any partner in a Jersey law partnership (including customary law, limited, limited liability and incorporated or separate limited partnerships); and
- any other intangible movable property situated in Jersey.

Security interests in these categories of property can only be created under Jersey law in accordance with the 2012 Law.

After-acquired property

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A security agreement may provide for a security interest in after acquired property.

Further advances

A security agreement may provide that the secured obligations include obligations as to further advances. If so, an additional benefit is that the security interest is not extinguished by repayment of a current advance, unless the parties have agreed otherwise. A secured party can therefore have security for the balance on a fluctuating overdraft account. Crucially, where the security is for advances and further advances, it has the same priority for all advances.

Own obligation security

Amongst other cases, a bank that has an obligation to pay money to a depositor in respect of a deposit account may take a security interest from the depositor in the bank's own such obligation, and a company may take a security interest from any of its shareholders in its own shares.

How to take security – attachment and perfection

The 2012 Law offers a variety of methods to take security from a grantor, depending on the type of collateral. Such methods are: (a) 'control' or 'possession'; and/or (b) description of collateral in writing. Every security interest must 'attach' by one or more of these methods, and should also be 'perfected'.

Attachment

- **Control:** a secured party has control of:
 - a deposit account (bank account) if:
 - the account is transferred into its name with the written agreement of the grantor and account bank/institution;
 - the grantor, the secured party and the account bank/institution have agreed in writing that the bank/institution will comply with instructions from the secured party directing the disposition of funds in that account;
 - the account is assigned (by way of security) to the secured party by instrument signed by or on behalf of the grantor and written notice is given to the account bank/institution; or
 - the secured party is the account bank/institution.
 - a securities account maintained by an intermediary if:
 - the account is transferred into its name with the written agreement of the grantor and the intermediary;
 - the grantor, the secured party and the intermediary have agreed in writing that the intermediary will comply with instructions from the secured party directing the disposition of investment securities credited to that account; or
 - the secured party is the intermediary.
 - investment securities (represented by a certificate and not being bearer securities) if:
 - it is registered with the issuer as holder of the securities; or
 - it has possession of the certificate.
- **Possession:** a secured party has possession of a negotiable instrument or negotiable investment security if it has possession of the relevant instrument or certificate.
- **Description:** security in any type of eligible collateral can attach when a security agreement is signed by or on behalf of the grantor and contains a description of the collateral that is sufficient to enable it to be identified.
- **Intermediary's purchase price security:** additionally, a security interest in favour of an intermediary automatically attaches to investment securities, and is perfected, if: (a) the grantor buys investment securities through the intermediary; (b) it is obliged to pay for them on or before the purchase; and (c) the intermediary credits them to the buyer's/grantor's securities account before being paid for them. The security interest then secures the purchase price.
- **After-acquired property:** where a security agreement provides for a security interest in after-acquired property then, subject to any agreement to the contrary between the parties, the security interest attaches to that property on the acquisition by the grantor of rights in that property without the need for any further steps.
- **Right to deal with the collateral:** the attachment of a security interest to collateral is not affected just because the grantor retains, in the absence of a contrary direction from the secured party, the right to deal with the collateral free from the security interest.

Perfection

The steps above are for attachment of a security interest. However, attachment only creates a security interest that is enforceable against the grantor. In order to have priority protection against third parties, the security interest must also be perfected. Perfection is also necessary for general validity of the security interest in insolvency of the grantor. The method of perfection can depend on the kind of collateral and in some cases a security interest is perfected by the same step that constitutes attachment.

- **Possession:** a security interest in a negotiable instrument or negotiable investment security is perfected by possession of that collateral by the secured party. As possession is also one of the methods by which the security in such collateral will attach, as stated above, no further step is required.
- **Control:** a security interest in a deposit account, a securities account maintained by an intermediary, or in a certificated investment security is perfected by control of that collateral by the secured party. Again, for these types of collateral, attachment and perfection can be effected in the same step.
- **Registration:** a security interest in eligible collateral of any type can be perfected by registration, and:
 - In practice, whatever other means of perfection may be available, a security interest is usually also registered.
 - Registration of a security interest is effected by registering a financing statement on the public, searchable, on-line register. Financing statements contain basic information as to the identity of parties, describe the relevant collateral and may indicate any subordination arrangement. Registration lasts for the period stated in the financing statement (up to a maximum of 99 years), or if no period is stated, for 10 years, and can be renewed. There is no requirement to register a copy of the security agreement itself. This system of registration is characterised as 'notice filing', not 'transaction filing'.
 - A security interest in 'proceeds' (intangible movable property derived from a dealing in the collateral), or in income rights (dividends on shares or interest on debt securities, which are not proceeds), can only be perfected by registration.
 - If the security agreement provides for a security interest in the after-acquired property, registration perfects a security interest in after-acquired property as soon as the grantor acquires it. In contrast, where such security interest is to be perfected by control (or possession) such perfection may only occur some time later, when the secured party gets control (or possession).
 - Registration is not required for perfection of a security interest over the trust property of a trust, other than a 'prescribed unit trust' (essentially a unit trust whose trust property includes immovable (i.e. real) property).

Priority rules

The 2012 Law has a comprehensive set of priority rules to regulate competing security interests, including provision for 'super priority' for control security or security by possession, as set out above.

Third party security

The 2012 Law expressly acknowledges that security under that Law can secure the obligations of a third party. As a result a security interest agreement that creates security for the obligations of a third party does not need to include a guarantee or undertaking to pay simply because it is third party security (though – as with any security under the 2012 Law – an undertaking or covenant to pay can still be useful, and may be necessary when the security is granted to a security trustee/agent).

Proceeds

The 2012 Law provides that except as otherwise provided in that Law a security interest in collateral that is dealt with or otherwise gives rise to proceeds: (a) continues in the collateral unless the secured party authorised the dealing; and (b) extends to such of the proceeds as are capable of being the subject of a security interest to which the 2012 Law applies.

'Whole undertaking' security – intangibles

The 2012 Law allows a secured party to take a security interest in all present and future intangible movable property of the grantor. While the security interest would therefore attach to all such property, the secured party still needs to perfect its security interests using a method applicable to each relevant asset type. Given the wide range of such property, and the potentially unknown nature of future property, it will be necessary to perfect all such security by registration, whatever control or possession security there may be in certain property.

No floating charges

Floating charges are not part of Jersey law (except for a special case equivalent in the trusts context, not relevant to this note), but under the 2012 Law the attachment of a security interest is not affected simply because a grantor retains (in the absence of a contrary direction from the secured party) the right to deal with the collateral free from the security interest and without a duty to account for the proceeds or to replace the collateral.

Enforcement

When can the secured party enforce?

The power of enforcement is exercisable when an event of default in relation to the security agreement has occurred and the secured party has served written notice on the grantor specifying such event.

Enforcement options

A secured party has a wide power of enforcement. This may be exercised by appropriation or sale (including self-sale) of collateral or proceeds, and by taking any of the following ancillary actions:

- taking control or possession of collateral or proceeds;
- exercising any rights of the grantor in relation to the collateral or proceeds (e.g. in the case of shares security, voting rights and/or the right to receive dividends, although a secured party can also control these prior to default by agreement); and
- 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 (e.g. directing the actions of an intermediary with whom the grantor holds a securities account).

The 2012 Law also permits the security agreement to provide for any (other) remedy exercisable pursuant to the power of enforcement, to the extent that it is not in conflict with the 2012 Law. Such bespoke remedies can therefore be included to fit precisely the circumstances and nature of the collateral. More than one enforcement step can be taken, to the extent they are not in conflict. The relevant provision of the 2012 Law further provides that it does not prevent the secured party from taking such other action in respect of the collateral as is permitted by the security agreement and is not in conflict with the 2012 Law (and this extends to pre-enforcement action too).

Self-sale

The question of self-sale should not be relevant in most cases as a secured party can appropriate any collateral, but the 2012 Law expressly states that a secured party is not prevented from buying the collateral it sells on enforcement.

Process

Before appropriating or selling collateral, a secured party must give the grantor and certain other specified interested persons 14 days' prior written notice, but the grantor and any other such person may agree in writing to waive its right to such notice (or that the notice period be reduced). The grantor will usually waive its entitlement to 14 days' notice in the relevant security agreement, meaning that, unless there are other interested persons, enforcement can usually proceed without the 14 day delay.

Duties of the secured party

On appropriation, the secured party must take all commercially reasonable steps to determine the fair market value of the collateral. And on a sale, the secured party must take all commercially reasonable steps to obtain the fair market value of the collateral.

In either case, the secured party must otherwise act in a commercially reasonable manner.

Following appropriation or sale, the secured party must give a statement of account to the grantor and certain other specified interested persons.

What is the impact of insolvency?

The 2012 Law provides that where the grantor becomes bankrupt or where it or its property is subjected, in Jersey or elsewhere, to any judicial arrangement or proceeding consequent upon insolvency, that shall not affect the enforcement powers of the secured party. There is therefore no Jersey insolvency moratorium effect on security under the 2012 Law.

A security interest can still be challenged, however, under the transaction at undervalue and preference regimes of relevant Jersey statutes, and a security interest that is not perfected before the grantor becomes bankrupt is void against the Viscount (the officer of the Jersey court in whom is vested the property of the insolvent in the *désastre* form of Jersey bankruptcy), or a liquidator, and the grantor's creditors.

For further information or professional advice please contact your usual Carey Olsen contact.

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