Enforcement of security taken under the Security Interests (Jersey) Law 2012

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Introduction

If your security interest agreement ("**SIA**") was entered into on or after 2 January 2014, it comes within the scope of the Security Interests (Jersey) Law 2012 (the "**Law**"). This note explains the process of enforcing it pursuant to the Law.

If you hold a Jersey law governed security interest agreement from before that date, it will be governed by and enforced pursuant to the Security Interests (Jersey) Law 1983 (the "**1983 Law**"). We can assist you with understanding how a 1983 Law security interest agreement may be enforced, but it is not the focus of this note.

Carey Olsen has advised numerous secured parties on enforcement of security under both the 2012 Law and the 1983 Law.

Trigger – for right to enforce

An SIA will specify the obligations it secures and usually also specifies a set of events of default that are intended to trigger a right to enforce. The rights of the secured party to enforce the SIA become exercisable when:

- there is a failure to pay or perform a secured obligation when due, or when any other event of default happens under the security agreement; and
- notice of the relevant default has been given by the secured party to the grantor of the security.

Notice – of enforcement action

The right to enforce by selling or appropriating the collateral can only be exercised after notice requirements are dealt with. There is a requirement to give 14 days' written notice to: (a) the grantor of the security (but such requirement should have been waived in the SIA); and (b) any person who at least 21 days prior to the proposed enforcement action has either (i) a registered security interest (by filing a financing statement on Jersey's Security Interests Register) or (ii) given the secured party notice that he/she/it has a proprietary interest in the collateral.

There are some caveats to the notice requirement:

- As above, the requirement to give 14 days' notice to the grantor of the SIA is usually waived, so that the right to enforce will be exercisable immediately after notice is given to the grantor without needing to wait 14 days.
- On a sale (but not appropriation) the 14 day notice requirement does not apply to the extent that:
  a. the SIA creates security in a quoted investment security (i.e. a security that is listed on a securities exchange);
  b. the secured party believes (on reasonable grounds) that the collateral will decline substantially in value if not disposed of within 14 days of the event of default; or
  c. the Royal Court of Jersey orders that no notice is needed (upon an *ex parte* application).

Enforcement options

The secured party has the following options:

- To appropriate the collateral
- To sell the collateral
- To take any of the following ancillary actions:
  a. Taking control or possession of the collateral
  b. Exercising any rights the grantor of the security has in relation to the collateral
  c. Instructing any person who owes an obligation in respect of the collateral (such as an account bank – as to funds sitting in a secured bank account, or an issuer of encumbered securities – as to how/where to pay a distribution)
- To apply any bespoke remedy that the SIA may provide for, to the extent that such remedy is not in conflict with the Law.

A sale can take place by way of auction, public tender, private sale or another method. It is also possible for a secured party to buy collateral itself (or use an SPV or affiliate entity for this purpose). The distinction between this and appropriation is fine, but may result from the different methodology or realisation process that is employed. We can provide more detail on this on request.

Duties of the secured party

The more difficult questions arise in considering the duties imposed by law on the secured party and determining how to discharge those duties in any particular set of circumstances.

On an appropriation, the secured party owes a duty to:

- take all commercially reasonable steps to determine the fair market value of the collateral as at the time of appropriation; and
- act in other respects in a commercially reasonable manner.

On a sale, the secured party owes a duty to:

- take all commercially reasonable steps to obtain the fair market value of the collateral as at the time of sale;
- act in other respects in a commercially reasonable manner; and
- enter into any agreement relating to the sale on commercially reasonable terms.

The duty is owed to the grantor and to anyone to whom the 14 day notice requirement would apply (ignoring the bullet-point exceptions mentioned in the third paragraph above).

What does a duty to take "*all commercially reasonable steps*" mean?

The above duty obviously begs the question – what does "*all commercially reasonable steps*" mean? In a 2019 case in relation to the enforcement of 2012 Law security and where Carey Olsen represented the secured party, the Royal Court stated that the duty is essentially one of (i) valuation and then (ii) realising that valuation; and that a secured party is not required to take additional steps to enhance the value of collateral. (A link to our note on that case can be found here.)

There is no single valuation formula/calculation that must be applied. Rather, collateral should be assessed on its own merits in order to determine what the appropriate valuation and sale process should be for that asset. The steps taken should be those designed to build a robust and defensible realisation methodology for the specific piece of collateral concerned.

Defining "all commercially reasonable steps" against a background of argument as to the distinction between "reasonable endeavours", "best endeavours", "all reasonable endeavours" and other variations on that theme – is not straightforward. We can help distil the duty down into a set of practical realisation steps that are tailored to your circumstances and your specific collateral.

Statement of account

Within 14 days after sale or appropriation, the secured party is required to prepare and deliver to the grantor (and the others who received notice per paragraph 3) a statement of account showing how the gross proceeds realised on enforcement have been applied. The statement must determine whether there has been a surplus and (if so) then distribute that in accordance with the Law.

Contact us

If you are considering enforcing your security, or just want to discuss your options, speak to your usual Carey Olsen contact or get in touch using our details below.

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