

The Security Interests (Jersey) Law 2012

Service area / [Banking and Finance](#)

Location / [Jersey](#)

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Introduction

The Security Interests (Jersey) Law 2012 (the “New Law”) came into force fully on 2 January 2014. The New Law updates and improves the current law relating to security interests in intangible movable property.

Main changes:

The main changes heralded by the New Law are:

- It lists the types of intangible movable property to which the New Law applies.
- It confirms that third-party security is permissible.
- It introduces three main methods of taking a security interest:
 1. by control
 2. by possession
 3. by describing the collateral in a written agreement, subject to registration (see below),
 and it also introduces the steps of ‘attachment’ and ‘perfection’ (see para. 4 below).
- It confirms the ability to take security over property acquired by a debtor in the future.
- It expands the enforcement powers and options available to secured parties.
- It establishes a searchable, on-line, public register of security interests.
- It includes transitional provisions preserving the status of existing Jersey security agreements entered into under previous legislation.

Scope of the new law

The New Law enables security interests to be taken in:

- Documentary intangibles (i.e. negotiable instruments and negotiable investment securities) situated in Jersey.
- Investment securities (e.g. shares/units) listed on a register maintained in Jersey, or maintained by a Jersey person.
- Investment securities held through a securities account with an intermediary where the account is maintained in Jersey.
- A bank account maintained in Jersey.
- Intellectual property created under Jersey law or vested in a Jersey person (but not registered IP).
- Other security interests.
- Trust property where the trust is governed by Jersey law.
- Trust property that is situate in Jersey (even if the trust is not governed by Jersey law).
- Contract rights under a Jersey law contract.
- Contract rights against a Jersey person under a foreign law contract.
- Interests of any person in a partnership (including customary, limited, limited liability and incorporated or separate limited partnerships).
- Any other intangible moveable property situate in Jersey.

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

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How to take security

The New Law offers a variety of methods to take security, depending upon the type of collateral with which one is concerned, and every security interest must “attach” and be “perfected” (see below). Those three methods are (i) control, (ii) possession and (iii) description of collateral in writing, combined with registration.

Control

In the case of a bank account, a secured party can take a security interest by way of control either by:

- having the account transferred into its name (with agreement);
- the account bank agreeing in writing to comply with the instructions of the secured party;
- assigning the account to the secured party in writing and giving written notice to the account bank; or
- by simply being the account bank.

In the case of a securities account, control can be achieved by the secured party by:

- having the account transferred into its name (with agreement);
- the intermediary agreeing in writing to comply with the instructions of the secured party; or
- by simply being the intermediary.

For investment securities, control is achieved by the secured party by:

- being registered with the issuer as holder of the securities; or
- being in possession of the certificate representing the securities.

Possession

Security can be taken in a negotiable instrument or negotiable investment security by possession of the relevant document.

Description

Security can be created over any type of eligible collateral by using a written agreement signed by the grantor and containing a description of the collateral that is sufficient to enable it to be identified.

Attachment and perfection

The steps described above set out how a security interest can ‘attach’. However, that only creates a security interest that is enforceable against the grantor. In order to gain priority protection against third parties, the security interest must be ‘perfected’. The method of perfection can depend on the kind of collateral being dealt with and in some cases perfection can be achieved by means of the same step that constitutes ‘attachment’:

How to ‘Perfect’ security

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 how security over such collateral will usually ‘attach’, no further step is required.

A security interest in a bank 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, this means that for these types of collateral, attachment and perfection can be effected in the same step.)

A security interest in collateral of any type can be perfected by registration (see below).

Registration and financing statements

An important change heralded by the New Law is the creation of a public, searchable, on-line register of ‘financing statements’. Registering a financing statement is a means of ‘perfecting’ a security interest in any type of collateral. Financing statements will contain basic information as to the identity of parties, describe the relevant collateral and may indicate any subordination arrangement. Registering a copy of the security agreement itself is not intended.

Registration lasts for the period stated in the financing statement, or if none is mentioned, for 10 years, and can be renewed.

Third party security

Where security is granted for the obligations of a third party, practice under prior legislation was to include a limited recourse guarantee and/or covenant to pay in the security agreement. The New Law expressly provides that security may be created to secure the obligation of a third party.

After-acquired property

A security agreement can be expressed to extend to after-acquired property and the security interest attaches to that property upon it being acquired by the grantor without the need for any further steps to be taken.

Security for further advances

If the security agreement provides that the secured obligations may include obligations as to further advances, the security interest is not extinguished by repayment of a current advance. One can therefore have security for the balance on a fluctuating overdraft account. Crucially, the priority position of the security for further advances is the same as for the original advance.

Proceeds

The New Law provides that if certain conditions are met, a security interest in collateral that is sold or otherwise gives rise to proceeds extends to proceeds of that collateral which are of a type that falls within the scope of the New Law.

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'Whole undertaking' security

The New Law will allow a secured party to take a security interest in "all present and future intangible movable property" of the grantor. While the security interest would 'attach' to "all present and future intangible movable property" of the grantor, the secured party still needs to 'perfect' its security interests in accordance with the method(s) applicable to each relevant asset type. Given the breadth of this type of document though, the simplest method will be to register a financing statement.

Floating charges are not part of Jersey law, but the New Law provides flexibility by permitting a grantor to deal in the collateral (in the absence of a contrary direction from the secured party), without a duty to account for the proceeds or to replace collateral and without invalidating the security interest.

Enforcement

Enforcement Options: Under previous legislation enforcement powers expressly provided for by the statute were limited to: (i) appropriation of money; and (ii) sale of the collateral.

Appropriation and sale remain the primary remedies of the secured party under the New Law but in addition to these, the New Law allows the secured party to:

- appropriate other types of collateral or proceeds;
- take control or possession of collateral or proceeds;
- exercise any of the rights of the grantor in relation to the collateral or proceeds (e.g. voting rights and/or the right to receive dividends (although you can also control these prior to default, by contract)); and
- instruct 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 who holds a securities account for the grantor).

The New Law also permits the parties to agree any other remedy to the extent that it does not conflict with the New Law. Bespoke enforcement powers can therefore be included to fit the circumstances and precise nature of the collateral. More than one enforcement step can be taken, except where they are mutually inconsistent; and taking one type of action does not preclude the exercise of other rights the secured party has under the agreement (so long as they are not in conflict with the New Law).

How to Enforce: The power of enforcement is exercisable once an event of default has occurred and written notice of this fact has been served on the grantor.

If on enforcement the secured party wants to appropriate or sell collateral, it must give the grantor 14 days prior written notice, but the grantor may agree in writing to waive its right to notice of appropriation or sale (or the notice period may be reduced). The obligation to give notice applies only where the secured party seeks to appropriate or sell collateral.

Self-Sale: The question of self-sale is less important now that secured parties can appropriate collateral other than money, but the New Law expressly states that a secured party can effect a sale by auction, public tender, private sale or another method, and that the secured party itself can also buy the collateral on enforcement.

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.

In 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 other specified interested persons.

What is the Impact of insolvency?

The New Law provides that where the grantor is bankrupt or subject to any insolvency order or proceedings consequent upon insolvency in Jersey or elsewhere, that fact shall not affect the enforcement powers of the secured party.

A security interest can still be challenged, however, under the 'transaction at undervalue' and 'preference' regimes of relevant statutes, and a security interest that is not perfected before the grantor becomes bankrupt is void against the Viscount (or a liquidator) and the grantor's creditors.

What are the transitional arrangements for existing Jersey security?

A security interest created under prior legislation (a 'continuing security interest') will be unaffected (and the current law will continue to apply to it) unless (and to the extent) that the continuing security interest is amended. 'Amend' is defined to mean where after the New Law came into force, the parties to the continuing security agreement purported to extend the continuing security interest to collateral to which it did not previously apply.

In this case, the continuing security interest continues to be governed by the current law and the security interest over the new collateral will be governed by the New Law.

A caveat to this is that a security interest in favour of an intermediary automatically attaches to investment securities, and is perfected, if: (i) the grantor buys investment securities through the intermediary; (ii) is obliged to pay for them on or before the purchase; and (iii) 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.

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