



Jersey Lending &
Secured
Finance 2020
Eighth Edition

CAREY OLSEN

Overview

What are the main trends/significant developments in the lending markets in your jurisdiction?

Banking deposits in Jersey are on the rise (£139.2bn as at September 2019 according to the figures from the Jersey Financial Services Commission). The headquarters of a number of international banking organisations remain in Jersey and following the completion of post-Vickers ring-fencing, deploying balance sheet capital through lending products continues to be high on the agenda for some of these banks. That means, for most, seeking out more international rather than local deals.

The absence of significant European M&A activity has continued to depress the leveraged finance market, although the outlook for 2020 is stronger with considerable private equity dry powder available.

Brexit has influenced the lending activity in Jersey, but only to the extent that it has affected the cross-border deals which are led from the City. Jersey remains to a great extent a "no change" jurisdiction as it is not a member of the EU. The actual impact of Brexit is therefore only to be felt via the aftershocks emanating from the European economies.

Significantly, Jersey was given a clean bill of health on matters of beneficial ownership (UK Parliamentary Review and the Financial Action Task Force ("FATF")), tax practices (OECD), economic substance (ECOFIN) and is set to align itself with, the EU's 5th Anti Money Laundering Directive, clearly demonstrating a commitment to being a cooperative jurisdiction.

New fund formations have been steady and the financing of such funds through subscription facilities, NAV or hybrid products as well as GP leverage (whether by debt or equity) remains an important part of the Jersey lending market.

The outlook for high-yield bonds is very positive going into Q1 2020.

What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Due to the nature of the work, many transactions are highly confidential. Carey Olsen is active on 35 global bank panels. As part of bank panel terms, we are unable to disclose the names of these banks.

Guarantees

Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, guarantees are commonly used by group companies. They are usually created by written agreement. Corporate benefit should be considered and this is covered in greater detail below.

The Security Interests (Jersey) Law 2012 (the "Security Interests Law") expressly provides that a security interest can be created to secure the obligation of a third party, which simplifies documentation and removes the need to include a limited recourse guarantee in Jersey security agreements.

Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guarantee/securing company can be shown?

A Jersey company has unlimited corporate capacity under the Companies (Jersey) Law 1991 (the "Companies Law").

When a company enters into a finance transaction, a transacting party should consider whether there is corporate benefit for the company. There is a risk that a company could seek to have the transaction set aside on the basis that the directors approving the transaction were acting outside their statutory duty to act in the best interests of the company. This can happen where:

- there is little or no corporate benefit to the company; or
- the transacting party knows or ought to know that there is little or no corporate benefit.

This risk to directors can be avoided if both:

- all the shareholders of the Jersey company authorise or ratify the particular transaction; and
- the Jersey company can pay its debts as they fall due at the time of, and immediately following, the entry into the transaction.

If there is no discernible corporate benefit to entry into a finance transaction, there is also a risk that a transaction could be set aside on the company's bankruptcy.

Is lack of corporate power an issue?

Article 18 of the Companies Law removed the concept of external *ultra vires*, meaning that nothing in a company's Memorandum or Articles of Association can limit the power of a Jersey company. That being said, the Memorandum and Articles of Association should still be reviewed to ensure there are no limits on the authority of the directors to enter into the required documents.

Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

As per the above, shareholder approval is advisable if there are corporate benefit concerns. A guarantee does not need to be registered in Jersey.

Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, although the solvency of the company should be considered when entering into a guarantee. If a company enters into a transaction with a person for cause (similar to consideration under English law) the value of which, in money

or equivalent, is significantly less than the value of the *cause* provided by that person, the transaction may be impugned as a transaction at an undervalue and challenged by (i) the Viscount of the Royal Court of Jersey (the insolvency officer of the Royal Court) (the “Viscount”) in a *désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the “*Désastre Law*”), and (ii) by a liquidator in a creditor’s winding up under the Companies Law.

A transaction may be challenged if it was entered into during the five years preceding the commencement of the *désastre* or winding up (no time limit applies to transactions involving persons connected with or an associate of the insolvent debtor).

However, a transaction is not vulnerable to attack as a transaction at an undervalue if either:

- the relevant company:
 - a. was able to pay its debts as they fall due at the time it entered into the transaction; and
 - b. did not become insolvent on a cash-flow basis as a result of entering into the transaction; and/or
- the court is satisfied that both:
 - c. the company entered into the transaction in good faith for the purpose of carrying on its business; and
 - d. at the time it entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Are there any exchange control or similar obstacles to enforcement of a guarantee?

If court proceedings are brought against a guarantor company, the enforceability of that company’s obligations can be qualified if the following Jersey customary law rights of a surety are available to it:

- *Droit de discussion* – this is the right to require that recourse is made against the assets of the borrower and that those assets are exhausted before any claim is enforced against the guarantor.
- *Droit de division* – this is the right to require that liability of co-guarantors is divided or apportioned between them. It is market practice for a lender to require a specific waiver of these rights

Collateral security

What types of collateral are available to secure lending obligations?

Common types of collateral that are secured are: real estate; shares; units in a unit trust; bank accounts; and contract rights.

Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to take “a debenture-style” security under the Security Interests Law over all present and future intangible movable property held by the grantor in Jersey from time to time. The attachment of a security interest to collateral is not affected by the security agreement providing an express right of the grantor to deal with the collateral free from the security interest and without a duty to account for the proceeds or to replace the collateral. Jersey law does not have a concept of a floating charge. The security would be taken by way of a security interest agreement entered into under the Security Interests Law. In order for a security interest to attach to collateral (on which the security becomes enforceable against the grantor), the following conditions must be satisfied:

- Value must have been given in respect of the security agreement. Value means something sufficient to support an onerous contract, and includes an antecedent debt or liability. It does not matter to whom value is given or from whom the value arises.
- The grantor must have rights, or the power to grant rights to a secured party, in the collateral. A trustee can therefore grant valid security under the Security Interests Law.
- The secured party has possession or control of the collateral and/or the security agreement is in writing and contains a description of the collateral that is sufficient for it to be identified. Even where there is no agreement in writing, there must still be a “security agreement”.

Perfection of a security interest is necessary for the purposes of priority and gives protection against third parties, which is particularly important in insolvency. The method of attachment and perfection will depend on the type of collateral secured. The three ways for the secured party to obtain perfection are:

- by possession of documentary intangibles such as negotiable instruments or bearer securities;
- by control of the collateral such as bank accounts (including security accounts) and investment securities; and/or
- by registration of a financing statement on the Jersey Security Interests Register in its favour in respect of the collateral.

[Can collateral security be taken over real property \(land\), plant, machinery and equipment? Briefly, what is the procedure?](#)

There are two main forms of security for real estate:

- **Hypothechs.** A hypothec is a right of security held by a creditor over the property of a debtor without possession of it, and is created either by agreement or by operation of law. A hypothec can attach only to immovable property; a hypothec can therefore encumber freehold and flying freehold property, and contract leases (but only where the terms of the lease expressly permit hypothecation). Paper leases cannot be hypothecated. Hypothecs can be specific (that is, over one property) or general (that is, attaching to all immovable property in Jersey owned by the debtor at the date of registration). There are two common types of hypothec:
 - a. **judicial hypothec.** This type of hypothec is created by the registration of an acknowledgment document (a "billet") in the Jersey Public Registry. The instrument of debt or obligation (for example, a bond, promissory note or guarantee) is not itself registered, rather the *billet* simply acknowledges the source of the indebtedness; and
 - b. **conventional hypothec.** This type of hypothec is created by the passing of a contract before the Royal Court, which contract sets out the terms of the borrowing and includes an express acceptance of the hypothec from the borrower. Once passed before Court, the contract is registered in the Jersey Public Registry, and is available for public inspection.
- **Share security.** In relation to share transfer properties, lenders require security in the shares of the company that owns the property. Share security would be taken by way of a security interest agreement entered into under the Security Interests Law.

In relation to plant, machinery and equipment, the only method of creating security over tangible movables in Jersey is by way of pledge. To pledge property there must be actual physical (as opposed to constructive) delivery of the tangible movable property pledged into the creditor's possession.

There is a right of retention. As a matter of customary law (absent any Jersey judicial authority on this point) the creditor should have an implied right of sale when the grantor is in default and there is likely to be an express power of sale in the pledge document.

[Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?](#)

Typically, security in respect of contract rights and receivables is created by way of a security interest agreement entered into under the Security Interests Law by way of description and registration. Although it is no longer necessary to give notice to the counterparty, there are usually advantages to doing so (for

example, to obtain, by way of acknowledgment to the notice a waiver of any conflicting provisions in the underlying contract and/or a confirmation that the counterparty will make payments directly to the secured party).

Common types of receivables include:

- Rent payable under a lease agreement.
- A general partner's right to call for capital from the partners of a limited partnership.
- Debts and other rights to the payment of money.
- Rights under performance contracts.
- Bank accounts into which the receivables are paid and other cash deposited with banks.

The Security Interests Law also contains specific provisions in relation to outright assignments of receivables which are defined as monetary entitlements arising from the supply of goods and services (other than insurance services) or the supply of energy.

[Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?](#)

Yes, this is a common form of security taken in Jersey. The method will depend on whether the account is with the secured party or a third-party bank.

Security will be created by way of a security interest agreement under the Security Interests Law. Control would be obtained by the:

- account being transferred into the name of the secured party with the written agreement of the grantor and the account bank;
- account bank agreeing in writing to act on the secured party's instructions directing disposition of funds in the account;
- account being assigned to the secured party and written notice of such being given to the account bank; or
- account bank being the secured party.

Typically, security over third-party bank accounts is taken by assignment. Although not necessary to perfect the security, it is usual to obtain an acknowledgment of the notice from the account bank, which will include, for example, a waiver of:

- Any terms and conditions which may restrict or prohibit the creation of the security.
- Its rights of set-off over the account.

[Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?](#)

Yes, security can be taken over shares in a Jersey company in a certificated format. Security would be taken by way of a

security interest agreement under the Security Interests Law. Control would be obtained by the secured party either:

- being registered as the holder of the securities; or
- having possession of the certificate representing the securities.

Security cannot be validly granted over shares in a Jersey company under a New York or English law-governed document.

[Can security be taken over inventory? Briefly, what is the procedure?](#)

Jersey law does not have a concept of a floating charge. Therefore, security over tangible movables such as inventory in Jersey would have to be taken by way of pledge.

[Can a company grant a security interest in order to secure its obligations \(i\) as a borrower under a credit facility, and \(ii\) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility \(see below for questions relating to the giving of guarantees and financial assistance\)?](#)

Yes – a typical security package we see in Jersey is: (i) borrower grants security over any accounts it holds in Jersey; (ii) borrower's shareholder(s) grant(s) security in respect of the shares in the borrower; and (iii) the lender of any intercompany loans to the borrower grants security over those contract rights.

[What are the notarisation, registration, stamp duty and other fees \(whether related to property value or otherwise\) in relation to security over different types of assets?](#)

There are registration fees associated with using the securities register. These are outlined on the Registry website:

- registration – £8 per year of registration up to a maximum fee of £165 if the registration will run longer than 20 years (there is no concept of infinite registration);
- discharge – no fee;
- amendment of registration – £25;
- extension of period of registration – same cost scheme as above;
- global change of multiple registrations (other than expiry date) – £110;
- search – £4 to view a financing statement; and
- filing a change demand – £25.

Stamp duty is payable when a lender registers security over real estate situated in Jersey. Stamp duty is calculated at the rate of 0.5% of the amount of debt secured over the property in favour of the lender, plus a Court fee of £80.

Land transaction tax ("LT^T") is payable when a lender takes security over a share transfer property situated in Jersey and is

calculated at a rate of 0.5% of the amount of the debt to be secured, plus an administration fee of £80. LT^T applies only in relation to residential property, where the articles of the property-owning company confer rights of occupation on their shareholders.

There are no relevant notary fees.

[Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?](#)

For security which is created over intangible movable property under the Security Interests Law, the registration requirements do not involve a significant amount of time or expense.

For security which is registered over Jersey immovable property, the *billet* (the acknowledgment document creating a judicial hypothec) or the contract creating the charge (in the case of a simple conventional hypothec) must be registered with the Royal Court of Jersey, which can only take place on a Friday afternoon (subject to Court holidays). The stamp duty must be paid at the time of registration. Once registered, the *billet* or contract (as the case may be) becomes a matter of public record.

[Are any regulatory or similar consents required with respect to the creation of security?](#)

A consent should be obtained from the grantor prior to the registration of the security interest on the Jersey Security Interests Register, pursuant to which the grantor consents to the registration and for any personal data to be publicly available.

[If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?](#)

The definition of secured obligations/liabilities in the security agreement should provide for further advances to ensure that the priority of the original advance will not be lost in respect of further advances.

[Are there particular documentary or execution requirements \(notarisation, execution under power of attorney, counterparts, deeds\)?](#)

No, there are not.

Financial assistance

Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

- Shares of the company - The concept of financial assistance was abolished in Jersey in 2008. Jersey companies are not prohibited from giving financial assistance for the acquisition of their own shares. If financial assistance raises questions relating to corporate benefit, or amounts to a distribution, the relevant statutory procedures must be complied with.
- Shares of any company which directly or indirectly owns shares in the company - Jersey companies are not prohibited from giving financial assistance for the acquisition of shares of any company which directly or indirectly owns shares in the company. If financial assistance raises questions relating to corporate benefit, or amounts to a distribution, the relevant statutory procedures must be complied with.
- Shares in a sister subsidiary - Jersey companies are not prohibited from giving financial assistance for the acquisition of shares in a sister subsidiary. If financial assistance raises questions relating to corporate benefit, or amounts to a distribution, the relevant statutory procedures must be complied with.

Syndicated Lending/Agency/Trustee/Transfers

Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Jersey law recognises the concept of agency and trust relationships and accordingly an agent or trustee would be able to enforce the loan documentation and collateral security and apply the proceeds in the manner set out in the loan agreement or intercreditor agreement.

If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special

requirements necessary to make the loan and guarantee enforceable by Lender B?

The transfer provisions will usually be set out in the loan agreement and guarantee and these should be complied with.

If there are no such transfer provisions, the benefit of the loan and the guarantee should be validly assigned to Lender B in order to ensure that the guarantee is enforceable by Lender B. For completeness, notice of the assignment should be given to the company and the guarantor. If the loan is not fully utilised and Lender A was under an obligation to make further advances, the loan would require to be novated as opposed to transferred. If the loan is not novated to Lender B, this could have implications on the enforceability of the guarantee.

Withholding, stamp and other taxes; notarial and other costs

Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No, there are not.

What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Foreign lenders do not receive preferential tax treatment when compared to Jersey lenders. However, Jersey can generally ensure tax neutrality, and avoidance of double taxation.

Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

No, it will not.

Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please see "Collateral Security" section above.

Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

Judicial enforcement

Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The courts in Jersey will recognise a foreign governing law provided it is a valid choice of law for the issue in question upon proof of the relevant provisions of the governing law.

Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The enforcement of foreign judgments is governed by the Judgments (Reciprocal Enforcement) (Jersey) Law 1960. If a final and conclusive judgment under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) were obtained in a Reciprocal Enforcement Court (as defined below) having jurisdiction in a case against a company, such judgment would, on application to the Royal Court of Jersey, be registered without reconsidering its merits and would thereafter be enforceable.

The Reciprocal Enforcement Courts means the following superior courts: (a) in England and Wales, the Supreme Court of the United Kingdom, the Court of Appeal and the High Court of Justice; (b) in Scotland, the Supreme Court of the United Kingdom, the Court of Session and the Sheriff Court; (c) in Northern Ireland, the Supreme Court of the United Kingdom and the Court of Judicature of Northern Ireland; (d) in the Isle of Man, Her Majesty's High Court of Justice of the Isle of Man (including the Staff of Government/Appeal Division); and (e) in Guernsey, the Royal Court of Guernsey and the Court of Appeal of Guernsey. The creditor of such a judgment must apply to have it enforced in Jersey within six years from the date the decision is handed down, or the date of the judgment on the last appeal. Such registration will not require the consideration of the merits of a case.

Where the above law does not apply, including New York judgments, foreign judgments will be recognised at customary/common law. Subject to the principles of private international law – by which, for example, foreign judgments may be impeachable, as applied by Jersey law (which are broadly similar to the principles applied under the common law rules of England) – if a Foreign Judgment (as defined below) were obtained, the judgment creditor must begin a fresh action in the Royal Court of Jersey, relying on the unsatisfied Foreign Judgment as a cause of action. The matter will usually be determined summarily without a full trial. The judgment debtor can oppose the application for summary judgment and/or defend the claim, but there are only limited grounds on which enforcement will be refused and a full factual enquiry is rarely necessary.

The grounds for refusing to enforce a judgment are substantially similar to the grounds on which registration can be set aside (i.e. the foreign court had no jurisdiction, or there were procedural inadequacies in obtaining the Foreign Judgment). If the court is satisfied that the judgment must be enforced, it will be entered in favour of the judgment creditor and be enforceable in Jersey as a domestic judgment.

Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Proceedings in respect of a debt for a liquidated sum can be commenced by way of a simple summons, which can be prepared and served within a few days. The summons must be served four clear days before the return date to which the company is summoned. If the company does not attend at the return date, judgment in default can be obtained (i.e. in as quickly as two weeks).

If the company defends the claim, the Royal Court of Jersey will place the action on the pending list (effective immediately). An application for summary judgment can be brought at this time, which we expect could be heard and determined within four to six weeks.

If the application for summary judgment is defended, and is unsuccessful, the matter would proceed to a trial and could take up to one year for it to be heard and a subsequent judgment to be issued.

The length of time to effect enforcement depends on the process used.

A monetary judgment is immediately enforceable by distraint against the judgment debtor's assets. The Viscount will take possession of and effect a sale of the debtor's assets and apply the proceeds in satisfaction of the judgment, subject to certain notification requirements. The timing of this process depends on the Viscount's availability and the number of assets to be dealt with.

If the debtor owns property in Jersey, orders can be sought one month following the issue of a court judgment (provided it remains unsatisfied), for an "*Acte Vicomte chargé d'écrire*". The effect of this declaration is that if the judgment is not satisfied within a further two months, the debtor's property will be deemed to have been renounced. At that time a creditor can seek orders for "*dégrèvement*" (for immovable property) and "*réalisation*" (for movable property). The timing of either of these enforcement processes once commenced is difficult to ascertain as once orders are made, the sale and dealing of the assets is conducted by the *Attournées*.

However, we generally understand that, from the making of an order, a *dégrèvement* process (including the hearing) may take approximately four to six weeks. Following the hearing the creditor who elects to take the property, subject to claims of superior lenders, will be immediately entitled to the asset. The timeframe for a *réalisation* may take approximately two to three months depending on the liquidity of the assets.

An application can also be made by a creditor of a company with a liquidated claim exceeding £3,000 that the assets of the company be declared *en désastre*, as it is unable to pay its debts as it falls due. Such an application can be made quickly without notice to the debtor usually on no more than 48 hours' notice to the Court. If a declaration is made by the Royal Court of Jersey, and after a one-month period within which the debtor can object has expired, the Viscount will begin the process of collecting in the debtor's assets and distributing them to all creditors on the basis of a statutory waterfall. It is difficult to give an estimate to the Viscount's process, but typically a creditor can expect this to take no less than six months.

Once a foreign judgment is registered under the Judgments (Reciprocal Enforcement) Law 1960 in Jersey, the creditor must serve a notice of registration on the debtor providing the timeframe (generally 14 or 28 days) within which the debtor may apply to have the registration set aside. Once the time for challenging registration has passed, the foreign judgment is enforceable from that point on in the same way as a domestic judgment.

With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

There is no requirement for a public auction in relation to the enforcement of security granted under the Security Interests Law. Generally speaking, enforcement does not require consent from the Viscount or an order from a court. Please also see question above in relation to enforcement of security.

However, enforcement of security over real estate in Jersey will if pursued under the Désastre Law involve the Royal Court of Jersey and the Viscount and will be subject to the requirements of Article 27 of the Désastre Law which provides that the Viscount may sell the property by public auction or public tender.

Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

No restrictions apply to foreign lenders beyond those which apply to Jersey lenders.

Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Pursuant to Article 10 of the Désastre Law there is a statutory moratorium on actions and enforcement, with effect from the date of the declaration of *en désastre*. Legal/enforcement action may only be commenced or continued with consent of the Viscount or by order of the Court. If the debtor is a company, any transfer of shares not made with the sanction of the Viscount or any alteration in the status of the company's members which is made after the declaration is void.

However, a secured party under the Security Interests Law is not prevented from exercising a power under Part 7 of the Security Interests Law in relation to the relevant collateral, including appropriating or selling shares. No consent of the Viscount or order of the Court is required.

Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Arbitration is rarely used as a method of commercial dispute resolution in Jersey. However, domestic arbitral awards are enforceable in Jersey with leave of the court under the Arbitration (Jersey) Law 1998 (the "Arbitration Law").

In addition to the domestic procedure above, the Arbitration Law provides that a foreign arbitral award handed down in a country that is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") is enforceable as if it were a domestic arbitral award.

Further, other foreign awards from certain non-New York Convention states may also be enforceable under the Arbitration Law if the state in question is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 in the same way as a domestic award or "by action".

Such awards must meet certain standards. They are recognised if the arbitration:

- was made pursuant to an agreement for arbitration that was valid under the law by which it is governed;
- was made by the tribunal provided for in the agreement or constituted in a manner agreed by the parties;
- was made in conformity with the relevant law governing arbitration;
- is final in the relevant jurisdiction;
- conforms to the definition of arbitration under Jersey law; and
- the enforcement of which would not be contrary to the law or public policy of Jersey.

Bankruptcy proceedings

How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In the event of a declaration of *en désastre* under Article 3 of the Désastre Law, the property and powers of a company vest in the Viscount and no further enforcement action may be taken against the company in respect of debts which are provable in a *désastre*. In the case of a creditors' winding up under Chapter 4 of Part 21 of the Companies Law, although there is no vesting, the liquidator has similar powers to the Viscount and the Companies Law provides that after commencement of the creditors' winding up, no further action shall be taken or proceeded with against the company except by leave of the court.

Notwithstanding the above, the Security Interests Law operates to allow a secured party to exercise a power of enforcement under the Security Interests Law in relation to the relevant collateral without the consent of the Viscount, and without an order of a Court, so that a secured party's powers to appropriate or sell the collateral will not be affected by the insolvency.

Nevertheless, the powers to set aside transactions at an undervalue and preferences still apply. A security interest will be void against the Viscount or a liquidator and the company's creditors, if it is not perfected before the grantor becomes bankrupt.

Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Under the Security Interests Law, a secured party with a perfected security interest has priority over any other creditor. If the secured party has sold or appropriated the collateral and the net value or proceeds of sale (as appropriate) of the collateral exceeds the amount of the debt owed to the secured party, the secured party must pay the amount of any resulting surplus in the following order:

- Any person who has a subordinate security interest in the collateral and has registered a financing statement over that security interest (where the registration remained effective immediately before the appropriation or sale);
- Any other person (other than the grantor) who has given the secured party notice that that person claims an interest in the collateral, and in respect of which the secured party is satisfied that that person has a legally enforceable interest in the collateral;
- The grantor.

Under the Security Interests (Jersey) Law 1983 (the "1983 Security Interests Law"), the secured party must apply the proceeds of sale in the following order:

- Payment of the costs and expenses of the sale.

- Discharge of any prior security interest;
 - Discharge of all monies properly due in relation to the obligation secured by the security agreement;
 - Payment, in due order of priority, of the secured parties whose security interests were created after those being enforced under the security agreement;
 - In relation to the balance (if any remains), payment to the grantor or, if the grantor is bankrupt or is subject to any other judicial arrangement due to its insolvency, to the Viscount, receiver or other proper officer. Money or monies in a bank account must be applied under the 1983 Security Interests Law as if they were proceeds of sale.
- If more than one creditor holds the same security interest (and each security interest is created under the Security Interests Law 1983) over the same asset, priority is determined by the date of creation of the security interest.

As stated above, if a declaration for *en désastre* is made, a secured party under the Security Interests Law is entitled to enforce their security over the collateral, which will not fall into the *désastre* estate. Once this has occurred, any surplus will fall into the *désastre* estate to be dealt with by the Viscount in the usual way.

Creditors who hold a judicial or conventional hypothec registered against real estate are entitled to a preference over the proceeds of sale of any property on which their charge is secured. If there are a number of registered hypothec, preference is determined by the date of creation. This is not subject to any other preference or clawback rights. Where the asset owner has been declared *en désastre*, the collateral will fall into the *désastre* estate and the Viscount will take the collateral subject to the hypothec.

Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Désastre Law sets out the persons in respect of whose property an *en désastre* declaration can be made, and includes any person:

- who is, or was, at any time within the period of 12 months immediately preceding the date of the application, ordinarily resident in Jersey;
- who carries on, or has carried on, at any time within the period of three years immediately preceding the date of the application, business in Jersey, whether or not they are domiciled in Jersey;
- who has in Jersey immovable property capable of realisation at the time of the application;
- who, being a company, is registered under the Companies Law or has been dissolved pursuant to that Law;
- who is an incorporated limited partnership; or
- who is a limited liability partnership,

whether or not the debtor is present in Jersey at the time of application for a declaration or at the time of the declaration.

No *en désastre* declaration may be made in respect of:

- Separate limited partnerships.
- Limited partnerships.

It is not clear as a matter of Jersey law whether or not the assets of a trustee as trustee of a trust can be declared *en désastre*. We are not aware of any instance in which such a declaration has been made. If, however, the assets of a trustee were declared *en désastre* and in the event that any document was held by the Jersey courts to constitute a transaction at an undervalue and/or the giving of a preference to any person, the Jersey courts would have the power, depending, *inter alia*, on the period of time elapsed since the transaction was entered into, to set aside such transaction.

Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

The Security Interests Law allows a secured party to enforce by way of sale or appropriation of the collateral or proceeds. In addition, the secured party can take any of the following ancillary actions for the purpose of effecting a sale or appropriation:

- Take control or possession of the collateral or proceeds. Exercise any of the rights of the grantor in relation to the collateral or proceeds.
- 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 (for example, directing the actions of an intermediary who holds a securities account for the grantor).
- Apply any remedy that the security agreement provides for as a remedy that is exercisable pursuant to the power of enforcement, to the extent that it does not conflict with the Security Interests Law. Bespoke enforcement powers can therefore be included as appropriate to the collateral secured.

More than one enforcement option can be taken, and taking one or more of the enforcement options specified above does not preclude the exercise of other rights of the secured party.

The power of enforcement is exercisable once an event of default has occurred and written notice specifying the event of default has been served on the grantor by the secured party.

If enforcement is by way of sale or appropriation, the secured party must give the grantor 14 days' prior written notice. Importantly, in contrast to the 1983 Security Interests Law, the grantor can agree in writing (typically in the security agreement) to waive its right to notice of appropriation or sale.

The secured party is obliged on sale or appropriation, to give at least 14 days' prior written notice to any person who, 21 days before the sale or appropriation, has a registered security interest in the collateral, or any person other than the grantor who has an interest in the collateral.

There are specific carve-outs from the obligation to give notice, to the extent, for example, that the security property is a quoted investment security.

Self-sale is now expressly permitted.

On appropriation or sale, the secured party must:

- Take all commercially reasonable steps to determine or, in the case of a sale, obtain the fair market value of the collateral, as at the time of the relevant appropriation or sale.
- Act in a commercially reasonable manner in relation to the appropriation or sale.
- In the case of a sale, enter into any agreement for or in relation to the sale on commercially reasonable terms.

The duty of the secured party is owed to the grantor and also to any other person to whom the secured party was required to give notice of appropriation or sale.

If, in exercising its powers of enforcement, a secured party appropriates or sells collateral, it must, within the 14 days after the day on which the collateral is appropriated or sold, give a written statement of account setting out certain information in relation to that appropriation or sale to:

- The grantor (subject to it having waived this requirement).
- Any person with a registered subordinate security interest.
- Any person claiming an interest in the collateral.

If, in exercising its powers of enforcement, a secured party appropriates or sells collateral, it must pay to certain specified persons the amount of any resulting surplus by satisfying the claims of those persons in the prescribed order, or alternatively, it can pay any amount of resulting surplus into the Royal Court of Jersey.

Security agreements under the 1983 Security Interests Law

For security created under and governed by the 1983 Security Interests Law, a power of sale is the only specified means of enforcement (other than in relation to cash or a negotiable instrument, which can be appropriated). A secured party's ability to enforce its security by a contractual mechanism is uncontested in the courts, but is often provided for in security agreements.

The power of sale can be exercised after the occurrence of a default event under the security agreement. The secured party must:

- Serve notice of default on the grantor.
- Require the grantor to remedy the default (if the grantor is capable of it). If the grantor fails to remedy the default within 14 days after notice, the power of sale becomes exercisable.
- The secured party must take all reasonable steps to ensure that the sale is made both:
 - a. Within a reasonable time.
 - b. For a price corresponding to the value on the open market at the time of sale of the collateral being sold.

Real estate

A secured creditor can enforce against Jersey real estate through either of the following:

- *Dégrèvement.* *Dégrèvement* is a process whereby a particular immovable has its encumbrances removed so that a creditor can take it free and clear of all charges. It is a bankruptcy for the purposes of Jersey law, having the following features:
 - a. The process is complicated and is carried out under Jersey's 1880 law on immovable property. It can only be commenced by a secured creditor and results in one creditor keeping the property.
 - b. The creditor taking the property must pay off all earlier (i.e. prior ranking) charges on the property. The creditor is not required to pay or return to the debtor any difference between the value of the property and the level of his claim or charge by which he has taken. If a secured creditor does not take the property when required to in accordance with the priority ranking of his charge, he loses his charge and becomes an unsecured creditor.
- *Désastre.* The entire property of the debtor is declared *en désastre*. This is a formal declaration of bankruptcy under Jersey law. It can be commenced by the debtor or by a creditor with a liquidated claim of £3,000 or more. All of the debtor's property vests in the Viscount. The Viscount must get in and distribute all of the debtor's assets for the creditors' benefit. This includes immovables (real property). On realisation of any immovables, creditors with security are paid under their security in respect of secured obligations before any amounts left over go into the bankrupt estate.

There is no equivalent to the English law concept of administration.

In certain circumstances, the Courts of Jersey can permit a solvent or insolvent company which has not been declared *en désastre* to be wound up, if it is of the opinion that it is either:

- just and equitable; or
- expedient in the public interest.

The application to the court on these grounds can be made by the Jersey company (or its directors or shareholders) and certain government and regulatory officials.

Jurisdiction and waiver of Immunity

Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Please see Judicial Enforcement section above.

Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Yes, it is.

Licensing

What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There are no licensing requirements in Jersey for foreign lenders lending to a Jersey company.

If a lender carries on business in Jersey or is a Jersey company, it will be subject to the Proceeds of Crime (Jersey) Law 1999. Under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, if the lender does not have a registered service provider in Jersey, it may need to apply to be registered with the Jersey Financial Services Commission (the "JFSC") to be supervised in relation to its compliance with relevant anti-money laundering and counter-terrorism legislation. Whether or not a lender requires to apply to be registered with the JFSC to be supervised, it is required to comply with relevant anti-money laundering and counter-terrorism legislation.

Other matters

Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Jersey is a politically stable and fiscally advantageous financial centre which has been at the forefront of the global finance industry for over 50 years. The Island enjoys economic stability, political independence, tax neutrality and sophisticated legal, regulatory and technological infrastructure. It has a global reputation founded on a robust legal framework and sound corporate governance practices.

Jersey's evolution as an international finance centre is founded on its close ties to the City of London and its growth as a jurisdiction of choice in the European as well as Middle Eastern, North American and Asian markets.

In 2016, the FATF confirmed that Jersey is compliant or largely compliant with 48/49 of the FATF recommendations in respect to anti-money laundering and combatting the financing of terrorism. In 2017, Standard & Poor's confirmed Jersey's credit as AA-, one of the highest possible ratings.

The International Stock Exchange offers an efficient listing service and has received a number of international recognitions, making it an attractive and increasingly popular option for listing debt securities.

 Authors**Robin Smith**

Partner

D +44 (0)1534 822264
E robin.smith@careyolsen.com

Robin is consistently recognised for his ability to deal with a wide range of international corporate and finance transactions. He has acted on numerous significant portfolio acquisitions and disposals. He often acts for both lenders and borrowers on complex financings, refinancings and restructurings and has significant experience in relation to the financing of investment funds.

Robin advises global banks and large corporates as well as smaller privately held entities. Robin regularly establishes new Jersey structures, including corporates, limited partnerships and unit trusts. He also has experience advising in relation to the establishment, transfer and redomiciliation of banking business in Jersey.

Robin is a director of Carey Olsen Corporate Finance Limited which provides sponsor services in respect of The International Stock Exchange listings and regularly advises on transactions involving Eurobonds and other TISE listed securities.

**Laura Healy**

Senior Associate

D +44 (0)1534 822331
E laura.healy@careyolsen.com

Laura acts on a wide range of banking, real estate finance, corporate finance and fund finance matters. She specialises in advising international financial institutions and corporate borrowers in relation to real estate finance transactions and funds finance transactions involving Jersey structures.

Laura has experience of acting on a number of high-value and multijurisdictional transactions.

Our offices

Jurisdictions

Bermuda

Carey Olsen Bermuda Limited
2nd Floor
Atlantic House
11 Par-la-Ville Road
Hamilton HM11
Bermuda

T +1 441 542 4500
E bermuda@careyolsen.com

British Virgin Islands

Carey Olsen
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

Cayman Islands

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000
E cayman@careyolsen.com

Guernsey

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272
E guernsey@careyolsen.com

Jersey

Carey Olsen Jersey LLP
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com

International offices

Cape Town

Carey Olsen
Protea Place
40 Dreyer Street
Claremont
Cape Town 7708
South Africa

T +27 21 286 0026
E capetown@careyolsen.com

Hong Kong

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong

T +852 3628 9000
E hongkong@careyolsen.com

London

Carey Olsen LLP
Forum St Paul's
33 Gutter Lane
London EC2V 8AS
United Kingdom

T +44 (0)20 7614 5610
E londonco@careyolsen.com

Singapore

Carey Olsen Singapore LLP
10 Collyer Quay #24-08
Ocean Financial Centre
Singapore 049315

T +65 6911 8310
E singapore@careyolsen.com

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG LONDON SINGAPORE

careyolsen.com