

Lending and taking security in Jersey: overview

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OVERVIEW OF THE LENDING MARKET

1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

Market overview

Over the last few years there has been a significant uptick in the use of Jersey companies in connection with financial restructurings/exits from restructuring, with Jersey companies frequently used as the vehicle through which lenders take control of distressed debtor groups. The 2019 novel coronavirus disease (COVID-19) crisis has increased the prevalence of this type of restructuring activity.

The resurgence of Jersey companies as the vehicle of choice for acquisition finance is another trend which has developed in recent years and has led to an uptick in the use of Jersey holding structures in acquisition finance transactions.

The last 12 months have also seen a continuation of third-party financing to private equity funds. Instructions in relation to the financing and establishment of new corporate real estate structures have continued, however, in a more patchy manner given political uncertainties and the COVID-19 crisis, but business flows have held up very well.

Jersey has enjoyed continued confidence over the last 12 months from investors from around the globe seeking to establish investment holding structures, including those seeking to benefit from Jersey's status as a well-regulated jurisdiction and top-tier credentials arising out of reviews by OECD, ECOFIN and MONEYVAL. Jersey's reputation means sustained use of Jersey companies and trust structures by Middle Eastern, South East Asian and other investors, regardless of the direction in which those vehicles face in terms of investment interests or objectives.

Peer-to-peer lending has continued its solid performance over the past few years in Jersey, and Jersey remains a popular choice through which to seat a joint venture vehicle with or without utilising a Eurobond exemption listing.

Jersey security law

The Security Interests (Jersey) Law 2012 (SIJL 2012) came into effect on 2 January 2014. The SIJL 2012 changed the way in which security could be taken over Jersey intangible moveable assets and the remedies available to secured parties. Some of the key features of the SIJL 2012 are that it:

- Allows security to be created in respect of all present and future Jersey situs intangible moveable assets of a company.
- Offers a registration regime.
- Offers a regime for the assignment of receivables.

SIJL 2012 allows flexibility in relation to the methods of taking and perfecting security and affords secured creditors greater enforcement rights including appropriation and step-in.

It is now only possible to take security in accordance with the provisions of SIJL 2012. However, security interests created before SIJL 2012 came into force and pursuant to the previous legislation, the Security Interests (Jersey) Law 1983 (SIJL 1983), continue to be governed by SIJL 1983. There is, therefore, a "dual" security regime in Jersey, but as time passes, fewer and fewer SIJL 1983 documents remain in place.

There is a requirement to replace existing SIJL 1983 security with SIJL 2012 security where new collateral is introduced that is not provided for in the existing security interest agreement, and it may also be necessary to replace such security (or previous SIJL 2012 security) with fresh SIJL 2012 security where significant changes are made to the secured obligations (much depending on how large the additional obligations are, both absolutely and relatively and, for example, whether there is a new or additional purpose to which the secured funding is applied).

FORMS OF SECURITY OVER ASSETS

Real estate

2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

Real estate

Property is classed as either movable (*meubles*) or immovable (*immeubles*). Real estate is immovable property comprising land and everything attached to it.

The four main types of interest in real estate are:

- **Freehold.** The most comprehensive form of property ownership, where the property owner holds the land in perpetuity (*propriété a din d'héritage*). Contracts for freehold properties are passed before the Royal Court of Jersey, then registered in the Jersey Public Registry and are available for public inspection.
- **Flying freehold.** This is a system of ownership derived from statute, where a collective property can be subdivided into multiple private units. A bespoke and comprehensive document describing the subdivision of the property must be registered with the Royal Court, and the individual purchasers acquire a "lot" (or share) within the property. As with freehold properties, contracts for flying freehold properties must be passed before the Royal Court of Jersey to have legal effect.
- **Leases.** These are categorised as:
 - paper leases, which have a term of nine years or fewer and are private agreements between the landlord and the tenant. Perhaps counterintuitively, a paper lease does not need to be in writing or reduced to paper, they are classed as movable property; or
 - contract leases, which have a term of more than nine years and must be passed before the Royal Court of Jersey to be

legally valid and binding. As they are passed before court, contract leases are classed as immovable property. Once passed, they are registered in the Jersey Public Registry and are available for public inspection.

- **Share transfer.** Share transfer structures were established as a method of dividing a property into multiple units or parts before the introduction of the statutory provision for flying freehold properties. Under these structures a Jersey holding company owns the freehold of the property. That company's shares have various rights attached to them under the constitutional documents of the company. A particular share (or block of shares) will provide the shareholder with rights of exclusive use and occupation of a particular flat or unit at the property, with collective responsibility for the remainder of the property resting with the shareholders.

Common forms of security

There are two main forms of security for real estate:

- **Hypothecs.** 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 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:
 - **judicial hypothec.** This type of hypothec is created by the registration of an acknowledgment document (*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
 - **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. Such share security is created under the SIJL 2012 (see *Question 4*).

Other security a lender may consider taking in connection with loans secured against immovable property are:

- **Security interest over lease receivables.** If a property is subject to a lease, it is common for a lender to take security under SIJL 2012 over the lease receivables (for example, rents and deposits) as security for advances to the landlord (see *Question 5*).
- **Security interest over contract rights.** If the property has recently been developed or is in the course of development, a lender may require a security interest over the rights in the major building contracts (see *Question 5*).

Formalities

The formalities for creating the common forms of hypothec are as follows:

- **Judicial hypothec.** To create a judicial hypothec over Jersey real estate, a borrower will sign a *billet* (charge document) acknowledging indebtedness in a defined sum, which is typically the amount of the loan or other obligation. The lender's lawyers then submit the *billet* to the Royal Court of Jersey, and it registered in the Jersey Public Registry. The

registration of this document creates the hypothec, which can be over all the immovable property of the debtor owned at the date of registration, or over a specific property described in the *billet*. The *billet* is merely an acknowledgment of indebtedness and does not set out the terms of the borrowing in full.

- **Conventional hypothec.** The terms of the borrowing are set out in the contract establishing the simple conventional hypothec, which must be passed before the Royal Court of Jersey and then registered in the Jersey Public Registry (and is available for public inspection). This form of charge may therefore be unattractive for commercial or complex lending. Passing a contract before the court involves representatives of the parties appearing before the court to swear their assent to the terms of that contract.

See *Question 4* for details of the creation of security over the shares of a Jersey registered company.

Tangible movable property

3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?

Tangible movable property

Tangible movable property includes plant, machinery, cars, paintings, gold bullion and antiques.

Common forms of security

Other than in relation to ships and aircraft, 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.

Formalities

The security is created by the delivery of the tangible movable property by or with the grantor's consent.

Ships

Security over Jersey-registered ships is accomplished by submitting to the Jersey ship registrar an MSA ship mortgage form duly completed and signed by the owner of the vessel, along with the prescribed fee. The Jersey register of ships is a part of the British Register and Jersey is authorised to register both pleasure and commercial vessels of up to 399GT.

It is common for parties to mortgages to agree collateral terms to those contained in the prescribed form, and these are usually included in a deed of covenants. The ability to mortgage a Jersey-registered ship is underpinned by the Shipping (Jersey) Law 2002 and the Shipping (Registration) (Jersey) Regulations 2004. Mortgages take priority in the order in which they are registered.

Aircraft

The Jersey aircraft registry launched in Q4 2015 after the Aircraft Registration (Jersey) Law 2014 came into effect. That law established an independent Jersey aircraft register with prefix "2J-". Aircraft mortgages and aircraft engine mortgages are possible and may be over any interest in an aircraft, aircraft engine or both, whether title to the asset is transferred to the mortgagee, or not. The mortgage agreement must:

- Be in writing.
- Be dated.

- Identity and be signed by the mortgagor.
- Identify the mortgagee.
- Provide specified descriptive information as to the aircraft/aircraft engine.
- Specify the events of default.
- Sufficiently identify the secured obligations to enable them to be identified.

A mortgage application form must be submitted to the registrar, together with:

- A certified true copy of the mortgage agreement.
- The names and addresses of the mortgagee and mortgagor.
- Details of aircraft/aircraft engine including registration numbers.
- The fee (prescribed from time to time).

Financial instruments

4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?

Financial instruments

The financial instruments over which security is most commonly created in Jersey are:

- Shares.
- Units in a unit trust.
- Other debt securities.

A security interest can be created over any intangible movable property (other than a lease) which is situated in Jersey. This includes both directly held financial instruments (for example, shares in Jersey companies and unit trusts) and indirectly held financial instruments (for example, securities held in a securities account with a custodian in Jersey).

Common forms of security

Security over intangible movable property situated in Jersey is created under the SIJL 2012. Each security interest must "attach" and be "perfected". Attachment is the process whereby the security interest becomes enforceable against the grantor of the security interest.

Attachment

For a security interest to attach to collateral, 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 SIJL 2012.
- The secured party must be in possession or control of the collateral and/or the security agreement must be in writing, signed by or on behalf of the grantor and contain a description of the collateral that is sufficient for it to be identified.

Perfection

Perfection of a security interest is necessary to establish priority and give protection against third parties, which is particularly important in insolvency. The method of attachment and perfection will depend on the type of collateral secured. A security interest is perfected when the security interest has attached and any further steps required under SIJL 2012 for perfection have been completed. The three methods of perfection are:

- Control of certified investment securities, bank accounts and securities accounts.
- Possession of documentary intangibles.
- Registration of a financing statement on the security interests register maintained under SIJL 2012 (Security Register), Registration perfects a security interest in any type of intangible moveable collateral.

In relation to financial instruments, perfection is achieved in the following ways:

Control. In the case of:

- Certificated securities, perfection is achieved by the secured party either:
 - being registered as the holder of the securities; or
 - having possession of the certificate representing the securities.
- A securities account held with a custodian, perfection is achieved by the:
 - transfer of the account into the name of the secured party with written agreement of the grantor and custodian;
 - custodian agreeing to comply with the instructions of the secured party directing the disposition of the securities; or
 - custodian being the secured party.

Possession. In the case of negotiable instruments, perfection is achieved by the secured party having possession of the relevant instrument.

Registration. Security over financial instruments can also be perfected by registering a financing statement on the Security Register.

In the case of financial instruments, the methods of perfection described above also constitute attachment. Security interests perfected by possession or control will have priority over security interests perfected by registration only (see *Question 23*). It is therefore advisable to perfect by possession or control where possible, but even where that is achieved, it is usual for a security interest to be perfected by registration as well.

Formalities

See above in relation to the creation, attachment and perfection of security over financial instruments.

A financing statement that is registered on the Security Register (an on-line 24/7 public register) contains the details of, among other things, the:

- Secured party.
- Grantor.
- Collateral.
- Duration of registration.

A financing statement can be registered in advance. The secured party should obtain the grantor's prior consent to the registration and its contents.

Before a registration, a search of the registry should be made against the grantor to ensure that there are no other registrations in respect of the relevant collateral. A search should be made against both current and previous names (if any) used on or after 2 January 2014, unless it is possible to search against the relevant registered number of the grantor.

Lenders usually prefer not to take security by becoming the registered shareholder in a company or registered unitholder in a unit trust, to avoid consolidation issues and/or potential shareholder or unitholder liability (for example, environmental liability in relation to property owned by the company).

When taking security over shares or units in a unit trust, it is advisable to take signed blank transfer forms in relation to shares or units and ensure that a security power of attorney is given by the grantor within the security agreement. This ensures that the secured party can exercise and enjoy the full extent of the security without having to rely on the grantor's compliance.

Whenever security is taken over shares in a Jersey private company or units in a Jersey unit trust, the secured party should check that both:

- The directors/trustees cannot refuse to register the secured party (or a nominee or a transferee on enforcement) as a shareholder or unitholder if it is necessary.
- There are no pre-emption rights or other transfer restrictions contained in the company's articles of association or the unit trust instrument which may prevent the sale, on enforcement of the security, of the securities to a third party or itself.

The requirement for registration under SIJL 2012 does not apply to a security interest over trust property where the grant of the security interest is by the trustees, so security granted by nominees of bare trusts or trustees of family or discretionary trusts, for example, are not perfected by registering a financing statement. The definition of trust excludes "prescribed unit trusts" though, in relation to which the above registration requirements apply, so establishing whether dealing with a prescribed unit trust is essential.

Claims and receivables

5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?

Claims and receivables

Common types of claims and 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.

Common forms of security

Security over contract rights and receivables situated in Jersey is created under the SIJL 2012. Each security interest must "attach" and be "perfected" as described in *Question 4, Financial Instruments*.

Jersey law does not have a concept of a floating charge. However, in practice, a similar degree of flexibility can be achieved (at least in respect of intangible movables) under (SIJL 2012). The attachment of a security interest to (intangible) collateral is not affected by the

security agreement providing an express right for 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. It is also possible to take "a floating charge style" security over all present and future intangible movable property held by the grantor from time to time.

SIJL 2012 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, but that is a distinct subject and separate from the grant of a security interest.

Formalities

Typically, security in respect of contract rights and receivables is created by both:

- A written security agreement, signed by or on behalf of the grantor and containing a description of the collateral that is sufficient for it to be identified for the purpose of attachment.
- The registration of a financing statement on the Security Register for the purpose of perfection (see *Question 4, Common forms of security* for further detail on 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 acknowledgement 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).

Cash deposits

6. What are the most common forms of security over cash deposits? How are they created and perfected?

Security over cash deposits maintained with banks situated in Jersey is also created pursuant to SIJL 2012. Each security interest must attach and be perfected as described in *Question 4, Common forms of security* above.

The method of creating security in a deposit account under SIJL 2012 will depend on whether the account is also provided/maintained by the secured party, or is provided/maintained by a third party bank.

Formalities

Security (both attachment and perfection) will be created by control (see *Question 4, Common forms of security*) 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.
- Account bank being the secured party.

Security over deposit accounts can also be perfected by registration of a financing statement on the Security Register and it is usual for a security interest to also be perfected by such means, but because perfection by control has certain priority rule advantages over perfection by registration only, security perfected by control is always preferable.

Although not necessary to perfect the security, it is usual to obtain an acknowledgement of the notice from the account bank, which will include, for example, a waiver of (or caveat to):

- Any terms and conditions that may restrict or prohibit the creation of the security.

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- Its rights of set-off over the account.

Intellectual property

7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?

Intellectual property

The most common types of intellectual property (IP) over which security is created are patents, trade marks, copyright and designs.

Common forms of security

The location of IP is determined under the principles of private international law applicable to intangible movable property, as applied by Jersey law. These principles are broadly similar to those accepted under English common law.

If IP is created under Jersey law and it is considered to be situated in Jersey, security should be taken under SIJL 2012 (provided such IP is unregistered). Registered IP will appear on a UK register, so the legislative intention is not to duplicate that register or to create conflicts by having interests registered in one place and not in the other.

See *Question 4, Formalities*. Typically, security in respect of IP is created by both:

- A written security agreement, signed by or on behalf of the grantor and containing a description of the collateral that is sufficient for it to be identified for the purpose of attachment.
- The registration of a financing statement on the Security Register for the purpose of perfection (see *Question 4, Common forms of security* for further detail on registration).

Problem assets

8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?

There are proposals to amend Jersey's SIJL 2012 to extend that regime to tangible movables, but this is not yet in place. The lack of such a regime is a hindrance perhaps to some domestic business financings, but for the majority of cross-border finance structures (where special purpose vehicles hold non-Jersey tangible assets) the absence of such a regime is of no relevance.

Future assets

SIJL 2012 clarifies the position regarding security in future assets and expressly permits the taking of security in after-acquired property. If the security agreement is drafted correctly, the security interest attaches immediately on acquisition by the grantor of rights in the relevant collateral.

Fungible assets

See *Question 5, Common Forms of Security*. Jersey law does not have a concept of a floating charge but the Jersey courts certainly recognise and will give effect to valid foreign security over foreign-situs tangible (and intangible) movables (and other assets). In respect of Jersey-situs assets, the Jersey courts are unlikely to recognise the use of a fixed and floating charge or other foreign legal instrument.

Other assets

SIJL 2012 clarifies the type of assets over which security interests can be granted. Certain interests including liens and set-off rights are outside its scope. SIJL 2012 permits parties to agree that its provisions apply to intangible movable property situated anywhere in the world, though this agreement regulates only the relationship between the parties, and does not affect the rights of third parties.

RELEASE OF SECURITY OVER ASSETS

9. How are common forms of security released? Are any formalities required?

Under SIJL 2012

Security is usually released by an instrument of release.

If security is created by possession or control, the arrangements by which this was achieved will need to be unwound including, for example, re-assignment to the grantor of the asset (if security has been taken by way of assignment) and/or terminating the arrangements constituting control. In addition, the grantor will typically require the discharge of any financing statement. The release is recorded in the Jersey security interests register by the secured party registering a financing change statement. Under SIJL 2012, a grantor may serve a written demand on the secured party requiring it to do so.

Under SIJL 1983

Once the security obligations in the security agreement have been discharged, the grantor of the security can notify the secured party and request any of the following:

- Possession of certificates of title (if possessory security has been taken).
- Control of a secured account (if security has been taken over a bank account and the secured party is also the account bank).
- Title to the property that is subject to the security interest (if security has been taken by way of assignment).

The grantor of security can also require a certificate of discharge of security to be provided in the form set out in the schedule to SIJL1983.

The security interest is terminated:

- On redelivery of the certificates of title (if possessory security is taken (except where security has also been taken by way of assignment)).
- When the account bank ceases to have control over the secured bank account (if security over a bank account is taken and the secured party is also the account bank).
- When the secured party ceases to have title to the property that is subject to the security interest (if security were taken by way of assignment, for example, when title is re-assigned back to the grantor of the security).

SPECIAL PURPOSE VEHICLES (SPVS) IN SECURED LENDING

10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?

Jersey investment holding vehicles are often used to hold foreign located assets. In these structures, share security can be taken under a security agreement either:

- As the only security.
- Together with security under appropriate foreign law over the foreign located assets.

In property finance transactions, secured parties often prefer to perfect the security interest by way of both:

- Control by possession of the share certificates (as opposed to taking control by being registered in the register of members of the Jersey vehicle) as this avoids potential consolidation risks and shareholder liability risks, such as environmental liability.
- Description of the collateral in the security agreement and registration.
- Similarly, account security is not taken by transferring the account into the name of the secured party but by one of the other available methods (see *Question 6*).

QUASI-SECURITY

11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

Sale and leaseback

There have recently been several sale and leaseback transactions involving Jersey commercial real estate, enabling business occupiers to extract capital value from their properties. Sale and leaseback structures of this nature are not used to, and are not considered to, create security under Jersey law, although they do provide a method of realising capital. If the sale and leaseback is designed to create a quasi-security arrangement, for example a sale and leaseback of a car to a finance provider, it may be a sham transaction and therefore voidable.

Factoring

Debt factoring is not common. In principle, Jersey law does not preclude a creditor from assigning to a third party his or her claim against a debtor.

There should be no obstacle to factoring where both:

- The debts are defined.
- There is an outright purchase of legal and beneficial ownership of debts reflected in the relationship between the assignor and assignee.

However, the assignment is at risk of being recharacterised as security rather than a sale and purchase, if the assignee of the debt is deemed not to have purchased the debt but to have both:

- Advanced the discounted amount to the assignor.
- Retained recourse to the assignor.

With the intention of promoting factoring in Jersey, SIJL 2012 includes provisions that govern the perfection and priority of absolute assignments (being assignments not by way of security) of Jersey receivables such as certain types of book debts. Perfection of such assignments is by registration in the Security Interests Registry. SIJL 2012 also permits the creation of security interests over such receivables, with perfection also by registration.

Hire purchase

Hire purchase agreements can be used to create quasi-security. If the transaction is a proper hire purchase and there is no retention of title by the lessee (that is, the asset must be originally owned and leased by the lessor), there should be little risk that this could be recharacterised as security.

Retention of title

A fundamental principle of Jersey law is that a person should not appear to own property that he or she does not and give the appearance of false wealth. Jersey law only therefore permits security to be created over tangible movables through physical delivery (see *Question 3, Formalities*). Seeking to release capital tied up in physical movable property is not usually possible where there is retention of title.

Other structures

Not applicable.

GUARANTEES

12. Are guarantees commonly used in your jurisdiction? How are they created?

Guarantees are commonly used. They are usually created by written agreement.

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.

SIJL 2012 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.

RISK AREAS FOR LENDERS

13. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?

Financial assistance

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 (see *below, Corporate benefit*), or amounts to a distribution, the relevant statutory procedures must be complied with.

Corporate benefit

A Jersey company has unlimited corporate capacity (*Article 18, Companies (Jersey) Law 1991 (1991 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 no corporate benefit to the company.
- The transacting party knows or ought to know that there is no corporate benefit.

This risk is avoided if both:

- All the shareholders of the Jersey company authorise or ratify the particular transaction. Shareholder authorisation or ratification can be given by ordinary resolution (or special resolution if the company's articles of association require).
- 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 entering into a transaction, there is also a risk that such transaction could be set aside on the company's bankruptcy.

Loans to directors

Generally, subject to the relevant company's articles of association, Jersey law permits companies to make loans to their directors. Directors must consider an appropriate declaration of a potential conflict of interest in approving this transaction.

Usury

The government can regulate interest rates, but no relevant regulations are in force. Obligations to make payments that are regarded as penalties may not be enforceable.

Others

If a company enters into a transaction with a person for **cause** (similar (but not equivalent) to the concept of 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 susceptible to challenge:

- As a transaction at an undervalue and attacked by the Viscount (that is, the Executive Officer of the Royal Court of Jersey) in a *désastre* under the Bankruptcy *Désastre* (Jersey) Law 1990 (*Désastre* Law).
- By a liquidator in a creditor's winding up under the 1991 Law.

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

14. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

A lender is not liable under environmental laws for advancing a loan or holding security.

However, a lender could be liable in two circumstances:

- If it took title to a property on a *dégrévement* (that is, a "disencumbrment") (see *Question 20, Real estate*).

- Where the lender is entered on the register of members of a property holding company.

STRUCTURING THE PRIORITY OF DEBTS

15. What methods of subordination are there?

Contractual subordination

Close-out netting, set-off and contractual subordination provisions are generally enforceable under the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (2005 Law). Despite any enactment or rule of law to the contrary, a close-out netting provision, a set-off provision or a contractual subordination provision of an agreement is enforceable on the bankruptcy of a party to the agreement.

Any person dealing with the affairs of the bankrupt party or person must give effect to any close-out netting provision, set-off provision or contractual subordination provision of an agreement.

Structural subordination

Structural subordination can be used in multi-layered financings involving Jersey companies. It is usually achieved by lending at different levels in the corporate stack, and separate security packages given. However, we also often see senior and mezzanine transactions with a combination of both common and separate security packages, and involving sophisticated inter-creditor arrangements.

Inter-creditor arrangements

It is common for Jersey vehicles to enter into an inter-creditor agreement or other agreement regulating the rights and ranking of multiple funders (in relation to either debt or equity). The documents regulating these agreements are commonly governed by English law and are frequently used where a Jersey vehicle is utilised in relation to a debt or structured finance transaction.

DEBT TRADING AND TRANSFER MECHANISMS

16. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

Debt is traded in Jersey, normally in the form of notes, bonds or convertible instruments. These are generally in registered form, and security under a security agreement can be granted over these instruments.

Debt securities can also be listed on The International Stock Exchange (TISE). It is common to list debt securities on TISE so that they are quoted Eurobonds for the purposes of section 882 of the UK Income Taxes Act 2007. There is usually a security or bond trustee to ensure that the noteholders obtain the benefit of the security and guarantees associated with the transferred debt.

AGENT AND TRUST CONCEPTS

17. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

Jersey law recognises the concept of agency in accordance with its development under English law. Therefore, property held by an agent in Jersey in its capacity as agent for the principal does not form part of the agent's assets and estate against which the agent's creditors have recourse. A facility agent or security agent can enforce rights on behalf of the other syndicate lenders in the courts in Jersey.

18. Is the trust concept recognised in your jurisdiction?

Trusts are recognised under Jersey law and a security trustee can enforce its rights in the courts of Jersey. In addition, security trustee structures are commonly used, particularly:

- Where there are syndicated lending arrangements.
- To create second-ranking security over intangible movable property.

ENFORCEMENT OF SECURITY INTERESTS AND BORROWER INSOLVENCY

19. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

Security agreements over intangible movable property

Under SIJL 2012. The power of enforcement under a security agreement is exercisable when:

- An event of default has occurred.
- The secured party has served a written notice on the grantor specifying the event of default. The procedure for enforcement is set out in *Question 20*.

Under SIJL 1983. The power of sale (the only type of enforcement under a security agreement created under that Law) arises after the occurrence of an event of default under the security agreement. The procedure for enforcement is set out in *Question 20*, although as time passes, fewer and fewer security agreements written under SIJL 1983 survive. The regime subsists in "grandfathered" form, however, to serve those that remain.

Real estate: hypothecs

A creditor can enforce its loan on a continuing default event as set out in the relevant loan agreement.

If a borrower cannot repay, a creditor can enforce its security by either:

- Proceeding to a *dégrévement*.
- Instituting *désastre* proceedings.

(See *Question 20, Real estate*.)

Methods of enforcement

20. How are the main types of security interest usually enforced? What requirements must a lender comply with?

Security agreements over intangible movable property other than cash

Under SIJL 2012. The secured party can 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:

- 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 SIJL 2012. 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.

On a sale or appropriation, the secured party is also required to give the grantor 14 days prior written notice of the intended sale or appropriation. Importantly though, in contrast to SIJL 1983, the grantor can agree in writing (typically in the security agreement) to waive its right to this notice of sale or appropriation.

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.
- 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 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.
- Enter (in the case of a sale only) 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.

Under SIJL 1983. For security created under and governed by SIJL 1983, 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 untested 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:

- Within a reasonable time.
- 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:

- **Dégrévement.** This is a process where 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, with the following features:
 - 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; and
 - the creditor taking the property must pay off all earlier (that is, 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 or her claim or charge by which he or she has taken. If a secured creditor does not take the property when required to in accordance with the priority ranking of his or her charge, he or she loses his or her 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 GBP3,000 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.

Rescue, reorganisation and insolvency

21. Are company rescue or reorganisation procedures (outside of insolvency proceedings) available in your jurisdiction? How do they affect a lender's rights to enforce its loan, guarantee or security?

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

In unusual circumstances, the Courts of Jersey can permit an insolvent company (but not one that has been declared *en désastre* (see *Question 20, Real estate*)) to be wound up if it is of the opinion that it is either:

- Just and equitable.
- 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.

22. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee or security?

A creditor of a debtor who has been declared *en désastre* (see *Question 20, Real estate*) must submit a proof of debt to the Viscount. The Viscount can admit or reject proofs of debt and decide whether any are privileged debts. The *Désastre* Law expressly stated that the provisions of Article 6 of SIJL 1983 (relating to the subsequent insolvency of a debtor) apply to any security interest to which any of the debtor's movable property is subject. In relation to immovable property, creditors who hold a charge registered against Jersey-located immovable property are entitled to a preference. The preference is determined in accordance with the date of creation of creditors' respective hypothecs.

Following the implementation of SIJL 2012, the *Désastre* Law was amended to afford greater protection to a secured party with a security interest in the event of insolvency of the grantor so that:

- A secured party can, without the consent of the Viscount, and without an order of the court, exercise a power of enforcement under Part 7 of SIJL 2012 in relation to the relevant collateral.
- A transfer of shares made pursuant to a power of enforcement under Part 7 of SIJL 2012 will not be avoided even if not made to, or with the sanction of, the Viscount.

23. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?

The Viscount in a *désastre* or a liquidator in a creditors' winding-up under Jersey insolvency law can attack a creditor's right to enforce its security if, among other things, the company was or became insolvent, on a cash flow basis, when it entered into or as a result of the transaction.

Where this insolvency exists, there is a statutory look-back or "hardening" period of:

- Five years from the date the *désastre* or winding-up commenced (in the case of transactions at an undervalue).
- 12 months before the commencement of the *désastre* or winding-up (in the case of a preference (which can only apply to a guarantor, surety or creditors of the debtor)).

During these periods, the transaction may be vulnerable to attack as a transaction at an undervalue or as a preference. The burden of proof is reversed if the transaction was entered into with either:

- A person connected with the company.
- An associate of the company.

24. In what order are creditors paid on the borrower's insolvency?

Priority statutory creditors

The Viscount pays debts from the monies received by him or her from the realisation of the debtor's property in the following order:

- The Viscount's fees, costs, charges, allowances and expenses.
- The debtor's employees for arrears of wages, for the period of six months before the declaration, holiday pay and bonuses.
- Health insurance, social security, income tax, goods and services tax, rent arrears and parochial rates.

- All other debts proved in the *désastre*.

(*Désastre Law*.)

Priority secured creditors

Creditors who hold a judicial or conventional hypothec (charge) (see *Question 2, Common forms of security*) registered against real estate are entitled to a preference over the proceeds of sale of any property on which their charge is secured. The preference is determined by the date of creation of the hypothec.

Creditors who have a security interest in the debtor's property granted under SIJL 1983 or SIJL 2012 are entitled to have the proceeds of a sale or other enforcement of the collateral applied in the manner provided by SIJL 1983 or SIJL 2012 (as appropriate).

Under SIJL 2012. If a 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:

- To 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).
- To any other person (other than the grantor) who has given the secured party notice that he or she claims an interest in the collateral, and in respect of which the secured party is satisfied that such person has a legally enforceable interest in the collateral.
- To the grantor.

Where two or more persons have subordinate security interests, they must be paid in the order of priority of those security interests as determined under SIJL 2012.

Alternatively, the secured party may discharge its obligation above with respect to any surplus by paying that amount into the Royal Court. The surplus may then only be paid out on the order of the court on application by a person entitled to the surplus.

Under SIJL 1983. SIJL 1983 provides that 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 SIJL 1983 as if they were proceeds of sale.

If more than one creditor holds a security interest (and each security interest is created under SIJL 1983) over the same asset, priority is determined by the date of creation of the security interest.

Priority of security interest rights

SIJL 2012 contains a clear set of priority rules that provide that control security has priority over registered security in the same asset. Further, the rules provide that:

- A perfected security interest has priority over an unperfected security interest in the same collateral.

- Where both interests are unperfected, priority is determined by the order of attachment.

- As a general rule as between two or more perfected security interests, priority goes to the security interest in relation to which any of the following events first occurred:

- a financing statement was registered;
- the secured party or its nominee took possession or control of the collateral; or
- the security interest was temporarily perfected under SIJL 2012.

Transitional rules state that a continuing security interest (a security interest created under SIJL 1983) has priority over a security interest created under SIJL 2012 in the same collateral.

SIJL 2012 also provides special priority rules that apply to conflicting security interests in certificated investment securities, securities accounts and deposit accounts (that is, any bank account, not just those holding funds traditionally categorised as a deposit). For example, security over a deposit account that is perfected by control by the transfer of the account into the name of the secured party with the written agreement of the grantor and the bank or other institution with which the deposit account is held has priority over any security interest held by the account bank (that is, the bank at which the account is held) (but a security interest in favour of an account bank (perhaps embedded in standardised account terms) has priority over all other types of security interest in such deposit account).

Purchase money security interests

SIJL 2012 makes provision for and gives priority to a "purchase money security interest" (PMSI). A PMSI is either:

- A security interest in collateral taken by a seller to the extent that it secures the purchase price of the collateral.
- A security interest taken in collateral to the extent it secures money/value advanced to the grantor for the purpose of, and actually used in, acquiring the collateral.

The rationale for the PMSI is to prevent a prior secured party who, for example, has a security interest in after-acquired property obtaining a windfall (by virtue of assets being added to its prior security, when those assets are acquired as a direct result of funding provided by the second secured party for the specific purpose of that acquisition).

Subject to certain exceptions, a PMSI therefore has priority over a non-PMSI. A PMSI must be perfected within 30 days of attachment. A PMSI must be created by agreement and does not simply arise by operation of law.

CROSS-BORDER ISSUES ON LOANS

25. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders, or taking guarantees from foreign subsidiaries of the borrower?

There are no restrictions on the making of loans by foreign lenders or on persons/entities granting guarantees or security to them, other than those that may lie in an entity's constitutional documents. In addition, if a Jersey company gives security governed by foreign law over property that is situated outside Jersey, it is deemed to have had capacity to give the security.

26. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

There is no exchange control legislation or regulation, except via the freezing of funds (or prohibiting investment) that may affect persons, entities or jurisdictions affected by international sanctions.

BREXIT

27. If UK financial institutions no longer have "passporting" rights in the EU after Brexit, what regulatory requirements would a UK lender have to comply with to make a loan to, or purchase a loan made to, a borrower in your jurisdiction?

Not applicable.

28. Will a UK financial institution require a licence to lend after Brexit? Will a UK lender be able to take security from a borrower in your jurisdiction?

Not applicable.

TAXES AND FEES ON LOANS, GUARANTEES AND SECURITY INTERESTS

29. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security interest?

Documentary taxes

Stamp duty payable on registration of security. 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. It must be paid in full before the required charge document can be registered in the Jersey Public Registry.

Land transaction tax (LTT) 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. LTT applies only in relation to residential property or those companies whose articles confer rights of occupation on their shareholders.

Stamp duty on transfers of real estate. Stamp duty and LTT are payable on sales of Jersey real estate.

Registration fees under SIJL 2012

Fees for the use of the Security Interests Register are set out in a Jersey Financial Services Commission notice of fees (see www.jerseyfsc.org/pdf/2017-Registry-Fees-SIR.pdf).

Notaries' fees

Not applicable.

Others

Income tax. Under the current "zero/ten" tax regime, 10% is generally applied to financial services entities (that is, banks, trust company businesses and fund administration businesses). 0% is generally applied to the remaining companies (which are not financial services entities or utility companies). Most companies used in financing transactions are taxed at the 0% rate.

A key exception to the 0% rate of tax is that income earned from land (for example, rental income) and any profits from the development of real estate or income from exploiting Jersey land (such as quarrying), is liable to income tax at the standard rate (currently 20%).

Jersey-based utility companies are taxed at 20%.

Large corporate retailers were brought into the 20% income tax bracket with effect from 1 January 2018. A "large corporate retailer" is a company that meets both of the following tests:

- 60% of its trading turnover is from retail sales to customers in Jersey.
- Retail sales to customers in Jersey are at least GBP2 million per year.

"Retail sales" does not include the provision of services or wholesale supplies.

Capital gains. There is no capital gains tax in Jersey. Capital gains are not ordinarily included in ordinary taxable income.

30. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security interest?

Strategies to minimise the cost of taxes and fees are not usually required given the low tax regime.

REFORM

31. Are there any proposals for reform?

An industry group is currently working on proposed amendments to SIJL 2012 but these are developmental or by way of clarification and do not materially alter the fundamentals explained here. No timeframe for their introduction has yet been set. Similarly, proposals to extend Jersey's SIJL 2012 to encompass and facilitate taking security over tangible movable property (other than via pledge) using the same SIJL 2012 framework that currently applies only to intangible movables is being prepared. No timetable has yet been announced.

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Areas of practice. Banking and finance; real estate; corporate and commercial; restructuring and insolvency.

Professional associations/memberships. Member of the banking lawyers group that worked with the government on the introduction of the Security Interests (Jersey) Law 2012; current member of the group working on a fresh round of improvements to the law.

Recent transactions

- Acting for GE Capital Real Estate in its GBP130 million financing of Blackstone's GBP186m acquisition of St Enoch Shopping Centre, Glasgow from Ivanhoe Cambridge.
- Acting for Morgan Stanley in its GBP60 million financing of Blackstone's acquisition of 1 America Square, London.
- Acting for Oxford Properties in its GBP235 million acquisition of King Edward Court, 10 Paternoster Square, London, home of the London Stock Exchange from MEC.

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Professional qualifications. England and Wales, Solicitor, 2003; Royal Court of Jersey, Advocate, 2006

Areas of practice. Corporate; banking and finance; investment funds and private equity.

Recent transactions

- Acting for Royal Bank of Scotland International, Natwest and various other lenders in relation to a number of Jersey law bilateral and syndicated capital call facility agreements to various private equity, private debt and real estate funds. The largest facility we acted on was well over EUR1 billion.
- Advising an international bank (as agent) and other lenders in relation to significant Jersey security and due diligence matters in relation to a EUR600 million facility to a European private equity fund.
- Acting for Travelport Group as Jersey counsel in relation to a significant debt restructuring including loan notes listed on TISE with a total value in excess of USD2 billion.

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Professional qualifications. Royal Court of Jersey, Advocate, 2003

Areas of practice. Real estate; finance; investment funds and private equity.

Recent transactions

- Advising Goldman Sachs International on the financing of the acquisition of a complex Jersey structure comprising unit trust, protected cell and limited partnership vehicles.
- Advising RS Fund III on the financing and structuring of RS Fund III including the entering into of a EUR125 million multicurrency bridge facility agreement (Roundshield as advisor and Silicon Valley Bank as lender).
- Advising Gaspé House IC on all financing aspects (including external lender, investor debt and investor equity funding) of Gaspé House IC's acquisition of Gaspé House, St Helier, Jersey, the largest ever single commercial property transaction in the Channel Islands.

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Professional qualifications. England and Wales, Solicitor; Royal Court of Jersey, Advocate, 2016

Areas of practice. Banking and finance; corporate; restructuring and insolvency.

Recent transactions

- The creditors committee in relation to the GBP200 million debt restructuring of FatFace, a UK-headquartered apparel retail business.

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- The ad hoc committee of creditors and the company in connection with the financial restructuring of Doncasters Group.
 - The lenders and initial purchasers in respect of super senior revolving credit facilities and related bond issuances for Domestic & General Group.