



ADVISORY
Industry Information

Amending Secured Facilities: Do I Need New Guernsey or Jersey Law Security?

4 May 2020

It is a question which lenders have to consider every time the terms of a facility are amended: will the existing security remain effective following the amendment?

Zoë Hallam and Jon Le Rossignol from our specialist Channel Islands' Banking and Finance team explain the key points to consider.

Step 1 - Examining the definition of secured liabilities

The first step is to examine the definition of "Secured Liabilities" or "Secured Obligations" in the security interest agreement and consider whether the amended obligations fall inside that definition. Most commonly, these definitions reference liabilities secured under a particular set of finance documents. A well drafted definition should refer to those finance documents "as may be amended from time to time" as otherwise it may be difficult to conclude that the existing security continues to secure the obligations as amended. The definition of "Finance Document" itself should also be reviewed to check that it includes any document designated by the borrower and the lender/agent as such, including, importantly, any letter or agreement documenting the proposed amendment.

If the definition of secured liabilities does refer to finance documents as may be amended from time to time, the next step is for the secured party to consider how to interpret it.

Step 2 – Considering how to interpret the definition of secured liabilities

The first issue is whether an amendment is sufficiently fundamental that it can result in the amended agreement being treated as a new agreement (often referred to as the "tipping point" question).

The second issue is whether the purported amendments take the secured obligations beyond the "general purview" of what was contemplated by the parties when entering into the original transaction.

In practice the first and second issues are difficult to distinguish, albeit as the purview principle has its origins in the law relating to guarantees there is arguably a lower threshold to engaging it, particularly in the case of third party security (where the security provider is granting security for the obligations of someone else and will usually not be party to the facility amendment agreement). The consequence for the existing security however, is the same; if the amendment is sufficiently fundamental that it could result in a new agreement, or if the amendment takes the secured obligations beyond the "general purview" of what was originally contemplated, new security is required.



If there is English law security in the transaction, then English counsel will likely also be considering the same issues and the position it takes regarding confirming or retaking security will also be persuasive (particularly as the body of case law around purview is English).

Practical guidance and conclusion

- >> In a market where secured parties are increasingly seeking to examine and rely upon rights under security documents, erring on the side of caution is warranted and will typically be backed by a costs indemnity and further assurance clause in the finance documents.
- >> That said, the commercial background to the transaction, the approach foreign counsel take to any existing foreign security and the secured party's risk appetite will all have a bearing on whether new security is taken or a security confirmation is used.
- >> Closer scrutiny should be given to changes of substance, particularly in the amount or nature of the obligations secured or adding new collateral.
- >> It is possible where appropriate, to 'layer' Guernsey and Jersey security, in other words leave the existing security in place and take new – albeit second ranking but in favour of the same secured party – security over the amended obligations which avoids resetting hardening periods in relation to the original security.
- >> In Jersey, if dealing with security originally created under the Security Interests (Jersey) Law 1983, there will likely be benefits to the secured party of taking new security under the law by which it has been superseded, being the Security Interests (Jersey) Law 2012.

This briefing is not intended to be exhaustive, the precise drafting and circumstances are always key, but hopefully is indicative of the considerations which will need to be given by a secured party. If you need further Guernsey or Jersey law advice specific to your circumstances, please do not hesitate to contact us.

Contacts

Please contact your usual Walkers contact or one of the below for more information.



Alexandra Corner
Partner, Jersey
T: +44 (0) 1534 700 778
E: alexandra.corner@walkersglobal.com



Sam Shires
Partner, Guernsey
T: +44 (0)1481 748 916
E: sam.shires@walkersglobal.com



Nigel Weston
Partner, Jersey
T: +44 (0)1534 700 788
E: nigel.weston@walkersglobal.com



Zoë Hallam
Senior Counsel, Guernsey
T: +44 (0)1481 748 920
E: zoe.hallam@walkersglobal.com



Jon Le Rossignol
Senior Counsel, Jersey
T: +44 (0) 1534 700 716
E: jon.lerossignol@walkersglobal.com

Disclaimer

The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter.