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Industry Information

## Jersey Law - Taking Security Over Intangible Moveable Property

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One of the most common parts of our jobs as offshore Banking & Finance legal specialists is advising on security packages as part of pre-deal structuring and fee quoting. Often we are asked what security should be taken in respect of Jersey entities (and their assets) in the borrower group, how that security is taken and what registration and perfection steps are required.

In keeping with its status as a major international finance centre, Jersey has a modern, flexible regime for taking security over intangible moveable property such as shares, units, bank accounts and contractual rights which is governed by the Security Interests (Jersey) Law 2012 (as amended) ("SIL").

SIL superseded the Security Interests (Jersey) Law 1983 (the "1983 Law") which had governed such matters prior to 2 January 2014. The 1983 Law continues to govern all existing security taken in accordance with it prior to that date unless and until any further collateral is added to an existing 1983 Law security interest agreement which was not within the general purview of the parties when the agreement was originally entered into. In such cases, a new security interest agreement under SIL would usually be entered into by the parties and "layered" over the existing 1983 Law security.

### Security Interests (Jersey) Law 2012

The principal features of SIL are:

1. The ability to secure present and future intangibles with minimum formality through a single agreement.
2. A grantor may grant a valid security interest in relation to obligations owed by a third party (which most practitioners considered had not been possible within the framework of the 1983 Law).
3. A publically accessible registration system for Jersey law governed security interests. The system is fully automated and real-time with registrations and updates requiring completion of simple, on-line statements.
4. Clear and detailed rules as to priority of Jersey law security interests (see further below).
5. A range of efficient, easily exercisable, default remedies for secured parties. The 1983 Law provided simply for the exercise of a power of sale of collateral and the appropriation of monies.

There are a number of specifically excluded security interests to which SIL does not apply, such as rights of set-off and netting, liens and charges arising by operation of law and any interests in ships or aircraft.



## Creation of security

SIL applies only to security interests created by agreement and there are two fundamental steps that must be taken to ensure that a security interest is valid and binding: Attachment and Perfection.

### Attachment

The general rule for Attachment is that a security interest attaches to the relevant collateral when:

1. value has been given with respect to the security interest agreement;
2. the grantor has rights in the collateral or power to grant rights in the collateral to the secured party; and
3. one or both of the following apply:
  - (a) the secured party or someone on its behalf has possession or control of the collateral; and
  - (b) the security interest agreement is in writing, signed and adequately identifies the collateral.

The significance of Attachment is that when the security interest in the collateral attaches, it becomes enforceable against the grantor.

### Perfection

There are then three ways in which the security interest may be perfected. Once perfected, a security interest is valid and binding with respect to third parties, such as other creditors, purchasers and the Viscount (the Executive Officer of the Jersey courts responsible for administering insolvency proceedings).

The three methods of Perfection are registration, possession or control:

1. To perfect a security interest by way of registration, the secured party will file an on-line financing statement. This method may be used in relation to any type of collateral and in the case of contract rights and receivables, is the only method of perfection available. Registrations take the form of notice filings and no underlying transaction documents need be registered. There is a specific confidentiality exemption that allows trustees (other than trustees of a prescribed unit trust) to perfect security other than by filing on the public register. In such cases, the security interest will instead be perfected immediately upon attachment without the need for any further perfection steps to be taken. Registrations may be amended by filing a financing change statement which may be required, for example, to record a partial discharge of collateral from the security.
2. Possession of a “documentary intangible” – which consist of negotiable instruments such as bills of exchange or promissory notes and negotiable investment securities - by or on behalf of a secured party will perfect a security interest that has attached to that documentary intangible.
3. Control of collateral (as specifically defined in SIL) by or on behalf of a secured party will perfect a security interest which has attached to bank accounts (including securities accounts) and investment securities that are certificated but which are not bearer securities.

Possession or control of collateral each give rise to simultaneous attachment and perfection. Therefore, where either exists, there is no strict legal requirement to also register the security interest but it is common market practice to do so.



## Priority

SIL contains detailed rules as to priority of security interests, but the general rules are as follows:

1. a perfected security interest will have priority over an unperfected security interest;
2. among competing, perfected security interests, the first secured party to take a perfection step shall have priority; and
3. among competing, unperfected security interests, the order of attachment will determine priority.

A practical point to note in connection with 2. above is that SIL allows a secured party to take a perfection step (for example, to register its security interest) prior to attachment and it is therefore common practice in Jersey for security interests to be pre-registered and/or for original title documents to be delivered to a secured party in advance of a security interest agreement becoming effective.

There are also specific situations in which a secured party can avail itself of enhanced priority rights under SIL, namely:

1. where one secured party has control of the collateral and competing security holders do not;
2. where a secured party has loaned funds for the purposes of an acquisition of the collateral and therefore has a “purchase money security interest”; or
3. where the secured party is granted a security interest over one of its own accounts (i.e. a charge-back).

SIL also provides for a secured party to subordinate its security interest to any other interest.

## Enforcement

If an event of default occurs and the secured party wishes to enforce the security it must first serve notice on the grantor specifying the default. Where the secured party wishes to appropriate or sell any of the collateral it must give fourteen days’ notice prior to doing so to the grantor, any other secured party with a registered security interest in the collateral and to any other person with an interest in the collateral which has notified the secured party of same (the “Notified Parties”). The Notified Parties have a right to redeem the collateral by fulfilling the relevant secured obligations and also paying the reasonable costs and expenses incurred as part of the enforcement at any time prior to the appropriation or sale of the collateral or the secured party having otherwise acted irrevocably in relation to it.

Unless the security interest agreement provides otherwise the grantor will also have a right to reinstate the agreement if it makes good the situation. This right is usually excluded in the relevant security interest agreement as a matter of course.

Having served notice, and subject to the foregoing rights, the secured party may then do any of the following:

1. appropriate the collateral or proceeds from it;
2. sell the collateral or proceeds from it whether by auction, public tender, private sale or another method;
3. take control or possession of the collateral or proceeds;
4. exercise any rights of the grantor in relation to the collateral or proceeds;
5. 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; and
6. apply any remedy that the security interest agreement provides for as a remedy that is exercisable pursuant to the power of enforcement, to the extent that the remedy is not in conflict with SIL.



If the collateral is to be appropriated or sold the secured party must take all commercially reasonable steps to either determine or obtain (respectively) the fair market value of the collateral and act in a commercially reasonable manner. Following the sale or appropriation (as applicable) the secured party must within fourteen days provide a statement of account to the Notified Parties.

There is no equivalent role of a receiver of assets under SIL or Jersey law generally. Enforcement of a security interest is a self-help remedy carried out by the secured party itself. For further information on the enforcement of Jersey security interests please refer to our note on [enforcement of Jersey security](#).

## Contacts

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