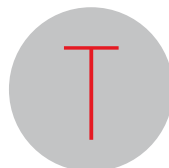


SECURITY

Jersey's new security regime

► By Mark Dunlop



The Security Interests (Jersey) Law 2012 (the "Law") came into full force on 2 January 2014. The Law significantly reforms the way in which security may be taken over Jersey intangible movable property (such as shares in a Jersey company, units in a Jersey property unit trust, bank accounts maintained in Jersey and contracts with Jersey obligors).

The Law is designed to be modern and flexible and to meet the expectations of banks and financiers when entering into secured transactions. The Law is a solid bedrock on which secured financings can be built and is a distinguishing factor in promoting Jersey as a finance centre of choice.

THE PRIOR LAW

The prior law which governed the taking of security over Jersey intangible movable property was the Security Interests (Jersey) Law 1983 (the '1983 Law'). The 1983 Law has served its purpose well. It has facilitated numerous secured transactions and allowed security to be taken over a range of Jersey intangible movable property.

THE NEED FOR MORE FLEXIBILITY

However, whilst the 1983 Law has enabled many secured financings to be successfully concluded, the 1983 Law had certain practical and structural limitations.

‘The Law is a significant reform and enhances the ability of a secured party to take security which meets international standards and expectations’

This generated a desire for reform within the finance industry and the States of Jersey turned to a leading English academic and expert on security law matters, Professor Sir Roy Goode QC, to advise on the new Law.

The new Law is based on the Personal Property Security Acts ('PPSA') of Canada and New Zealand (which are in turn influenced by the American Uniform Commercial Code). This PPSA regime has recently been introduced into Australia. Jersey has adopted this PPSA approach but the Law has been simplified and adapted to meet the particular needs of Jersey's finance industry.

A DUAL REGIME

Under the new Law, it will only be possible to take new security in accordance with the provisions of the Law. However, the 1983 Law will continue to govern all security interests taken before the Law came into force (with some exceptions). The 1983 Law will therefore continue to govern 'old' security agreements and the new Law will govern 'new' security agreements.

KEY FEATURES OF THE LAW

The key features of the Law include:

- The Law establishes a simplified concept of what constitutes a security interest. It is possible to simply create a 'security interest' in the collateral (without having to specify any particular method

of creation such as possession of certificates of title or the assignment of title).

- It is possible to take 'debenture style' security over all of a company's present and future intangible movable property.
- The Law confirms that the attachment of a security interest (i.e. the enforceability of a security interest against the grantor) is not affected if the grantor retains the right to deal with the collateral. This will have particular significance as regards bank accounts where it is common to allow a borrower to make withdrawals from the account unless there is an event of default. Under the 1983 Law, such freedoms can make the security interest vulnerable to challenge. However, under the new Law, this concern no longer applies.
- The Law establishes a clear set of priority rules. A secured party will enjoy more certainty as to how security interests will rank against competing interests.
- The Law introduces a security registration system. The registration system is a fully automated system which is available on-line.
- The Law significantly extends the enforcement remedies available to a secured party.

ENFORCEMENT

A major advantage of the Law is the increased scope of enforcement remedies that a secured party may have on default. Under the 1983 Law, the secured party's only statutory remedy was to exercise a power of sale. Under the Law, the power of enforcement may be exercised in any of the following ways:

- by the secured party appropriating the collateral;
- by the secured party selling the collateral;
- by the secured party taking any of the following ancillary actions: (i) taking control or possession of the collateral; (ii) exercising any rights of the grantor in relation to the collateral; and (iii) instructing any person who has an obligation in relation to the collateral to carry out the obligation for the benefit of the secured party; and
- by the secured party applying any remedy that the security agreement itself provides for as a remedy (but only if this remedy is not in conflict with the Law).

The remedy of appropriation may be particularly attractive to a secured party. Under this remedy, the secured party takes title in and to the collateral, and sets off the value of the appropriated collateral against the secured liabilities. In essence, the secured party





purchases the collateral itself. The secured party becomes the absolute owner of the collateral and will therefore take the risks and rewards of ownership (and may benefit from any increase in value on a subsequent disposal of the asset).

REGISTRATION

A secured party should ensure that its security interest is perfected. The concept of perfection describes the steps that need to be taken to ensure that the security interest is binding against third parties and on the bankruptcy of the grantor.

The failure to perfect a security interest may be severe:

- an unperfected security interest will be subordinate to a perfected security interest;
- a third party who acquires the collateral for value will take the collateral free of an unperfected security interest; and
- an unperfected security interest will be void against the Viscount, the liquidator and the grantor's creditors on the bankruptcy of the grantor.

The Law introduces a system of security registration.

All security interests may be perfected by registration (save for (i) a security interest created by a trustee of a trust (other than a prescribed unit trust) and (ii) a security interest in favour of an intermediary over investment securities held with that intermediary and

which secures the buyer's obligation to pay for the investment securities).

In addition to registration, the Law allows certain security interests to be perfected by the secured party having possession or control of the collateral. Notwithstanding these alternative methods of perfection, it is likely that secured parties will favour registration as a 'belt and braces' approach in relation to perfection.

However, the security register cannot be regarded as being definitive as it may not reveal all security interests granted by a particular person. For example, as a general rule, security interests created under the 1983 Law are 'grandfathered' and so will not be registered on the new security register. By way of further example, the security register will not give details of any security where the secured party is relying solely on possession or control to perfect its security interest.

In practice, searches of the register will become commonplace. Lenders will be interested in any security that has been registered against the relevant grantor. The purchaser of assets will also want to ensure that the asset that it is acquiring is unencumbered.

LAND

The Law does not apply to the taking of security over Jersey real property. The existing laws of Jersey will continue to apply to such security arrangements.

CHATELS - ISLAND IMPACT

The Law does not apply to chattels.

Under the current law of Jersey, security over chattels can only be taken if the secured party is given possession of the relevant chattel. This frustrates the ability of local banks to take security over the plant and machinery of local businesses. The local business will need to retain possession of the equipment in order to trade.

However, there are proposals to extend the Law to cover chattels. When the Law is extended to chattels, this will have a significant impact on local lending transactions.

Banks will for the first time be able to take effective and meaningful security over the assets of a local trading company.

In addition, a key feature of the PPSA regime is that it treats title finance arrangements (such as finance leases, hire purchase agreements and conditional sale agreements) as security interests. The owner of the asset will therefore need to perfect this deemed security interest by registration. This will clearly impact on the business practices of Jersey's finance lessors.

CONCLUSION

The Law is a significant reform and enhances the ability of a secured party to take security which meets international standards and expectations. The ability to take security over all present and future intangible movable property and the enhanced enforcement remedies are significant improvements on the previous security regime.

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Mark is an experienced banking and corporate lawyer and a member of the Jersey banking lawyers group which has commented on the Security Interests (Jersey) Law 2012 through its various drafts and legislative development.

Mark is the author of '*Dunlop on Jersey Company Law*', which is the first comprehensive book to be published on Jersey company law. He is also writing a book on the Security Interests (Jersey) Law 2012 to be published later this year.

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Footnote: This article provides only a general overview of certain matters. This article does not constitute legal advice and should not be relied on by any person as giving any legal advice. You should obtain independent legal advice if you need any guidance or advice on the matters discussed in this article.