Enforcement of pre-2014 Jersey Security Agreements

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The Security Interests (Jersey) Law 2012 (the **2012 Law**) came into force on 2 January 2014, introducing a new regime for creating security over intangible movables under Jersey law. However, many security packages will include security created pursuant to the Security Interests (Jersey) Law 1983 (the **1983 Law**); under the 2012 Law, these will continue to be effective security, albeit still governed by the 1983 Law.

When were pre-2014 Jersey security interest agreements used?

Prior to 2 January 2014, security over Jersey situs assets, such as shares of a Jersey company, units of a Jersey unit trust (such as a JPUT), bank accounts in Jersey or a portfolio of assets held by a Jersey intermediary, was created pursuant to the 1983 Law. Jersey law did not recognise the concept of the floating charge, so it was important to create specific security over material Jersey situs assets, rather than rely on general charging clauses.

How was a Jersey security interest created under the 1983 Law?

A Jersey security interest over shares or other securities was created by either:

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A Jersey security interest over a bank account was created:

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A Jersey security interest over rights in a custody account or a custodian agreement was created by title to such rights being assigned to the secured party or its trustee or agent (together with the giving of written notice to the counterparty).

The 1983 Law is silent as to the creation of third party security, so it was market practice for the collateral provider to enter into a guarantee or covenant to pay to create a primary obligation in favour of the secured party.

There were no perfection steps (such as public registration of security as under the 2012 Law) to be completed in Jersey under the 1983 Law other than the giving of written notice as described above.

What are the rights of a secured party on enforcement of a pre-2014 security?

Upon the occurrence of an event of default (as specified in the security agreement), the power of sale arises. However, such power of sale is not exercisable unless the secured party has served written notice on the debtor specifying the event of default complained of. If the particular event of default is "capable of remedy", the notice must require the debtor to remedy it, and the power of sale is exercisable only if the event of default is not remedied within 14 days of receipt of the notice.

Under the 1983 Law, an order of the Royal Court is required before the power of sale is exercisable (save where the collateral is money, negotiable instruments or money in a bank account). However, this requirement can be, and invariably is, waived under the provisions of the security agreement.

It is notable that, unlike the 2012 Law, the 1983 Law does not give the secured party a power of appropriation or foreclosure (save where the collateral is derived from money, negotiable instruments or money in a bank account). In those circumstances, the secured party therefore needs to sell the collateral to a separate legal entity, although there is no restriction on this entity being connected to the secured party.

The secured party is under a duty to take all reasonable steps to ensure that the sale is made within a reasonable time and for a price corresponding to open market value at the time of sale. The 1983 Law is silent as to the manner of the sale; this could include private sale or auction. The power of sale applies to collateral held as possessory security as well as security by way of assignment of title.

Upon the sale (or appropriation in the case of collateral derived from money, negotiable instruments or money in a bank account), the proceeds are applied as follows:

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What is the effect of the debtor's insolvency on a Jersey security interest?

Désastre is the usual Jersey insolvency procedure which can be commenced by creditors. On a declaration of désastre, the Viscount, a court official, takes title and possession of the debtor's property. The 1983 Law does not prevent this, but the declaration of désastre does not affect the power of a secured party to realize or otherwise deal with the collateral. The Viscount has the power to apply to the Royal Court for an order for the rights of the secured party in the collateral to be vested in him. This is only likely to be exercised if the secured party is dilatory in enforcing its security, to the extent that this has a detrimental effect on the administration of the désastre.

A Jersey company which is insolvent may be wound up voluntarily under the Companies (Jersey) Law 1991, pursuant to a creditors' winding up. The directors of an insolvent Jersey company will often take this option to avoid potential personal liability for wrongful trading. As with désastre, the commencement of a creditors' winding up does not affect the power of a secured party to realize or otherwise deal with the collateral.

Jersey law also recognises the concept of an irrevocable power of attorney given for the purpose of facilitating the exercise of the powers of a secured party under the 1983 Law or under the provisions of a security agreement. The Powers of Attorney (Jersey) Law 1995 provides that, in such circumstances, an irrevocable power of attorney (a) survives the bankruptcy of the donor, (b) has effect notwithstanding any law which, on bankruptcy, vests property of the donor in any other person (such as the Viscount on a désastre), and (c) allows the secured party to act as if that other person had given such power of attorney. It is usual practice for Jersey law security agreements to contain an irrevocable power of attorney.

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