

The Security Interests (Jersey) Law 2012

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| Introduction

The creation of security over intangible movables under Jersey law is now governed by the Security Interests (Jersey) Law 2012 (the SIJL), which came fully into force on 2 January. This replaces the Security Interests (Jersey) Law 1983 (the old Law).

| What are the main changes?

More flexible methods of creation

The SIJL provides for creation of security by:

| Control

(a) in the case of a bank account, (i) the account being transferred into the name of the secured party, (ii) the account bank agreeing to act on the secured party's instructions, (iii) title to the account being assigned to the secured party or (iv) the secured party being the account bank;

(b) in the case of a custody or securities account, (i) the account being transferred into the name of the secured party, (ii) the intermediary maintaining the account agreeing to act on the secured party's instructions or (iii) the secured party being the intermediary;

(c) in the case of a certificated investment security, the secured party either being registered as the holder or taking possession of the certificate representing such investment security;

| Possession

(d) in the case of a negotiable instrument or negotiable investment security, the secured party taking possession of the instrument or relevant certificate; and

Description and registration

(e) description of the collateral without the requirement for any title transfer, provided that the security interest is registered at the Jersey security interests register.

The SIJL introduces a new centrally-maintained online register, accessible to the public

Registration will be an integral step for perfection where security is taken by the collateral being described in the security agreement (rather than by possession or control). Searching the register will become relevant for new lenders. There is an important carve out from the registration regime, where the grantor is the trustee of a private trust.

Clearer priority between competing secure parties

The SIJL sets out clear principles on priority, including that control security interests will have priority over security interests created by description and by registration. This gives comfort to secured parties on enforcement.

Charge back

The SIJL expressly provides that an account bank can take security over a deposit account held at it by the grantor, and that a custodian can take security over its obligation to redeliver securities and money to the holder of the securities account.

Power to take security over after-acquired collateral

The old Law did not permit any equivalent to the English floating charge. Rather than permitting a floating charge per se, the SIJL allows a security interest to attach to all intangible movables acquired from time to time by the debtor.

Clarification as to creation of third party security

The old Law was unclear as to the validity of third party security, leading to the market practice of requiring a third party security provider to enter into a limited recourse guarantee in respect of the primary debtor's obligations. The SIJL makes it clear that third party security is permitted without the need for a guarantee.

Clarification as to the level of control ceded to the grantor

Some concerns with the old Law had been raised as to whether the grantor being given a right to deal with the collateral could impact on the validity of security. The SIJL makes it clear that the grantor can retain the right to deal with the collateral without the validity of the security interest being affected.

Wider powers of enforcement

Under the old Law, a secured party's rights on enforcement were limited to a power of sale. The SIJL permits a power of appropriation and step-in rights, as well as making it clear that the secured party may take wider ancillary actions in support of enforcement.

Removal of the 14 day statutory grace period on enforcement

The old Law provided that, where the event of default complained of is "capable of remedy", the power of sale is only exercisable after the expiry of a 14 day period after notice is served on the grantor. The SIJL allows this period to be excluded by agreement with the grantor, although it will be necessary to check the security interests register for interests of third parties, and to confirm no notices of such interests have been directly received.

What happens to security interests created under the old law?

Transitional provisions apply so that, notwithstanding that the SIJL is now in force, an existing security interest will continue to be effective as a valid security interest under the old Law. However, if new collateral beyond that envisaged in the original agreement is added to the old security interest, it will be deemed to be a security interest created under, and subject to, the SIJL.

It is therefore important for a secured lender to be aware of the consequences of any such amendments, given that it should (a) make sure that any amendments to the security agreement include any provisions necessary to take advantage of the SIJL and (b) check whether, depending on the nature of the collateral, any registration of the security is necessary in order to ensure continued perfection.

What about tangible movables?

The old Law applied only to security over intangible movables. This will not be changed by the SIJL in its initial form. However, the second stage of the process of updating the SIJL will be extended to tangible movables.

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