

Subscription-secured financings: enforcements vs perfection - Jersey

Insights - 29/10/2019

Subscription-secured financings in Jersey: enforcement vs perfection

This article formed part of a report originally produced with Haynes and Boone LLP titled [Subscription-Secured Financings: Enforcement vs Perfection \(European Deals Edition\)](#). You can see links to Ogier's other chapters below and find the original report [here](#).

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Creation of security in Jersey

Security Interest Agreements

For a subscription facility, we would typically expect security to be taken over (i) rights of the general partner or manager to make capital calls to investors under the LPA (the “Capital Call Security”); and (ii) the bank account(s) into which capital call proceeds are paid (the “Account Security”). If the limited partnership is a Jersey limited partnership and the relevant bank account is in Jersey, this security package can be combined into one Jersey security interest agreement.

Capital Call Security

In Jersey, security created under a Capital Call Security will be perfected by way of registration of a financing statement on the Jersey Security Interests Register (“SIR”) maintained by the Jersey Financial Services Commission (“Registration”).

Account Security

Security granted over any Jersey bank account into which capital call proceeds are paid, will be perfected either by:(a) control, by:(i) the deposit account being transferred into the name of the secured party with the written agreement of the grantor and the account bank;(ii) the grantor, the secured party and the account bank agreeing in writing that the account bank will comply with instructions from the secured party directing the disposition of funds in the deposit account;(iii) the deposit account being assigned (by way of security) to the secured party by instrument in writing signed by or on behalf of the grantor and notice is given in writing to the account bank; or(iv) the secured party being the account bank,(together, “Control”); or (b) Registration.

Notices

Capital Call Security

There is no requirement to send notification to or obtain acknowledgment from investors to create or perfect security over the uncalled investor commitments in Jersey. However, we would advise a secured party to require that the fund give notice of the creation of such security to its investors either contemporaneously with the execution of the security interest agreement or with the next communication sent to the investors after completion/the first drawdown. Ideally, key or large investors would also acknowledge such notice and provide certain funding confirmations directly to the secured party but this would depend on the relative negotiating positions of the bank and the borrower.

Account Security

Account security perfected by way of Control, will have priority over security perfected by Registration only. As such, although Registration alone would be sufficient to achieve a perfected security interest, given the priority implications, we recommend that perfection by way of Control is achieved in addition to Registration. Control over deposit accounts held with a third-party account bank, is created and perfected by sending a notice to the third party account bank which satisfies limbs (ii) and (iii) of the definition of Control (above), signed by the grantor and the secured party, and the secured party receiving an acknowledgement signed by the third party account bank wherein the account bank agrees to, among other things, comply with instructions from the secured party directing the disposition of funds in the account. The notice should also contain a confirmation from the third party account bank that it has not received any prior notices of any security interest over the bank account(s).

Most account banks have their own form of notice and acknowledgement which they are reluctant to negotiate. Therefore, similar to the English position, borrowers should liaise with their account banks as early on in the transaction as possible in order to avoid delays in the transaction.

Security registration

As discussed above, it is market practice to perfect Jersey security interests by Registration (even if the security is also perfected by another means such as control).

Enforcement

The power of enforcement in respect of a security interest created under Jersey law may be exercised following (i) an event of default under the finance documents (or relevant negotiated trigger in the security interest agreement); and (ii) the secured party having served written notice on the grantor specifying the event of default complained of. A secured party has wide enforcement powers under the Security Interests (Jersey) Law 2012 (“SIJL”) including the power to:

(a) appropriate the collateral;

(b) sell the collateral; or

(c) take any of the following actions:

(i) take control or possession of the collateral;

(ii) exercise the rights of the grantor in relation to the collateral;

(iii) instruct any person who has an obligation in respect of the collateral to carry out such obligation for the benefit of the secured party;

or (iv) apply any remedies provided for by the security agreement to the extent that such remedies do not conflict with the SIJL.

Enforcement would be effected through the secured party and not, for example, by a receiver appointed on his behalf (Jersey does not have the concept of receiver or administrative receiver) nor would any administrator appointed to a company have the power to realise assets subject to the security on behalf of the secured party.

The proceeds of any sale and/or appropriation must be applied by the secured party by reference to a statutory waterfall which in principle provides for the payment of the secured debt following payment of any costs and fees, with any surplus to be distributed in accordance with the provisions of the SIJL.

In an insolvency scenario, where a grantor becomes insolvent (or subject to a *désastre*) or its property is otherwise subject to proceedings consequent upon insolvency (or on a declaration of *désastre*), the secured party may realise or otherwise deal with the collateral as if such event had not taken place (i.e. there is no stay of enforcement proceedings).

Power of attorney

It is usual practice for Jersey law security interest agreements to contain an irrevocable security power of attorney. Such power of attorney (a) survives the insolvency of the grantor; and (b) has effect, notwithstanding any statute which vests the property of the grantor in any other person on insolvency; the secured party shall be entitled to act as if the power of attorney had been given also by the person in whom the property vests.

Due Diligence

In respect of any potential obstacles to the enforcement of security in Jersey, the LPA and any side letters should be reviewed carefully to ascertain as to whether there are any provisions which may affect the ability to create or enforce the security. Among other provisions, the ability to assign the rights to make capital calls and to receive the proceeds therefrom must be identified and any restrictions on the assignment or exercise of such rights should be amended or removed. Further, the LPA should not prohibit someone other than the general partner or manager from making a capital call to investors. In addition, any contractual provisions in the LPA which allow investors to claw back some or all of capital contributions made to the general partner or manager should be considered so that the scope and extent of the rights being assigned pursuant to the security agreement is clear. Similarly, the LPA should not restrict the payment of the proceeds of capital calls directly to the secured party following enforcement of the security, i.e. by way of set-off or counterclaim. As per the position in England, it should be clear in the finance documents that any payment obligations the fund and a general partner or manager has to investors should be subordinated in favour of repayments to the secured party (in the event that such wording is not included in the LPA). Any requirements in relation to the service of notice on investors should be noted and complied with.

In the event that investors have not expressly agreed to meet a capital call request from the secured party in the fund documents, the secured party can, on enforcement, exercise the irrevocable power of attorney contained in the Jersey security document to 'step into the shoes' of the general partner or manager grantor and issue a capital call notice. Unlike the position in England, a Jersey law governed security document which contains a power of attorney does not require to be executed as a deed.

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