# The Acquisition and Leveraged Finance Review

Editor
Christopher Kandel

Law Business Research

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# The Acquisition and Leveraged Finance Review

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# EDITOR'S PREFACE

Acquisition and leveraged finance is a fascinating area for lawyers, both inherently and because of its potential for complexity arising out of the requirements of the acquisition process, cross-border issues, regulation and the like. It can also cut across legal disciplines, at times requiring the specialised expertise of merger and acquisition lawyers, bank finance lawyers, securities lawyers, tax lawyers, property lawyers, pension lawyers, intellectual property lawyers and environmental lawyers, among others.

*The Acquisition and Leveraged Finance Review* is intended to serve as a starting point in considering structuring and other issues in acquisition and leveraged finance, both generally but also particularly in cases where more than just an understanding of the reader's own jurisdiction is necessary. The philosophy behind the sub-topics it covers has been to try to answer those questions that come up most commonly at the start of a finance transaction and, having read the contributions, I can say that I wish that I had had this book available to me at many times during my practice in the past, and that I will turn to it regularly in the future.

Many thanks go to the expert contributors who have given so much of their time and expertise to make this book a success; to Nick Barette, Gideon Roberton and Shani Bans at Law Business Research for their efficiency and good humour, and for making this book a reality; and to the partners, associates and staff at Latham & Watkins, with whom it is a privilege to work. I should also single out Sindhoo Vinod and Aymen Mahmoud for particular thanks – their reviews of my own draft chapters were both merciless and useful.

**Christopher Kandel**
Latham & Watkins
September 2014

# Chapter 10

# GUERNSEY

*Christopher Jones*[1]

## I OVERVIEW

Leveraged acquisitions involving Guernsey entities are typically financed through a mixture of bonds and term loans, with ongoing working capital requirements provided through cash flow or asset-backed revolving facilities entered into concurrently with the acquisition.

Financing utilising term loans and revolving facilities is typically guaranteed by each material subsidiary of the borrower and secured by specified Guernsey assets of the borrower and each guarantor, together with an English law debenture over any material assets of the Guernsey entities situated in England and Wales (or equivalent security over assets situated elsewhere).

In Guernsey, primarily lending is from UK and international banks, funds and other financial institutions to Guernsey structures that hold Guernsey and non-Guernsey *situs* assets, including UK real estate. Lending from Guernsey banks tends to be limited to transactions involving local assets (including real estate).

Guernsey has been an international finance centre for over 50 years and remains an important financial centre. For example, the overall value of funds under management and administration in Guernsey stands at £264 billion[2] with 830 Guernsey funds, the total value of deposits held by banks in Guernsey is £90.5 billion[3] and 761 international insurers[4] are licensed in the Island.

1 Christopher Jones is a managing associate at Ogier.

2 Guernsey Finance, as at the end of March 2014.

3 Ibid.

4 Guernsey Finance, as at the end of May 2014.

## II REGULATORY AND TAX MATTERS

### i Licensing

Financial institutions that are lending to (as opposed to deposit taking from) Guernsey entities (and that are not carrying on or holding themselves out as carrying on certain regulated business in or from within the Bailiwick of Guernsey) are not required to be licensed by the Guernsey Financial Services Commission (Commission), qualified or otherwise entitled to carry on business in the Bailiwick in order to enter into a loan agreement.

Lenders that are accepting a deposit in the Bailiwick of Guernsey in the course of carrying on, whether in the Bailiwick of Guernsey or elsewhere, a deposit taking business, will be required to be appropriately licensed by the Commission in accordance with the provisions of the Banking Supervision Law.[5] Where such a licence is not required, a local lender may be required to be appropriately registered in accordance with the provisions of the Registration of Non-Regulated Financial Services Businesses Law,[6] unless they qualify for one of the exemptions available under such law.

### ii Sanctions

Financial services businesses are required to comply with local laws and regulations concerning money laundering, terrorist financing and related offences. A risk-based approach to risk management is in place involving risk identification and assessment, risk mitigation, risk monitoring and policies, procedures and controls. International sanctions are also applied in Guernsey and, as they are often revised, they should be reviewed on an ongoing basis.

### iii Withholding taxes

Generally, no withholding tax is imposed in respect of Guernsey taxation on interest paid to a recipient who is not liable to Guernsey income tax.

### iv Channel Islands Securities Exchange (CISE) debt listings

The CISE (formerly the CISX) has seen a steady increase over the past few years in the listing of debt securities. Typically, the issuer of debt securities would be a UK tax-resident company issuing intercompany loan notes in connection with a private equity transaction. Historically, private equity sponsors have tended to deal with withholding tax issues by using double tax treaty vehicles located in jurisdictions such as Luxembourg. However, following the *Indofood* case[7] and changes to HMRC's approach to clearances and guidance on beneficial ownership and double tax treaties, it has become more popular for debt listings to be used as a cost-effective way to benefit from the quoted Eurobond exemption.

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5 Banking Supervision (Bailiwick of Guernsey) Law, 1994, as amended.

6 Registration of Non-regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008, as amended.

7 *Indofood International Finance Limited v. JPMorgan Chase Bank NA London Branch* [2006] EWCA Civ 158.

In December 2013, the UK Inland Revenue (now HM Revenue & Customs) designated the CISE as a recognised stock exchange under Section 841 of the UK Income and Corporation Taxes Act 1988. The predecessor exchange had also been so designated for many years. The designation is significant because qualifying debt securities listed on the CISE are eligible for the 'quoted Eurobond exemption'. This exemption allows an issuer within the UK tax net to make payments of interest on the listed securities gross without deduction for tax.

To qualify as quoted Eurobonds securities have to meet the following conditions prescribed by UK tax legislation; namely, a quoted Eurobond means any security that is issued by a company, is listed on a recognised stock exchange and carries a right to interest.

To proceed with a CISE listing, the issuer needs to appoint a sponsor to assist with the listing procedure and deal with the CISE.[8]

The CISE is licensed to operate as an investment exchange under the Protection of Investors Law,[9] and is regulated and supervised by the Commission. In December 2013, the CISE was approved as an affiliated member of the International Organisation of Securities Commissions and became an associate member of the International Capital Market Services Association.

## III SECURITY AND GUARANTEES

### i Guarantees

Guarantees of obligations are typically provided by all subsidiaries and often the direct or indirect holding company of the borrower.

*Corporate benefit*

The directors of a Guernsey company granting a guarantee must consider the corporate benefit for the Guernsey guarantor. A director of a Guernsey company has a duty of care to act in good faith in the best interests of the company. Therefore, where the corporate benefit for the Guernsey company providing a guarantee is doubtful, it is usual practice to seek a prior unanimous shareholder resolution approving the company's entry into the guarantee.

*Customary rights*

There are two Guernsey law rights, known as the *droit de discussion* and the *droit de division*, which may qualify the enforceability of a Guernsey company's obligations under a guarantee in the event of proceedings being taken against the company in the Guernsey courts in respect of such document. Under the *droit de discussion*, a guarantor of another person's obligations may require the obligee of such obligations to exhaust his or her remedies against such other person before seeking recourse from the guarantor. Under the *droit de division*, a co-obligor may require the joint obligations of the various co-obligors to be divided equally so that they become several obligations only of each co-obligor. Both these rights are often expressly waived in the guarantee document.

8 Ogier Corporate Finance Limited is a full listing member of the CISE, with the largest market share of debt listings where it acts as listing sponsor.

9 Protection of Investors (Bailiwick of Guernsey) Law 1987, as amended.

The provision of a guarantee is potentially subject to characterisation as a vulnerable transaction as discussed below.

***Financial assistance***

The giving of financial assistance (including the provision of a guarantee) by a Guernsey company or its subsidiaries to enable a person to acquire shares in such company is permitted under the Companies Law.[10] Such financial assistance is deemed to be a distribution and the procedure in the Companies Law for making a distribution must be followed. In summary, this requires the board of directors of the Guernsey company to be satisfied (and to certify) on reasonable grounds that the company will, immediately after making the distribution, satisfy the solvency test. Any other requirement in the company's memorandum and articles of incorporation must also be satisfied. A company satisfies the solvency test if the company is able to pay its debts as they become due ('cash flow test') and the value of the company's assets is greater than the value of its liabilities ('balance sheet test'). The Companies Law also makes it clear that if, after a distribution is authorised and before it is made, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the distribution is made, satisfy the solvency test, any distribution made by the company is deemed not to have been authorised.

***Secuirty trusts and parallel debt***

Guernsey generally follows English trusts law principles and has a favourable statutory regime under the Guernsey Trusts Law[11] in respect of Guernsey trusts and recognition of the enforceability of foreign trusts in accordance with their proper law (as long as the foreign trust does not purport to do anything contrary to Guernsey law, does not confer or impose any right or function the exercise or discharge of which would be contrary to Guernsey law or is not declared immoral or contrary to public policy by the Royal Court of Guernsey). Therefore, Guernsey law recognises the concept of security trusts (which are usually governed by English law or New York law) and there is no need to include parallel debt provisions in finance documents to which Guernsey are a party.

**ii Security**

As a matter of Guernsey law, security over intangible moveable property situated in Guernsey (other than a lease) may be taken pursuant to the 1993 Law.[12]

Guernsey security interests under the 1993 Law are most commonly taken over the shares of Guernsey companies, Guernsey bank accounts held with a Guernsey account bank, Guernsey securities accounts held with a Guernsey custodian and receivables in respect of intercompany loans. 'Floating charges' and debentures are not capable of being created under Guernsey law. There is, however, no restriction *per se* on a Guernsey entity granting a floating charge, debenture or other security over collateral held outside Guernsey (assuming that the security interest over the collateral is valid, binding and

10 Companies (Guernsey) Law, 2008, as amended.

11 Trusts (Guernsey) Law, 2007, as amended.

12 Security Interests Guernsey Law, 1993, as amended.

enforceable as a matter of its governing law (and, if different, the law of the jurisdiction where the collateral is situated)).

The giving of financial assistance by a Guernsey company or its subsidiaries to enable a person to acquire shares in such company includes the grant of security, and would therefore be treated as a distribution as discussed above.

Similarly, as with the provision of a guarantee, the grant of security may give rise to corporate benefit issues and is potentially subject to characterisation as a vulnerable transaction as discussed below.

***Security creation***

Security under the 1993 Law must be created by one of the following methods:

*a* a security interest in securities is created where the secured party (or some person on its behalf other than the debtor or some person on behalf of the debtor) has possession pursuant to a security agreement of the certificates of title to such securities. 'Securities' includes, *inter alia*, shares, stock, debentures, loan stock, bonds, units of a unit trust scheme and other instruments that confer rights in, options to acquire or dispose of, and rights under any contract for the acquisition or disposal of the same. It does not include negotiable instruments.

For the purpose of the 1993 Law, a 'certificate of title' means any document of title whereby a person recognises the title of another to securities issued or to be issued by it. This is generally accepted in Guernsey to include share certificates for limited liability companies. To have possessory security over securities in accordance with the 1993 Law, the secured party (or someone on its behalf other than the debtor or some person on behalf of the debtor) must retain possession of the original share or unit certificates for as long as the secured liabilities are outstanding. If possession of the original certificates of title is lost, the security may terminate as discussed below;

*b* a security interest in a policy of life assurance is created where the secured party (or some person on its behalf other than the debtor or some person on behalf of the debtor) has possession pursuant to a security agreement of the policy;

*c* a security interest in a bank account is created where the bank that holds such account for its customer is the secured party and that bank has control of the account pursuant to a security agreement, and its customer and the debtor are one and the same person; or

*d* a security interest in any intangible moveable property (other than a lease) is created where the secured party (or some person on his or her behalf other than the debtor or some person on behalf of the debtor) has title to the collateral pursuant to a security agreement and, where that title is acquired by assignment, has given express notice in writing to the person from whom the debtor would have been entitled to claim the collateral. The reference to title is a reference to title acquired in the case of a bearer certificate or a negotiable instrument, by delivery with any necessary endorsement; and in any other case, by assignment of the collateral (with or without a proviso or condition for reassignment).

Where title is to be acquired by assignment (which, in the case of shares of a Guernsey company, includes the name of the secured party being entered in the register of

members of the company), until express notice has been given there will not be an effective assignment of title to the securities, and security by assignment of title will not be created pursuant to the 1993 Law. There is no deemed receipt provision of such notice in Guernsey, and it would be typical to require an acknowledgement of receipt of such notice. The 1993 Law additionally provides that if a person so notified is aware either that the assignment is disputed or that there are opposing or conflicting claims, he or she is to give notice of that fact to the assignee.

As it may not be commercially attractive to the secured party to take title to securities, security in respect of shares of a Guernsey company is typically created by possession of the certificates of title as described above together with undated executed instruments of transfer. In addition, the security agreement typically also includes a contractual obligation on the debtor to complete an assignment of title at a future date (e.g., on an event of default). Further assurance language and a power of attorney in favour of the secured party are usually included in the security agreement to support this contractual obligation.

Under the 1993 Law, a security agreement must:

*a* be in writing;
*b* be dated;
*c* identify and be signed by the debtor;
*d* identify the secured party;
*e* contain provisions regarding the collateral sufficient to enable its precise identification at any time;
*f* specify the events that are to constitute events of defaults; and
*g* contain provisions regarding the obligation payment or performance of which is to be secured sufficient to enable it to be identified.

Typically, the Guernsey security agreement would also contain a grantor covenant to pay in respect of the obligations the performance of which is to be secured. Other than these requirements, the 1993 Law provides that a security agreement may be in such form, and may contain or refer to such matters, as may be agreed between the parties.

Given that the 1993 Law refers to the requirements for creation of security, in Guernsey the relevant issue is creation of security as opposed to 'perfection' of security. There is currently no public register of security interests, charges or mortgages in Guernsey (save in respect of real property situated in Guernsey, ships in respect of which title has been entered on the Registry of British Ships maintained in Guernsey and certain Guernsey registered aircraft assets).

A security agreement may be created before or after the obligation whose payment or performance is to be secured by it comes into existence provided that, pursuant to the 1993 Law, the security agreement must contain provisions regarding the obligation sufficient to enable it to be identified.

***Security enforcement***

A power of sale or application of the collateral under the 1993 Law arises after an event of default (as specified in the security agreement) occurs. The power of sale is not exercisable unless the secured party has served on the debtor a notice specifying the particular event of default complained of. For the purposes of enforcement, a power of application must

be exercised on the same basis as a power of sale, and the proceeds of its exercise must be applied in the same way as the proceeds of a sale.

***Discharge and cancellation of security interests***

The 1993 Law makes provisions for the discharge and cancellation of security interests. Subject to any other rights or interests of which the secured party has notice and, unless the security agreement expressly provides otherwise, upon the discharge, payment or other performance of the obligation payment or performance of which is secured, the security interest terminates forthwith and the secured party must transfer to the debtor the certificates of title or policy, control of the relevant account or title to the relevant collateral, as the case may be. The secured party must also provide the debtor with a certificate of discharge, either partial or full, of the security interest.

In addition, for the avoidance of doubt, the 1993 Law sets out that when a security interest taken under the 1993 Law also ceases:

*a* a security interest created by possession in respect of securities and policies of life assurance terminates when the secured party (or some person on his or her behalf not being the debtor or some person on behalf of the debtor) ceases to have possession pursuant to the security agreement of the certificates of title to securities, or policy, as the case may be;

*b* a security interest created in a bank account where the bank holding the debtor's account is the secured party and that bank has control of the account terminates when the bank being the secured party ceases to have control pursuant to the security agreement of the account; or

*c* a security interest created in any intangible moveable property (other than a lease) where the secured party (or some person on his or her behalf other than the debtor or some person on behalf of the debtor) has title to the collateral pursuant to a security agreement terminates when the secured party ceases to have pursuant to the security agreement title to the collateral;

*d* a security interest ceases when the Royal Court so orders under certain provisions of the 1993 Law.

Accordingly, a secured party should ensure that its security interest is not terminated by ceasing to have possession of the relevant certificates of title or policy, control of the relevant account or title to the relevant collateral (depending on the method of creation of security).

***Vulnerable transactions***

The provision of a guarantee and the grant of security are potentially subject to characterisation as a vulnerable transaction as discussed below.

***Preferences***

The provision of a guarantee or the grant of security can be set aside as a preference if:

*a* the guarantee was provided or the security was granted by a Guernsey company to a creditor, surety or guarantor no more than six months (or two years if the lender is 'connected') prior to the commencement of the liquidation of the Guernsey company;

*b* the Guernsey company was insolvent at the time or became insolvent as a result of the provision of the guarantee or the granting of the security;

*c* by providing the guarantee or granting the security the Guernsey company improved the lender's position in the Guernsey company's insolvency; and

*d* the Guernsey company was influenced by a desire to prefer the lender.

The three principal issues here are:

*a* insolvency of the security provider or guarantor: on the basis that the relevant company is unable to pay its debts as they fall due, that the relevant company's assets are less than its liabilities, or that the relevant company fails to satisfy one of the regulatory solvency tests set down by supervisory legislation (for supervised companies[13] only);

*b* desire to prefer: this is likely in Guernsey to follow the English line of cases where the court looks at the company's controlling minds to ascertain whether there is something more than an intention to prefer but a real subjective wish to improve the creditor's position with no real commercial purpose behind that wish; and

*c* connected party: there is a statutory test to ascertain whether the creditor is connected to the company. If the creditor is connected, then the six-month period set out above is extended to two years, and the 'desire to prefer' test set out above is reversed so that it is up to the creditor to rebut the statutory presumption that the company did desire to prefer it.

***Transactions at an undervalue or fraudulent preference***

Guernsey does not have a developed modern jurisprudence in respect of the setting aside of transactions that are at an 'undervalue' or that may constitute a 'fraudulent preference'; nor are these concepts included in the statutory law. Guernsey's customary law, however, recognises that a transaction may be voidable at the instance of creditors where it is effectively a transaction at an undervalue or constitutes a fraudulent preference.

In addition, the Jersey courts have applied customary law principles in cases including the Pauline action to provide victims of fraud with rights in certain circumstances to revoke transfers by fraudsters of the victim's assets to a third-party recipient. The elements of the cause of action differ depending on whether the transfer is at full value (when the transfer is known as an *aliénation onéreuse*) or at less than full value (when the transfer is known as an *aliénation lucrative*). Although the Guernsey courts have not ruled on such matters (certainly in recent times), the customary law principles invoked by the Jersey courts in such actions and the reasoning of the Jersey courts would be persuasive to the Guernsey courts should they be called upon to consider similar issues.

13 Generally, companies regulated under any of the Protection of Investors (Bailiwick of Guernsey) Law, 1987, the Insurance Business (Bailiwick of Guernsey) Law, 2002, the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002, the Banking Supervision (Bailiwick of Guernsey) Law, 1994 and the Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2000, each as amended.

## IV PRIORITY OF CLAIMS

### i Priority

The 1993 Law provides that priority between security interests in the same collateral is determined by their order of creation (although it is rare in practice that there will be successive security interests in the same collateral). However, a secured party may postpone his or her rights.

The 1993 Law also provides that upon a debtor becoming insolvent, or upon his or her affairs being declared in a state of *désastre*, where the secured party does not have title to the collateral, to the extent that the collateral is sufficient, the amount due to the secured party in respect of the relevant security interest shall be paid in priority to all other claims. In addition, the power of the title-holding secured party to realise or otherwise deal with the collateral is unaffected by the debtor either becoming insolvent or his or her property being subject to any other judicial arrangement or proceeding consequent upon insolvency or a declaration of *désastre*.

In addition, where the debtor has been declared *en désastre*, the arresting creditor may apply to the Royal Court of Guernsey for an order vesting in him or her the rights of the secured party to the collateral and directing that it be sold or applied by HM Sheriff in accordance with the 1993 Law. The proceeds of that sale or application of the collateral are then applied by HM Sheriff in accordance with the 1993 Law. Subject to the above, the Royal Court of Guernsey may make an order directing such vesting and sale upon such terms and subject to such conditions as the Royal Court of Guernsey thinks fit. In our view, an arresting creditor is most likely to make such application to the Royal Court of Guernsey if the secured party is acting in a way that the arresting creditor considers detrimental to the conduct of the *désastre* (e.g., by the secured party being dilatory in exercising his or her power of sale or application).

Should an event of default occur under a security agreement, a power of sale or application will arise under the 1993 Law that prescribes certain steps to be taken upon the exercise of a power of sale or application. The order in which the proceeds of sale or application must be applied is as follows:

*a* in payment of the costs and expenses of the sale;

*b* in discharge of any prior security interest (such priority being determined by the order of creation);

*c* in discharge of all monies properly due in respect of the obligations secured by the security agreement;

*d* in payment, in due order of priority, of secured parties whose security interests were created after his or her own, and on whose behalf (as well as on his or her own behalf) he or she was, immediately before exercising his or her power of sale or application, holding possession of documents or exercising control of collateral (whether by him or herself or through some other person on his or her behalf) for the purposes of creating security pursuant to the 1993 Law; and

*e* as to the balance (if any remains) in payment to the debtor, or in the event that the debtor has become insolvent or been subjected to any other judicial arrangement consequent upon insolvency, to the Sheriff or other proper person.

The 1993 Law is silent on the priority of a secured party holding foreign law security in respect of non-Guernsey *situs* collateral.

A liquidation in Guernsey would not, as a matter of Guernsey law, affect the enforcement of effective Guernsey security to any extent, although it should be noted that a company's shares may not be transferred after the commencement of its winding up without the sanction of the liquidator. To the extent that there is an application on foot in Guernsey for an administration order (or such an order is in force), then a general moratorium is in force. However, rights of set off and secured interests and rights of enforcement thereof are, subject to the potential vulnerable transactions discussed above, unaffected by the moratorium.

### ii Subordination and intercreditor arrangements

Contractual subordination is permitted under the Companies Law, which provides that the company's assets in a winding up shall be realised and shall be applied in satisfaction of the company's debts and liabilities *pari passu* subject to the provisions of:

*a* the Companies Law and any rule of law as to preferential payments;

*b* any agreement between the company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors; and

*c* any agreement between the company and any creditor thereof as to set off.

Where more than one entity requires the benefit of security in respect of an asset situated in Guernsey, generally a security trustee (usually pursuant to an English or New York law trust) is appointed and priority between such entities is regulated by way of an intercreditor agreement.

### iii Set off

The 1979 Law[14] provides that where there is, for the time being, an agreement (whether written or oral, and whether express or implied) in force whereby, in respect of mutual dealings between them, any debt from one party is to be set off against any debt from the other party, the effect of that agreement is, unless the parties have expressly or by implication agreed to a different effect that the only action that may be taken at any time in relation to what would otherwise be those mutual debts (whether by or at the instance of either party or any third party, and whether by way of enforcement, assignment, arrest, restraint or otherwise), in respect of the balance (if any), then due after that set off.

This is subject to the following exceptions:

*a* in ascertaining the balance due as described above (but only for the purposes of the above), if a contingent liability is to be taken into account, the contingency is to be treated as having occurred, and if a future liability is to be taken into account, it is to be treated as if presently payable; and

14 The Law of Property (Miscellaneous Provisions)(Guernsey) Law, 1979, as amended.

*b* in a case where the affairs of one party have been declared in a state of *désastre* at a meeting of his or her arresting creditors held before a jurat as Commissioner of the Royal Court, where a jurat has reasonable cause to believe that any set off agreement was entered into by the party whose affairs have been declared in a state of *désastre* less than six months before the date of the creditors' meeting, the matter of the agreement shall be referred to the Royal Court of Guernsey to determine whether the agreement was entered into with a view to giving to the other party a preference over the other creditors of the debtor, in which case the Royal Court of Guernsey may make an order directing that the agreement shall be treated as being fraudulent and void as against the other creditors of the debtor.

There is also under Guernsey customary law a concept of compensation. There is some ambiguity as regards the customary law position, although it has been stated[15] that the principal features of compensation were:

*a* that there were two debts between two parties in respect of which they were reciprocally creditors and debtors the one of the other;

*b* that the two parties were creditor and debtor in the same right (i.e., a party indebted personally could not set off against it a sum due to him or her as the agent or trustee of another);

*c* both debts must be '*certaine*' and '*liquide*'. A disputed claim could not be set off against a certain debt. Nor could a claim for an unliquidated sum be used in set off;

*d* both debts must be presently due; and

*e* compensation occurred '*ipso facto*' (i.e., automatically when the features were present).

## V JURISDICTION

The choice of the laws of any foreign jurisdiction to govern transaction documents will generally be upheld as a valid choice of law in Guernsey (and applied by the Guernsey courts, subject to proof of the relevant provisions of foreign law), provided that the choice of law is *bona fide* and not made with any intention to evade the laws of the jurisdiction with which the transaction under such document has the closest and most real connection.[16] Similarly, the Guernsey courts will generally recognise the submission by a Guernsey entity to the exclusive or non-exclusive jurisdiction of the courts of a foreign jurisdiction.

As regards the choice of law to govern security documents, Guernsey generally follows English common law conflict of laws principles. In accordance with these principles, security will generally be governed by the *lex situs* (i.e., the laws of the jurisdiction where the secured assets are situated).

Enforceability of foreign judgments under Guernsey law will depend on which jurisdiction the original judgment was obtained in. A final and conclusive monetary

15 'Set-off', PR Collas, *Guernsey Law Journal*, January 1986.

16 *Re Nield* 1990 JLR N-12, N-18.

judgment (not being for a sum payable in respect of taxes or other charges of a like nature, or in respect of a fine or penalty) obtained from certain superior courts in England and Wales, Scotland, Northern Ireland, the Isle of Man or Jersey[17] against a Guernsey company in respect of finance documents to which it is a party will generally be recognised as a valid judgment by the Guernsey courts, and enforceable in accordance with and subject to the provisions of the Reciprocal Enforcement Law[18] without a substantive re-examination of the merits of such judgment.[19]

However, if the original judgment was obtained in a jurisdiction other than those listed above, the Guernsey courts would recognise any final and conclusive monetary judgment (not being for a sum payable in respect of taxes or other charges of a like nature, or in respect of a fine or penalty) obtained against the Guernsey company in the courts of any other territory in respect of the finance documents to which it is a party in accordance with conflict of laws principles that are similar to those that would apply under English common law. Further, such judgment would be sufficient to form the basis of proceedings in the Guernsey courts for a claim for liquidated damages in the amount of such judgment. In such proceedings, the Guernsey courts would not re-hear the case on its merits, save in accordance with such principles of private international law.

## VI ACQUISITIONS OF PUBLIC COMPANIES

There is no distinction in Guernsey law between public and private companies. Guernsey companies that are the subject of a leveraged finance transaction are typically existing holding companies in the borrower group, or newly incorporated acquisition or holding vehicles.

For the rare transactions involving takeovers of Guernsey companies, the Takeover Code[20] is likely to apply, and it would be necessary to comply with the statutory regime in the Company Law, including regarding the rights of the offeror to squeeze out minority shareholders.

## VII OUTLOOK

Given the continued popularity of Guernsey as a domicile for funds and acquisition corporate structures, and the large amount of secured financing activity, CISE debt listing is expected to remain popular, and lenders are expected to be concerned with achieving a robust security package that is created and perfected in accordance with the requirements of local law (depending on where the collateral is situated).

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17 Together with certain superior courts in Israel, the Kingdom of the Netherlands, the Netherlands Antilles, the Republic of Italy and Surinam.

18 The Judgments (Reciprocal Enforcement)(Guernsey) Law, 1957, as amended.

19 The Reciprocal Enforcement Law includes grounds on which an application may be made to the Guernsey courts to set aside a judgment registered under such Law.

20 The UK Takeover Code by virtue of the Companies (Appointment of Panel on Takeovers and Mergers) Regulations, 2009.

# Chapter 14

# JERSEY

*Bruce MacNeil*[1]

## I OVERVIEW

Leveraged acquisitions involving Jersey entities are typically financed through a mixture of high yield bonds, term loans and revolving credit facilities. These bonds and facilities are typically guaranteed by each material subsidiary and the direct parent (if any) of the borrower, with the bonds, facilities and guarantees being documented under English law or New York law (or a mixture of both).

The Jersey entities in the structure are usually existing holding companies in the borrower group or newly incorporated acquisition or holding vehicles. The security package typically includes:

*a* Jersey law specific collateral security agreements over the shares of the Jersey entities, any Jersey bank accounts and any intercompany loans with Jersey debtors respectively; and

*b* an English law debenture over any material assets of the Jersey entities situated in England and Wales.

It is now also possible to take debenture or floating charge style security in Jersey under a general security agreement over all present and future intangible moveable property (e.g., all shares or securities, bank accounts and intercompany loans from time to time), although this will only be effective to secure any intangible moveable property that is situated in Jersey.

The sources of funding are broad, including UK and international banks, funds and other non-bank lenders. Recent activity has been strong, particularly given the large amount of high yield and refinancing activity. Leveraged finance in Europe has made a

1 Bruce MacNeil is a partner at Ogier.

near complete recovery from the financial crisis of 2008, with volumes last year reaching €124 billion (of which there was €70 billion high yield bond issuance).[2]

## II REGULATORY AND TAX MATTERS

### i Regulatory issues

*Lending*

Lending to (as opposed to deposit-taking from) Jersey entities is not a regulated activity in Jersey and does not require regulatory consent from the Jersey Financial Services Commission (JFSC). Lenders are neither required to be licensed nor deemed to be resident or carrying on business in Jersey by reason only of lending to Jersey entities.

*Debt issuance*

As regards debt issuance, Jersey SPVs have traditionally often been used as issuers for structured finance and high yield transactions. The issue of debt securities by a Jersey incorporated company will generally require regulatory consent under both the Control of Borrowing (Jersey) Order 1958 (COBO) and the Companies (General Provisions) (Jersey) Order 2002 (GPO).

Under COBO, the consent of the JFSC is generally required for any issue by a company of securities if the company is incorporated in Jersey or the securities are to be registered in Jersey. However, such consent is not required where the number of persons in whose names the securities are to be registered does not exceed 10 (with joint holders being counted as one person).

Under the GPO, no Jersey incorporated company shall circulate a prospectus relating to securities in the company unless:

*a* the prospectus contains the information and statements specified in the Schedule to the GPO;

*b* the JFSC has received a copy of the prospectus and any other information required by the JFSC; and

*c* the JFSC has consented to the circulation of the prospectus.

For these purposes, a 'prospectus' is, in summary, an offer to the public (i.e., more than 50 persons) to acquire or apply for securities of a Jersey incorporated company.

For completeness, we note that COBO also regulates the circulation in Jersey of offers of securities of an issuer incorporated or established outside Jersey. COBO restricts the circulation of such offers in Jersey without the consent of the JFSC, but does provide wide exceptions, for example where the issuer does not have a relevant connection with Jersey and the offer is communicated to no more than 50 persons in Jersey, or the offer is valid in the UK or Guernsey and is *mutatis mutandis* circulated in Jersey only to similar persons and in a similar manner as in the UK or Guernsey. The JFSC has published a

2 *European leveraged finance market hots up*: www.FT.com, 10 April 2014.

Guide to circulation in Jersey of offers for subscription, sale or exchange of securities originating outside Jersey, which contains more information.[3]

*Sanctions*

International sanctions and anti-money laundering laws in Jersey require financial institutions to implement customer due diligence procedures with respect to their customers in order to prevent the transfer of cash to certain prohibited countries and persons. These sanctions are often revised and need to be reviewed on an ongoing basis.

**ii Tax issues**

*Withholding taxes*

The Income Tax (Jersey) Law 1961 provides that the general basic rate of income tax on the profits of companies regarded as resident in Jersey or having a permanent establishment in Jersey will be zero per cent, and that only a limited number of financial services companies that are regulated by the JFSC under the Financial Services (Jersey) Law 1998 shall be subject to income tax at a rate of 10 per cent, and that only utility companies (as defined in the Income Tax (Jersey) Law 1961) and certain Jersey immoveable property profits shall be subject to income tax at a rate of 20 per cent.

The vast majority of Jersey incorporated companies are zero rated under the Income Tax (Jersey) Law 1961 (meaning they are not subject to Jersey income tax) and are not required to make any withholding or deduction for any Jersey taxation from any interest paid by the company under its finance documents.

*Channel Islands Securities Exchange (CISE) debt listings*

The CISE (formerly the CISX) has seen a steady increase over the past few years in the listing of debt securities. Typically the issuer of debt securities would be a UK tax resident company issuing intercompany loan notes in connection with a private equity transaction. Historically, private equity sponsors have tended to deal with withholding tax issues by using double tax treaty vehicles located in jurisdictions such as Luxembourg. However, following the *Indofood* case[4] and changes to HMRC's approach to clearances and guidance on beneficial ownership and double tax treaties, it has become more popular for debt listings to be used as a cost-effective way to benefit from the quoted Eurobond exemption.

In December 2013, the UK Inland Revenue (now HM Revenue & Customs) designated the CISE as a recognised stock exchange under Section 841 of the Income and Corporation Taxes Act, 1988. The predecessor exchange had also been so designated for many years. The designation is significant because qualifying debt securities listed on the CISE are eligible for the quoted Eurobond exemption. This exemption allows an

3 www.jerseyfsc.org/the_commission/general_information/policy_statements_and_guidance_notes/circulationinjersey.asp.

4 *Indofood International Finance Limited v. JPMorgan Chase Bank NA London Branch* [2006] EWCA Civ 158.

issuer within the UK tax net to make payments of interest on the listed securities gross without deduction for tax.

To qualify as quoted Eurobonds, securities have to meet the following conditions prescribed by UK tax legislation: namely, a quoted Eurobond means any security that is issued by a company, is listed on a recognised stock exchange and carries a right to interest.

To proceed with a CISE listing, the issuer must appoint a sponsor to assist with the listing procedure and deal with the CISE.[5]

The CISE is licensed to operate as an investment exchange under the Protection of Investors (Bailiwick of Guernsey) Law 1987 and is regulated by the Guernsey Financial Services Commission. In December 2013, the CISE was approved as an affiliate member of the International Organisation of Securities Commissions and became an Associate Member of the International Capital Market Services Association.

## III SECURITY AND GUARANTEES

### i Guarantee issues

*Guarantees*

Guarantees of obligations are typically documented under English law or New York law and provided by each material subsidiary and the direct parent (if any) of the borrower. There are usually no Jersey law limitations on the value of guarantees. However, it is market practice for Jersey guarantors to be required expressly to waive any rights under the laws of Jersey, whether by virtue of the *droit de division* or otherwise, to require that any liability under the guarantee be divided or apportioned with any other person or reduced in any manner whatsoever; and, whether by virtue of the *droit de discussion* or otherwise, to require that recourse be had to the assets of any other person before any claim is enforced against the Jersey guarantor under the guarantee. This waiver wording would typically be included in the guarantee itself.

*Corporate benefit*

Where there are upstream or cross-stream guarantees or security given by Jersey companies, it is necessary to consider the corporate benefit for the Jersey guarantor or grantor entering into the transaction. Under Article 74(1) of the Companies (Jersey) Law 1991 (Companies Law), a director of a Jersey company has a statutory duty to act honestly and in good faith with a view to the best interests of the company – this requires the director to consider the best interests of the company, as opposed to its shareholders or the corporate group as a whole. However, under Article 74(2), no act or omission of a director shall be treated as a breach of Article 74(1) if all of the shareholders of the company authorise or ratify the act or omission and, after the act or omission, the company will be able to discharge its liabilities as they fall due (i.e., will be cashflow solvent). Therefore, where the corporate benefit for the Jersey company providing an

5 Ogier Corporate Finance Limited (incorporated in Jersey) is a full listing member of the CISE, with the largest market share of debt listings where it acts as listing sponsor.

upstream or cross-stream guarantee or security is unclear or doubtful, it is usual for unanimous shareholder approval to be obtained and for the board minutes to document the passing of the above cashflow solvency test.

As an alternative to unanimous shareholder approval under Article 74(2), it is now possible for shareholders to approve the transaction by ordinary resolution or special resolution under Article 74(3) (in addition to passing the above cashflow solvency test). However, we expect that this alternative will only be used in unusual circumstances where unanimous shareholder approval cannot be obtained.

***Financial assistance***

Under Article 58 of the Companies Law, the rule of law prohibiting financial assistance by Jersey companies has been abolished; therefore, financial assistance limitations and whitewash procedures no longer apply under Jersey law. However, in the context of upstream guarantees or security and other circumstances that would have constituted financial assistance under the old law, it is still necessary to consider the corporate benefit for the Jersey company entering into the transaction (e.g., whether shareholder approval is required) and whether there may be a deemed distribution from the Jersey company to its shareholders.

***Deemed distributions***

As regards deemed distributions, there was a historical concern that an upstream guarantee from a Jersey company may in certain circumstances constitute a deemed distribution from the Jersey company to its shareholders, in which case it would be necessary to follow the statutory distribution procedure, which involves the directors giving a cashflow solvency statement under the Companies Law. However, Article 115 of the Companies Law has recently been amended to provide that it is only necessary to follow the statutory distribution procedure where the distribution reduces the net assets of the company, or is in respect of shares that are required to be recognised as a liability in the accounts of the company. Therefore, for the vast majority of upstream guarantees where it is considered by the directors to be be unlikely that the guarantee will be called and no provision for the liability is made in the guarantor company's accounts, it is not necessary to treat the upstream guarantee as a deemed distribution or to follow the statutory distribution procedure.

***Contractual set off and subordination provisions***

Under Article 2 of the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (2005 Law), despite any enactment or rule of law to the contrary, any contractual set off provision and any contractual subordination provision (each as defined in the 2005 Law) is enforceable in accordance with its terms against, *inter alia*, any Jersey party to the agreement, despite the bankruptcy of a party to the agreement or of any other person, or the lack of any mutuality of obligation between a party to the agreement and any other person. This assumes that such provisions are enforceable in accordance with their terms under the governing law of the agreement.

***Security trusts and parallel debt***

Jersey generally follows English trusts law principles and has a favourable statutory regime under the Trusts (Jersey) Law 1984 in respect of Jersey trusts and recognition of the enforceability of foreign trusts in accordance with their proper law (as long as the foreign trust does not purport to apply directly to Jersey immoveable property or otherwise do anything that breaches Jersey law). Therefore, Jersey law recognises the concept of security trusts, and there is no need to include parallel debt provisions in finance documents to which Jersey obligors are a party.

**ii Jersey law security issues**

***Scope of the Security Interests (Jersey) Law 2012 (New Law)***

The New Law in respect of security over intangible moveable property was in development for several years and came into full force and effect on 2 January 2014, replacing the Security Interests (Jersey) Law 1983 (1983 Law). The New Law applies to Jersey law security interests created on or after 2 January 2014. Subject to limited exceptions, the 1983 Law continues to apply to Jersey law security interests created before 2 January 2014 (which will continue to have priority over New Law security), although we only analyse the provisions of the New Law in this chapter.

As regards the scope of the New Law, Article 4 provides that the New Law applies to security interests in certain specific categories of intangible moveable property. In general terms, these categories relate to intangible moveable property that is situated in Jersey (applying Jersey principles of private international law, which are similar to those established under English common law). Where collateral is situated in Jersey, it is generally recommended that the lenders take and perfect Jersey law security over the collateral under a Jersey law security agreement that complies with the requirements of the New Law (thereby ensuring that the security is enforceable under Jersey law).

Under the New Law, the most commonly secured assets are shares or securities of Jersey companies, Jersey bank accounts (held with a Jersey account bank), Jersey securities accounts (held with a Jersey custodian) and intercompany loans with Jersey debtors. It is now also possible to take English law debenture or floating charge style security in Jersey under a general security agreement over all present and future intangible moveable property, although this will generally only be effective to secure any intangible moveable property that is situated in Jersey.

The New Law does not purport to apply to foreign law security, except to provide that a Jersey entity is deemed to have capacity to give foreign law security over property situated outside Jersey. Therefore, the requirements of the New Law (e.g., in relation to perfection and registration) do not apply to foreign law security over property situated outside Jersey.

As regards public searches in Jersey, the only publicly available records of security over the shares or assets of Jersey companies include the Jersey registers for:

*a* certain security over intangible moveable property governed by the New Law (but not security governed by the 1983 Law);

*b* security over immoveable property situated in Jersey; and

*c* security over ships in respect of which title has been entered on the Registry of British Ships maintained in Jersey.

Therefore, in addition to running public searches, it is necessary to make enquiries of the borrower as regards any existing Jersey law security (e.g., any security governed by the 1983 Law that would not be publicly registered).

***Creation and perfection***

The New Law defines a 'security interest' as an interest in intangible moveable property that, under a security agreement, secures payment or performance obligations (including present or future obligations). The creation of third party security (i.e., security in support of the obligations of a third party) is expressly permitted under the New Law.

A security interest must attach to be enforceable against the grantor and with respect to the collateral. The formal requirements for attachment are that:

*a* value has been given in respect of the security agreement;

*b* the grantor has rights in the collateral, or the power to grant rights in the collateral to a secured party; and

*c* the secured party has possession or control of the collateral, or the security agreement is signed by the grantor and contains a description of the collateral that is sufficient to enable the collateral to be identified, or both.

A security interest must also be perfected to be enforceable during insolvency and against third parties, such as creditors and insolvency officials. The main methods of perfection are control according to the statutory definition (similar to taking a fixed charge under English law) and registration under the New Law as explained below. Perfection of a security interest by control or registration continues only while such control or registration is maintained (unless continuously perfected by another one of these methods).

It is only possible for secured parties to take control over certain types of collateral, namely shares, investment securities, deposit accounts and securities accounts. For other types of collateral, the security may only be perfected by registration. Even where the security is perfected by control, it is still market practice to register the security; this is for the benefit of secured parties in the event that control is lost, and to seek to put the world on notice of the security from a commercial perspective, even though this will not constitute constructive notice to third parties.

Registration of security is made by the secured party or its lawyers or agents filing a financing statement in respect of the security interest on the Jersey Security Interests Register (SIR) established under Part 8 of the New Law. This is an online registration (usually made at completion) containing basic details of the grantor, secured party, collateral and duration of the registration. Typically, registrations are made for the maximum period of 99 years and discharged at the grantor's request at the end of the security period.

A registration will be invalid if the financing statement contains a defect, irregularity, omission or error that is seriously misleading (e.g., in the name of the grantor). However, the data entry requirements of the SIR do not require a financing statement to be updated once it has been registered, so that subsequent material changes in the data contained in the financing statement, such as the name of the grantor, will not result in the financing statement becoming seriously misleading.

*Shares*

A security interest over shares (or other certificated investment securities) of a Jersey company is perfected by control where the secured party (or someone on its behalf) has possession of the share certificate; or the secured party (or someone on its behalf) is registered with the issuer of the shares as holder of the shares (i.e., by assignment of title to the shares).

It is market practice for the articles of association of any Jersey company that has its shares secured to be amended to remove any transfer restrictions (e.g., any discretion of the directors to refuse to register share transfers upon an enforcement).

*Bank accounts*

A security interest over deposit accounts maintained by a Jersey account bank is perfected by control where:

*a* the deposit account is transferred into the name of the secured party with the written agreement of the grantor and the account bank; this is rarely done in practice;

*b* the grantor, the secured party and the account bank or other institution have agreed in writing that the account bank will comply with instructions from the secured party directing the disposition of funds in the deposit account; this is usually done under a notice to and acknowledgement from the account bank in the form scheduled to the security agreement;

*c* the deposit account is assigned (by way of security) to the secured party and written notice of the assignment is given to the account bank; the assignment is usually conducted under the security agreement, with a notice of assignment being given to the account bank in the form scheduled to the security agreement; or

*d* the secured party is the account bank; this does not require a separate notice to the account bank.

The New Law expressly provides that security is not affected (i.e., control will not be lost) by the grantor retaining the right to deal with collateral (in the absence of a contrary direction from the secured party) or having the right to substitute equivalent collateral or withdraw excess collateral. Therefore, there is no requirement for secured accounts to be blocked for secured parties to have control security.

*Securities accounts*

A security interest over securities accounts (including the investment securities credited to the account) maintained by a Jersey custodian is perfected by control where:

*a* the securities account is transferred into the name of the secured party with the written agreement of the grantor and the intermediary (i.e., the custodian); this is rarely done in practice;

*b* the grantor, the secured party and the intermediary have agreed in writing that the intermediary will comply with instructions from the secured party directing the disposition of investment securities credited to the securities account; this is usually done under a notice to and acknowledgement from the custodian in the form scheduled to the security agreement; or

*c* the secured party is the intermediary; this does not require a separate notice to the intermediary.

It is market practice in Jersey for the acknowledgement from any third party account bank or custodian to contain a waiver of any of its security and set off rights and any conflicting terms prohibiting the creation of security under the relevant terms and conditions.

***Intercompany loans, contractual rights and general security***

A security interest over intercompany loans, contractual rights, or all present and future intangible moveable property, cannot be perfected by control, and therefore must be perfected by registration of a financing statement on the SIR as explained above.

***Enforcement***

Under the New Law, the power of enforcement in respect of a security interest becomes exercisable when an event of default has occurred, and the secured party has served written notice on the grantor specifying the event of default.

Subject to limited exceptions, the secured party must give written notice not less than 14 days before appropriating or selling the collateral to the (1) grantor and (2) any person who has a registered or notified interest in the collateral not less than 21 days before the sale or appropriation (unless they have agreed in writing to a different notice period, or that no notice period is required). Unlike the position under the 1983 Law, it is now possible and market practice under the New Law for the grantor to contract out of the above-mentioned 14-day notice period being required before enforcement of security. Therefore, the enforcement trigger in the Jersey law security agreements will simply follow the agreed security principles.

The New Law provides for wider enforcement remedies than under the 1983 Law, including a power of appropriation, a power of sale (e.g., by auction, public tender or private sale) and the right to take ancillary actions, such as taking control of collateral or exercising contractual rights.

A secured party who sells or appropriates collateral under the New Law owes a duty to the grantor and any other persons who have a security interest in the collateral to take all commercially reasonable steps to determine or obtain fair market value of the collateral, as at the time of the appropriation or sale; and to act in other respects in a commercially reasonable manner, and to enter into any sale agreement only on commercially reasonable terms.

There is generally no requirement to obtain a Jersey court order before enforcing a security interest under the New Law, and the grantor's reinstatement rights are usually waived in the security agreement. However, the grantor and other persons with an interest in the collateral have statutory rights to redeem the collateral by repaying the secured obligations and the reasonable costs and expenses of enforcement.

Within 14 days after the date on which the collateral was appropriated or sold, the secured party must give a written statement of account to the grantor and any other persons who have a registered or notified interest in the collateral. In summary, the statement of account must show the value realised (in the case of an appropriation) or the amount of the sale proceeds (in the case of a sale), the reasonable costs and expenses of enforcement, and any surplus or outstanding debt.

Where any surplus exists after an appropriation or sale of the collateral, the secured party is obliged to pay the surplus in a prescribed order (e.g., to other secured parties and the grantor), or alternatively may take the safe option of paying the surplus

into court (in which case, the surplus will only be paid out by court order following an application by a person entitled to the surplus).

***Tangible moveable property***

It is generally not possible under current Jersey law to secure tangible moveable property situated in Jersey by any other means than the pledge, involving physical delivery of the asset to the creditor. Therefore, it is rare for lenders to take this type of security. However, it is proposed in future to extend the scope of the New Law to cover security over tangible moveable property (e.g., inventory, equipment and consumer goods), which may make this type of security more popular.

***Immoveable property***

Immoveable property situated in Jersey may only be secured by hypothec under the Loi (1880) sur la propriété foncière (1880 Law). However, it is rare for Jersey immoveable property to be used as collateral in cross-border financing transactions; usually, the immoveable property is situated in the UK and secured under an English law debenture or charge.

***Impact of bankruptcy***

The main bankruptcy or insolvency procedures for Jersey companies are winding up under the Companies Law (usually administered by a liquidator) and *désastre* under the Bankruptcy (Désastre) (Jersey) Law 1990 (Désastre Law) (administered by the Viscount, a Jersey court official). Under Article 59 of the New Law, in the case of the bankruptcy of the grantor of a security interest, the security interest is void as against the liquidator or Viscount and the grantor's creditors unless the security interest is perfected before the grantor becomes bankrupt.

However, in respect of perfected security interests, Article 56 of the New Law provides that if the grantor of a perfected security interest becomes bankrupt or subjected to Jersey or foreign insolvency proceedings, that shall not affect the power of the secured party to appropriate or sell collateral, or otherwise act in relation to collateral in connection with enforcement. Therefore, security must be perfected under the New Law to remain enforceable during insolvency.

***Transactions at an undervalue and preferences***

There are a few types of transactions that may be challenged and potentially set aside by a liquidator or the Viscount during Jersey insolvency proceedings, of which the main types are transactions at an undervalue and preferences. The Jersey statutory provisions on transactions at an undervalue and preferences under the Companies Law and the Désastre Law are similar to the equivalent English statutory provisions under the UK Insolvency Act 1986, except:

*a* the main challenge periods are five years before the commencement of Jersey insolvency proceedings for transactions at an undervalue and 12 months for preferences; and

*b* the Jersey company must have been cashflow insolvent when it entered into the transaction (or become cashflow insolvent as a result of the transaction) for it to constitute a transaction at an undervalue or a preference.

On the application of a liquidator or the Viscount, the Jersey court may make such an order as it thinks fit for restoring the position to what it would have been if the Jersey company had not entered into a transaction at an undervalue or a preference. Subject to a good faith defence for the Jersey company, the Jersey company will be treated as having entered into a transaction at an undervalue with a person if it makes a gift to that person, or it enters into a transaction with that person on terms for which there is no (or insufficient) cause or consideration.

The Jersey company will be treated as having given a preference to another person if that person is a creditor, guarantor or surety of the Jersey company, and the Jersey company does anything, or suffers anything to be done, that has the effect of putting the person into a better position in the event of Jersey insolvency proceedings for the Jersey company, provided that the Jersey company, when giving the preference, was influenced by a desire to prefer that person.

The Companies Law and the Désastre Law also contain provisions on disclaimer of onerous property and extortionate credit transactions during insolvency. Further, Jersey case law recognises the concept of the Pauline action, under which a creditor may commence proceedings to set aside a transaction that is undertaken to defraud creditors, provided that the debtor was insolvent at the time of the transaction or became insolvent as a result thereof.[6]

## IV PRIORITY OF CLAIMS

Where there are competing security interests, priority is generally established by reference to the priority rules in Part 4 of the New Law (although the relevant secured parties may agree priority as between themselves under an intercreditor or subordination agreement). In general, and subject to special priority rules for certain types of collateral, these priority rules give priority to:

*a* perfected security interests over unperfected security interests;

*b* security interests perfected by control over security interests perfected by registration;

*c* among perfected security interests, the security interest that was first in time to be perfected (whether by control or registration); and

*d* among unperfected security interests, the security interest that was first in time to attach.

In the event of a judicial enforcement of third party claims in the assets of the grantor, a secured party having a validly created and perfected security interest will rank ahead of unsecured creditors (including preferred unsecured creditors) in respect of the collateral.

### i Second ranking security interests

The ability to create a security interest in the nature of a charge under the New Law without any transfer of possession or title to the secured party (as was required under the 1983 Law)

6 *In re Esteem Settlement* 2002 JLR 53.

means that it is now substantially easier to create second ranking security interests under Jersey law. Therefore, we expect second ranking security interests gradually to become more common in the Jersey market, particularly for leveraged finance transactions.

### ii Treatment of intercreditor or subordination agreements

Article 32 of the New Law provides that a secured party can agree, in a security agreement or otherwise, to subordinate its security interest to any other interest. The subordination agreement is effective according to its terms between the parties to the agreement (including any transferees who accede to the agreement) and will also be binding on non-acceding transferees of the subordinated security interest if the subordination is publicly registered on the SIR.

Usual practice would be to include the subordination provisions in an intercreditor or subordination agreement (usually governed by English law or New York law) rather than the security agreement itself. The New Law clarifies that any such agreement or turnover trust will not create a security interest unless the agreement expressly provides that it does so.

The enforceability of subordination provisions in respect of security interests is governed by Article 32 of the New Law as explained above, whereas the enforceability of contractual subordination provisions in respect of debt and other claims is governed by Article 2 of the 2005 Law as explained in Section III, *supra*.

## V JURISDICTION

The choice of the laws of any foreign jurisdiction to govern transaction documents will generally be upheld as a valid choice of law in Jersey (and applied by the Jersey courts, subject to proof of the relevant provisions of foreign law), provided that the choice of law is *bona fide* and not made with any intention to evade the laws of the jurisdiction with which the transaction under such document has the closest and most real connection.[7] Similarly, the Jersey courts will generally recognise the submission by a Jersey entity to the exclusive or non-exclusive jurisdiction of the courts of a foreign jurisdiction.

Enforceability of foreign judgments under Jersey law will depend on which jurisdiction the original judgment was obtained in. A final and conclusive monetary judgment (not being for a sum payable in respect of taxes, a fine or penalty) obtained from certain superior courts in England and Wales, Scotland, Northern Ireland, the Isle of Man or Guernsey against a Jersey company in respect of finance documents to which it is a party will generally be recognised as a valid judgment by the Jersey courts and enforceable in accordance with and subject to the provisions of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 without a substantive re-examination of the merits of such judgment.

However, if the original judgment was obtained in a jurisdiction other than those listed above, then the Jersey courts would recognise any final and conclusive monetary judgment (not being for a sum payable in respect of taxes, a fine or penalty) obtained

7 *Re Nield* 1990 JLR N-12, N-18.

against the Jersey company in the courts of any other territory in respect of the finance documents to which it is a party in accordance with principles of private international law, which are similar to those that would apply under English common law.

## VI ACQUISITIONS OF PUBLIC COMPANIES

The vast majority of leveraged acquisitions involving Jersey entities have been acquisitions of non-Jersey target companies, or acquisitions of Jersey private companies rather than public companies. Therefore, we do not go into detail on Jersey law requirements for the acquisition of public companies, except to note the following points:

*a* the UK Takeover Code will apply to Jersey public companies whose shares are admitted to trading on AIM, the main market of the London Stock Exchange, or any stock exchange in the Channel Islands or the Isle of Man, regardless of where the company is centrally managed and controlled; and Jersey public companies that are centrally managed and controlled in the UK, the Channel Islands or the Isle of Man;

*b* there are minority squeeze-out provisions under Article 117 of the Companies Law that require the offeror to have acquired or contracted to acquire 90 per cent of the shares or class of shares to which the offer relates; and

*c* it is becoming increasingly popular (as an alternative to a takeover offer) to effect a takeover through a Jersey law scheme of arrangement. This requires the approval of 75 per cent in voting rights and a majority in number of the target company's shareholders under Article 125 of the Companies Law.

## VII OUTLOOK

We do not envisage any material changes in policy or legislation relevant to this section; Jersey has historically been regarded as a stable, creditor-friendly jurisdiction and we expect that to continue to be the case. The European market continues to be robust, with a large pipeline of leveraged acquisitions being announced. As mentioned in Section I, *supra*, last year leveraged finance volumes in Europe reached €124 billion (including €70 billion high yield bond issuance). These volumes are expected to be substantially exceeded in 2014.

As regards ongoing trends, we have noticed a recent trend in the European market of borrowers using senior secured high yield bonds together with super senior revolving credit facilities. Given the large amount of financing activity, we expect sponsors to continue to use Jersey companies as acquisition and holding vehicles, for CISE debt listings to remain popular and for lenders to be concerned with achieving a robust security package that is created and perfected in accordance with the requirements of local law (depending on where the collateral is situated).

In Jersey, over the past year there has been an evolution in market practice under the New Law, and there are some signs that lenders are looking to take a wider range of collateral than was market prior to the introduction of the New Law. For transactions involving Jersey law security, we expect that lenders will continue to take advantage of the provisions of the New Law, particularly in relation to wider enforcement remedies and public registration of security in Jersey.

## Appendix 1

# ABOUT THE AUTHORS

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Christopher Jones joined Ogier in January 2010, having worked previously with Cleary Gottlieb Steen & Hamilton and Slaughter and May.

He advises investment funds, financial institutions and corporate clients on a broad range of multi-jurisdictional transactions.

His practice primarily is banking-focused, advising debtors, creditors and other advisory professionals in respect of leveraged and real estate secured financing transactions as well as regulatory, derivatives and restructuring matters. He also has extensive experience advising on corporate and commercial matters, mergers and acquisitions, private equity and listings.

He is a solicitor in England and Wales and a member of the Bar of New York.

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Bruce MacNeil joined Ogier in 2008 and became a partner in 2014, having previously worked as a finance associate in London for Allen & Overy and Latham & Watkins.

He has represented a wide range of financial institutions and companies on banking, leveraged finance, derivatives, corporate and restructuring transactions.

He studied law at University College London and is a member of The Law Society of England and Wales. He qualified as an English solicitor in 2003, was admitted to practice as a New York attorney in 2009 and qualified as a Jersey advocate in 2013.

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