

ADVISORY | INDUSTRY INFORMATION

Agreed Security Principles – Guernsey and Jersey Law Considerations

It is not uncommon for local counsel to be instructed on deals after Agreed Security Principles (ASPs) have been agreed between our onshore counterparts and underlying clients. Whilst we are adept at conforming local security documents to accommodate ASPs, there are a few peculiarities of taking security in Guernsey and Jersey that are worth bearing in mind when agreeing ASPs at the start of a deal. This article highlights the points to bear in mind when dealing with the most commonly secured offshore assets – shares, bank accounts and contract rights arising in respect of subordinated debt.

General Principles

Security is created and perfected over Guernsey situs assets pursuant to the Security Interests (Guernsey) Law, 1993 (as amended) (**the Guernsey Security Interests Law**), and over Jersey situs assets pursuant to the Security Interests (Jersey) Law, 2012 (as amended) (**the Jersey Security Interests Law**). This article does not propose to cover how a security interest "attaches" to collateral situate in the Channel Islands (which Walkers would advise on in its role as local counsel) but instead to cover how security interests are created and perfected so as to be binding against third parties, including on the insolvency of a grantor.

Share Security – Guernsey

Under the Guernsey Security Interests Law there are two ways of taking security over shares of a Guernsey company:

- i. by physical possession of share certificates (a "**section 1(3) security interest**"); and/or
- ii. by way of assignment pursuant to a written security agreement, and notice of such assignment being given to the underlying company (a "**section 1(6) security interest**").

If ASPs provide that original share certificates are to be provided to the secured party after the completion date, then there is no section 1(3) security interest created at completion. Similarly, if the ASPs agree that notice of assignment is to be given after the completion date, there will be no section 1(6) security interest created on completion. It is worth noting that under Guernsey law the giving of notice is critical to the creation of a section 1(6) security interest, it is not just a perfection point. It is not necessary, under Guernsey law, in order to create a section 1(6) security interest, that the underlying company execute an acknowledgement of assignment. Note however that where the underlying company is an obligor on the transaction it is market practice to obtain this and should be commercially reasonable to do so.

Takeaway: when acting for the secured party always ensure the security provider is obligated to deliver original (wet-ink) share certificates (and share transfer forms) and a notice of assignment immediately on completion (or, at the latest, prior to first utilisation) so that both a section 1(3) security interest and a section 1(6) security interest is created. A wet-ink certified copy of the register of members (dated on the completion date) and an acknowledgement from the issuer are also advisable, although neither is required as a matter of Guernsey law to create a valid security interest.

Account Security – Guernsey

Under the Guernsey Security Interests Law, an entity providing security over a Guernsey situs bank account (where that bank account is held with a bank other than the secured party) does so by way of a section 1(6) security interest, and in this case a notice of assignment is given to the account bank. As with the case of security over shares, the section 1(6) security interest is only created when notice of assignment is given. If the ASPs provide that the notice of assignment can be given post-completion, then there is no Guernsey law security created over the bank account at completion as a matter of Guernsey law.

Most, if not all, accounts banks in Guernsey have their own internally approved form of notice and acknowledgement of assignment. If this form is used, the account bank will usually sign the acknowledgment of assignment and deliver it in escrow for completion. Sometimes they will require sight of the executed (but not yet dated) notice of assignment (and any release documentation if there is existing security over the account) prior to confirming that their executed acknowledgement can be released contemporaneously with all signatures at completion.

If the account bank does not deliver an acknowledgement of assignment at completion it is not fatal to the creation of the section 1(6) security interest, but it is common practice that it should be provided within 1 or 2 business days of completion.

Separately, the terms and conditions of various account banks in Guernsey contain prohibitions on granting security and market practice has developed such that separate waivers will be provided by those account banks at completion, where applicable.

Takeaway: when acting for the secured party always ensure the account holder is obligated to deliver a notice of assignment (in the account bank's agreed form) immediately on completion so that a section 1(6) security interest is created.

Contract Rights Security – Guernsey

Security over contracts rights (i.e. rights under Guernsey law governed contracts and/or undocumented receivables owing by a Guernsey company) can be secured by a section 1(6) security interest. In this case a notice of assignment is given by the security provider to the counterparty to the contract, or the Guernsey company in the case of undocumented receivables. As noted in the case of security over shares and security over bank accounts, a section 1(6) security interest is only created when notice of assignment is given. If the ASPs provide that the notice of assignment can be given post-completion, then there is no Guernsey law security created over the contract rights/ receivables at completion as a matter of Guernsey law. If the contract counterparty is an obligor on the transaction it is market practice to obtain an acknowledgement of assignment, although this is not required as a matter of Guernsey law to create a section 1(6) security interest.

Takeaway: when acting for the secured party always ensure the security provider is obligated to deliver a notice of assignment to the contract counterparty immediately on completion (or, at the latest, prior to first utilisation) so that a section 1(6) security interest is created, and wherever practicable obtain an acknowledgement of assignment from the contract counterparty.

Share Security – Jersey

A security interest over shares in a Jersey company may be perfected by possession, control or registration (or a combination of these steps). In practice, control in relation to such shares is most likely established by taking possession of the original share certificates so, possession and control are ultimately one and the same thing. Perfection by way of control or possession confers the highest priority security interest under the Jersey Security Interests Law.

If ASPs provide that original share certificates are to be provided to the secured party after the completion date, then whilst a registration on the online security interests register in Jersey (the SIR) will ensure there is a valid and perfected security interest at completion, there will be no possession or control at that stage which goes to priority of the security interest. Accordingly, it is standard to both take possession of the original share certificates and effect a registration on the SIR. As accepted practice by both borrower and lender counsel in Jersey, original certificates, share transfer forms and a certified register of members of the underlying issuer will all be delivered to lender counsel in Jersey shortly in advance of completion to be held to order. Similarly any registration on the SIR (for any collateral type) will also be filed shortly in advance of completion.

ASPs will often provide that notice should not be served where not necessary for the creation or perfection of a security interest. It is not necessary, under Jersey law, in order to create a security interest over shares, that the grantor serve notice on or obtain an acknowledgement from the underlying issuer. However, where the underlying company is an obligor on the transaction and there is the opportunity to obtain these, we would advise doing so particularly with one eye on potential need to enforce such security.

Takeaway: when acting for the secured party, the best position is to ensure the grantor is obligated to deliver original (wet ink) share certificates (and share transfer forms) immediately at completion. A wet-ink certified copy of the register of members (dated on the completion date) and a notice/ acknowledgement to/from the issuer are also advisable, although neither is required as a matter of Jersey law to create a valid security interest. Finally, a signed and dated consent will be required from the grantor shortly in advance of completion in order to pre-register the security interest.

Account Security – Jersey

A security interest over accounts situate in Jersey may be perfected by control and/or by registration. The latter involves the same registration process as described above. Perfection by way of control confers the highest priority security and control may be established in a number of ways under the Jersey Security Interests Law, most commonly by way of a tri-partite written agreement (effectively, a notice and acknowledgement) between the grantor, the secured party and the account bank confirming that the latter will comply with instructions of the secured party;

As is the case in Guernsey, most if not all, accounts banks in Jersey have their own internally approved form of notice and acknowledgement. If this form is used, the account bank will usually sign the acknowledgment and deliver it in escrow for completion. Sometimes they will require sight of the executed (but not yet dated) notice (and any release documentation if there is existing security over the account) prior to confirming that their executed acknowledgement can be released contemporaneously with all signatures at completion.

Separately, the terms and conditions of various account banks in Jersey contain prohibitions on granting security and market practice has developed such that separate waivers will be provided by those account banks at completion, where applicable.

Takeaway: when acting for the secured party the best position is to ensure the grantor is obligated to deliver a notice (in the account bank's agreed form) and obtain the account bank's acknowledgement at completion to establish the required tri-partite agreement. A separate waiver may also be required so is worth including in any ASPs. Finally, a signed and dated consent will be required from the grantor shortly in advance of completion if the security interest will also be registered on the SIR.

Contract Rights Security – Jersey

Under the Jersey Security Interests Law, contract rights security can only be perfected by registration. Whilst not a strict statutory requirement for creation of a Jersey security interest, it is also advisable (if possible) to serve notice on the contract counterparty for similar reasons as you would in relation to share security. There may also be a prohibition on assignment or creation of security in the underlying contract which needs written agreement to amend or waive.

Takeaway: Any security interest agreement securing contract rights must be registered on the SIR and a signed and dated consent will be required from the grantor shortly in advance of completion in order to pre-register the security interest so that it is perfected from completion. In addition, it is advisable to serve notice on the contract counterparty and if that party is an obligor on the transaction, to also obtain an acknowledgement, although neither is required as a matter of Jersey law to create a valid security interest.

Conclusion

This article provides pointers as to where local law requirements can be helpfully taken into account when agreeing ASPs. Of course, it's often also helpful to include catch-all language such as "subject to applicable law or custom in the relevant jurisdiction" when agreeing security deliverables in ASPs, but by building these requirements in upfront, it can avoid debate as what is custom or the need to employ work-arounds for what is otherwise agreed practice in the islands.

Please also feel free to reach out to Walkers in any of Guernsey, Jersey, London (covering Bermuda, Cayman Islands and British Virgin Islands law) or Ireland at term sheet stage if helpful to discuss.

Further information

We practice Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Irish and Jersey law from an international network of ten offices across Europe, the Americas, Asia and the Middle East. For more information, please get in touch with your usual contact at Walkers or any of the contacts in your region listed below.

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