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Collas Crill explains... Taking security over Jersey contract rights

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This guide is one in a series of 'Collas Crill explains...' in which we examine areas of Jersey law that frequently arise in practice.

Jersey is a popular place to establish an asset holding company because its companies legislation is modern, flexible and modelled on English companies legislation.

Where a Jersey company borrows money or participates in a group financing, the lender's security package will frequently involve taking security over **Jersey contract rights**.

This guide looks at the key things you need to know about taking security over **Jersey contract rights**, like shareholder loans made to a Jersey company.

Words in bold text are defined at the end of this guide.

Preliminary steps

A **security taker** should take the following preliminary steps before taking security over **Jersey contract rights**.

- Review the **Contract** to determine whether there are any terms that will adversely impact on its security interest over the **Jersey contract rights** (eg any prohibition on the creation of security) that need to be amended or disapplied.
- Agree a form of security notice and security acknowledgement with the other parties to the **Contract**.
- If the **security giver** is a Jersey company, carry out:
  - a companies registry search; and
  - an insolvency search,

  to make sure there is no evidence it is insolvent or subject to any insolvency proceedings.
- Search the **security interests register** to find out whether a financing statement has been registered for an existing security interest over the **Contract**. This search will not, however, reveal any security interest created under the Security Interests (Jersey) Law 1983 (the predecessor to the **Law**).

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Security basics

The **Law** sets out a statutory framework for creating security interests over Jersey intangible movable assets, like **Jersey contract rights**.

Under the **Law**, a security interest is any interest in **Jersey contract rights** created under an agreement which secures the payment or performance of an obligation.

The key features of the **Law** relevant to creating a security interest over **Jersey contract rights** are as follows.

- **Agreement**: a security interest over **Jersey contract rights** may only be created by agreement between the **security giver** and **security taker**.
- **Attachment**:
  - Attachment is the process by which a security interest creates a proprietary right in **Jersey contract rights**.
  - Once a security interest attaches to **Jersey contract rights**, it becomes enforceable against the **security giver**.
  - The general position is that a security interest attaches to **Jersey contract rights** at the time all of the following conditions are satisfied:
    - value has been given in respect of the security agreement;
    - the **security giver** has rights in the **Jersey contract rights** or the power to grant rights in the **Jersey contract rights** to the **security taker**; and
    - the security agreement contains a description of the **Jersey contract rights** that is sufficient to allow them to be identified.

- **Perfection**:
  - Perfection is the process by which a security interest over **Jersey contract rights** becomes effective against third parties subject to the priority rules.
  - A security interest over **Jersey contract rights** is perfected when it has attached and any step required under the **Law** for it to be perfected has been taken.
  - A security interest over **Jersey contract rights** can only be perfected by the **security taker** registering a financing statement for that security interest on the **security interests register**.
  - A security interest over **Jersey contract rights** must remain continuously perfected to remain enforceable against third parties.

Security deliverables

The **security giver** will normally be required by the security agreement or (where relevant) the credit agreement to deliver the following documents to the **security taker**:

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- a certified copy of the **Contract**;
- a security notice to the each other party to the **Contract** from the **security giver** and **security taker**;
- a security acknowledgement from each other party to the **Contract**; and
- a consent to filing a financing statement.

Where the **Contract** has terms that adversely impact on the **security taker's** security interest over the **Jersey contract rights**, these will need to be amended or disapplied. If this is done in the security acknowledgement, it is vital that each of the security notice and security acknowledgment are agreed in advance and signed on the same day as the security agreement.

Registration

The **Law** establishes the **security interests register** which records details of security interests created over Jersey intangible movable property. It is kept by the Jersey registrar of companies and can be searched online by anyone.

The **security taker** may register details of (or any changes to) the security interest created over the **Jersey contract rights** by registering a financing statement. The financing statement will record in the **security interests register** details of the **security taker**, the **security giver** and the **Jersey contract rights**.

The maximum period for which a financing statement can be registered is 99 years and this is the period for which a finance statement is typically registered.

A **security taker** must register a financing statement relating to the security interest created over **Jersey contract rights** because, as mentioned above, it is the only way to perfect the security interest. It also:

- ensures that the security interest remains continuously perfected; and
- puts anyone who searches the **security interests register** on actual notice of its security interest over the **Jersey contract rights**.

Priority

The **Law** sets out the following priority rules that apply to a security interest created over **Jersey contract rights**.

- A perfected security interest has priority over an unperfected security interest over the **Jersey contract rights**.
- Where there is more than one perfected security interest over the **Jersey contract rights**, the security interest for which any of the following actions was first taken has priority:
  - a financing statement was registered; and
  - the security interest was temporarily perfected under the **Law**.

- Where competing security interests over the **Jersey contract rights** are perfected by attachment, priority is determined by the order of attachment.

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Enforcement

Remedies

If a security interest over **Jersey contract rights** becomes enforceable, the **security taker** may:

- sell the **Jersey contract rights** (including to itself) by auction, public tender or private sale;
- appropriate the **Jersey contract rights**;
- take control of the **Jersey contract rights**;
- exercise any of the **security giver's** rights in the **Jersey contract rights**; or
- instruct any person who has an obligation in relation to the **Jersey contract rights** to perform that obligation for the benefit of the **security taker**.

The **Law** allows the security agreement to include any other remedy as long as it does not conflict with the **Law**.

Process

The **Law** allows the **security taker** to enforce its security interest if:

- an event of default under the security agreement occurs; and
- it gives a notice to the **security giver** specifying the event of default.

If the **security taker** wants to appropriate or sell the **Jersey contract rights**, it must first give at least 14 days' written notice to the **security giver** and any **interested party**.

The **security taker** does not need to give notice if:

- the **security giver** or **interested party** agrees in writing to waive notice (which the **security giver** normally does in the security agreement);
- in the case of a sale of the **Jersey contract rights**:
  - the **security taker** believes on reasonable grounds that the **Jersey contract rights** will decline substantially in value if they are not disposed of within 14 days of the event of default; or
  - the Jersey court orders for any other reason that notice need not be given; or

- the **security taker** exercises a remedy other than appropriation or sale.

Within 14 days of appropriating or selling **Jersey contract rights**, the **security taker** must give to the **security giver** and other parties with an interest in the **Jersey contract rights** a statement of account which shows (among other things) the net value of the **Jersey contract rights** (in the case of appropriation) or net sale proceeds (in the case of a sale).

If any surplus remains after the enforcement costs and secured obligations and have been paid, the surplus must be applied among the relevant parties in the order of priority stated in the **Law**.

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Effect on other security interests

If the **security taker** sells or appropriates **Jersey contract rights**, any security interest that ranks after its security interest is automatically extinguished.

Duties

The **security taker** has the following duties to the **security giver** and any **interested party** on enforcing its security interest.

- Where it appropriates **Jersey contract rights**, it must take all commercially reasonable steps to determine the fair market value of the **Jersey contract rights** as at the time of appropriation.
- Where it sells **Jersey contract rights**, it must:
  - take all commercially reasonable steps to obtain fair market value for the **Jersey contract rights** at the time of sale; and
  - enter into any sale contract on commercially reasonable terms.

- It must act in other respects in a commercially reasonable manner in relation to the appropriation or sale.

Insolvency of security giver

The **Law** states that the power of the **security taker** to appropriate, sell or otherwise act in relation to **Jersey contract rights** is not affected by:

- the **security giver** becoming insolvent; or
- its property becoming subject to insolvency proceedings in Jersey or elsewhere,

as long as the security interest was perfected before the **security giver** became insolvent.

Terms used

Contract means any contract entered into by the **security giver** (whether in writing or not) which is:

- governed by Jersey law; or
- made with a Jersey company or Jersey individual.

interested party means any person who:

- 21 days before the **Jersey contract rights** are appropriated or sold, has registered a financing statement for a security interest over the **Jersey contract rights**; or
- not less than 21 days before the **Jersey contract rights** are appropriated or sold, has given the **security taker** notice of an interest in the **Jersey contract rights**.

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Jersey contract rights means all rights of the **security giver** under a **Contract** (including any payment owed to, or claim or cause of action of, the **security giver**) over which the **security giver** creates a security interest.

Law means the Security Interests (Jersey) Law 2012.

security giver means the person who creates a security interest over the **Jersey contract rights**.

security interests register means the register of security interests kept by the Jersey registrar of companies under the **Law**.

security taker means the person in whose favour a security interest is created over the **Jersey contract rights**.

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About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

About this guide

*This guide is one of a series of '**Collas Crill explains...'** and gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.*

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