COLLAS CRILL

# Collas Crill explains... Taking security over a Jersey bank account

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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 a Jersey bank account.

This guide looks at the key things you need to know about taking security over a Jersey bank account.

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 a **secured account**.

- Review the terms and conditions for the **secured account** to determine whether there are any terms that will adversely impact on its security interest over the **secured account** (eg any prohibition on the creation of security, right of set off or combination or lien) that need to be disapplied.

- Agree a form of security notice and security acknowledgement with the **account bank**. Some Jersey banks have their own forms of notice and acknowledgement which they require be used.

- 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 **secured account**. This search will not, however, reveal any security

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interest created under the Security Interests (Jersey) Law 1983 (the predecessor to the **Law**).

**Security basics**

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

Under the **Law**, a security interest is any interest in a **secured account** 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 a **secured account** are as follows.

- **Agreement**: a security interest over a **secured account** may only be created by agreement between the **security giver** and **security taker**.

- **Account held with security taker**:

  - When a customer deposits money into a bank account, the deposit represents a debt owed by the bank to the customer. In some jurisdictions, there are restrictions on the ability of a bank to take security over a bank account held by it (since the bank would be taking security over its own debt obligation) which is undesirable in the context of a financing transaction.

  - To avoid this issue, the **Law** allows a **security taker** to take security over a deposit account held by the **security giver** with the **security taker**.

- **Attachment**:

  - Attachment is the process by which a security interest creates a proprietary right in a **secured account**.

  - Once a security interest attaches to a **secured account**, it becomes enforceable against the **security giver**.

  - The general position is that a security interest attaches to a **secured account** 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 **secured account** or the power to grant rights in the **secured account** to the **security taker**; and

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  - the **security taker** has control of the **secured account** and/or the security agreement contains a description of the **secured account** that is sufficient to allow it to be identified.

- If the **security giver** retains the ability to deal with a **secured account**, this does not affect the attachment of a security interest to that **secured account**.

- **Perfection**:

  - Perfection is the process by which a security interest over a **secured account** becomes effective against third parties subject to the priority rules.

  - A security interest over a **secured account** 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 a **secured account** can be perfected by:

    - **control**: the **security taker** having control of the **secured account** and it will have control where:

      - the **secured account** is transferred into the name of the **security taker** with the written consent of the **security giver** and **account bank**;

      - the **security giver**, **security taker** and **account bank** agree in writing that the **account bank** will comply with the directions of the **security taker** regarding the transfer of funds in the **secured account**;

      - the **secured account** is assigned by way of security to the **security taker** in writing and the **account bank** is given written notice of the assignment; or

      - the **secured account** is held with the **security taker**; or

    - **registration**: the **security taker** registering a financing statement for that security interest on the **security interests register**.

- A security interest over a **secured account** must remain continuously perfected to remain enforceable against third parties.

**Security deliverables**

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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**:

- a security notice to the **account bank** from the **security giver** and **security taker**;
- a security acknowledgement from the **account bank**; and
- a consent to filing a financing statement.

Where the **account bank's** terms and conditions have terms that adversely impact on the **security taker's** security interest over the **secured account**, these will normally be disapplied in the security acknowledgement. Therefore, 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 a **secured account** 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 **secured account**.

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.

The **Law** does not require a **security taker** to register a financing statement. If the **security taker** does not register a financing statement, this will not invalidate a perfected security interest.

A **security taker** will normally want to register a financing statement relating to the security interest created over a **secured account** because:

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

**Priority**

The **Law** sets out the following priority rules that apply to a security interest created over a **secured account**.

- A perfected security interest has priority over an unperfected security interest over the **secured account**.

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- Where there is more than one perfected security interest over the **secured account**, the security interest for which any of the following actions was first taken has priority:
  - a financing statement was registered;
  - the **security taker** took control of the **secured account**; and
  - the security interest was temporarily perfected under the **Law**.
- Where competing security interests over the **secured account** are perfected by attachment, priority is determined by the order of attachment.
- A security interest over the **secured account** in respect of which the **security taker** has control has priority over a competing security interest in respect of which the other **security taker** does not have control.
- Where **security takers** with competing security interests over the **secured account** have control over the **secured account**, priority is determined by the order in which control was acquired.
- A security interest over the **secured account** in respect of which the **security taker** is the **account bank** has priority over a competing security interest in the **secured account** held by another **security taker**.
- A security interest over the **secured account** in respect of which the **security taker** has control due to the **secured account** being transferred into the **security taker's** name has priority over a competing security interest in the **secured account** held by the **account bank**.

**Enforcement**

Remedies

If a security interest over a **secured account** becomes enforceable, the **security taker** may:

- sell the **secured account** (including to itself) by auction, public tender or private sale;
- appropriate the **secured account**;
- take control of the **secured account**;
- exercise any of the **security giver's** rights in the **secured account**; or

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- instruct any person who has an obligation in relation to the **secured account** 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**.

In practice, the **security taker** will enforce its security interest over a **secured account** by appropriating it.

## 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 a **secured account**, 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); or

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

Within 14 days of appropriating a **secured account**, the **security taker** must give to the **security giver** and other parties with an interest in the **secured account** a statement of account which shows (among other things) the net value of the **secured account**.

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**.

Effect on other security interests

If the **security taker** appropriates a **secured account**, 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.

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- Where it appropriates the **secured account**, it must take all commercially reasonable steps to determine the fair market value of the **secured account** as at the time of appropriation.

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

Insolvency of security giver

The **Law** states that the power of the **security taker** to appropriate or otherwise act in relation to a **secured account** 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**

**account bank** means the Jersey bank or other deposit taking institution at which the **secured account** is held.

**interested party** means any person who:

- 21 days before a **secured account** is appropriated, has registered a financing statement for a security interest over the **secured account**; or
- not less than 21 days before the **secured account** is appropriated, has given the **security taker** notice of an interest in the **secured account**.

**Law** means the Security Interests (Jersey) Law 2012.

**secured account** means a Jersey bank account of the **security giver** over which it creates a security interest.

**security giver** means the person who creates a security interest over a **secured account**.

**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 a **secured account**.

**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.*

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