

Summary of Responses

SUMMARY OF CONSULTATION DETAILS

In 2009, the Economic Development Department published a White Paper on the Draft Security Interests (Jersey) Law 200-. The consultation invited comments on the Draft Law that will replace the existing Security Interests (Jersey) Law 1983 to provide a modern legal framework for creating security.

OVERVIEW OF CONSULTATION RESPONSES

There was a significant response to the consultation, including feedback from the Jersey Law Society and Banking Lawyers sub-group.

DEPARTMENT'S RESPONSE TO CONSULTATION

A number of modifications have been made to the Draft Law in response to the submissions received and the proposed changes put forward by the Banking Lawyers sub-group. These changes are summarised below. An updated version of the Draft Law can be read alongside this paper.

**Summary of Responses to the consultation on the Draft Security Interest
(Jersey) Law**

Introduction

1. There has been a significant response to the consultation on the draft Security Interests Law (“**the Consultation draft**”). This has included valuable feedback from the Jersey Law Society and from the Banking Lawyers sub-group (“**the Group**”). In response to the various submissions received, coupled with proposed changes contained in a revised draft prepared by Ogier on behalf of the Group, a number of modifications have been made to the Consultation draft. These are summarised in the present paper, which should be read alongside the final draft of the new Law (“**the Final draft**”). Some of the changes made are significant, whilst others are by way of technical improvements designed to simplify and clarify the text.

Major changes

Deletion of Part 5

2. Part 5 of the Consultation draft contained detailed provisions relating to the transfer by a debtor of its interest in collateral. The Group submitted that such transfers were almost invariably prohibited by the terms of the security agreement and asked for the ability for the parties to contract out of this provision as is currently the case. The merits of this approach were considered and it was felt that it would not be right to bar such an established practice. As there was evidence that the right to contract out would be likely to be exercised in almost every case it has been decided to remove Part 5 altogether, thereby simplifying and shortening the Final draft.

Sphere of application

3. Under Article 4 of the Consultation draft the new Law would have applied to a security interest created over any intangible property, wherever situated, by a company registered in Jersey or by a Jersey individual. It would have also applied to an assignment of a receivable by a company registered in Jersey or by a Jersey

individual. However, the Group strongly urged that the new Law should be confined to intangible property situated in Jersey and should not apply where the account debtor was located abroad. In the view of the Group, the fact that the grantor of the security interest or the assignor of the receivable was based in Jersey was not a ground for applying the Law. Therefore the relevant factor should be the location of the account debtor.

4. It is accepted that the location of the grantor or assignor should not be determinative. However, it was pointed out that the appropriate connecting factor would depend on the nature of the collateral. In line with established conflict of laws rules, the revised Article 4 distinguishes five classes of security interests. Security interests in documentary intangibles will be governed by the Law if the documents themselves (i.e. negotiable instruments or negotiable investment securities) are situated in Jersey. In the case of non-negotiable investment securities, the Law will apply if they are listed on a register maintained in Jersey or a register maintained by a Jersey company or individual. Where a security interest is given over one or more investment securities held through a securities account with an intermediary, and where security interests are created in deposit accounts, the Law will apply if the account is maintained in Jersey. This corresponds to the conflict rule embodied in Article 9 of the EC Financial Collateral Directive. With regard to any other kind of intangible, the Law will apply only if the account debtor or other person owing payment or other performance to the grantor is situated in Jersey. The Law will also govern an interest or transaction prescribed by Order for the purposes of the Article, as well as an assignment of a receivable if the receivable is payable by a Jersey company or individual.¹ Article 4 was discussed in draft with some members of the Group, who expressed satisfaction with it.

5. In addition, an Article has been inserted (Article 5 in the Final draft) to enable parties to choose that this Law shall apply to an agreement that would, apart from the operation of Article 4, create a security interest in intangible moveable property. This provision will only be available when those deciding this Law should apply are parties to the agreement and consequently, it will not bind third parties. For the purposes of this Article, the property may be situated anywhere in the world. This clarifies Article 102(2) in the Consultation draft.

¹ Assignment means an assignment otherwise than by way of security - see the definition of "assign" in Article 1.

6. It should also be noted that Article 8 no longer excludes the application of the Law to security interests over intellectual property. This prevents an unnecessary restriction to the application of this Law.

Floating charges

7. Article 15 on floating charges was removed because the floating charge is not a relevant form of security in Jersey.

Priority rules

8. The special priority rules in Article 30 have now been extended to cover not only investment securities and deposit accounts but also securities accounts, which had been omitted. A paragraph has been added to Article 31 (which deals with priorities where a security interest is transferred) to make it clear that between successive transferees of the same security interest, priority goes to the first to register his assignment.

Remedies

9. Part 7 (Part 8 in the Consultation draft) dealing with enforcement of security interests has been substantially revised to address comments made regarding the earlier draft. Article 43(1) now provides for when enforcement can be exercised, and Article 43(2) lists all the remedies available under the Law, leaving to later Articles any conditions necessary for the exercise of a particular remedy. This allows the reader to see at a glance what steps a creditor can take in the event of default. Among the remedies listed are: appropriating, selling or taking control or possession of the collateral or proceeds subject to the security interest; exercising the rights of the grantor in relation to that collateral or proceeds; or instructing any person who has an obligation in relation to the collateral or proceeds to carry out that obligation for the benefit of the secured party. Article 43(3) makes it clear that the remedies are cumulative to the extent that they are not in conflict (for example, a creditor cannot exercise both the remedy of sale and the remedy of taking the collateral in satisfaction of the debt).

10. Whilst Article 44 sets out notice required for appropriation or sale of collateral, it also provides that a person can agree to dispense with such notice should they have agreed to do so in writing with the secured party. The power of sale is no longer confined to the senior secured creditor (as stated in Article 60 of the Consultation draft). Consequently, any secured creditor can sell, though if the purchaser is to take free of the senior secured party's interest it will be necessary for the latter either to consent or to be paid out of the proceeds.

11. At Article 46(1)(a), the duty as to fair market value imposed on a secured party who sells or appropriates collateral is limited to the taking of all reasonable steps to obtain such value rather than obtaining fair market value as specified in the Consultation draft. The opportunity has been taken to integrate non-judicial means of facilitation into the primary provisions on remedies and to confine the facilitation of remedies to orders of the court. This removes a possible source of confusion over the difference between facilitation of a remedy and the remedy itself. As regards court orders, Article 52(c) now provides the remedy of appropriation, subject to the debtor's right to redeem.

12. In light of representations by the Group, amendments have been made to what were Articles 55 and 56 and are now Articles 49 and 50. Article 49(1) has been reworded to make it clearer. Article 50 permits the secured party to make a payment into court as an alternative to discharging its obligations under Article 49 and to be able to do so irrespective of whether there is a question as to who is entitled to receive payment under Article 49.

13. Article 66(1) in the Consultation draft gave the defaulting debtor the right to redeem the security at any time before the secured party sold the collateral. A member of the Group suggested that the right to redeem should be curtailed not only by a sale by the secured party but by that party's entry into a contract of sale, on the basis that this would make it impossible for the secured party to return the collateral to the debtor. New Article 54(1) now covers this eventuality and broadens it to cover every situation in which the secured party has acted irrevocably in relation to the collateral, for example, by applying it in satisfaction of the debt.

14. The grantor's alternative right to reinstate the security agreement (previously Article 67 but incorporated in Article 54 in the Final draft) is now qualified by

reference to the terms of that agreement. However, the right to redeem may not be excluded or modified by agreement. The difference between reinstatement and redemption is that the former involves remedying accrued defaults and reviving the security agreement so that, for example, the debtor who reinstates continues to enjoy the benefit of contractual provisions for repayment by instalments. Redemption entails discharge of the entire indebtedness, resulting in termination of the security agreement and reversion of the collateral in the debtor. The right to redeem is an essential feature of a secured transaction.

Bankruptcy

15. To the extent that an asset is subject to a security interest, it does not form part of a bankrupt debtor's estate. Article 56 accordingly provides that the secured party's power of sale or exercise of other remedies is not affected by the bankruptcy of the debtor or subjection of its property to any other judicial proceeding. This is so whether or not the security interest takes the form of a holding of title, the rights of a security creditor who does not hold title will not be restricted to a priority claim to the proceeds, as they are under Article 6(1) of the Security Interests (Jersey) Law 1983. Paragraph 2(b) of Schedule 1 makes a consequential amendment to Article 10 of the Bankruptcy (Désastre) (Jersey) Law 1990. Where the collateral includes a contract entered into by the debtor with a third party, Article 53 enables the secured party to exercise any contractual right to step into the debtor's position under the contract, or appoint another person to do so, notwithstanding the bankruptcy.

Supply of information

16. The duty imposed by Article 85 to supply information is now limited to the supply of information to the grantor. The equivalent Article in the Consultation draft (Article 95) had extended it to cover judgment creditors, persons with a security interest in intangible movable property of the debtor and a representative authorised by any of them. The Article has been further amended for clarity, and in addition, liability has been specified by Article 85(6) as a fine of Level 3 on the standard scale.

Transitional provisions: security interests

17. Schedule 2 of the Consultation draft provided that the new Law should apply not only to security interests created on or after its commencement but also to pre-existing security interests, with a transitional period for perfection of such interests under the new Law. Detailed representations were made that while it might be desirable to ensure that those taking security after entry into force of the new Law should be able to ascertain outstanding pre-existing interests after the end of the transition period, it would be difficult, if not impossible, for banks and their lawyers to ascertain from their records what security interests were still outstanding.

18. After considering the balance of the competing interests Schedule 2 has been revised to confine the new Law to security interests, created after the new Law's entry into force and to continuing security interests which are amended in one of the ways set out in paragraph 1 of Schedule 2.² These amendments affect the extent of the security interest and therefore require it to be treated as if it were a new interest and as such to be governed by the new Law.

19. Continuing security interests that have not been so amended will have priority over any security interest created under the new Law, and over any assignment of a receivable perfected under the new Law, unless the secured party in respect of the continuing security interest otherwise agrees. Amended security interests will have their priority determined under the new Law.

Transitional provisions: assignments of receivables

20. The starting position under paragraph 5(1) of Schedule 2 is that the new Law does not apply to a prior assignment.³ However, considerations leading to the exclusion of un-amended continuing security interests from the new Law do not apply with the same force to outright assignments of receivables, which typically involve a continuing relationship between assignor and assignee under factoring, invoice discounting and block discounting arrangements.

² Continuing security interests mean pre-existing security interests still in force when Part 3 of the new Law comes into force.

³ Prior assignment is an assignment made before Part 6 comes into force of a receivable by a Jersey company or a Jersey individual.

21. Accordingly, paragraph 5 of Schedule 2 now provides that such assignments may be registered during or after the end of the transitional period and shall be deemed to be registered when Part 6 comes into force or when actually registered, whichever is the later. The transitional period is the period commencing when Part 8 (registration) comes into force and ending when Part 6 (assignments of receivables) comes into force (Schedule 2, paragraph 5(8)).

22. Registration does not affect the priority of a prior assignment against another prior assignment but does determine priority between a prior assignment and a new-Law assignment. In addition registration has the effect of perfecting the assignment for the purpose of Article 59(2), which deals with the effect of bankruptcy on unperfected assignments.

Minor changes

Definitions

23. The definitions in Article 1 were significantly refined as the result of proposals by respondents. This includes the addition of a definition of “account debtor”, the transferral of the definition of “advance” to Article 33(4) and a refined definition of “purchase-money security interest”. The term “default” has been replaced by “event of default” since, apart from the fact that this is standard terminology in loan and security agreements, it is also the phrase used in Article 8(1) of the 1983 Law. The definitions of “Jersey company” and “Jersey individual” have been moved to Article 1.

24. A definition of “assign” has been inserted to make it clear that the provisions relating to assignments of receivables are confined to assignments otherwise than by way of security, since security assignments fall within the definition of “security interest.” An exception is provided by Article 41, dealing with the debtor’s defences and rights of set-off against an assignee, which applies both to outright assignments and to security assignments.

25. The definition of “debtor” was previously used to cover both cases where the debtor granted the security and those where the debtor was merely an obligor, the security having been provided by a third party. It was pointed out that this dual meaning could be a source of confusion and that it was better to refer to the party

having rights in the collateral, and thus giving the security, as the “grantor.” This suggestion has been adopted, replacing the definition of debtor in the Consultation draft with definitions of grantor and obligor. “Grantor” refers to the person who owns or has other rights in the collateral and thus grants the security even if this is not for his own obligation but for that of a third party. “Obligor” denotes the person who owes the obligation that is the subject of a security interest and who may or may not be the person giving the security.

26. The phrase “valuable consideration” in the Consultation draft Article 13b came in for some criticism on the ground that while the concept was well-established in English law it did not reflect Jersey law, which was based on the French law concept of “cause”. It was felt desirable to escape from the associations both with the common law concept of consideration and with the civil law concept of “cause” and to refer simply to “value.”

27. Finally, a new Article 2 makes it clear that a reference in the Law to a grantor, obligor or secured party includes a reference to his successor or assign.

Other minor amendments

28. Article 3 has been amended to add a new Paragraph 7 providing for a person to exercise control through another, whether as trustee or in some other capacity.

29. A new Article 15(4) deals with the circumstances in which a security interest is extinguished.

30. Schedule 1 now incorporates associated amendments to nine Laws. This includes provision to amend rather than repeal Article 14(2) of the Bankruptcy (Désastre) (Jersey) Law 1990.

31. Various other minor drafting amendments have been made for the purposes of clarification and consistency.