

# GUIDE TO TAKING SECURITY IN GUERNSEY

## CONTENTS

PREFACE	1
1. Types of Security Interests	2
2. Security Interest Agreements Generally	3
3. Creation of Security over Specific Intangibles	3
4. Registration of Security	4
5. Rights of Foreign Creditors	4
6. Enforcement of Claims by Secured Creditors	4
7. Reciprocal Judgments and Cross-Border Enforcement	7
8. Conclusion	8

## PREFACE

Insolvency is a major commercial risk. Prudent creditors are able to protect themselves against the potential risk of a debtor's insolvency by taking security, thereby obtaining priority over other creditors.

This Guide provides an overview of the process of taking security and enforcing security over Guernsey assets which will be subject to the laws of Guernsey.

This Guide focuses on the legislative and regulatory framework for taking of security over both real (or "immovable") and personal (or "movable") property, the methods by which a creditor may register a charge, the rights of foreign creditors and enforcement of claims by secured creditors in Guernsey. Also discussed are the methods by which a creditor may enforce security granted pursuant to an instrument governed by a law other than that of Guernsey.

We recognise that this Guide will not answer the detailed questions that clients and their advisers may have. It is intended to provide an outline of Guernsey's legal and regulatory environment in relation to taking security. This Guide is, therefore, a starting-point for a more detailed and comprehensive discussion of the issues. If any such questions arise in relation to the contents, they may be addressed to any member of the Corporate Group in Guernsey, using the [contact information](#) provided at the end of this Guide.

### **Appleby**

Guernsey

March 2016

## 1. TYPES OF SECURITY INTERESTS

The type of security which can be created in Guernsey depends on whether the asset is an immovable asset (real property) or a movable asset (all other property, tangible and intangible).

We will cover the details of taking security over real property briefly in this paper but the focus is on taking security over movable assets, and, in particular, intangible assets.

### 1.1 Immovable Assets

Security is generally taken over real property in Guernsey by means of a bond. In order for a bond to constitute a charge over the real property of the debtor, it must be:

- consented to *devant justice*;  
this involves the debtor appearing before a Lieutenant Bailiff and two Jurats of the Royal Court and agreeing to be bound by the provisions of the bond;
- registered at the Greffe.

### 1.2 Movable Assets

There is distinction between movable assets depending on whether they are tangible or intangible.

For tangible movable assets, the following types of security may be taken:

- pledges;
- liens;
- a landlord's right to priority for unpaid rent secured by movable property on the demised premises;
- mortgages over ships;
- reservation of title clauses.

For intangible movables the following are recognised:

- a security interest may be created under the Security Interests (Guernsey) Law, 1993 (**Security Interests Law**);
- set-off agreements and assignments with provisos for reassignment are recognised under the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979;
- foreign security over movables sited outside of Guernsey will be recognised even though the form of security is not recognised under Guernsey law.

### 1.3 Ships

The instrument creating security over ships, known as a maritime mortgage, must be in the form required by the regulations made under the Merchant Shipping (Bailiwick of Guernsey) Law, 2002.

### 1.4 Aircraft

There is no separate law covering the taking of security over aircraft in Guernsey. Security over an aircraft is therefore created by a security interest agreement (see below), assigning the various contractual rights associated with the aircraft from the owner to the secured party who must give notice of the assignment to the person from whom the assignor would have been entitled to claim the collateral (as described, above) for the security to become effective. Those contractual rights could be, for example, rights against the manufacturer under a purchase agreement, or against a lessee under a leasing agreement.

## 2. SECURITY INTEREST AGREEMENTS GENERALLY

The ability to take security is often a key requirement for commercial and banking transactions. The taking of security over Guernsey-sited intangibles is governed by the Security Interests Law.

A security interest agreement must:

- be dated and in writing;
- identify the secured party and the debtor;
- be signed at least by the debtor;
- contain sufficient particulars of the collateral and of the obligations secured so that they can be identified; and
- specify the events which are to constitute the events of default.

## 3. CREATION OF SECURITY OVER SPECIFIC INTANGIBLES

### 3.1 Shares

The secured party must either:

- obtain possession (either personally or through an agent) of the securities' certificates of title, usually with a power of attorney granting rights to effect the transfer of title in the event of default of the debtor; or
- obtain title to the securities in question (by an assignment of the contractual rights in the collateral to the secured party).

### 3.2 Negotiable Instruments

Security over a negotiable instrument will be effective where the secured party has, pursuant to a security agreement, title to the collateral by delivery and with any necessary endorsement.

### 3.3 Cash in a Bank Account

The secured party must either:

- obtain control of the secured account if the secured party is also the account holding bank; or
- obtain title to the secured account.

In the latter case such title may be transferred by assignment, in which case the security will not be effective until notice of the assignment is given to the bank with which the account is held.

### 3.4 Goods

Under Guernsey customary law, security cannot be taken over movable property without delivery of the physical property itself into the hands of the creditor. The concept of the floating charge is unknown to Guernsey law. The only form of charge which Guernsey customary law generally recognises over tangible movable property is a pledge of the tangible movable asset by transfer of possession together with an appropriate agreement.

### 3.5 Securities and Insurance/Assurance Policies

To create the security, the party taking the security (secured party) must either:

- obtain possession (either personally or through an agent) of the securities' certificates of title, or of the policy as the case may be; or
- obtain title to the securities or the policy (e.g. by an assignment of the contractual rights in the collateral to the secured party).

Either route to security is effective. However, if the secured party takes an assignment of title to the policy, that security will not be effective until notice of the assignment is given to the person from whom the debtor would have been entitled to receive the securities (usually the company issuing the securities or policy).

### 3.6 Intellectual Property

Security over intellectual property is taken by assignment of title under a security agreement.

## 4. REGISTRATION OF SECURITY

As stated earlier, a bond over real property must be registered with the Greffe in order for it to be effective. Priority of bonds is determined by the date of registration at the Greffe. A search can be carried out at the Greffe to establish what bonds have been registered over property.

There is no register of security interests in Guernsey and there are no provisions under the Companies (Guernsey) Law, 2008 (**Companies Law**) requiring a Guernsey company to file information about security interests which that company creates over any of its intangible property.

Priority of security interests in the same collateral is governed by the Security Interests Law. Those interests take priority in the order of their creation (unless otherwise agreed).

## 5. RIGHTS OF FOREIGN CREDITORS

Guernsey law does not, as a general principle, impose any legal disability on foreign creditors merely due to their foreign status. A Guernsey judgement obtained by a foreign creditor would be enforceable in Guernsey, but foreign judgments are not enforceable as of right unless they comply with the requirements of the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 (**Enforcement Law**). Where the Enforcement Law does not apply, enforcement of a foreign judgment would take place under common law. Similarly there are provisions for the enforcement of foreign arbitrational awards under Guernsey law.

Whilst Guernsey law does not include the concept of a floating charge, Guernsey companies have capacity under the Security Interests Law to create foreign floating charges and other types of foreign security over foreign situate assets and those charges could be enforced in a Guernsey court.

## 6. ENFORCEMENT OF CLAIMS BY SECURED CREDITORS

### 6.1 Real Property

The procedure in Guernsey whereby a creditor can have the property of his debtor vested in him in satisfaction of his debt is known as *saisie*. It has its origins in ancient customary law, though the current procedure is governed by the Saisie Procedure (Simplification) (Bailiwick) Order 1952, as amended.

A full explanation of the *saisie* procedure is outside the scope of this Guide but, in summary, the procedure has three stages:

#### (a) Preliminary Vesting Order (PVO)

When judgment is given against a debtor in the Royal Court, the creditor can seek leave to levy the execution on the real property of the debtor. The grant of this request by the Court constitutes a PVO. It should be noted that, once a creditor has chosen to obtain a preliminary vesting order, the creditor cannot then proceed against the debtor's personal property for the debt. If the debtor has personal property, it is therefore advisable to obtain an ordinary judgment, proceed against the personal property first and then, once the personal property has been exhausted, convert the judgment to a PVO, which is effected by a separate application to

the Court. Once a PVO has been granted, the creditor to whom it is granted (**judgment creditor**) has certain rights in relation to the property, including the right to let the premises and collect rent.

Before moving on to the next stage, the IVO, the judgment creditor must arrange a meeting before a Commissioner of the Court, to which the debtor must be summoned, and at which an account is produced which sets out the amount of the judgment obtained by the creditor together with accrued interest and costs. The Commissioner certifies the amount due to the creditor.

(b) **Interim Vesting Order (IVO)**

The judgment creditor summons the debtor to Court to require him to pay the sum due to the creditor as certified in the Commissioner's report. If that sum is not paid, the judgment creditor applies for an IVO. From the date on which an IVO is granted until the date on which a FVO is granted, the judgment creditor holds the property as trustee for all of the creditors of the debtor. Any rent which he receives from that date must be accounted for. Having obtained an IVO, the judgment creditor opens a register of claims at the Greffe and must give notice in *La Gazette Officielle* that the register has been opened. The register is open for 28 business days. Any creditor of the debtor (whether or not he has a charge over the property) can enter his claim on the register.

(c) **Final Vesting Order (FVO)**

Once the register is closed, the judgment creditor can apply immediately to the Court for an order that the premises be vested in the judgment creditor. If this is done, then the judgment creditor will be responsible for paying all of the other creditors who have registered their claims at the Greffe though in practice, this is usually only done where no significant claims have been registered at the Greffe other than that of the judgment creditor. Where this procedure is not adopted, the judgment creditor must summon all of the creditors who have registered their claims at the Greffe to a meeting before a Commissioner of the Court. The claims of the creditors are then placed in order of priority, known as "marshalling". Creditors with charges will be ranked according to when their charges were registered. At that sitting the judgment creditor summons each creditor, in reverse order of priority, who can choose to either have the property which is the subject of the *saisie* vested in him or to renounce his claim. A creditor who declines to take the property when offered to him is deemed to have renounced to his right so to do and his claim ceases to be of any effect. A creditor who takes the property has a FVO made in his favour, the property is vested in the creditor and the conveyance to the creditor is registered automatically at the Greffe. That creditor must pay all creditors whose registries rank ahead of his in full within 15 days.

## 6.2 Personal Property

When an event of default occurs under the security interest agreement, a power of sale arises. However, before the secured party can exercise the power of sale or any provision of a security agreement, the secured party must serve the debtor with a default notice specifying the event of default. There is no requirement to allow a period to remedy the event of default within the Security Interests Law. Unless the security agreement contains an express requirement, no court order is required before the sale can proceed. The power of sale over the collateral must be exercised within a reasonable time period by the secured party and on an open market price basis. The Security Interests Law provides that the secured party must take "all reasonable steps" to exercise the power of sale "within a reasonable time" and "for a price corresponding to the value on the open market".

The Security Interests Law sets out the order in which the sale proceeds must be applied. After the payment of costs and expenses of the sale and the discharge of any prior security interests, the bank may discharge the secured obligations and any subsequent security interests before accounting for the

balance to the debtor or, if the debtor is insolvent or has been subjected to any other judicial arrangement in relation to insolvency, to the Sheriff or other proper person.

### 6.3 General Limitations on Enforcement

#### (a) Appointment of Receiver

There is no procedural provision under the laws of Guernsey enabling the courts of Guernsey to appoint a receiver of assets situated within Guernsey (except in relation to cell of a protected cell company).

#### (b) Exchange Control

There are no foreign exchange controls.

#### (c) Stamp Duty

Document duties, court fees and registration fees are payable on a bond over real property.

No stamp duties are payable on Guernsey security interest agreements over intangible movable property.

#### (d) Limiting Legislation

Enforcement may be limited by other laws of general application which relate to, or affect creditors' generally (including laws relating to bankruptcy, insolvency, liquidation, reorganisation or matters of public policy).

#### (e) Set-off

The law in relation to set-off is contained in the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (**1979 Law**). The 1979 Law confirms the right of set-off pursuant to an agreement governing mutual dealings between the parties. Section 1 of the 1979 Law makes it clear that any third party right is enforceable only against the net balance after set off, provided such agreement does not amount to a fraudulent and void preference given within six months either of the material party being declared *en désastre* or the commencement of liquidation.

### 6.4 Enforcement Mechanisms/Protection of Creditors

#### (a) Shares

Where shares in a private company are taken as security, the security is effected by taking title to the shares or by possession of the share certificates. For the latter, the terms of the security interest agreement will usually require the debtor to give the secured party possession of the share certificates, executed blank share transfers and a power of attorney in respect of the shares. On default (provided the debtor is not bankrupt or *en désastre*) in exercise of the power of sale as described above, the secured party should tender the completed instruments of transfer to the company secretary to register the secured party, its nominee or a purchaser as members on the company register. If the debtor is *en désastre* the Sheriff will exercise the power of sale and apply the proceeds in the same order as set out above.

Issues to do with pre-emption rights in the debtor company's Articles of Association, and capacity of the directors to refuse registration of the transfer of shares, should be dealt with at the time the security is first taken.

#### (b) Choses in Action

The terms of the security instrument which created the secured interest in the chose in action will govern its enforcement, subject to them being consistent with the Security Interests Law.

**(c) Secured Creditors**

Section 4 of the Security Interests Law provides that priority between security interests in the same collateral is determined by their order of creation. Section 5 of the Security Interests Law provides that where the debtor either becomes insolvent or is declared to be *en état de désastre*, the amount due to a secured party in respect of a security interest without title is payable in priority to all other claims. After the collateral is exhausted, the secured party becomes an unsecured credit and ranks *pari passu* with other unsecured creditors. The Security Interests Law also provides that the power of a title holding secured party to realise or deal with the collateral is unaffected by the debtor either becoming insolvent or his property being subjected to other judicial arrangement or proceeding consequently upon insolvency.

**(d) Preferential Creditors**

The Preferred Debts (Guernsey) Law, 1983 provides that certain preferred creditors shall be paid before unsecured creditors but after secured creditors. The debts preferred are those in respect of arrears of rent, arrears of employees' wages (up to a maximum of £5,000 or an unlimited amount of wages if they were payable as a lump sum at the end of employment), employees' holiday pay and unpaid tax (including income tax and social security contributions) retained by the employer in respect of its employees.

**(e) Pari Passu Distribution**

Subject to the full discharge of rights of secured creditors and priority creditors, the claims of unsecured creditors are paid *pari passu*.

**6.5 Reversible Antecedent Transactions****(a) Preferences**

The Companies Law contains provisions which enable a liquidator (in a creditors' winding-up) to apply to the Royal Court to set aside preferences. A preference is granted when a debtor enters into a transaction with a creditor, surety or guarantor with a desire to create a preference and the transaction puts the other party in a better position in the event of a declaration or winding-up than it would have been but for the transaction; it occurred within six months of the date of any application for the compulsory winding-up or the date of the passing of a resolution for the voluntary winding-up; and the company was, at the time of giving the preference, or because as a result of the preference, unable to pay its debts or the desire in carrying out the transaction was to improve a person's position in the company's liquidation. In such cases, the transaction may be reversed, unless it is proved that the company was solvent, or did not become insolvent as a result of the transaction. There is protection for bona fide third parties acquiring for value.

**(b) Fraudulent Trading**

Any parties knowingly involved in running a business with the intention to defraud creditors or others, or for any fraudulent purpose, may be liable to contribute to the company's assets, as well as possibly being subject to criminal sanctions.

**(c) Wrongful Trading**

A director may be guilty of wrongful trading if the director allowed a company to trade when the director knew that there was no reasonable prospect that it would avoid a creditors' winding-up or a *désastre* (or was reckless about that). If guilty, the director may be required to meet some or all of the company's debts from the time of such knowledge unless the director took reasonable steps to minimise the potential loss.

**7. RECIPROCAL JUDGMENTS AND CROSS-BORDER ENFORCEMENT**

There are two principal methods of enforcing security granted pursuant to an instrument governed by a law other than Guernsey:

- through the Enforcement Law; or
- through the applicability of the common law doctrine of obligation by action on the debt evidenced by the judgment of such competent foreign court.

Assuming that the instruments constitute legal, valid and binding obligations on each of the parties thereto and are enforceable in accordance with their terms as a matter of their own governing law, then the courts in Guernsey will generally enforce a judgment of a foreign court in respect of such obligations.

If the judgment in question originates in a jurisdiction to which the Enforcement Law applies, then the procedures provided for in the Enforcement Law must be followed.

It should also be noted that receivership is not recognised in Guernsey though the Guernsey courts will still generally recognise and assist a foreign appointed receiver.

## 8. CONCLUSION

Guernsey provides the requisite legislative and regulatory infrastructure to ensure that a creditor which has obtained security, subject to the laws of their jurisdiction, is protected from the risk of his debtor's insolvency. Guernsey's legislation also provides for the perfection of such security and, as a general principle, the foreign creditor is under no legal disability due to their foreign status.

The secured position of the creditor thus allows for relatively straightforward enforcement of claims over the assets subject to security and, whilst there are limitations to enforcement across the jurisdictions, there are mechanisms in place to protect the creditor.

In addition, there are various methods by which a creditor may enforce security in Guernsey granted pursuant to an instrument governed by a law other than that of the Island of Guernsey.

For more specific advice on taking security in Guernsey, we invite you to contact:

### Guernsey

#### Jeremy Berchem

Group Partner, Group Head, Guernsey

Corporate

+44 (0)1481 755 601

jberchem@applebyglobal.com

For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).

The term "Partner" is a title referring to a member, employee or consultant of equivalent standing and qualifications of Appleby (Guernsey) LLP which is an Appleby legal practice and a limited liability partnership. A list of the partners of any Appleby partnership, members of any Appleby limited liability partnership, or of the members, shareholders and directors of any Appleby limited company and of any other non-shareholders who are termed "Partners" of any legal practice is available for inspection upon request from your relationship partner. Appleby is an organisation of separate entities and legal practices comprising both corporate and partnership form, each established to provide legal services under the Appleby name from the numerous jurisdictions in which it is based.

This publication is for general guidance only and does not constitute definitive advice  
© Appleby Global Group Services Limited 2016