

Collas Crill explains... Taking security over shares in a Jersey company

November 2019

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 the Jersey company's shares.

This guide looks at the key things you need to know about taking security over the shares in 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 the **secured shares**.

- Inspect the **issuer's** register of shareholders to make sure:
 - the **security giver** is the registered holder of the **secured shares**;
 - there is no evidence of any existing security interest over the **secured shares**; and
 - the **secured shares** are fully paid.
- Review the **M&A** to ensure that there are no provisions that prohibit the creation, or might hinder or impair the enforcement of, a security interest over the **secured shares**, like:
 - restrictions on share transfers;
 - pre-emptive rights;
 - a lien in favour of the **issuer**; or
 - directors' discretion to refuse to register share transfers.
- Review each share certificate for the **secured shares** to make sure it complies with the **M&A** and find out where the original is kept.

- Review the **issuer's** consent to issue shares under the Control of Borrowing (Jersey) Order 1958 to make sure there are no unusual or problematic conditions in it.
- Carry out:
 - a companies registry search; and
 - an insolvency search,
 to make sure there is no evidence the **issuer** or (if a Jersey person) **security giver** 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 shares**. This search will not, however, reveal any security 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 the **secured shares**.

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

- **Agreement:** a security interest over the **secured shares** 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 the **secured shares**.
 - Once a security interest attaches to the **secured shares**, it becomes enforceable against the **security giver**.
 - The general position is that a security interest attaches to the **secured shares** 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 shares** or the power to grant rights in the **secured shares** to the **security taker**; and
 - the **security taker** has control of the **secured shares** and/or the security agreement contains a description of the **secured shares** that is sufficient to allow them to be identified.
- **Perfection:**
 - Perfection is the process by which a security interest over the **secured shares** becomes effective against third parties subject to the priority rules.

- A security interest over the **secured shares** 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 the **secured shares** can be perfected by:
 - **control**: the **security taker** having control of the **secured shares** by:
 - being registered as the holder of the **secured shares**; or
 - possessing the certificate for the **secured shares**; or
 - **registration**: the **security taker** registering a financing statement for that security interest on the **security interests register**.
- A security interest over **secured shares** 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**:

- the original share certificate(s) for the **secured shares**;
- a share transfer form for the **secured shares** signed in blank;
- a **special resolution** signed by the **security giver** (in its capacity as shareholder of the **issuer**) making any changes to the **M&A** required by the **security taker**;
- a certified copy of the **issuer's** register of shareholders which has a note of the security interest created over the **secured shares** by **security taker**; and
- a consent to filing a financing statement.

In addition, frequently, the **security giver** will be required to:

- give a notice to the **issuer** advising the **issuer** that it has created a security interest over the **secured shares**; and
- ensure the **issuer** gives a notice to the **security taker** acknowledging the notice from the **security giver**.

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 **secured shares** 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 shares**.

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 the **secured shares** 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 shares**.

Priority

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

- A perfected security interest has priority over an unperfected security interest over the **secured shares**.
- Where there is more than one perfected security interest over the **secured shares**, the security interest for which any of the following actions was first taken has priority:
 - a financing statement was registered;
 - the **security taker** took possession or control of the **secured shares**; and
 - the security interest was temporarily perfected under the **Law**.
- Where competing security interests over the **secured shares** are perfected by attachment, priority is determined by the order of attachment.
- A security interest over the **secured shares** in respect of which the **security taker** has possession or control has priority over a competing security interest in respect of which the other **security taker** does not have possession or control.
- Where **security takers** with competing security interests over the **secured shares** have possession or control over the **secured shares**, priority is determined by the order in which possession or control was acquired.

Third parties

Where a person acquires the **secured shares** for value:

- it acquires the **secured shares** free of any unperfected security interest unless it was party to the transaction that gave rise to the unperfected security interest; and
- if it takes possession of the certificate for the **secured shares**, it acquires the **secured shares** free of any security interest over them even if it knows about the existence of the security interest unless it knows the disposal of the **secured shares** will breach the security agreement which created the security interest.

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London

Enforcement

Remedies

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

- sell the **secured shares** (including to itself) by auction, public tender or private sale;
- appropriate the **secured shares**;
- take possession or control of the **secured shares**;
- exercise any of the **security giver's** rights in the **secured shares**; or
- instruct any person who has an obligation in relation to the **secured shares** 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 **secured shares**, 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 **secured shares**:
 - the **secured shares** are listed on a securities exchange;
 - the **security taker** believes on reasonable grounds that the **secured shares** 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 the **secured shares**, the **security taker** must give to the **security giver** and other parties with an interest in the **secured shares** a statement of account which shows (among other things) the net value of the **secured shares** (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**.

Effect on other security interests

If the **security taker** sells or appropriates the **secured shares**, 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 the **secured shares**, it must take all commercially reasonable steps to determine the fair market value of the **secured shares** as at the time of appropriation.
- Where it sells the **secured shares**, it must:
 - take all commercially reasonable steps to obtain fair market value for the **secured shares** 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 the **secured shares** 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.

Insolvency of issuer

Where the property of the **issuer** is declared en désastre, the prohibition in the Bankruptcy (Désastre) (Jersey) Law 1990 on the transfer of its shares without the approval of the Viscount does not apply if its shares are subject to a security interest under the **Law**.

Terms used

interested party means any person who:

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London

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

issuer means the company which issued the **secured shares**.

Law means the Security Interests (Jersey) Law 2012.

M&A means the **issuer's** memorandum and articles of association.

secured shares means the shares in the **issuer** in certificated form over which the **security giver** creates a security interest.

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

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 **secured shares**.

special resolution means a resolution that is required to be passed as a special resolution by a majority of two thirds (or any higher majority specified in the company's articles of association) of shareholders who (being entitled to do so) vote at a meeting of the **issuer** of which not less than 14 days' notice has been given.

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.

For more information please contact:



Matt Gilley

Advocate // Jersey

t: +44 (0) 1534 601691 // e: matthew.gilley@collascrill.com