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Jersey Lending & Secured Finance 2023

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Overview

What are the main trends/significant developments in the lending markets in your jurisdiction?

As in other jurisdictions, economic headwinds created by rising interest rates, inflation, the potential disruption to energy supplies and UK monetary and fiscal policy have impacted M&A activity, new loan origination and debt capital market transactions in 2022. Consequently, there has been a prevalence of "amend and extend" transactions entered into by borrowers that failed to refinance in 2021 and were facing maturity dates in 2022. There has also been significant activity related to other liability management measures, such as asset sales, covenant resets, debt buybacks and refinancing with equity.

Despite these challenges, which also apply to other jurisdictions, Jersey has enjoyed continued confidence over the last 12 months from investors from around the globe seeking to estab- lish investment holding structures, including those seeking to benefit from Jersey's status as a well-regulated jurisdiction and top-tier credentials arising out of reviews by OECD, ECOFIN and MONEYVAL. Jersey's reputation means sustained use of Jersey companies and trust structures by North American, Middle Eastern, South East Asian and other investors, regardless of the direction in which those vehicles face, in terms of investment interests or objectives.

ESG (including ESG-linked pricing structures) continued to be one of the main themes during 2022 and Carey Olsen has been at the forefront of activity in Jersey.

Instructions in relation to the financing and establishment of new corporate real estate structures have continued, albeit, in a more patchy manner given economic uncertainties; however, business flows have held up very well, given that uncertainty.

The fund finance market continued to be very resilient and a large number of new facilities were implemented over the last 12 months. Diversification has continued to be a key characteristic, with work including subscription line facilities, GP facilities, co-investment facilities and Net Asset Value ("NAV") facilities.

The growth of Jersey companies as the vehicle of choice for acquisition finance continues, with an uptick in the use of Jersey holding structures in acquisition finance transactions. Jersey remains a popular choice in which to seat a joint venture vehicle with or without utilising a Eurobond exemption listing.

Over the last few years there has been a significant increase in the use of Jersey entities in connection with financial restructur- ings/exits from restructuring, with Jersey companies frequently used as the vehicle through which lenders take control of distressed debtor groups.

Court ordered creditors' winding up

New legislation (the Companies (Amendment No. 8) (Jersey) Regulations 2022) that came into force on 1 March 2022, created an additional type of winding up procedure, known as a "court ordered creditors' winding-up". It enables creditors, for the first time in Jersey, to apply to the court under the Companies (Jersey) Law 1991 for an order placing an insolvent company into a creditors' winding up and for a liquidator to be appointed to conduct that winding up. A creditor with a liquidated claim of £3,000 or more may apply to the court for an order to commence a creditors' winding up where:

- the company is unable to pay its debts;
- the creditor has evidence of the company's cash flow insolvency; or
- the creditor has the consent of the company.

Where the court makes an order to commence a creditors' winding up, it will also appoint a liquidator (or more than one liquidator), being either a person nominated by the creditor that made the application or a person selected by the court. The new regime also enables the court to appoint a provisional liquidator and therefore provides comfort to creditors that company assets will not be dissipated in the intervening period between the initial application and the court order to commence the creditors' winding up.

There are also safeguards to balance the interests of businesses against those of creditors and to protect against frivolous or vexatious applications. For example, a creditor will usually be required to give a company notice that it intends to make an application and, once an order for a creditors' winding up has been made by the court, at any time during the course of that winding up, the company may apply to the court for an order terminating it.

Reforms applicable to liquidators

Contemporaneously with the introduction of the new court ordered creditors' winding up procedure, a Ministerial Order (the Companies (General Provisions) (Amendment No. 6) (Jersey) Order 2022 (the "Order")) came into force, to effect changes to the Companies (General Provisions) (Jersey) Order 2002 that have redefined the eligibility criteria for appointment as a liquidator in specified circumstances (including liquidator appointments under the new court ordered creditors' winding up procedure).

Under the Order, a person will only be regarded as eligible for appointment as a liquidator of a public company and a liquidator of a company that is subject to a creditors' winding up (under both the existing and new regimes) if they are registered as an approved liquidator and entered on the new public Register of Approved Liquidators administered by the Viscount (the executive officer of the Royal Court with particular responsibility for bankruptcy related matters). Although the eligibility requirements include being Jersey

resident, it is nevertheless possible for a non-Jersey resident individual (who otherwise meets the qualification requirements) to be appointed as a liquidator in Jersey under the new regime provided that they are appointed jointly with a liquidator who is Jersey resident and registered as an approved liquidator. This will enable creditors and the court to draw on resources and expertise that may not otherwise be available in Jersey.

The reforms applicable to liquidators and new court ordered creditors' winding up procedure represent a significant milestone in the evolution of Jersey's corporate insolvency regime and implement improvements from which creditors of distressed businesses will derive considerable benefit whilst incorporating protections that safeguard those businesses from frivolous or vexatious applications.

LLCs

The Limited Liability Companies (Jersey) Law 2018 came into force on 1 September 2022. The Law introduces US-style limited liability companies ("LLCs") into Jersey, which provide a familiar structure aimed primarily at Jersey's growing US client base. Jersey LLCs combine the limited liability protection of a company with the constitutional flexibility and privacy of a partnership, whilst enabling a choice as to management structure and tax treatment of both.

Limited partnerships

The Limited Partnerships (Amendment No.2) (Jersey) Law 2022 came into force on 12 August 2022. It modernises the Limited Partnership (Jersey) Law 1994, clarifying and enhancing certain key areas, such as:

- The extension of the "safe-harbours" list, to increase an investor's ability to engage with the day-to-day business of the applicable limited partnership without exposing itself to additional liability.
- Right to profits/return of contributions: The LPA may now state that a partner has no right to a return of their contribution or to receive profits. This is beneficial if the intention is that one or more partners do not share in the LP's profits and dispenses with the need for all partners to be given at least a nominal profit share.

What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Due to the nature of the work, many transactions are highly confidential. Carey Olsen is active on over 30 global bank panels. As part of bank panel terms, we are unable to disclose the names of these banks.

Significant matters include:

- RBS International – advising RBS International in connection with a €1.455 billion ESG-linked financing for European investment firm Triton Partners. The facility structure is intended to be replicated across future Triton funds, providing a common set of strategic targets that will catalyse the delivery of Triton's overall sustainability goals and objectives.
- Petrofac Refinancing Plan – advising FTSE250 listed and Jersey incorporated company, Petrofac Limited, a leading international services provider to the energy industry, on a proposed equity capital raise and refinancing plan comprising a US$275 million fully underwritten firm placing an open offer of new shares, a US$500 million bridge financing facility which was replaced by a public bond issuance of US$600 million 9.75% senior secured notes due 2026 (launched alongside the equity raise), a US$180 million new revolving credit facility, an AED$185 million (US$50 million) new bilateral facility and an amendment of a US$50 million existing bilateral term loan facility. As part of the plan, a £300 million Covid Corporate Financing Facility was repaid on December 1 2021.
- Pizza Express Restructuring - advising the ad hoc group of creditors in relation to the debt and equity restructuring of Pizza Express, a leading international casual dining operator. The transaction was implemented by means of a restructuring plan under the UK Corporate Insolvency and Governance Act 2020.

Guarantees

Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, guarantees are commonly used by group companies. They are usually created by written agreement. Corporate benefit should be considered and this is covered in greater detail in the following question.

The Security Interests (Jersey) Law 2012 (the "**Security Interests Law**") expressly provides that a security interest can be created to secure the obligation of a third party, which simplifies documentation and removes the need to include a limited recourse guarantee in Jersey security agreements.

Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

A Jersey company has unlimited corporate capacity under the Companies (Jersey) Law 1991 (the "**Companies Law**").

When a company enters into a finance transaction, a transacting party should consider whether there is corporate benefit for the company. There is a risk that a company could seek to have the transaction set aside on the basis that the directors approving the transaction were acting outside their statutory duty to act in the best interests of the company. This can happen where:

- there is little or no corporate benefit to the company; and
- the transacting party knows or ought to know that there is

little or no corporate benefit.

This risk can be avoided if both:

- all the shareholders of the Jersey company authorise or ratify the particular transaction; and
- the Jersey company can pay its debts as they fall due at the time of, and immediately following, the entry into the transaction.

If there is no discernible corporate benefit to entry into a finance transaction, there is also a risk that a transaction could be set aside on the company's bankruptcy.

Is lack of corporate power an issue?

Article 18 of the Companies Law removed the concept of external *ultra vires*, meaning that nothing in a company's Memorandum or Articles of Association can limit the power of a Jersey company. That being said, the Memorandum and Articles of Association should still be reviewed to ensure there are no limits on the authority of the directors to enter into the required documents.

Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

As per the above, shareholder approval is advisable if there are corporate benefit concerns. A guarantee does not need to be registered in Jersey.

Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, although the solvency of the company should be considered when entering into a guarantee. If a company enters into a transaction with a person for cause (similar to consideration under English law) the value of which, in money or equivalent, is significantly less than the value of the cause provided by that person, the transaction may be impugned as a transaction at an undervalue and challenged by (i) the Viscount of the Royal Court of Jersey (the insolvency officer of the Royal Court) (the "**Viscount**") in a *désastre* under the Bankruptcy (Désastre) (Jersey) Law 1990 (the "**Désastre Law**"), and (ii) by a liquidator in a creditors' winding up under the Companies Law.

A transaction may be challenged if it was entered into during the five years preceding the commencement of the *désastre* or winding up. However, a transaction is not vulnerable to attack as a transaction at an undervalue if either:

- the relevant company:
  a. was able to pay its debts as they fell due at the time it entered into the transaction; and
  b. did not become insolvent on a cash-flow basis as a result of entering into the transaction; and/or
- the court is satisfied that both:
  c. the company entered into the transaction in good faith for the purpose of carrying on its business; and
  d. at the time it entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

In addition, the Royal Court may, on the application of the Viscount (in a *désastre*) or liquidator (in a creditors' winding up), set aside as a preference a transaction that that has the effect of putting a particular creditor, surety or guarantor into a better position than if the company had not done that thing or allowed that thing to be done.

An application can only be brought if (a) the transaction occurred during the 12 months preceding the date of commencement of the winding up or declaration of *désastre* and (b) the company was insolvent (on a cash flow test) when the preference was given, or became insolvent as a result of giving the preference.

Are there any exchange control or similar obstacles to enforcement of a guarantee?

If court proceedings are brought against a guarantor company, the enforceability of that company's obligations can be qualified if the following Jersey customary law rights of a surety are available to it:

- *Droit de discussion* – this is the right to require that recourse is made against the assets of the borrower and that those assets are exhausted before any claim is enforced against the guarantor.
- *Droit de division* – this is the right to require that liability of co-guarantors is divided or apportioned between them.

It is market practice for a lender to require a specific waiver of these rights.

Collateral security

What types of collateral are available to secure lending obligations?

Common types of collateral that are secured are: real estate; shares; units in a unit trust; bank accounts; and contract rights.

Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

It is possible to take "a debenture-style" security under the Security Interests Law over all present and future intangible movable property held by the grantor in Jersey from time to time, although note that this would not include security over tangible movable property (broadly equivalent to English law chattels) or immovable property (real estate).

In addition, although Jersey law does not have a concept of a floating charge, a similar degree of flexibility can be achieved under the Security Interests Law as the security agreement may provide the grantor with an express right to deal in the collateral, without a duty to account for the proceeds or to replace the collateral, and without any such dealing invalidating the security interest or affecting the priority of the security.

The security would be taken by way of a security interest agreement entered into under the Security Interests Law. In order for a security interest to attach to collateral (on which the security becomes enforceable against the grantor), the following conditions must be satisfied:

- Value must have been given in respect of the security agreement. Value means something sufficient to support an onerous contract, and includes an antecedent debt or liability.
- The grantor must have rights, or the power to grant rights to a secured party, in the collateral. A trustee can therefore grant valid security under the Security Interests Law.
- The secured party has possession or control of the collateral and/or the security agreement is in writing and contains a description of the collateral that is sufficient for it to be identified.

Perfection of a security interest is necessary for the purposes of priority and in order for the security to be valid against third parties and not void against the Viscount or a liquidator, and third party creditors, in an insolvency. The method of attachment and perfection will depend on the type of collateral secured. The three ways for the secured party to obtain perfection are:

- by possession of documentary intangibles such as negotiable instruments or bearer securities;
- by control of the collateral such as bank accounts, securities accounts and investment securities; and/or
- by registration of a financing statement on the Jersey Security Interests Register. Security that cannot be perfected by possession or control, for example over a right to repayment under a contract (e.g. an intra-group loan) or over other contractual rights, must be perfected by registration of a financing statement. As registration perfects any type of security interest, it is usual for a security interest that has been perfected by possession or control to be perfected by registration as well. Security interests perfected by possession or control will have priority over security interests perfected by registration only.

Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

There are two main forms of security for real estate:

- **Hypothecs**. A hypothec is a right of security held by a creditor over the property of a debtor without possession of it, and is created either by agreement or by operation of law. A hypothec can attach only to immovable property; a hypothec can therefore encumber freehold and flying freehold property, and "contract leases" with a term of more than nine years (but only where the terms of the lease expressly permit hypothecation). "Paper leases" with a term of less than nine years cannot be hypothecated. Hypothecs can be specific (that is, over one property) or general (that is, attaching to all immovable property in Jersey owned by the debtor at the date of registration). There are two common types of hypothec:

  a. **Judicial hypothec**. This type of hypothec is created by the registration of an acknowledgment document (a "*billet*") in the Jersey Public Registry. The instrument of debt or obligation (for example, a loan, a bond, promissory note or guarantee) is not itself registered, rather the billet simply acknowledges the source of the indebtedness; and

  b. **Conventional hypothec**. This type of hypothec is created by the passing of a contract before the Royal Court, which contract sets out the terms of the borrowing and includes an express acceptance of the hypothec from the borrower. Once passed before court, the contract is registered in the Jersey Public Registry, and is available for public inspection.

- **Share security**. In relation to share transfer properties, lenders require security in the shares of the company that owns the property. Share security would be taken by way of a security interest agreement entered into under the Security Interests Law.

In relation to plant, machinery and equipment, the only method of creating security over tangible movables in Jersey is by way of pledge. To pledge property there must be actual physical (as opposed to constructive) delivery of the tangible movable property pledged into the creditor's possession.

There is a right of retention. As a matter of customary law (absent any Jersey judicial authority on this point) the creditor should have an implied right of sale when the grantor is in default and there is likely to be an express power of sale in the pledge document.

Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Typically, security in respect of contract rights and receivables is created by way of a security interest agreement entered into under the Security Interests Law by way of description and registration. Although it is no longer necessary to give notice to the counterparty, there are usually advantages to doing so (for example, to obtain, by way of acknowledgment to the notice, a waiver of any conflicting provisions in the underlying contract and/or a confirmation that the counterparty will make payments directly to the secured party.

Common types of receivables secured in this way include:

- Rent payable under a lease agreement.
- A general partner's right to call for capital from the partners of a limited partnership.
- Debts and other rights to the payment of money.
- Rights under performance contracts.
- Bank accounts into which the receivables are paid and other cash deposited with banks.

The Security Interests Law also contains specific provisions in relation to outright assignments of receivables, which are defined as monetary entitlements arising from the supply of goods and services (other than insurance services) or the supply of energy.

Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes, this is a common form of security taken in Jersey. The method will depend on whether the account is with the secured party or a third-party bank.

Security will be created by way of a security interest agreement under the Security Interests Law. Control would be obtained by the:

- account being transferred into the name of the secured party with the written agreement of the grantor and the account bank (although in practice this approach is not usually taken);
- account bank agreeing in writing to act on the secured party's instructions directing disposition of funds in the account;
- account being assigned to the secured party and written notice of such being given to the account bank; or
- account bank being the secured party.

Typically, security over third-party bank accounts is taken by assignment. Although not necessary to perfect the security, it is usual to obtain an acknowledgment of the notice from the account bank, which will include, for example, a waiver of:

- any terms and conditions which may restrict or prohibit the creation of the security; and
- its rights of set-off over the account.

Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

Yes, security can be taken over shares in a Jersey company in a certificated format. Security would be taken by way of a security interest agreement under the Security Interests Law. Control would be obtained by the secured party either:

- being registered as the holder of the securities; or
- having possession of the certificate representing the securities.

Security cannot be validly granted over shares in a Jersey company under a New York or English law-governed document.

Can security be taken over inventory? Briefly, what is the procedure?

Jersey law does not have a concept of a floating charge. Therefore, security over tangible movables such as inventory in Jersey would have to be taken by way of pledge. Please see question on real property, plant, machinery and equipment above.

Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, subject to corporate benefit and solvency considerations, a company can grant a security interest which secures both its primary obligations as a borrower and its secondary obligations as a guarantor.

What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

There are registration fees associated with using the Jersey Security Interests Register. These are outlined on the Registry website:

- registration – £8 per year of registration up to a maximum fee of £165 if the registration will run longer than 20 years (there is no concept of infinite registration);
- discharge – no fee;
- amendment of registration – £25;
- extension of period of registration – same cost scheme as above;
- global change of multiple registrations (other than expiry date) – £110;
- search – £4 to view a financing statement; and
- filing a change demand – £25.

Stamp duty is payable when a lender registers security over real estate situated in Jersey. Stamp duty is calculated at the rate of 0.5% of the amount of debt secured over the property in favour of the lender, plus a court fee of £80.

Land transaction tax ("**LTT**") is payable when a lender takes security over a share transfer property situated in Jersey and is calculated at a rate of 0.5% of the amount of the debt to be secured, plus an administration fee of £80. LTT applies only in relation to residential property, where the articles of the property-owning company confer rights of occupation on their shareholders.

There are no relevant notary fees.

Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

For security which is created over intangible movable property under the Security Interests Law, the registration requirements do not involve a significant amount of time or expense.

For security that is registered over Jersey immovable property, the *billet* (the acknowledgment document creating a judicial hypothec) or the contract creating the charge (in the case of a simple conventional hypothec) must be registered with the Royal Court of Jersey, which can only take place on a Friday afternoon (subject to court holidays). The stamp duty must be paid at the time of registration. Once registered, the *billet* or contract (as the case may be) becomes a matter of public record.

Are any regulatory or similar consents required with respect to the creation of security?

A consent should be obtained from the grantor prior to the registration of the security interest on the Jersey Security Interests Register, pursuant to which the grantor consents to the registration and for any personal data to be publicly available.

While no regulatory consents are required in Jersey for the creation of security generally, there may be additional steps required on creation or enforcement of, or other exercise of rights under, security over regulated groups.

If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

The definition of secured obligations/liabilities in the security agreement should provide for further advances to ensure that the priority of the original advance will not be lost in respect of further advances.

Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

No, there are not.

Financial assistance

Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

The concept of financial assistance was abolished in Jersey in 2008. Jersey companies are not prohibited from giving financial assistance for the acquisition of: (a) their own shares; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary. If financial assistance raises questions relating to corporate benefit, or amounts to a distribution, the relevant statutory procedures must be complied with.

Syndicated Lending/Agency/Trustee/Transfers

Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Jersey law recognises the concept of agency and trust relationships and accordingly an agent or trustee would be able to enforce the loan documentation and collateral security and apply the proceeds in the manner set out in the loan agreement, intercreditor agreement or other relevant finance document.

If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable.

Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The transfer provisions will usually be set out in the loan agreement and guarantee, and these should be complied with. If there are no such transfer provisions, the benefit of the loan and the guarantee should be validly assigned to Lender B in order to ensure that the guarantee is enforceable by Lender B. For completeness, notice of the assignment should be given to the company and the guarantor. If the loan is not fully utilised and Lender A was under an obligation to make further advances, the loan would require to be novated as opposed to transferred. If the loan is not novated to Lender B, this could have implications on the enforceability of the guarantee.

Withholding, stamp and other taxes; notarial and other costs

Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

No, there are not.

What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Foreign lenders do not receive tax incentives when compared to Jersey lenders. However, Jersey can generally ensure tax neutrality, and eliminate double taxation risk.

Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

No, it will not.

Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please see question on notarisation, registration, stamp duty and other fees above.

Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No, there are not.

Judicial enforcement

Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The courts in Jersey will recognise a foreign governing law provided it is a valid choice of law for the issue in question upon proof of the relevant provisions of the governing law.

Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The enforcement of foreign judgments is governed by the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the "**Reciprocal Enforcement Law**"). If a final and conclusive judgment under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) were obtained in a "Reciprocal Enforcement Court" having jurisdiction in a case against a company, such judgment would, on application to the Royal Court of Jersey, be registered without reconsidering its merits and would thereafter be enforceable.

A "Reciprocal Enforcement Court" for such purposes would include, in England and Wales, the Supreme Court of the United Kingdom, the Court of Appeal and the High Court of Justice. The creditor of such a judgment must apply to have it enforced in Jersey within six years from the date the decision is handed down, or the date of the judgment on the last appeal. Such registration will not require the consideration of the merits of a case.

As the Reciprocal Enforcement Law does not apply to a judgment of the New York courts, recognition of any such judgment would be governed by customary/common law. Subject to the principles of private international law – by which, for example, foreign judgments may be impeachable, as applied by Jersey law (which are broadly similar to the principles applied under the common law of England) – if a judgment of a New York court were obtained, the judgment creditor (being the claimant in the foreign proceedings) must begin a fresh action in the Royal Court of Jersey, relying on the unsatisfied foreign judgment as a cause of action. The matter will usually be determined summarily without a full trial. The judgment debtor (being the defendant in the foreign proceedings) can oppose the application for summary judgment and/or defend the claim, but there are only limited grounds on which enforcement will be refused, and a full factual enquiry is rarely necessary.

The grounds for refusing to enforce a foreign judgment (including that of a New York court) are substantially similar to the grounds on which registration of a judgment of an English court under the Reciprocal Enforcement Law can be set aside (e.g. the foreign court had no jurisdiction, or there were procedural inadequacies in obtaining the foreign judgment). If the court is satisfied that the New York judgment must be enforced, it will be entered in favour of the judgment creditor and be enforceable in Jersey as a domestic judgment.

Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

a. Proceedings in respect of a debt for a liquidated sum can be commenced by way of a simple summons, which can be prepared and served within a few days. The summons must be served four clear days before the return date to which the company is summoned. If the company does not attend

at the return date, judgment in default can be obtained (i.e. in as quickly as two weeks).

If the company defends the claim, the Royal Court of Jersey will place the action on the pending list (effective immediately). An application for summary judgment can be brought at this time, which we expect could be heard and determined within four to six weeks.

If the application for summary judgment is defended, and is unsuccessful, the matter would proceed to a trial and could take up to one year for it to be heard and a subsequent judgment to be issued.

The length of time to effect enforcement depends on the process used.

A monetary judgment is immediately enforceable by distraint against the judgment debtor's assets. The Viscount will take possession of and effect a sale of the debtor's assets and apply the proceeds in satisfaction of the judgment, subject to certain notification requirements. The timing of this process depends on the Viscount's availability and the number of assets to be dealt with.

If the debtor owns property in Jersey, orders can be sought one month following the issue of a court judgment (provided it remains unsatisfied), for an "*Acte Vicomte chargé d'écrire*". The effect of this declaration is that if the judgment is not satisfied within a further two months, the debtor's property will be deemed to have been renounced. At that time a creditor can seek orders for "*dégrèvement*" (for immovable property) and "*réalisation*" (for movable property). The timing of either of these enforcement processes once commenced is difficult to ascertain as once orders are made, the sale and dealing of the assets is conducted by the *Attournées*. However, we generally understand that, from the making of an order, a *dégrèvement* process (including the hearing) may take approximately four to six weeks. Following the hearing, the creditor who elects to take the property, subject to claims of superior lenders, will be immediately entitled to the asset. The timeframe for a *réalisation* may take approximately two to three months depending on the liquidity of the assets.

An application can also be made by a creditor of a company with a liquidated claim exceeding £3,000 that the assets of the company be declared *en désastre*, as it is unable to pay its debts as they fall due. Such an application can be made quickly without notice to the debtor, usually on no more than 48 hours' notice to the court. If a declaration is made by the Royal Court of Jersey, and after a one-month period within which the debtor can object has expired, the Viscount will begin the process of collecting in the debtor's assets and distributing them to all creditors on the basis of a statutory waterfall. It is difficult to give an estimate to the Viscount's process, but typically a creditor can expect this to take no less than six months.

b. Once a foreign judgment (e.g. of the English courts) is registered under the Reciprocal Enforcement Law in Jersey, the creditor must serve a notice of registration on the debtor providing the timeframe (generally 14 or 28 days) within which the debtor may apply to have the registration set aside. Once the time for challenging registration has passed, the foreign judgment is enforceable from that point on in the same way as a domestic judgment.

   Where a judgment is not registrable under the Reciprocal Enforcement Law (i.e. it is a judgment of a court in a country not covered by that Law, such as, for example, a New York court) then a fresh judgment in Jersey is required. This is usually achieved by bringing a fresh action in Jersey and then seeking summary judgment on that action. A typical timescale for doing so is 4-6 weeks, variable depending on the circumstances.

With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

There is no requirement for a public auction in relation to the enforcement of security granted under the Security Interests Law. Generally speaking, enforcement does not require consent from the Viscount or an order from a court. However, enforcement of security over real estate in Jersey (see question "*Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?*" below for further detail) will, if pursued under the Désastre Law, involve the Royal Court of Jersey and the Viscount and will be subject to the requirements of Article 27 of the Désastre Law, which provides that the Viscount may sell the property by public auction or public tender.

Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

No restrictions apply to foreign lenders beyond those that apply to Jersey lenders.

Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In principle, both a declaration of *désastre* and the commencement of a creditors' winding up instigate a moratorium. A creditor with a claim provable in a *désastre* cannot:

- seek any other remedy against the debtor;
- commence any action or legal proceedings to recover the debt; or
- except with the consent of the Viscount or by order of the court, continue any action or legal proceedings to recover the debt.

In addition, if the debtor is a company, a transfer of shares in the company which is not made to or with the sanction of the Viscount, or an alteration in the status of the company's members, is void.

However, an important exception applies in the case of secured creditors. The moratorium does not extend to title security or security in intangible movable property under the Security Interests Law. Such security can therefore be enforced notwithstanding a declaration of *désastre* and, in the case of share security, a transfer of the shares made pursuant to the power of enforcement will not be avoided even if not made to or with the sanction of the Viscount.

A similar position applies after the commencement of a creditors' winding up. No action may be taken against the company except by leave of the court and subject to such terms as the court may impose. A transfer of shares not made to or with the sanction of the liquidator, and an alteration in the status of the company's members, is void. This is subject to the ability of secured creditors to rely on an equivalent exception to that available in a *désastre*. Creditors are also still able to apply for a declaration of *désastre*. If granted, this automatically terminates the creditors' winding up and in this sense a *désastre* trumps a creditors' winding up.

Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Arbitration is rarely used as a method of commercial dispute resolution in Jersey. However, domestic arbitral awards are enforceable in Jersey with leave of the court under the Arbitration (Jersey) Law 1998 (the "**Arbitration Law**").

In addition to the domestic procedure above, the Arbitration Law provides that a foreign arbitral award handed down in a country that is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**") is enforceable as if it were a domestic arbitral award.

Further, other foreign awards from certain non-New York Convention states may also be enforceable under the Arbitration Law if the state in question is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 in the same way as a domestic award or "by action".

Such awards must meet certain standards. They are recognised if the arbitration:

- was made pursuant to an agreement for arbitration that was valid under the law by which it is governed;
- was made by the tribunal provided for in the agreement or constituted in a manner agreed by the parties;
- was made in conformity with the relevant law governing arbitration;
- is final in the relevant jurisdiction;
- conforms to the definition of arbitration under Jersey law; and
- the enforcement of which would not be contrary to the law or public policy of Jersey.

Enforcement of foreign arbitral awards can be refused in limited circumstances as set out in the Arbitration Law.

Bankruptcy proceedings

How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In the event of a declaration of *en désastre* under Article 3 of the Désastre Law, the property and powers of a company vest in the Viscount and no further enforcement action may be taken against the company in respect of debts that are provable in a *désastre*. In the case of a creditors' winding up under Chapter 4 of Part 21 of the Companies Law, although there is no vesting, the liquidator has similar powers to the Viscount and the Companies Law provides that after commencement of the creditors' winding up, no further action shall be taken or proceeded with against the company except by leave of the court.

As noted above, an important exception applies in the case of secured creditors. The Security Interests Law allows a secured party to exercise powers of enforcement in relation to the relevant collateral without the consent of the Viscount, and without an order of a court, so that a secured party's powers to appropriate or sell the collateral will not be affected by the insolvency.

Nevertheless, the powers to set aside transactions at an undervalue and preferences still apply. Furthermore, a security interest will be void against the Viscount or a liquidator and the company's creditors, if it is not perfected before the grantor becomes bankrupt.

Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

The principal grounds for challenging pre-insolvency transactions are in respect of transactions at an undervalue, preferences and unperfected security. Please see question above in respect of transactions at undervalue and preferences. If a security interest granted under the Security Interests Law has not been perfected before the grantor becomes insolvent, it is void as against the Viscount (in a *désastre*) or liquidator (in a creditors' winding up).

Certain claims are treated as preferential. For security granted under the Security Interests Law, in general terms:

- a secured party with a perfected security interest has priority over any other creditor; and

- amongst priority statutory creditors, unsecured creditors rank last, and, as between themselves, unsecured creditors rank *pari passu*.

Secured creditors: where there is a valid and perfected security interest in collateral granted pursuant to the Security Interests Law, there are no statutorily preferred claims on that collateral that have priority over that of the secured party.

If the secured party has sold or appropriated the collateral and the net value or proceeds of sale (as appropriate) of the collateral exceeds the amount of the debt owed to the secured party, the secured party must pay the amount of any resulting surplus in the following order:

- Any person who has a subordinate security interest in the collateral and has registered a financing statement over that security interest (where the registration remained effective immediately before the appropriation or sale).
- Any other person (other than the grantor) who has given the secured party notice that that person claims an interest in the collateral, and in respect of which the secured party is satisfied that that person has a legally enforceable interest in the collateral.
- The grantor.

Priority statutory creditors: rank behind secured creditors in whose favour a security interest has been granted pursuant to the Security Interests Law, in the following order:

- the Viscount or liquidator, in payment of costs and expenses properly incurred;
- where the insolvent entity is a bank in default, payments to the Jersey Bank Depositors Compensation Board;
- employees, in payment of up to six months of arrears of salary and any outstanding holiday pay and bonuses (subject to prescribed limits);
- in payment of health insurance, social security, income tax, goods and services tax, rent arrears and parochial rates (the equivalent of UK local rates/council tax); and
- unsecured creditors (who, as between themselves, rank *pari passu*).

Immovable property: creditors who hold a judicial or conventional hypothec registered against real estate are entitled to a preference over the proceeds of sale of any property on which their charge is secured. If there are a number of registered hypothecs, preference is determined by the date of creation. This is not subject to any other preference or clawback rights. Where the real estate owner has been declared *en désastre*, the collateral will fall into the *désastre* estate and the Viscount will take the collateral subject to the hypothec.

Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

The Désastre Law sets out the persons in respect of whose property an *en désastre* declaration can be made, and includes any person:

- who is, or was, at any time within the period of 12 months immediately preceding the date of the application, ordinarily resident in Jersey;
- who carries on, or has carried on, at any time within the period of three years immediately preceding the date of the application, business in Jersey, whether or not they are domiciled in Jersey;
- who has in Jersey immovable property capable of realisation at the time of the application;
- who, being a company, is registered under the Companies Law or has been dissolved pursuant to that Law;
- who is an incorporated limited partnership; or
- who is a limited liability partnership, whether or not the debtor is present in Jersey at the time of application for a declaration or at the time of the declaration.

No *en désastre* declaration may be made in respect of:

- Separate limited partnerships.
- Limited partnerships.

It is not clear as a matter of Jersey law whether or not the assets of a trustee as trustee of a trust can be declared *en désastre*. We are not aware of any instance in which such a declaration has been made. If, however, the assets of a trustee were declared *en désastre* and in the event that any document was held by the Jersey courts to constitute a transaction at an undervalue and/or the giving of a preference to any person, the Jersey courts would have the power, depending, *inter alia*, on the period of time elapsed since the transaction was entered into, to set aside such transaction.

Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Power of enforcement: enforcement of security under the Security Interests Law is an out of court process conducted by the secured party. The Security Interests Law allows a secured party to enforce by way of sale or appropriation of the collateral or proceeds. In addition, the secured party can take any of the following ancillary actions for the purpose of effecting a sale or appropriation:

- Take control or possession of the collateral or proceeds.
- Exercise any of the rights of the grantor in relation to the collateral or proceeds.
- Instruct any person who has an obligation in relation to the collateral or proceeds to carry out the obligation for the benefit of the secured party (for example, directing the actions of an intermediary who holds a securities account for the grantor).

- Apply any remedy that the security agreement provides for as a remedy that is exercisable pursuant to the power of enforcement, to the extent that it does not conflict with the Security Interests Law. Bespoke enforcement powers tailored to the collateral secured can therefore be included in the security agreement.

More than one enforcement option can be taken, and taking one or more of the enforcement options specified above does not preclude the exercise of other rights of the secured party.

When security becomes enforceable: the power of enforcement is exercisable once an event of default has occurred and written notice specifying the event of default has been served on the grantor by the secured party.

Methods of sale: the Security Interests Law expressly provides that (in exercising its powers of enforcement) the secured party may effect a sale of collateral by auction, public tender, private sale, or another method and may itself buy collateral that it so sells.

Notice of appropriation or sale: a secured party is required to give not less than 14 days' written notice to the grantor of the security of the appropriation or sale of the collateral and to any other person (a "**Subordinated Secured Party**") who has a registered security interest in the collateral or who has another interest in the collateral and has given the secured party notice of that interest. "Interest" in this context means a proprietary interest.

In practice, it is standard for the grantor and any Subordinated Secured Party to waive their right to receive notice. Consequently, the only prerequisite to enforcement under the Security Interests Law is ordinarily service of a notice of event of default, which can be served immediately prior to enforcement.

There are specific carve-outs from the obligation to give notice, to the extent, for example, that the security property is a quoted investment security.

Valuation - duties and requirements in relation to appropriation and sale: on appropriation or sale, the secured party must:

- Take all commercially reasonable steps to determine or, in the case of a sale, obtain the fair market value of the collateral, as at the time of the relevant appropriation or sale.
- Act in a commercially reasonable manner in relation to the appropriation or sale.
- In the case of a sale, enter into any agreement for or in relation to the sale on commercially reasonable terms.

The duty of the secured party is owed to the grantor and also to any Subordinated Secured Party.

Steps post-enforcement: if, in exercising its powers of enforcement, a secured party appropriates or sells collateral, it must:

- Within the 14 days after the day on which the collateral is appropriated or sold, give a written statement of account setting out certain information in relation to that appropriation or sale to the grantor and any Subordinated Secured Party.
- Apply the amount of any resulting surplus in satisfaction of the claims of certain specified persons in the prescribed order, or, alternatively, pay any resulting surplus into the Royal Court.

Jurisdiction and waiver of Immunity

Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Please see questions under the "Judicial Enforcement" section above.

Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Yes, it is.

Licensing

What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There are no licensing requirements in Jersey for foreign lenders lending to a Jersey company. If a lender carries on business in or from within Jersey or is a Jersey company, it will be subject to the Proceeds of Crime (Jersey) Law 1999. Under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, if the lender does not have a registered service provider in Jersey, it may need to apply to be registered with the Jersey Financial Services Commission (the "**JFSC**") to be supervised in relation to its compliance with relevant anti-money laundering and counter-terrorism legislation. Whether or not a lender must apply to be registered with the JFSC to be supervised, it is required to comply with relevant anti-money laundering and counter-terrorism legislation.

LIBOR Replacement

Please provide a short summary of any regulatory rules and market practice in your jurisdiction with respect to transitioning loans from LIBOR pricing.

The key characteristic of market practice in Jersey has been active transition to risk-free rates. As part of this process, there has been significant activity throughout 2021 amending the terms of existing finance documents to replace LIBOR-based interest calculation provisions. The approach taken to new finance documents, has been to include risk free rates from the outset.

SONIA has already become well established in the market as the risk-free rate of choice to replace LIBOR. Although there are no specific Jersey regulatory rules, all key interest rate benchmarks used in the loan and bond markets are also used for products that fall within the scope of UK and EU benchmark legislation, therefore the risks posed to market participants by LIBOR discontinuance is the same in Jersey as, for example, in the UK. There has therefore been a concerted effort to ensure an orderly transition to risk-free rates.

Other matters

How has COVID-19 impacted document execution and delivery requirements and mechanics in your jurisdiction during 2021 (including in respect of notary requirements and delivery of original documents)? Do you anticipate any changes in document execution and delivery requirements and mechanics implemented during 2020/2021 due to COVID-19 to continue into 2022 and beyond?

COVID-19 has had a significant impact on document execution and delivery requirements and mechanics. Due to constraints on the ability to execute documents manually in "wet-ink", there was a huge rise in the use of electronic signatures at the outset of the pandemic. This trend has persisted throughout 2021, both in and out of lockdown.

In most cases, Jersey law documents can be executed by electronic signature. The main exceptions are (i) documents that are not usually relevant to financing transactions, such as contracts relating to Jersey land, and (ii) share certificates where they are provided to a secured party for the purpose of obtaining security perfected by control under the Security Interests Law. The position is not settled in Jersey as to whether a secured party having an electronically signed share certificate constitutes possession of the original certificate and therefore perfection by control for the purpose of the Security Interests Law. This is due to the evidential difficulty of demonstrating that a print out of a share certificate that has been signed electronically is the original of that electronically signed certificate.

There are generally no notary requirements in relation to financing transactions in Jersey.

We expect to see the use of electronic signatures extend beyond the end of COVID-19 but whether this will be at a somewhat reduced rate remains to be seen.

In addition, the legislation that governs electronic communications and related matters in Jersey will be enhanced in the near term by the Electronic Communications (Amendment No. 2) (Jersey) Law 202- (the "**Amendment No.2 Law**"), which has been approved by the Jersey States Assembly and is awaiting completion of the final legislative steps before coming into force. The Amendment No.2 Law will effect two principal amendments to Electronic Communications (Jersey) Law 2000 (the "**E-Comms Law**") to specifically enable: (a) remote witnessing of signatures; and (b) a person to attach an electronic signature on behalf of another person.

In addition to the two principal amendments, clarificatory amendments to the E-Comms Law will also be effected. Taken together, these amendments will provide further certainty and clarity to the E-Comms Law and foster wider use of remote and/or electronic signing. They follow intense scrutiny of that legislation during the COVID-19 pandemic, when remote working, and electronic signature of documents and witnessing, became the "new normal".

Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Jersey is a politically stable and fiscally advantageous financial centre that has been at the forefront of the global finance industry for over 50 years. The Island enjoys economic stability, political independence, tax neutrality and sophisticated legal, regulatory and technological infrastructure. It has a global reputation founded on a robust legal framework and sound corporate governance practices.

Jersey's evolution as an international finance centre is founded on its close ties to the City of London and its growth as a jurisdiction of choice in the European as well as Middle Eastern, North American and Asian markets.

In 2016, the FATF confirmed that Jersey is compliant or largely compliant with 48/49 of the FATF recommendations in respect to anti-money laundering and combatting the financing of terrorism. In 2017, Standard & Poor's confirmed Jersey's credit as AA-, one of the highest possible ratings.

The International Stock Exchange offers an efficient listing service and has received a number of international recognitions, making it an attractive and increasingly popular option for listing debt securities.

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Endnotes

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PLEASE NOTE

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