

Lending and Taking Security in Guernsey: Overview

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A Q&A guide to finance in Guernsey. The Q&A gives a high level overview of the lending market, forms of security over assets, special purpose vehicles in secured lending, quasi-security, guarantees, and loan agreements. It covers creation and registration requirements for security interests; problem assets over which security is difficult to grant; risk areas for lenders; structuring the priority of debt; debt trading and transfer mechanisms; agent and trust concepts; enforcement of security interests and borrower insolvency; cross-border issues on loans; taxes; and proposals for reform.

Overview of the Lending Market

1. What have been the main trends and important developments in the lending market in your jurisdiction in the last 12 months?

Guernsey entities remain a popular choice as either issuers or investment holding vehicles and Guernsey is home to a large number of investment holding structures holding a variety of investments, including UK real estate. There have been a large number of refinancing and restructuring transactions in the past 12 to 18 months in relation to these structures.

The larger private equity funds still require leverage and those that have been active in the acquisition market are taking advantage of the credit that is available. Guernsey has seen an increase in capital call bridging facilities and a number of Guernsey domiciled debt funds have been established in order to meet some of the need for non-bank lending.

Forms of Security over Assets

Real Estate

2. What is considered real estate in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected (that is, made valid and enforceable)?

Real Estate

Guernsey law classifies property into "movable property" and "immovable property." Real estate would be considered immoveable property. Immovable property is defined as that property which cannot be moved from one place to another and which follows or is associated with the land. Parcels of land are immovable, as well as all things incorporated in the earth, such as houses and other buildings, trees, shrubs and other produce until harvested. Personal effects permanently attached to land also form part of that land. Under Guernsey law, a lease of immovable property (regardless of length) is classified as "movable property." Special rules have recently been introduced to the part of the Bailiwick of Guernsey comprising the island of Sark in order to facilitate the creation of security over leasehold interests situated in Sark. These new laws are yet to be fully tested in practice.

Other assets classified as immovable property include usufruct, servitudes, actions based upon a claim in immovable property, *rentes foncières* (perpetual ground rents payable as a fixed annual sum and redeemable at the will of the debtor).

Common Forms of Security

Security over real estate in Guernsey is taken by way of hypothecation. An *hypothèque* (in English "hypothec") is a form of security which arises by a legal act and which does not involve delivery of possession or immediate proprietary interest in the secured property.

An *hypothèque* may be created by agreement (*hypothèque conventionnel*) or by operation of law.

The *hypothèque conventionnel* is used for the taking of security over real estate. The process of creation involves the entry into the "convention" (or agreement) in the form of a bond. In the bond, the debtor acknowledges the debt and agrees to the creation of security to secure it. The bond is then registered in the records of the Royal Court pursuant to which the *hypothèque* is created in favour of the creditor.

The practice has developed whereby the security created pursuant to registration of the bond can be:

- General (where the debtor agrees that the creditor's security will hypothecate all the debtor's real and personal property, both present and future).
- Specific (where the debtor agrees that the creditor's security will hypothecate specified real estate or specified real estate and all personal property generally). The effect of this is to release any real estate other than that specified from hypothecation without further consent or acknowledgement being required.

As noted above, hypothecation does not confer any immediate proprietary interest in the real estate owned by the debtor. The creditor's rights of possession only arise under a form of foreclosure proceeding known as "*saisie*."

The bond must be registered, however, in order to establish the necessary *hypothèque* (see below, [Formalities](#)).

Registration of the bond puts any successor-in-title of the real estate owned by the debtor at the date of the registration on notice of the creditor's claim and the successor-in-title of the debtor becomes a guarantor of obligations under the bond. This means

that in any enforcement proceedings the successor-in-title is made party to the proceedings to either make good the value of the claim or surrender the real estate to the enforcement proceedings (see [Question 20, Security Over Immovable Property](#)).

The liability of a successor-in-title to a debtor under a registered bond is subject to two distinct prescription periods commencing on the date on which the title to the real estate vested in that successor-in-title:

- The first, after a period of three years, limits the successor-in-title's liability to the price paid by the successor-in-title for the real estate.
- The second, after a period of 20 years, extinguishes the successor-in-title's liability absolutely.

It should be noted, however, that a successor-in-title to further real estate acquired by the debtor after the date of registration of a bond is not held to be on notice and is not subject to the rule that would otherwise make them a guarantor.

Obligations secured pursuant to a bond are subject to a prescription period of six years from the date on which the claim falls due. After that period, the creditor cannot rely on the bond to enforce his/her claim. For an on-demand bond, the six years run from the date on which demand is made. However, for a bond in which periodic payments are payable with effect from the time of the advance, each payment interrupts the running of the prescription period.

Formalities

The bond must be both:

- In writing.
- Executed by a Lieutenant Bailiff and two jurats of the Royal Court with the consent of the debtor before the Royal Court of Guernsey sitting as the Contract Court. Consent may be given:
 - in the case of an individual: in person or by power of attorney;
 - in the case of a company: by power of attorney or by producing a written signed original or a certified copy of a resolution of the board of directors.

The Royal Court will require the original power of attorney to be produced if this is being relied upon and the current law does not permit such powers of attorney to be evidenced electronically.

Although as noted above, a bond does not need to be signed by the parties to acknowledge the debt and for the *hypothèque* to be created, in practice, the bond is often required to be signed by the debtor in order to deal with additional undertakings of the debtor contained within the bond (practice varies between lenders and any such additional matters may need to be addressed in the facility agreement).

Following the court process described above, the bond is assessed for document duty registration fees (see [Question 27](#)). Following payment of the document duty and fees, the bond is registered in the Greffe (the registry of the Royal Court) and is available for public inspection to anyone wishing to conduct a search against the debtor.

Tangible Movable Property

3. What is considered tangible movable property in your jurisdiction? What are the most common forms of security granted over it? How are they created and perfected?

Tangible Movable Property

Movable property is defined as those things which follow or are associated with the person, the body of which is capable of being moved from one place to another, whether of itself (for example, inventory, equipment, a horse), or whether it is incapable of changing place without an external force (for example, gold and other inanimate objects).

Common Forms of Security

Security over tangible movable property in Guernsey can generally only be taken by way of actual possession of the property in question in order to create a pledge.

Separate regimes apply to the taking of security over Guernsey registered aircraft assets (taken by way of a statutory form of charge) and over Guernsey registered ships (taken by way of a statutory form of mortgage).

Formalities

For a pledge to constitute valid security, giving the lender priority in relation to the pledged assets, the following two conditions must be satisfied:

- The lender must have possession of the subject matter of the pledge (physical possession of the pledged property).
- The pledged goods must have been given to the pledgee on terms that the pledgee should have possession of such goods as security for the debt in question.

For a charge over Guernsey registered aircraft assets, the charge must be in writing and must be registered in the charges register maintained by the Aircraft Registrar under the Aviation Registry (Guernsey) Law, 2013 (as amended). It is also possible to register a notice of intention to make an application to register a charge over Guernsey registered aircraft assets.

For a mortgage over a Guernsey registered ship, the mortgage must be in the form prescribed by the registrar and must be registered in accordance with the Merchant Shipping (Bailiwick of Guernsey) Law, 2002 (as amended). It is also possible to register an intention to mortgage a Guernsey registered ship.

Financial Instruments

4. What are the most common types of financial instrument over which security is granted in your jurisdiction? What are the most common forms of security granted over those instruments? How are they created and perfected?

Financial Instruments

The Security Interests (Guernsey) Law, 1993 (Security Interests Law) enables the creation of security interests in a wide range of intangible moveable property including financial instruments or securities, insurance policies, bank accounts and other choses in action.

"Securities" are defined to include shares, stock, debentures, debenture stock, loan stock, bonds, units of a unit trust scheme, and other interests in the investments of a collective investment scheme. This would include, for example, instruments which confer rights in, options to acquire or dispose of, and rights under any contract for the acquisition or disposal of, securities as so defined, but does not include negotiable instruments.

Common types of securities in respect of which security interests are frequently created under Guernsey law include:

- Shares issued by Guernsey companies.
- Limited partner interests in Guernsey limited partnerships.
- Units issued by trustees of Guernsey unit trusts.
- Where shares issued by a Guernsey company are dematerialised in connection with any listing, it may not be appropriate to take security in accordance with Guernsey law. The rules and requirements of the relevant exchange would need to be reviewed. Where depository interests have been issued, security would normally be taken in accordance with the law governing those depository interests.

Common Forms of Security

The following two methods are available for creating security interests in securities under the Security Interests Law:

- **Security interest by possession.** This method of creation is where the secured party (or some person on their behalf other than the debtor or someone on the debtor's behalf) has possession pursuant to a security agreement of the certificates of title to those securities.
- **Security by way of title.** This method of creation is available to all types of intangible moveable property. This method involves having title to the securities pursuant to a security agreement, usually taken by way of assignment and the giving of notice of the assignment.

The priority between security interests in the same collateral is determined by the order of creation of those security interests (Security Interests Law).

Formalities

For security interests to be created there must be a security agreement in place. For the purposes of the Security Interests Law, a security agreement must:

- Be in writing.
- Be dated.
- Identify and be signed by the debtor.
- Identify the secured party.
- Contain provisions concerning the collateral sufficient to enable its precise identification at any time.
- Specify the events that are to constitute events of default.
- Contain provisions regarding the obligation, payment or performance of which is to be secured, sufficient to enable it to be identified.

Subject to the above, the security agreement can be in the form, and can contain or refer to matters, as agreed between the parties.

The security agreement is not an instrument of grant in itself: the creation of the security interest requires the exercise of a method of creation. This means that:

- For security interests to be created by way of possession: the secured party must have possession of the certificates of title to the securities pursuant to a security agreement.
- For security interests to be created by way of title: the secured party (or some person on their behalf other than the debtor or some person on behalf of the debtor) must have title to the securities pursuant to a security agreement, and where that title is acquired, by way of assignment, notice of the assignment must be given to the person from whom the assignor would have been entitled to claim the collateral.

Claims and Receivables

5. What are the most common types of claims and receivables over which security is granted in your jurisdiction? What are the most common forms of security granted over claims and receivables? How are they created and perfected?

Claims and Receivables

In Guernsey, security interests can be created in any intangible moveable property, which by way of example, could include:

- Life assurance policies.

- Bank accounts.
- Intellectual property assets.
- Other contract rights including those arising under inter-company loan agreements, custodian agreements and capital call rights under limited partnership agreements.

Common Forms of Security

A security interest in a life assurance policy is created under the Security Interests Law where the secured party (or some person other than the debtor or some person on behalf of the debtor) has possession pursuant to a security agreement of that policy.

A security interest in a bank account can be created by a bank in a customer account where all of the following apply:

- The bank that holds that account for its customer is the secured party.
- That bank has "control" of the account pursuant to a security agreement.
- The customer and the debtor are one and the same person.

A security interest is created in a bank account under this method whether or not the debtor or any other person has rights specified in the security agreement (to receive interest or otherwise) in respect of the account.

A security interest in any intangible movable property other than a lease of any land or buildings can also be created by way of title, usually by means of assignment (Security Interests Law) (see *Question 4, Common Forms of Security*).

Priority between security interests in the same collateral is determined by the order of creation of those security interests.

Formalities

See *Question 4, Common Forms of Security*.

Subject to the requirements of the Security Interests Law, a security agreement may be in such form, and may contain or refer to such matters, as may be agreed between the parties.

For security interests to be created:

- By way of possession of a policy of life assurance: the secured party must have possession of the policy in question pursuant to a security agreement.
- in a bank account held by a bank for its customer: the bank as secured party must have "control" of that account pursuant to a security agreement.
- In any claims or receivables: the secured party must acquire title to the claims or receivables pursuant to a security agreement and where that title is acquired by way of assignment, give notice of such assignment (see *Question 4, Formalities*).

There is no public register of security interests in Guernsey.

Cash Deposits

6. What are the most common forms of security over cash deposits? How are they created and perfected?

Security in bank accounts into which cash deposits are made is achieved by taking a security interest in the bank account to which the cash was deposited. This can be done by way of assignment of third-party bank accounts pursuant to a security agreement, or where the bank holding the account is the secured party and the customer and the debtor are the same person, by the bank having control of the account pursuant to a security agreement.

For the rules relating to the creation of a security interest by way of assignment of a third-party bank account, see *Question 4, Formalities*.

For the rules relating to the creation of a security interest in a bank account where the bank holding the account is the secured party and the customer and the debtor are the same person, see *Question 5, Formalities*.

Intellectual Property

7. What are the most common types of intellectual property over which security is granted in your jurisdiction? What are the most common forms of security granted over intellectual property? How are they created and perfected?

Intellectual Property

There are a wide range of intellectual property rights for which protection is given under Guernsey law and in which a security interest can be taken. Intellectual property rights registers that are maintained in Guernsey include:

- Trade marks.
- Designs.
- Plant variety rights.
- Patent and biotechnological inventions.
- Image rights.

Intellectual property rights for which no register is maintained but for which protection is provided include copyright, database rights and performance rights and these can also be taken as security.

Common Forms of Security

Intellectual property is classed as intangible movable property. A security interest in any intangible movable property is created by way of title transfer by an assignment pursuant to a security agreement (Security Interests Law) (see *Question 4, Common Forms of Security*).

Formalities

See *Question 4, Formalities*.

Subject to the specific minimum requirements set out in the Security Interests Law, a security agreement may be in such form, and may contain or refer to such matters, as may be agreed between the parties.

For security in any intellectual property by way of title where that title is acquired by way of assignment pursuant to a security agreement, the secured party must give notice of such assignment (see *Question 4, Formalities*).

Until an application to register an assignment of title of a Guernsey registered trade mark is made to the Registrar of Intellectual Property in Guernsey, the assignment is ineffective against a person acquiring a conflicting interest in or under the registered trade mark in ignorance of it (The Trade Marks (Bailiwick of Guernsey) Ordinance, 2006 (as amended)).

Any person who acquires title to a registered patent by way of assignment is entitled against any other person who claims to have acquired that patent by virtue of an earlier assignment if, at the time of the later assignment:

- The earlier assignment or event was not registered with the Registrar of Intellectual Property.
- The person claiming under the later transaction did not know of the earlier assignment.

(Registered Patents and Biotechnological Inventions (Bailiwick of Guernsey) Ordinance, 2009 (as amended).)

Until an application to register an assignment of title of a Guernsey registered personality and/or image right is made to the Registrar of Intellectual Property in Guernsey, the assignment is ineffective against a person acquiring a conflicting interest in or under the registered personality and/or image right in ignorance of it (Image Rights (Bailiwick of Guernsey) Ordinance, 2012 (as amended)).

For a secured party to ensure its priority in relation to patents, trade marks and image rights, the assignment of title through the security agreement must be registered with the Registrar of Intellectual Property in Guernsey.

Problem Assets



8. Are there types of assets over which security cannot be granted or can only be granted with difficulty? Which assets are difficult or problematic when security is granted over them?

Future Assets

A bond generally provides that the security that is intended to be created will cover all real estate present and future belonging to the debtor.

Security in respect of tangible movable property must be taken by way of pledge, which requires physical delivery of possession of that property.

If security interests in intangible movable property are created pursuant to a security agreement under the Security Interests Law, the security agreement must contain (among other matters) provisions concerning the collateral that are sufficient to enable its precise identification at any time. This presents issues in relation to the creation of security in future assets.

Fungible Assets

A floating charge is a creation of the English courts which has not been adopted in Guernsey. The essential reason for this is that under Guernsey customary law, security is created by way of hypothecation, unless specific laws have been created to deal with specific types of security, such as in the case of the Security Interests (Guernsey) Law, 1993. Therefore, a floating charge created under a jurisdiction outside of Guernsey would not provide security in relation to property situated in Guernsey.

This includes any bank accounts maintained in Guernsey or other movable property, whether tangible or intangible, which is situated in Guernsey. The question of where assets are situated (*lex situs*) is determined by the Royal Court in accordance with the principles of private international law. These are broadly similar to principles applied by the courts of England and Wales, but (for example) Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) is not part of Guernsey law.

Although the hypothecation of a fluctuating pool of assets under Guernsey law can be created in theory, the remedies available to the creditor are limited in practice. Therefore, fluctuating assets which are the subject of a securities account held with a custodian or bank is most likely to be taken by way of the creation of a security interest in the debtor's rights to the account rather than in the underlying assets themselves.

Other Assets

The Security Interests Law does not allow for the creation of a security interest in a lease. This leaves open the question whether a valuable lease could be secured by other means (such as hypothecation or a security assignment under the Law of Property (Miscellaneous Provisions) Guernsey Law 1997).

It should be noted that in relation to assets that are the subject of mortgage, charge, *hypothèque*, lien or other security, "secured interests" are not subject to the moratorium on enforcement that would otherwise arise on the appointment of an administrator under Part XX1 of the Companies (Guernsey) Law 2008.

Release of Security over Assets

9. How are common forms of security released? Are any formalities required?

Subject to the security agreement, on the discharge, payment or other performance of the secured obligation, the secured party must:

- Provide the debtor with a certificate of discharge in the form specified under the Security Interests Law.
- Transfer to the debtor the following (where applicable):
 - possession of the documents of title to the collateral;
 - control of the bank account;
 - title to any collateral provided.

(Security Interests Law.)

Special Purpose Vehicles (SPVs) in Secured Lending

10. Is it common in your jurisdiction to take security over the shares of an SPV set up to hold certain of the borrower's assets, rather than to take direct security over those assets?

If the SPV is incorporated in Guernsey, it is common to create a security interest in the shares of the SPV irrespective of whether security is taken over the underlying assets.

A security interest in the shares issued by a Guernsey company must be taken through either:

- Possession pursuant to a security agreement of the certificates of title to the shares of the SPV.
- Acquiring title to the shares of the SPV.

Where title to collateral pursuant to a security agreement is acquired by way of assignment, there must be given notice of the assignment to the person from whom the assignor would be entitled to claim the collateral (Security Interests Law) (see *Question 4, Common Forms of Security*).

Quasi-Security

11. What types of quasi-security structures are common in your jurisdiction? Is there a risk of such structures being recharacterised as a security interest?

Sale and Leaseback

A sale and leaseback of an asset would not be recharacterised as a security interest or hypothecation.

Factoring

See below, *Other Structures*.

Hire Purchase

A hire purchase agreement would not be characterised as an hypothecation or security interest. It would fall to the construction of the relevant provision to determine whether title had as a matter of law been retained. See below, *Other Structures*.

Retention of Title

A retention of title provision would not be characterised as an hypothecation or security interest. It would fall to the construction of the relevant provision to determine whether title had as a matter of law been retained. See below, *Other Structures*.

Other Structures

Certain financing structures involving the sale and leaseback of securities, factoring, hire purchase, retention of title, negative pledges and other structures involving the transfer of ownership of securities are all common in Guernsey but are generally regulated by the laws of a jurisdiction other than Guernsey.

These structures should not be characterised as security in Guernsey if the applicable governing law would not characterise them in this way. However, as the applicable conflict of law rule in relation to recharacterisation is not entirely clear, the recharacterisation risk under the law of the place where the structure is located (*lex situs*) should also be considered. If Guernsey law is relevant because the eligible credit support is located in Guernsey, English authorities on point would be considered as persuasive. Therefore, provided that the arrangement is not a sham, the Guernsey courts are likely to respect the parties' intention as to the form of the transaction.

Guarantees

12. Are guarantees commonly used in your jurisdiction? How are they created?

Guarantees are commonly used in Guernsey.

A guarantee arises under an agreement between guarantor and lender under which the guarantor agrees to guarantee the performance of an obligation to pay by the principal debtor.

A guarantor can resist a call to pay the guaranteed amount under two customary law defences:

- ***Droit de division.*** This is a substantive defence that applies where there is more than one guarantor of a Guernsey guarantee. The guarantor has the right to defend an action for the recovery of the debt against the principal debtor on the basis that, unless the other guarantor(s) is joined, their liability is limited to their pro rata share of the guarantee.
- ***Droit de discussion.*** This allows the Guernsey guarantor a procedural defence in an action for the recovery of the guaranteed debt. The guarantor can claim that the creditor must first exhaust all his/her remedies or rights against the principal debtor before bringing his/her claim against the guarantor.

It is common for the lender to require the Guernsey guarantor to waive their rights under these two customary law defences.

Risk Areas for Lenders

13. Do any laws affect the validity of a loan, security or guarantee (or the terms on which they are made or agreed)?

Financial Assistance

Financial assistance is lawful in Guernsey provided that the directors of the Guernsey company giving the financial assistance certify, among other things, that the Guernsey company will, immediately after giving the financial assistance, satisfy the solvency test prescribed by the Companies (Guernsey) Law 2008 (as amended) (Companies Law).

Corporate Benefit

The directors of a Guernsey company providing a guarantee or security interest must ensure that any proposed transaction is in the best interests of the company as a whole. Guarantees and other security arrangements may be construed as not being in the best interests of a company (and not for the company's corporate benefit) if the granting company receives no commercial benefit from the underlying financing arrangements. In these circumstances:

- A Guernsey court may, in certain circumstances if the beneficiary of the guarantee or security interest is viewed as a constructive trustee, hold that the guarantee or applicable security interests be set aside as a breach by the directors of their fiduciary duty to act in the company's best interests.
- A shareholder, creditor or liquidator of the granting company can bring an action against the company to have the guarantee or applicable security interest set aside as a breach by the directors of their fiduciary duty to act in the company's best interests.

If the guarantee or security interest is upstream (that is, subsidiary to parent) or cross-stream (that is, to an affiliate), secured parties usually seek approval of the granting company's shareholders before entry into this type of transaction. This should avoid a shareholder subsequently challenging the validity of the transaction. However, this may not eliminate the risk of challenge by other parties, or if the company is insolvent or threatened by insolvency.

Loans to Directors

A Guernsey company is not restricted by Guernsey law from making or guaranteeing a loan to its directors or to directors of a related company except if these restrictions appear in the articles of incorporation of that company.

A director of a Guernsey company must disclose to the board of directors of that company the nature and extent of their interest in the transaction.

This includes the making or guaranteeing of a loan by the company to that director.

A transaction entered into by a Guernsey company in which a director is interested is voidable by the company at any time within three months after the date the transaction is disclosed to the company's board of directors unless any of the following apply:

- The director's interest was disclosed to the board by the director immediately after they became aware of the fact that they were interested but prior to entry by the Guernsey company into the transaction.
- The transaction is ratified by the members of the company.
- The company received fair value for the transaction.

If a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions then the company is presumed to receive fair value under the transaction.

Usury

There is no legislation that sets out rules as to usury which would apply to a corporate debtor.

The current rate of judgment interest is 8% per annum unless otherwise ordered by the Guernsey courts.

Licencing Rules and Economic Substance Requirements

The Lending, Credit and Finance (Bailiwick of Guernsey) Law, 2022 (LCF Law). The LCF Law came into force on 1 January 2023, with full implementation scheduled for 1 July 2023. Under the LCF Law:

- All businesses providing or offering consumer credit, or that provide services that are ancillary to the provision of consumer credit, in or from within the Bailiwick of Guernsey, must have a Part II Licence from the Guernsey Financial Services Commission (GFSC), unless an exemption applies.
- All Bailiwick bodies to include Guernsey, Alderney and Sark companies or any other legal person registered, constituted or incorporated in Guernsey that provide or offer by way of business consumer credit, or services ancillary to the provision of consumer credit, from anywhere in the world, must also have a Part II Licence from the GFSC, unless an exemption applies.

The specific activities which require a Part II Licence under the LCFL include:

- Providing personal loans (whether secured or unsecured).
- Providing credit cards to individuals in their personal (but not business) capacity.
- Providing any mortgage that is secured against residential real estate in Guernsey, provided that the property is owned by the individual borrower.
- Certain exemptions apply to the requirement to have a Part II Licence. Most notably, an equivalence-based exemption applies to businesses regulated in jurisdictions which are considered to offer appropriate or equivalent protections to those provided under the LCF regime (although such businesses must notify the GFSC and certain conditions apply).

The following (among others) are also exempt from the requirement to have a Part II Licence:

- Mortgages secured against any real property within Guernsey and which is not the borrower's residence.
- Mortgages secured against any real estate located outside of Guernsey and which is not the borrower's residence.
- Lombard lending to high-net-worth individuals carried out by persons holding licences under another regulatory law, where the lending is secured against marketable securities (of which cash as a marketable security may represent no more than 50% of the total value of the loan made).

The LCF also provides that, subject to certain exemptions, persons cannot carry on, or hold themselves out as carrying on, a business in or from within Guernsey unless under the authority of a Part III FFB Licence. The regulated activities under a FFB Licence include lending and providing financial guarantees or commitments.

The LCF also introduces licensing requirements for a wide range of activities related to cryptocurrencies and other virtual assets and regulates Fintech platforms operating crowdfunding and peer-to-peer platforms together with virtual asset providers.

Economic Substance Requirements. The economic substance requirements are set out in the Income Tax (Substance Requirements) (Implementation) Regulations, 2021 (Substance Regulations), which were first implemented in December 2018. The Substance Regulations came into force on 1 January 2019 and were subsequently amended in June 2021. The Economic Substance Regulations apply:

- **Guernsey-resident companies generating their gross income from relevant activities.** The term "companies" includes all vehicles treated as companies for tax purposes. An incorporated cell will be treated separately from its incorporated cell company and other incorporated cells. By comparison, a protected cell company and its cells will be treated as one entity.
- **Guernsey-resident Partnerships.** All types of partnerships resident in Guernsey will potentially be within scope of the Substance Regulations to the extent that they derive gross income from certain specified activities (including general

partnerships, limited partnerships and limited liability partnerships). Foreign partnerships formed outside of Guernsey may also be required to comply to the extent that they have their "place of effective management" in Guernsey and carry out their business activities in Guernsey.

There are specific categories of "relevant activity" carried out by certain entities that will fall within the scope of the Substance Regulations. These include:

- **Banking activities.** A banking business has been defined to mean any deposit-taking business specified in the Banking Supervision (Bailiwick of Guernsey) Law, 2020, which is carried on by a licensed banking institution (as defined in that law).
- **Financing and leasing activities.** This encompasses providing credit facilities of any kind for consideration, unless where the activities fall within the remit of banking, fund management or insurance activities.

If Guernsey resident entities carry out relevant activities for income in an accounting period, they will be required to account to the Guernsey Revenue Service in the year of charge for the activities and must show proof of their compliance with the applicable Substance Requirements.

Others

In certain circumstances, transactions can be set aside as preferences on application by a liquidator of a company that is being wound up under the Companies Law.

14. Can a lender be liable under environmental laws for the actions of a borrower, security provider or guarantor?

There are no environmental laws that impose liability specifically on holders of security interests in land. However, there are circumstances in which secured parties could be exposed to liability, for breaches of Guernsey's planning control laws, as successor-in-title to the land following enforcement of the security.

Structuring the Priority of Debts

15. What methods of subordination are there?

Contractual Subordination

Contractual subordination is both possible and common under Guernsey law and is usually achieved by entering into either:

- A subordination agreement, under which a creditor or a group of creditors agrees to rank behind other debts of a company.
- An inter-creditor agreement, under which the different classes of creditor agree the priority of their respective claims against the company.

An agreement between the company and any of its creditors as to the subordination of the debts due to that creditor to the debts due to the company's other creditors is recognised in the liquidation of a Guernsey company (section 419(1)(c), Companies Law).

Structural Subordination

Structural subordination is possible and common under Guernsey law. A lender to a Guernsey subsidiary company will have structural priority over a lender to the Guernsey parent company of that subsidiary.

Inter-creditor Arrangements

See above, *Contractual subordination*.

Debt Trading and Transfer Mechanisms

16. Is debt traded in your jurisdiction and what transfer mechanisms are used? How do buyers ensure that they obtain the benefit of the security and guarantees associated with the transferred debt?

The on-sale of a loan and the sale of one or more participations in a loan to a Guernsey company are relatively common. However, these arrangements are usually regulated by the laws of a foreign jurisdiction. Any sale or participation is usually regulated by the same law as that of the underlying loan agreement.

The following analysis applies if the governing law is Guernsey law.

On-sale

If a loan is sold, the incoming lender steps into the outgoing lender's shoes under a novation agreement that is entered into by the lenders and the borrower. The novation agreement provides that the outgoing lender is released from its obligations and liabilities under the loan agreement and the incoming lender assumes these obligations and liabilities, each from a specified effective date (usually the date of the execution of the novation agreement).

Any related security interests can either be either:

- Assigned to the incoming lender (if permitted by the security documents). Notice of the assignment must be given to all relevant persons, including the person from whom the assignor (that is, the outgoing lender) is entitled to claim the collateral secured.
- Released with new security being created in favour of the new lender.

Participation

In a participation structure, the lender of record in a loan arrangement is able to transfer the risk associated with a loan to a third party. Participations can be either:

- Funded (where the sub-participant reimburses the lender of record for its agreed participation in the loan (and any related costs, expenses and indemnity payments)).
- Risk based (where the sub-participant agrees only to reimburse the lender of record for a certain percentage of any monies not paid by the borrower under the loan agreement).

The security interests granted to the lender of record in any participated structure remain unaffected.

Agent and Trust Concepts

17. Is the agent concept (such as a facility agent under a syndicated loan) recognised in your jurisdiction?

The agent concept (such as a facility agent under a syndicated loan) is recognised in Guernsey. A facility agent that is properly appointed would be able to enforce right on behalf of other syndicate lender in this jurisdiction.

18. Is the trust concept recognised in your jurisdiction?

The trust concept (such as a security trustee holding security on behalf of two or more creditors) is recognised in Guernsey.

Enforcement of Security Interests and Borrower Insolvency

19. What are the circumstances in which a lender can enforce its loan, guarantee or security interest? What requirements must the lender comply with?

The transaction documents in each secured lending transaction set out the basis on which the secured party can enforce its security. These provisions reflect the commercial agreement between the secured party and the debtor, and can provide for a remedy or a grace period.

Each Guernsey law security agreement must specify the events that are to constitute events of default (Security Interests Law).

A power of sale or application of the collateral will arise when an event of default occurs. However, this power cannot be exercised unless the secured party has served on the debtor a notice specifying the particular event of default complained of.

The security agreement can (but need not) provide that the power of sale or application is only exercised on the authority of an order of the Royal Court. In these circumstances, the Royal Court grants an order on being satisfied that the power of sale or application has arisen and has become enforceable under the Security Interests Law.

Methods of Enforcement

20. How are the main types of security interest usually enforced? What requirements must a lender comply with?

Security Over Immovable Property

The enforcement procedure of *saisie* is the means by which a judgment creditor (whether secured or unsecured) pursues monies due to that creditor from a debtor owning real estate in Guernsey. The *saisie* procedure enables the creditor to have the debtor's real estate vested in it following necessary process substantially contained in the Saisie Procedure (Simplification) (Bailiwick) Order 1952, as amended.

The harshness of this process has recently been mitigated by the provisions of The Lending, Credit and Finance Rules, 2023 made in exercise of powers under the LCF Law. The rules provide that where a licensee under the LCF Law takes possession of assets provided as security as a result of a borrower defaulting on its obligations under a regulated agreement (whether pursuant to *saisie* proceedings or otherwise), any surplus realised from the sale of those assets must be returned to the borrower. This is a change from the Guernsey customary law position.

The procedure involves three stages that can be completed within a minimum time frame of six months:

- **Preliminary vesting order (PVO).** Under a PVO a judgment creditor can evict, let or carry out repairs to the debtor's property. If there is a tenant then the judgment creditor could require that the rent paid by the tenant be paid to the creditor or that the judgment debtor in occupation pay a rent to the judgment creditor. These rights are exercisable only after notice in writing by Her Majesty's Sheriff of the PVO is served on the debtor. At this stage the creditor does not have any obligations to other creditors who may exist. The creditor can apply any rent they receive in reduction of

their judgment debt but ownership of the real estate at this stage is still vested in the debtor who may sell its real estate, provided it can either:

- repay the creditor and any other secured creditors out of the proceeds of the sale;
 - come up with an arrangement with the other creditors whereby they cancel or release their charges secured against the real estate.
- **Interim vesting order (IVO).** On the making of an IVO, the judgment creditor holds the real estate on trust for all creditors of the debtor. The judgment creditor opens a register and all persons who are owed money by the debtor and wish to participate in the *saisie* have the opportunity to enrol their names in that register together with the sums due to them. Those creditors who have enrolled are then marshalled in order of priority. The creditor with priority over all other enrolled claimants will be the first holder in date order of any registered claim (such as a bond) against the debtor's real estate. Subsequently, registered claims rank in order of the date of registration and other unsecured judgment creditors rank in order of the date of their judgment.
 - **Final vesting order (FVO).** All creditors who appear on the marshalled list are summoned before the court before making the FVO. At this stage, each creditor is asked by the court in reverse order of priority to confirm whether the creditor wishes to take the property, subject to paying all those creditors who appear above that creditor in the list, or whether that creditor wishes to renounce its claim in its entirety. The first-registered creditor is therefore guaranteed either the:
 - payment of the debt due to that creditor and appearing on the marshalled list;
 - vesting of the real estate in that creditor free from all other debts.

Following a vesting of the real estate under an FVO, the real estate is the property of that creditor. All other rights of the creditor against the debtor under the claim are extinguished, although the real estate may not, on re-sale, be equivalent to the total amount of the claim. Although the debtor is not formally entitled to any surplus, as the debtor has renounced its rights to its real estate in satisfaction of all claims registered in the *saisie* proceedings, in practice the Guernsey Courts expect the creditor taking the property under an FVO to undertake to pay over any balance after the debt is paid in full.

Security in Intangible Movable Property

The rights of a secured creditor on the enforcement of the security interest in intangible movable property should be described in the transaction documents giving rise to the security interest.

The Security Interests Law allows for a power of sale or application of the collateral to arise when an event of default occurs, provided that a notice specifying the particular event of default complained of has been served on the debtor.

On a sale or application of the collateral, the secured party must take all reasonable steps to ensure that the sale or application is made within a reasonable time and for a price corresponding to the value on the open market at the time of the sale of the collateral being sold, or where there is no open market, the best price reasonably obtainable. The proceeds of the sale or application must be applied by the secured party in the following order:

- In payment of the costs and expenses of the sale.
- In discharge of any prior security interest.

- In discharge of all monies properly due in relation to the obligations secured by the security agreement.
- In payment, in due order of priority, of secured parties whose security interests were created after their own, and on whose behalf (as well as on their own behalf) was, immediately before exercising their power of sale or application, holding possession of documents or exercising control of collateral (whether by themselves or through some other person on their behalf).
- The balance (if any) in payment to either:
 - the debtor; or
 - where the debtor has become insolvent or been subject to any other judicial arrangement consequent on insolvency, to HM Sheriff or other proper person.

Rescue, Reorganisation and Insolvency

21. Are company rescue or reorganisation procedures (other than insolvency proceedings) available in your jurisdiction? How do they affect a lender's rights to enforce its loan, guarantee or security?

Administration

A Guernsey company can be made the subject of an administration order under the Companies Law for the purposes of achieving either:

- The survival of the company and the whole or any part of its undertaking as a going concern.
- A more advantageous realisation of the company's assets than would be effected on a winding-up.

An application for an administration order can be made by, among others:

- The company.
- The company directors.
- Any company member.
- Any company creditor (including any contingent or prospective creditor of the company).

The Royal Court can make an administration order if it is satisfied that the company does not satisfy or is unlikely to be able to satisfy the solvency test and if the making of the order would achieve one or more of the purposes described above.

During the period between the making of an application for an administration order and the making of that order and while that order is in force:

- No resolution can be passed or order made for the winding-up of the company.
- No proceedings can be commenced or continued against the company except with the leave of the Royal Court and subject to such terms and conditions it may impose.

Rights of set-off and secured interests (including security interests under the Security Interests Law) and rights of enforcement of secured interests are unaffected by an application for, or the granting of, an administration order.

Arrangements and Reconstructions

Where a compromise or arrangement is proposed between a Guernsey company and its creditors, the Royal Court can order a meeting of the creditors to be summoned. The application for an order can be made by, among others:

- The company.
- Any company creditor.
- Any company member.

If a majority in number representing 75% of the creditors agree to the compromise or arrangement then the Royal Court can sanction the compromise or arrangement. If the sanction is given then the compromise or arrangement is binding on all creditors and the company, among others.

While a creditor can have an arrangement or compromise imposed on them, the sanctioning of the arrangement or compromise by the Royal Court does not affect the enforcement of security rights.

22. How does the start of insolvency procedures affect a lender's rights to enforce its loan, guarantee or security?

Insolvency procedures do not generally affect a secured creditor's right to enforce its security.

However, special considerations apply to security over shares in a Guernsey company. If the secured party or its nominee is not registered as the holder of the shares, the secured party's priority is preserved when any insolvency proceedings begin in Guernsey against the debtor. However, title to the shares may (if Guernsey law applies), vest in the relevant insolvency officer for the purposes of realisation of those shares.

Where a security interest is created in the shares of a Guernsey company (including registration of the secured party or its nominee as registered holder of the shares), the court has the power in *désastre* (see below) proceedings to:

- Vest the rights of the secured party in the arresting creditor.
- Direct that the shares and other collateral secured by the security agreement be sold or applied by HM Sheriff.

Désastre is a Guernsey procedure where either a company's or an individual's movable property is seized by HM Sheriff subsequent to a judgment against that party. The arresting creditor seeks the leave of the court to sell the movable property to satisfy the debt. At this stage the creditors prove in the *désastre* and a dividend is declared on the realisation of the movable property. A dividend on *désastre* does not absolve the remainder of the debt. In addition, there are no special powers to question the debtor or to discover where his/her movable property is.

23. What transactions involving loans, guarantees, or security interests can be made void if the borrower, guarantor or security provider becomes insolvent?

The Companies Law contains provisions that can affect the rights of a creditor of a Guernsey company on the insolvency of that company.

If a Guernsey company has given a preference to any person, the company liquidator can apply to the court for an order to restore the company to the position it would have been in had the preference not been given, at any time after the commencement of a period of six months (or two years where the person giving the preference is connected) immediately preceding the earlier of:

- The making of an application to compulsorily wind-up the company.
- The passing of a resolution for the voluntary winding-up of the company.

A Guernsey company gives a preference to a person if either:

- That person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities.
- The company does anything, or permits anything to be done, which improves that person's position in the company's liquidation.

To grant an order the court must be of the opinion that the company was both:

- Unable to pay its debts at the time of the giving of the preference.
- Influenced in deciding to give the preference by a desire to improve the person receiving the preference's position in the company's liquidation.

24. In what order are creditors paid on the borrower's insolvency?

On a Guernsey company's winding-up, the company's assets are realised and applied in satisfaction of the company's debts and liabilities *pari passu* (that is, proportionally). Any surplus is then distributed (subject to the company's articles of incorporation) to the members of the company.

This general rule is subject to any rule of law as to preferential payments, any agreements between the company and any creditor as to subordination, and any agreement between the company and any creditor as to set-off.

The Preferred Debts (Guernsey) Law 1983 (as amended) (Preferred Debts Law) ranks classes of debt that are paid in priority to all other debts in insolvency proceedings. These include:

- Any rents owing to a landlord by his/her tenant secured by goods subject to tacit hypothecation (see [Question 2, Common Forms of Security](#)).
- Tax payable to the Guernsey authorities on a Guernsey employee's wages.
- A proportion of an employee's wages.
- Holiday pay.
- Unpaid income tax.
- Unpaid social security contributions.
- The costs of the liquidator in a winding-up.

Creditors with security interests are entitled to enforce their security interest outside of the insolvency of the company, and therefore their claims are satisfied in priority to other claims.

If the secured party or its nominee is not registered as the holder of the collateral the secured party's priority will be preserved when any insolvency proceedings begin in Guernsey against the debtor. However, if Guernsey law applies, title to the collateral may vest in the relevant insolvency officer for the purposes of realisation of the collateral.

Where a security interest is created in the collateral (including registration of the secured party or its nominee as registered holder of the collateral), the Royal Court has the power in *désastre* proceedings (see [Question 22](#)) to vest the rights of the secured party in the arresting creditor and direct that the collateral secured by the security agreement is sold or applied by HM Sheriff in the following order:

- Payment of the costs and expenses of the sale.
- Discharge of any prior security interest.
- Discharge of all monies properly due to the secured party.
- Payment, in priority order, of any other secured parties.
- If any balance remains, payment to the debtor or other appropriate person in the event of the debtor's insolvency.

In relation to security over real estate, the first in time of registration prevails. Bonds registered on the same day have equal priority.

In relation to security over intangible movable property, priority between security interests in the same collateral is determined by the order of creation of those security interests (Security Interests Law).

Cross-Border Issues on Loans

25. Are there restrictions on the making of loans by foreign lenders or granting security (over all forms of property) or guarantees to foreign lenders, or taking guarantees from foreign subsidiaries of the borrower?

There are no restrictions on the making of loans by foreign lenders or granting security or guarantees to foreign lenders or the taking of guarantees from foreign subsidiaries of a borrower.

26. Are there exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

There is no exchange control legislation in Guernsey.

27. What regulatory requirements does a UK lender have to comply with to purchase a loan made to a borrower in your jurisdiction?

There are no restrictions on the purchase by UK lenders of loans made to borrowers incorporated or registered in Guernsey.

Taxes and Fees on Loans, Guarantees and Security Interests

28. Are taxes or fees paid on the granting and enforcement of a loan, guarantee or security interest?

Documentary Taxes

There are currently no stamp duties or similar taxes payable on the granting and enforcement of a loan, guarantee or security interest.

Registration Fees

Court and registration fees are payable on the grant and registration of any document charging real estate and may be payable on the enforcement of any document in Guernsey.

Notaries' Fees

Notarial fees are generally charged on a time-spent basis at a rate equal to the rate that the notary in question charges when acting as an Advocate of the Royal Court of Guernsey.

29. Are there strategies to minimise the costs of taxes and fees on the granting and enforcement of a loan, guarantee or security interest?

There is no mechanism through which the court and registration fees incurred by a bond or guarantee over real estate can be minimised.

Reform

30. Are there any proposals for reform?

There are currently no proposals for reform.

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