

# SECURITY ENFORCEMENT: PROCEDURES AND PITFALLS

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## INTRODUCTION

Political, commercial and economic factors may influence the propensity of lenders to consider the enforcement of security including, for example, fluctuating exchange rates, the rise and fall of energy and commodity prices, and uncertain commercial property market valuations, impacting on loan-to-value ratios. As a result, lenders may seek to understand their enforcement options; security agents and security trustees may wish to minimise their exposure on executing enforcement action; and potential purchasers of debt and collateral may seek to acquire assets through enforcement including “loan to own” strategies.

Set out below is an outline of the procedure and issues that may be faced when enforcing Jersey security, with a principal focus on the Security Interests (Jersey) Law 2012 (**2012 Law**).

## WHEN DOES THE POWER OF ENFORCEMENT BECOME EXERCISABLE?

Articles 43 to 59 of the 2012 Law regulate when a power of enforcement becomes exercisable, its means of exercise, the duties of the secured party and the distribution of the proceeds of sale. The position may be modified by the provisions of the security agreement itself, so when providing advice we will have regard to both the law and the security agreement.

The power of enforcement becomes exercisable under Article 43(1) of the 2012 Law when (a) an event of default has occurred in relation to the security agreement that created the security interest and (b) written notice specifying the event of default has been served on the grantor. A court order is not required to exercise

the power of enforcement. However, court orders may be obtained to facilitate the enforcement under Article 52 of the 2012 Law.

The position is different under the Security Interests (Jersey) Law 1983 (**1983 Law**), where the power of sale arises after an event of default (as defined in the relevant security agreements) occurs, but when the power of sale becomes exercisable depends on whether the relevant event of default is capable of remedy. If the event of default is capable of remedy, the notice must require the debtor to remedy it, and the power of sale is only exercisable if the debtor fails to remedy it within 14 days of receipt of such notice. There is no guidance in the Security Law as to the meaning of "capable of remedy"

### **HOW MAY THE POWER OF ENFORCEMENT BE EXERCISED?**

Under Article 43(2) of the 2012 Law, the secured party may exercise the power of enforcement by doing any of the following in relation to the collateral secured under the security agreements (the **Collateral**) or the proceeds of the Collateral:

- a) appropriating the Collateral or proceeds;
- b) selling the Collateral or the proceeds;
- c) taking any of the following ancillary actions: (i) taking control or possession of the Collateral or proceeds; (ii) exercising any rights of the grantor in relation to the Collateral or the proceeds; and (iii) instructing 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; and
- d) applying any remedy that the security agreement provides for as a remedy that is exercisable pursuant to the powers of enforcement, to the extent that the remedy is not in conflict with the 2012 Law.

The enforcement would usually be conducted by the secured party, who may be acting in the capacity as a security agent or security trustee for itself and/or others. The exact nature of the relationship between the parties involved will have an impact on how (and even whether) the secured party conducts the enforcement.

There is a greater degree of flexibility under the 2012 Law compared to the powers expressly provided for in the 1983 Law, where security is enforced through means of a power of sale.

### **HOW IS A SALE/APPROPRIATION EXERCISED?**

The secured party under Article 44(1) of the 2012 Law (in the case of appropriation of the collateral) and Article 44 (2) of the 2012 Law (in the case of a sale of the Collateral) must, not less than 14 days before selling or appropriating the Collateral, give written notice of the sale or appropriation (unless otherwise agreed as described below) to:

- a) the grantor;
- b) any person who has 21 days before the sale a registered security interest in the collateral; and
- c) any person apart from the grantor who has an interest in the collateral and has given notice of that interest to the secured party not less than 21 days before the sale.

The requirements set out above do not apply to quoted investment security and in certain specified exceptional circumstances specified in the 2012 Law. The secured party and the grantor (or other interested persons if there are any) can agree in writing to shorten or dispense with the notice of sale/appropriation under Article 44 (4) of the 2012 Law.

The possible methods of sale of the Collateral permitted in Article 45 of the 2012 Law are wide and include by auction, public tender, private sale, or another method and include sales to the secured party.

**DUTIES OF THE SECURED PARTY**

Upon exercising the power of sale, Articles 46 (2) and (3) of the 2012 Law impose a duty upon the secured party to the grantor and anyone else who has a registered security interest or other notified interest at the specified time (not less than 21 days before the sale) to:

- a) take all commercially reasonable steps to determine the fair market value of the collateral at the time of the sale;
- b) act in other respects in a commercially reasonable manner in relation to the sale; and
- c) enter into any agreement for or in relation to the sale only on commercially reasonable terms.

There is no guidance in the Security Law or related Jersey case law on “fair market value” or the steps that would be considered “commercially reasonable” in this context. A secured party could potentially be liable in damages if it fails to comply with these requirements. This is a modification of the position under the 1983 Law, which provides that a secured party must take all reasonable steps to ensure the sale is made within a reasonable time and for a price corresponding to the value on the open market at the time of sale of the collateral being sold.

**CONCLUSION**

There is a greater degree of additional flexibility to enforcing security under the 2012 Law compared to the 1983 Law but nevertheless there can be a number of complications, especially with regard to the practicalities involved with exercising the powers of sale/appropriation (where various notices may need to be served on interested parties), interpreting the secured party’s duties under the law in the precise circumstances (in particular, the need to obtain reliable and timely valuation evidence) and also the steps to be taken to execute a sale and account for any surplus.

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