

COLLAS DAY | COMMERCIAL

Taking *security* over
intangible property
under Guernsey law

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The ability to take security is often a key requirement for commercial and banking transactions. This note sets out the steps involved in taking security over intangible moveable property under Guernsey law (Intangibles), such as shares in a Guernsey company.

1 Security Law

The taking of security over Intangibles is governed by The Security Interests (Guernsey) Law, 1993 (Security Law).

2 Creation of Security Interest

- 2.1 The Security Law specifically categorises Intangibles into the following groups and sets out the means by which a security interest may be created over each group:

(See table opposite)

- 2.2 If title is taken over Intangibles by way of an assignment:

- 2.2.1 the assignment must be a legal assignment. Guernsey law does not recognise the concept of an equitable assignment; and
- 2.2.2 notice in writing that the property has been assigned must be given to the person from whom the assignor would have been entitled to claim the property.

3 Security Agreement

- 3.1 The pre-requisites of a security agreement are set out in the Security Law. Such an agreement must:

- 3.1.1 be in writing;
- 3.1.2 be dated;
- 3.1.3 identify and be signed by the debtor, i.e., the party giving the security;
- 3.1.4 identify the secured party;
- 3.1.5 contain provisions regarding the collateral sufficient to enable its precise identification at any time;
- 3.1.6 specify the events which are to constitute events of default; and
- 3.1.7 contain provisions regarding the obligation payment or performance of which is to be secured, sufficient to enable it to be identified.

PROPERTY TO BE SECURED	SECURITY
Securities	
includes shares, stock, debentures, bonds and units in a unit trust scheme, together with instruments that confer rights in or options to acquire or dispose of such securities. Negotiable instruments are specifically excluded.	Security is created when the secured party (or someone on its behalf) has physical possession of the certificates of title and is holding them pursuant to a security agreement.
Life assurance policies	
	Security is created by physical possession of the relevant policy.
Bank accounts held with the secured party	
The Security Law specifically provides for security to be created over an account that is held with the secured party in what is commonly recognised as a “charge-back” situation.	The secured party must have control over the bank account pursuant to a security agreement.
Any other intangible moveable property	
Bank accounts held with a bank which is not the secured party and accounts held with custodians fall within this category. Leases are specifically excluded from the Security Law.	The secured party (or someone on its behalf) must have title to the collateral pursuant to a security agreement. Such title may be transferred by an assignment. For example, the secured party may take an assignment of shares in a Guernsey company (i.e. become the registered shareholder). Some secured parties are more comfortable with this approach than simply having possession of certificates of title. This clearly does not suit certain lenders, principally banks, who prefer to keep shares of its borrower’s group off their balance sheet.

3.2 Provided the security agreement contains the matters set out above, the agreement may contain such other matters as the parties may agree. It is not uncommon to set out the conditions under which the property may continue to be available for use by the debtor in the absence of a default.

3.3 Events of default in a security agreement may be incorporated by reference to another document, for example, a facility agreement or other finance document particularly in complex finance transactions with numerous security arrangements.

4 Priority

It is possible to create a security interest over the same Intangibles in favour of more than one lender. Priority may be determined by an intercreditor arrangement between the parties, or in the absence of such an arrangement, by the order of creation of those security interests.

5 Enforcement

Notice must be served on the debtor specifying the event of default relied on before the security may be enforced.

6 Power of Sale or Application

6.1 A power of sale over the property secured must be exercised within a reasonable period and for a price corresponding to the value on the open market, or if there is no open market value, the best price reasonably obtainable.

6.2 The secured party may choose to exercise its power of sale or application over all or any part of the property secured.

7 Application of Proceeds

The proceeds must be applied in the following order:

- 7.1 costs and expenses of the sale;
- 7.2 discharge of all prior security interests;
- 7.3 discharge of the security interests of the party exercising the power;
- 7.4 discharge of subsequent security interests;
- 7.5 in payment of the balance to the debtor.

8 Insolvency

The insolvency of the debtor does not prejudice the ability of the secured party to realise or otherwise deal with the relevant property in the same manner as it would have been entitled to realise or deal with it if the debtor or its property had not been the subject of such insolvency, *désastre* or other judicial proceedings or arrangement.

9 Registration

There are no registration formalities in any public register under Guernsey law in order to perfect the security interest created under the Security Law. "Perfection" as a concept is not relevant to the creation or enforceability of security interests under the Security Law.

10 Release

Where the debtor has discharged its obligations under the security agreement:

- 10.1 the Intangibles to which the secured party has taken possession must be returned to the debtor; and
- 10.2 a certificate of discharge in the appropriate statutory form must be issued to the debtor.

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