

ORDER IN COUNCIL

**III
1993**

ratifying a Projet de Loi

ENTITLED

The Security Interests (Guernsey) Law, 1993

(Registered on the Records of the Island of Guernsey
on the 25th May, 1993.)



1993

The Security Interests (Guernsey) Law, 1993

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The Security Interests (Guernsey) Law, 1993

THE STATES, in pursuance of their Resolution of 30th. September 1992^a, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Islands of Guernsey, Herm and Jethou.

Creation of security interests.

1. (1) A security interest may be created under this Law in any intangible moveable property other than a lease.

(2) A security interest may be created in accordance with any one or more of the methods of creation referred to in this section.

(3) A security interest in securities is created where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has possession pursuant to a security agreement of the certificates of title to those securities.

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

(5) A security interest in a bank account is created where

^a On Article 18 of Billet d'État No. XVII of 1992.

- (a) the bank which holds that account for its customer is the secured party; and
- (b) that bank has control of the account pursuant to a security agreement; and
- (c) its customer and the debtor are one and the same person;

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.

(6) A security interest in any intangible moveable property other than a lease is also created where -

- (a) the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has title to the collateral pursuant to a security agreement; and, where that title is acquired by assignment
- (b) the requirements of subsection (8) as to the giving of notice have been complied with.

(7) The reference to title in subsection (6) is a reference to title acquired -

- (a) in the case of a bearer certificate or a negotiable instrument, by delivery with any necessary endorsement; and

- (b) in any other case, by assignment of the collateral (with or without a proviso or condition for reassignment).

(8) Express notice in writing that collateral has been assigned must be given by or on behalf of the secured party to the person from whom the assignor would have been entitled to claim the collateral; and if a person to whom such notice is given is aware

- (a) that the assignment is disputed by the assignor or any person claiming under him; or
- (b) of any other opposing or conflicting claims to or rights in the collateral,

he must give notice thereof to the assignee, and may institute proceedings against the secured party, and against the assignor or person having the claim or right as the case may be, in which the Court may make such order as it thinks fit.

(9) References in this section to a security agreement are references to a security agreement which complies with the requirements of section 2.

Security agreement.

2. (1) For the purposes of this Law a security agreement must -
- (a) be in writing;
 - (b) be dated;

- (c) identify and be signed by the debtor;
- (d) identify the secured party;
- (e) contain provisions regarding the collateral sufficient to enable its precise identification at any time;
- (f) specify the events which are to constitute events of default; and
- (g) contain provisions regarding the obligation payment or performance of which is to be secured, sufficient to enable it to be identified.

(2) Subject to subsection (1), a security agreement may be in such form, and may contain or refer to such matters, as may be agreed between the parties.

Time of creation of security interest.

3. A security interest may be created before or after the obligation whose payment or performance is to be secured by it comes into existence, provided that section 2(1)(g) can be and is complied with.

Priority between security in same collateral.

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

(2) Nothing in this section prevents the postponement by a secured party of his rights.

Effect of subsequent insolvency or désastre.

5. (1) Upon the debtor becoming insolvent, or upon his affairs being declared in a state of désastre, where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) does not have title to the collateral, to the extent that the collateral is sufficient, the amount due to the secured party in respect of a security interest created under section 1(3), (4) or (5) shall be paid in priority to all other claims.

(2) Where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has title to the collateral, the provisions of this section other than subsection (1) shall apply.

(3) Subject to the provisions of this section, and without prejudice to the provisions of section 7, the fact of the debtor becoming insolvent, his affairs being declared in a state of désastre, or he or his property being subjected (whether in Guernsey or elsewhere) to any other judicial arrangement or proceeding consequent upon insolvency or a declaration of désastre, shall not affect the power of a secured party to realise or otherwise deal with the collateral in the same manner as he would have been entitled to realise or deal with it if the debtor or his property had not been the subject of such insolvency, désastre or other judicial proceedings or arrangement.

(4) Where the debtor has been declared en désastre -

- (a) the arresting creditor may apply to the Court for an order vesting in him the rights of the secured party to the collateral and directing that it be sold or applied by H.M. Sheriff in accordance with section 7(5)(a) and 7(6);

- (b) the proceeds of that sale or application of the collateral shall be applied by the Sheriff in accordance with section 7(5)(b) and 7(6); and
- (c) subject to paragraph (b), the Court may make an order directing such vesting and sale upon such terms and subject to such conditions as the Court thinks fit.

Cancellation or discharge of security interest.

6. (1) Upon the discharge, payment or other performance of the obligation payment or performance of which is secured, unless the security agreement expressly provides to the contrary the person who was the secured party must:

- (a) subject to any other rights or interests of which he has notice, transfer to the person who was the debtor -
 - (i) possession of the documents relevant for the purposes of section 1(3) or (4);
 - (ii) control of the account relevant for the purposes of section 1(5);
 - (iii) title to the collateral relevant for the purposes of section 1(6),

as the case may be; and

- (b) furnish the person who was the debtor with a duly completed certificate of discharge of the security interest.

(2) Where it is agreed to release part of the collateral upon payment or performance of certain of the obligations referred to in the security agreement then upon payment or performance of those obligations the secured party must furnish the debtor with a duly completed certificate of discharge as to the part of the collateral released from the security interest.

(3) If the person who is or was the secured party does not comply with subsection (1) or (2) the person who is or was the debtor may apply to the Court for an order under subsection (5).

(4) Where the secured obligation has not been wholly discharged, paid or performed but -

- (a) the collateral has been arrested by Her Majesty's Sheriff as an asset of the secured party but has not been sold or applied, or
- (b) the affairs of the secured party (being a body corporate which is insolvent) have commenced within the preceding 14 days to be wound up,

if the debtor tenders a full discharge, payment or performance of the obligation to the secured party, the debtor may apply to the Court for an order under subsection (5).

(5) On an application under subsection (3) or (4) the Court may, as appropriate, discharge the security interest and -

- (a) make an order re-vesting title to the whole or part of the collateral in the person who is or was the debtor; and/or
- (b) order the person who is or was the secured party, within such time and on such penalty as the order may specify, to do any of the things referred to in subsection (1)(a) or (b); and/or
- (c) make an order as to damages against the person who is or was the secured party; and/or
- (d) make such other order as the Court thinks fit.

(6) If the Court awards damages under subsection (5) those damages shall be paid in full in priority to all debts not secured by way of a bond or judgment registered in the Livre des Obligations kept at the Greffe.

(7) If the Court re-vests shares in a Guernsey company under subsection (5) the order takes effect as a transfer in accordance with the company's Articles and the Companies Laws apply accordingly.

(8) In this section "certificate of discharge" means a certificate of discharge in the form given in Schedule 1 to this Law and "documents relevant for the purposes of section 1(3) or (4)" means a certificate of title to securities, or a policy, as the case may be.

(9) For the purposes of this section the affairs of a body corporate which is a Guernsey company have commenced to be wound-up -

(a) in the case of voluntary winding-up, when the special resolution requiring the company to be wound-up voluntarily is passed;

(b) in the case of winding-up by the Court, when the application for winding-up is presented to the Court.

Power of sale or application.

7. (1) An event of default occurs upon the happening of an event which under the provisions of the security agreement is an event of default.

(2) A power of sale or application of the collateral arises when an event of default occurs.

(3) A power of sale or power of application is not exercisable unless the secured party has served on the debtor a notice specifying the particular event of default complained of.

(4) If a security agreement provides that a power of sale or application under this section shall be exercised only on the authority of an order of the Court, then the Court, on the application of the secured party -

(a) shall grant such an order upon being satisfied that a power of sale or application has arisen and has become enforceable under this Law; but

(b) subject to subsection (5), may grant the order either unconditionally or on such conditions as the Court thinks fit; and

(c) may order the debtor to do such acts and things as to the Court seem requisite for the effective execution of the power of sale or application.

(5) Upon a sale under this section the secured party must -

(a) take all reasonable steps to ensure that the sale is made -

(i) within a reasonable time; and

(ii) 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 value, the best price reasonably obtainable;

(b) apply the proceeds of sale in the following order -

(i) in payment of the costs and expenses of the sale;

(ii) in discharge of any prior security interest;

- (iii) in discharge of all monies properly due in respect of the obligations secured by the security agreement;
- (iv) in payment, in due order of priority, of secured parties whose security interests were created after his own, and on whose behalf (as well as on his own behalf) he was, immediately before exercising his power of sale or application, holding possession of documents or exercising control of collateral (whether by himself or through some other person on his behalf) for the purposes of section 1;
- (v) as to the balance (if any remains) in payment to the debtor, or in the event that the debtor has become insolvent or been subjected to any other judicial arrangement consequent upon insolvency, to the Sheriff or other proper person.

(6) For the purposes of this section a power of application must be exercised on the same basis as a power of sale, and the proceeds of its exercise must be applied in the same way as the proceeds of a sale, under subsection (5).

(7) For the avoidance of doubt it is hereby declared that a power of sale or application may be exercised in respect of the whole or any part of the collateral; and that where such a power is exercised in respect of only part of the collateral the security interest in the remaining collateral is unaffected.

Termination of security interest.

8. (1) This section is for the avoidance of doubt.

(2) A security interest created under section 1(3) or (4) terminates when the secured party (or some person on his behalf not being the debtor or some person on behalf of the debtor) ceases to have possession pursuant to the security agreement of the documents relevant for the purposes of section 1(3) or (4).

(3) In subsection (2) "documents relevant for the purposes of section 1(3) or (4)" means a certificate of title to securities, or a policy, as the case may be.

(4) The termination of a security interest by virtue of subsection (2) does not affect the continuation of any further security interest in the same collateral under section 1(6).

(5) A security interest created under section 1(5), terminates when the bank being the secured party ceases to have control pursuant to the security agreement of the account relevant for the purposes of section 1(5).

(6) A security interest created under section 1(6) terminates when the secured party ceases to have pursuant to the security agreement title to the collateral relevant for the purposes of section 1(6).

(7) Any security interest also terminates forthwith -

(a) when the Court so orders under section 6(5); or

- (b) unless the security agreement creating it expressly provides to the contrary, upon the discharge, payment or other performance of the obligation secured by it.

Set-off.

9. In section 1 of the 1979 Law -

- (a) for the marginal note there is substituted:

"Effect of set-off by agreement.";

- (b) for subsection (1) there is substituted:

" (1) It is hereby declared for the removal of doubt that where there is for the time being in force an agreement (whether written or oral and whether express or implied) whereby, in respect of mutual dealings between them, any debt from one party is to be set off against any debt from the other party, the effect of that agreement is, unless the parties have expressly or by implication agreed to a different effect, that the only action which may be taken at any time in relation to what would otherwise be those mutual debts (whether by or at the instance of either party or any third party, and whether by way of enforcement, assignment, arrest, restraint or otherwise) is in respect of the balance (if any) then due after that set off; but

- (a) in a case where the affairs of one party have been declared in

a state of "désastre" at a meeting of his arresting creditors held before a Jurat as Commissioner of the Royal Court, this is subject to subsection (2) of this section; and

- (b) in ascertaining the balance due as described in this subsection (but only for the purposes of this subsection), if a contingent liability is to be taken into account the contingency is to be treated as having occurred, and if a future liability is to be taken into account it is to be treated as if presently payable."

Security given under foreign law.

10 .(1) In this Section -

- (a) "**foreign law**" means any law other than the law of Guernsey; and
- (b) "**property**" means any property, whether tangible or intangible, whether vested contingent or future, and whether moveable property or property which would be regarded by the law of Guernsey as "immeubles".

(2) For the avoidance of doubt it is hereby declared that a person who is resident, domiciled or incorporated in Guernsey is not to be considered as lacking capacity, or as ever having lacked capacity, to give security governed by foreign law over property situated outside Guernsey, by reason only that the law of Guernsey does not permit security to be given by the method or in the circumstances permitted by that foreign law.

Interpretation.

11. (1) In this Law, unless the context otherwise requires -

"bearer certificate" means a certificate of title to securities by the delivery of which (with or without endorsement) the title to the securities is transferable;

"certificate of deposit" means a document relating to money, in any currency, which has been deposited with the issuer or some other person, being a document which recognises an obligation to pay a stated amount to bearer or to order, with or without interest, and being a document by the delivery of which, with or without endorsement, the right to receive that stated amount, with or without interest, is transferable;

"certificate of title to securities" means any document of title whereby a person recognises the title of another to securities issued or to be issued by the first-mentioned person, and in the case of any such document with coupons (whether attached or on separate coupon sheets) includes any coupons which have not been detached;

"collateral" means property that is subject to a security interest and includes initial, substituted and additional property which is so subject from time to time;

"company" means a body which is incorporated under the law of any country or territory;

"the Companies Laws" means the Companies (Guernsey) Laws, 1908 to 1990;

"Court" means the Royal Court sitting as an Ordinary Court;

"debtor" means a person who causes or permits a security interest to be created in property in which he has an interest, and includes his successors and assigns;

"Guernsey company" means a body incorporated under the Companies Laws;

"lease" means anything which is, or operates as, a lease, underlease or other tenancy of any land or building, and any agreement therefor;

"moveable property" means all property, wherever situated, whether tangible or intangible, and whether vested, contingent, or future, which is not regarded by the law of Guernsey as "immeubles", and includes choses or things in action;

"negotiable instrument" means a bill, note or cheque within the meaning of the Bills of Exchange (Guernsey) Law, 1958^b, or a certificate of deposit;

^b Ordres en Conseil Vol. XVII, p.384; Vol. XXIV, p.84.

"obligation" includes a debt, and also includes a contingent obligation and a guarantee of payment or performance of an obligation;

"policy of life assurance" or **"policy"** means any instrument by which the payment of monies on the happening of any contingency depending on the duration of human life is assured or secured;

"proceeding consequent upon insolvency" includes the winding-up of a company which is insolvent;

"secured party" means a person who has a security interest, and includes his successors and assigns;

"securities" means 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; and also includes instruments which confer rights in, options to acquire or dispose of, and rights under any contract for the acquisition or disposal of, securities as thus defined; but does not include negotiable instruments;

"security agreement" means an agreement that makes provision for a security interest under the provisions of this Law;

"security interest" means an interest in intangible moveable property that secures payment or performance of an obligation under the provisions of this Law;

"the 1979 Law" means the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979,^c.

(2) The States may by Ordinance amend or replace any definition contained in subsection (1).

(3) A reference in this Law to a section by number only, and without further identification, is a reference to the section of that number contained in this Law.

(4) A reference in a section of this Law to a subsection or paragraph by number or letter only, and without further identification, is a reference to the subsection or paragraph of that number or letter contained in that section.

(5) Unless the context otherwise requires, where this Law refers to any enactment, the reference is to that enactment as amended, replaced, extended or applied by or under any other enactment, including this Law.

Rules of Court.

12. The Royal Court sitting as a Full Court may make Rules of Court for the purposes of this Law and proceedings under this Law.

Service of notices.

13. (1) This section has effect in relation to any notice or other document required or authorised by or under this Law to be given to or served on any person.

^c Ordres en Conseil Vol. XXVII, p.132; No. XXVII of 1990.

(2) Any such document may be given to or served on the person in question -

- (a) by delivering it to him; or
- (b) by leaving it at his proper address; or
- (c) by sending it by post to him at that address.

(3) Any such document may -

- (a) in the case of a company, be given to or served on the secretary or other similar officer of the company or any person who purports to act in any such capacity, by whatever name called;
- (b) in the case of a partnership, be given to or served on a partner or a person having the control or management of the partnership business.

(4) For the purposes of this section and section 11 of the Interpretation (Guernsey) Law, 1948^d (meaning of service by post) in its application to this section, the proper address of any person to or on whom a document is to be given or served is his last known address, except that -

- (a) in the case of a company or its secretary or other person referred to in subsection (3)(a), it is the address

^d Ordres en Conseil Vol. XIII, p.355.

of the registered office of the company (wherever situated), or the address of its principal place of business (if any) in Guernsey, or either of those addresses;

- (b) in the case of a partnership or a person having the control or management of the partnership business, it is the address of the principal office of the partnership (wherever situated), or the address of its principal place of business (if any) in Guernsey, or either of those addresses.

(5) If the person to be given or served with any document mentioned in subsection (1) has specified an address within Guernsey other than his proper address within the meaning of subsection (4) as the one at which he or someone on his behalf will accept documents of the same description as that document, that address shall also be treated for the purposes of this section and section 11 of the Interpretation (Guernsey) Law, 1948 as his proper address.

Saving provisions.

14. (1) The rights of -

- (a) a holder in due course of a negotiable instrument other than a certificate of deposit,
- (b) a bona fide purchaser of securities without notice of a security interest affecting those securities,

- (c) a person who has taken a certificate of deposit in good faith and for value without notice of a security interest affecting that certificate of deposit,
- (d) any person (other than the debtor) who was the owner of, or who had an interest in, any collateral at the time when a debtor purported to cause or permit a security interest to be created in it,

are to be determined without regard to this Law.

(2) Although a security interest may not be created under this Law in a lease, in any tangible moveable property, or in any immoveable property, that is not to be taken as prejudicing any arrangement affecting such property which would be valid apart from this Law.

(3) Nothing in this Law affects the validity of -

- (a) a lien over, or a right of set off in relation to, intangible moveable property; or
- (b) any other arrangement entered into, or right or remedy arising, under the customary law or under the 1979 Law.

(4) Without prejudice to subsection (3), it is hereby declared that

-

- (a) any express or implied agreement such as is mentioned in section 1 of the 1979 Law, and

- (b) any assignment such as is mentioned in section 2 of the 1979 Law,

whether made before or after the commencement of this Law, is governed, if it does not create a security interest under this Law (because of the absence of any security agreement or otherwise) by the 1979 Law.

(5) Nothing in this Law affects the rights of any creditor or other person under the customary law, or under any enactment, as respects any transaction or disposition conferring a fraudulent preference.

Minor and consequential amendments.

15. The enactments specified in column (1) of Schedule 2 to this Law are amended as set out in column (2) of that Schedule.

Citation.

16. This Law may be cited as the Security Interests (Guernsey) Law, 1993.

Commencement and application.

17. This Law shall come into force on the day after its registration on the records of the Island of Guernsey and shall apply on and after that date in relation to any security interest created pursuant to a security agreement entered into on or after 10th. December 1992.

SCHEDULE 1

Section 6(8)

Form of certificate of discharge

THE SECURITY INTERESTS (GUERNSEY) LAW, 1992

Certificate of discharge

I, A.B., of (insert name and address of secured party), certify that the security interest created or provided by C.D., of (insert name and address of debtor) under a security agreement dated the day of , 19 , is wholly discharged (or) is discharged in part as follows (here state the description of the part of the collateral in respect of which the security interest is discharged).

Dated:

.....

Signature of secured party

SCHEDULE 2

Section 15

Minor and consequential amendments

(1) Enactment	(2) Amendment
<hr/> The Ordinance concerning "Hypothèques etc" passed at the Chief Pleas after Easter 1636 ^e	<hr/> After the end of the Ordinance insert: "Bien entendue que les dispositions de cette Ordonnance ne portent aucune préjudice à la validité d'un intérêt créé dans un meuble incorporel selon les provisions de la loi intitulée "the Security Interests (Guernsey) Law, 1992".".

^e Recueil d'Ordonnances, Tome 1, p.174.

The Law of Property
(Miscellaneous Provisions)
(Guernsey) Law, 1979

section 2

After subsection (7) insert:

- ;(8) Sections 1(8) and 13 of the
Security Interests
(Guernsey) Law, 1992
apply in place of
subsections (4) to (7) of
this section if the debtor,
trustee or other person
liable has written notice
that the assignment is
pursuant to a security
agreement under that
Law."

(1) Enactment	(2) Amendment
<hr/> section 3	<hr/> After subsection (4) insert: <div data-bbox="815 607 1334 1104"> i "(5) Section 6 of the Security Interests (Guernsey) Law, 1992 applies in place of this section if the proviso or condition for reassignment arises under an agreement creating a security interest under that Law." </div>

The Preferred Debts (Guernsey)

Law, 1983^f

section 1

Immediately after subsection (6)
insert:

"(7) Where any property
of such a person as is
described in subsection (1)
of this section is subject to
a security interest within
the meaning of the Security
Interests (Guernsey) Law,
1992 the proceeds of its
sale or application are to be
applied in the manner
provided by section 7(5)
and (6) of that Law."

(1)

Enactment

(2)

Amendment

The Drug Trafficking Offences

(Bailiwick of Guernsey) Law,

1988^g

section 10

For subsection (3)

substitute:

^f Ordres en Conseil, Vol. XXVIII, p.184; No.VII of
1992.

"(3) A personalty charging order shall have effect as follows:

- (a) to the extent that it relates to property within subsection (2)(a) or (d), as an absolute assignment to the Crown of the interest concerned, made in accordance with section 2 of the Law of Property (Miscellaneous Provisions)(Guernsey) Law, 1979, the requirements of that section as to notice and writing being deemed to have been complied with by the charging order, and by the giving of notice in accordance with its provisions, respectively.

(b) to the extent that it relates to property within subsection (2)(b), (c) or (e), so as to create a security interest in that property under section 1(6) of the Security Interests (Guernsey) Law, 1992, the requirements of sections 2 and 1(8) of that Law being deemed to have been complied with by the charging order, and by the giving of notice in accordance with its provisions, respectively