



ADVISORY  
Industry Information

## Practical Issues Arising for Financiers and Borrowers in Acquisition Finance Transactions

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Guernsey and Jersey companies are often incorporated by purchasers as holding companies/co-investment vehicles to acquire the shares of a company incorporated in Guernsey, Jersey or elsewhere (referred to as the “**Target**”). In many cases a Guernsey or Jersey incorporated purchaser will enter into arrangements with a third party debt provider or financier (the “**Lender**”) to provide it with finance for the purposes of acquiring the Target.

It is within this context that our banking and finance team are often instructed to advise Lenders on the financing to be provided to the Guernsey or Jersey acquiring company (the “**Borrower**”) and the security package to be taken by the Lender over the Guernsey or Jersey Borrower, the Target and any Guernsey or Jersey companies within the Target group (the “**Target Group**”), as well as their assets on completion of the acquisition. Alternatively, we are often instructed to advise the Guernsey or Jersey Borrower working alongside our corporate team acting for the Borrower on the acquisition of the Target.

The purpose of this briefing is to touch on some of the practical issues that arise from a banking perspective within the context of these deals.

### Capacity to borrow

The constitutional documents of the Borrower or any relevant shareholders agreement relating to the Borrower should be checked as a starting point to see if there are any restrictions on it entering into the financing arrangements. In most cases where the Borrower has adopted Guernsey or Jersey market standard memorandum and articles of incorporation/association and/or there is no shareholders agreement or investment agreement in place which sets out any particular provisions to the contrary, the Borrower (subject to the points noted below in this briefing) will have the capacity to enter into the finance documents with simple board approval.

### Guarantees and Indemnities

Similarly the constitutional documents of the Borrower, the Target or any Target group member providing any guarantee or indemnity pursuant to the financing arrangements will need to be checked to see if there are any restrictions on it providing a guarantee or indemnity. Again, in most cases where the company has adopted Guernsey or Jersey market standard memorandum and articles of incorporation/association and/or there is no shareholders agreement or investment agreement in place which sets out any particular provisions to the contrary, the company will have the capacity to enter into the finance documents with simple board approval.

It must be noted, however, that where a Guernsey company provides an upstream or cross-stream guarantee or indemnity, then the directors of the Guernsey company must be satisfied that there will be corporate benefit to the company in providing that guarantee or indemnity. If there is any risk or concern then the shareholders of the guarantor/indemnifier should be asked to approve the entry by the Guernsey company into the guarantee or indemnity.

Under Jersey law, an upstream or cross-stream guarantee or indemnity may technically fall within the definition of a distribution under the Companies (Jersey) Law 1991 and the directors may therefore be required to give a statutory solvency statement if such guarantee (when called up) is likely to result in a reduction in the net assets of the company. In the majority of transactions, no solvency statement will be required and the directors will simply consider the net asset position of the Jersey company and, where relevant, the wider structure (with reference to appropriate financial information) alongside the likelihood of the guarantee or indemnity being called up and thereafter approve entry into the guarantee or indemnity in the transaction board minutes.



## Financial Assistance

Where a Guernsey Target or Target group company is providing a guarantee, indemnity or security in favour of the Lender for the Borrower's obligations under the facility provided to it for the purpose of acquiring the Target's shares, then consideration needs to be had as to whether such guarantee, indemnity or security constitutes financial assistance under section 329 of the Companies (Guernsey) Law, 2008 (as amended) (the "Guernsey Companies Law") requiring the guarantor, indemnifier or security provider to comply with the solvency test for a distribution set out in section 303 of the Guernsey Companies Law. There is no equivalent concept under current Jersey law.

## Security Package

The Lender needs to consider the security package. In that regard, the Security Interests (Guernsey) Law, 1993 (as amended) (the "Guernsey Security Interests Law") sets out the means of taking valid Guernsey security over securities in a Guernsey company and over the bank accounts and receivables of a Guernsey company. The equivalent statute for taking security over intangible moveable property situate in Jersey is the Security Interests (Jersey) Law 2012. There is no concept of a floating charge under Guernsey or Jersey law. As a result, a specific Guernsey law security interest agreement will need to be entered into in respect of each Guernsey asset that the Lender identifies as part of the security package. In Jersey, the Lender may take the same approach or alternatively, it may obtain 'debenture style' Jersey security over all present and future intangible, moveable, Jersey situs property of a grantor.

## Share Security

Where security is being taken by the Lender over the shares of a Guernsey company pursuant to a Guernsey law security interest agreement or over the shares of a Jersey company pursuant to a Jersey law security interest agreement, the articles of incorporation/association of that company should be checked to see that there are no restrictions on the Lender exercising its security over the shares under the security interest agreement in the case of an enforcement scenario. In Jersey, any consents issued to a Jersey company under the Control of Borrowing (Jersey) Order 1958 may contain restrictions on shares and should also be reviewed. If there are any restrictions, the board of the security grantor should be requested to procure that the shareholders of the company approve resolutions amending its constitutional documents to include security friendly provisions ahead of or on completion.

## Existing Security

Guernsey share security is possessory (i.e. the secured party holds the original share certificate and documents of title). In most cases, this will also be the position with Jersey share security (but it will depend on how the existing security was perfected). This means that consideration needs to be had as to whether or not the Target shares are subject to existing security in favour of an existing lender which will need to be released and discharged by the existing lender on completion of the acquisition and the incoming financier taking new security over the Target shares. The existing or outgoing lender also will need to agree to deliver the share certificate to the Target or its nominee so that it can issue a new one in favour of the incoming Lender pursuant to the new security interest agreement. If there is existing bank account security over existing Guernsey or Jersey bank accounts or other intangible moveable property in favour of an existing lender (for example, rights under subordinated debt), those will also need to be released and discharged by the outgoing lender. Any existing registrations of Jersey security on the public Security Interests Register should also be discharged. There is no similar public register of Guernsey security interests.

## Regulated Entities

Where security is being taken over the shares of a Guernsey or Jersey regulated Target or Target group member, then consideration should be had of any regulatory requirements under the Guernsey and Jersey regulatory laws relevant to the company that might need to be complied with for the Lender to exercise its rights under the Guernsey or Jersey security interest agreement and take control of the shares in an enforcement scenario. Where a Guernsey or Jersey guarantor or security provider is regulated then it should be considered if any guarantee or indemnity that it is providing will need to be limited recourse to cater for any regulatory capital requirements.



## Approval of financing and security documents

The financing and security that is to be put in place by the Lender is usually effective on completion of the acquisition of the Target and the Target group. As a result, it is often the case that the board of the Target and members of the Target group that are providing guarantees, indemnities and security need to approve the finance and security documents. Where the board of a guarantor or security provider is changing on completion, often those directors will be reluctant to approve the financing documents. The directors need to be consulted on this and one way to deal with it practically is to have the outgoing directors convene the meeting, the new directors appointed at it and the new directors approve the financing documents with the outgoing directors resigning. Corporate service providers in Guernsey and Jersey have strict on-boarding and due diligence requirements to fulfil and it is therefore advisable for the purchaser to engage with local counsel and local providers at the earliest opportunity in the transaction to ensure that any proposed changes to the composition of the board can become effective at the required time.

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