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There are numerous ways to create security under Jersey law, such as hypothecs, security interest agreements and pledges. The form of the security will depend on the type of property the borrower wishes to create security over, as certain types of property can only be secured by certain forms of security.

Broadly speaking, we can divide property into two classes: immovable property (*immeubles*), also called real property or realty; and movable property (*meubles*), also called personal property or personalty.

Immovable property concerns land and real estate, hence the somewhat self-evident nomenclature of “immovable”. An example of immovable property is a freehold house. Moveable property is an all-encompassing term for every other type of property which is not immovable property. Indeed, so many disparate types of property are classified under the heading of moveable property that it is necessary to sub-categorise them. This is done by asking if the property is tangible or intangible.

Two examples will serve to distinguish between the two: a car would be a piece of tangible moveable property as a car is a palpable, real good; however, shares would be a piece of intangible moveable property because, although valuable, they lack a physical presence.

These distinctions are very important in determining what type of security can be created over property.

Jersey’s law regarding securities is heavily derived from the civil law of Normandy, which in turn was derived from Roman law. Roman law had two primary types of security: the *pignus* (literally, “pledge”) and the *hypotheca* (literally, “mortgage”). The *pignus* necessitated the transfer of the property to the lender, whereas the *hypotheca* allowed the borrower to keep possession of the property over which the security had been created. These concepts survived the fall of Rome, being incorporated into the civil law of Normandy, and thus, eventually, Jersey law; even the nomenclature is relatively unchanged: a *pignus* is now called a pledge and a *hypotheca* is called hypothec.

In Roman days, one could use type of security for either immovable or moveable property. However, this is no longer the case: the subsequent development of the law was that one could not create a hypothec over moveable goods.

Interesting historical trivia aside, this remains the current situation in Jersey today: hypothecs cannot be created over moveable goods (with the sole exception being ships and aeroplanes). Whilst this does not overly matter for intangible moveable goods, such as shares, due to the existence of alternative, more modern, forms of security (namely, security interest agreements) it means that only form of security that can be created over a tangible moveable good is by way of pledge. If we use the aforementioned car as an example, the grantor would need “pledge” the car (usually done via written document, but this is not mandatory) to the lender and the lender would take possession of the car. The secured party would possess a right of retention, and, as a matter of customary law, an implied right of sale if the grantor defaults (this would usually be included expressly in the written pledge document).

In contrast, the hypothec concerns immovable property, such as freeholds or flying freehold properties. Immovable property can only be secured by means of a hypothec created in accordance with the terms of the *Loi (1880) Sur La Propriété Foncière* which provides for three types of hypothec, namely legal, judicial and conventional. Effectively, lenders will only be concerned with the judicial and conventional hypothecs.



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Stamp duty of ½% is payable upon the registration of hypothecs.

A judicial hypothec involves obtaining of a judgment acknowledging the existence of the security by the Royal Court of Jersey. This involves the grantor signing a “billet”, which is an acknowledgment of indebtedness, with the lender’s lawyers then registering the billet before the Royal Court. Crucially, the billet is merely an acknowledgment of the debt, and does not set out the terms of borrowing in full, allowing the lender to keep the commercial details of the security private.

In contrast, a conventional hypothec sets out all of the terms of the borrowing in a contract, with that contract being passed by the Royal Court and registered in the public registry. This means that the contract will be available to be viewed by the public; thus, a conventional hypothec may not be suitable for borrowers and lenders who value discretion, or for transactions that are particularly complex.

Long leases (nine years or more) which are registered at the Jersey land registry may also be offered as security provided that the lease expressly permits hypothecation.

Security over intangible moveable property, such as shares, is created via a security interest agreement (“**SIA**”). SIAs were previously created pursuant to the Security Interests (Jersey) Law 1983 (the “**SIJL 1983**”), however, Jersey has recently undergone significant reform in this area, with the enactment of the Security Interests (Jersey) Law 2012 (the “**SIJL 2012**”).

Under the SIJL 2012, a security interest is defined as *‘an interest in intangible movable property, being an interest that, under a security agreement, secures payment or secures the performance of an obligation.’*

An example of a security interest would be where someone wishes to purchase a flat that is a “share transfer property”, that is, where a block of flats is owned by a Jersey holding company and rather than buying the flat *per se* the purchaser buys a block of shares which correspond to and give rights in one of the flats, such as the right to exclusive possession. In that case the purchaser will create security in the shares via a SIA, and the bank, or whoever else is providing a loan, will take security in those shares.

Since the enactment of the SIJL 2012, SIAs can only be created pursuant to the SIJL 2012, but older SIAs which were created prior to the enactment of the SIJL 2012 continued to be governed by the SIJL 1983, meaning that knowledge of the SIJL 1983 continues to be relevant.

The SIJL 2012 necessitates that a number of conditions be fulfilled before security may be created over the intangible moveable property. Intangible movable property which *‘is subject to a security interest’* is called “collateral”. For there to be valid collateral the SIJL 2012 imposes a number of conditions, namely that: (i) there must be “value”, meaning that there must be some intrinsic worth to whatever the security is being created over; (ii) the grantor must have either the right or the power to grant rights in the collateral to the secured party; and (iii) the secured party has possession or control of the collateral or the SIA is in writing and contains a description of the collateral so it may be identified.

The crucial step of the creation of a security interest is a stage known as “perfection”. Perfection is the process whereby the security is “attached” to the collateral. This is important as the perfection of a SIA is what prioritises the secured party before any general creditors. The manner in which perfection can be



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achieved varies depending on the type of collateral secured, but speaking generally, perfection can be achieved by one of three ways, these being:

- control, via (in the case of shares) being registered as the holder of the securities or having possession of the share certificate, or via (in the case of a bank account) the transfer of the account into the name of the secured party, or the bank agreeing to comply with the instructions of the secured party, or the bank being the secured party;
- possession, if the collateral is a negotiable instrument such as a bill of exchange or a promissory note, achieved by the secured party having possession of the negotiable instrument; and
- registration, where, pursuant to Article 22(4) of the SIJL 2012, a financing statement is registered with the Jersey Financial Services Commission.

There is nothing to preclude perfection being attained in more than one way: indeed, if the security interest is perfected solely by registration, it is usually advisable for the secured party to seek to also perfect the security interest via control or possession, as security interests perfected by control or possession take precedence over those perfected solely by registration,

Voisin has a great deal of experience and expertise dealing with the creation of security over both movable and immovable property and Voisin will be able to answer queries arising from this briefing note.

For further information or specific advice, please contact [Ian Strang](#) or [Jeffrey Giovannoni](#) of Voisin.

*This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.*