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The Southeast Europe Taking & Enforcing Security Handbook 2015

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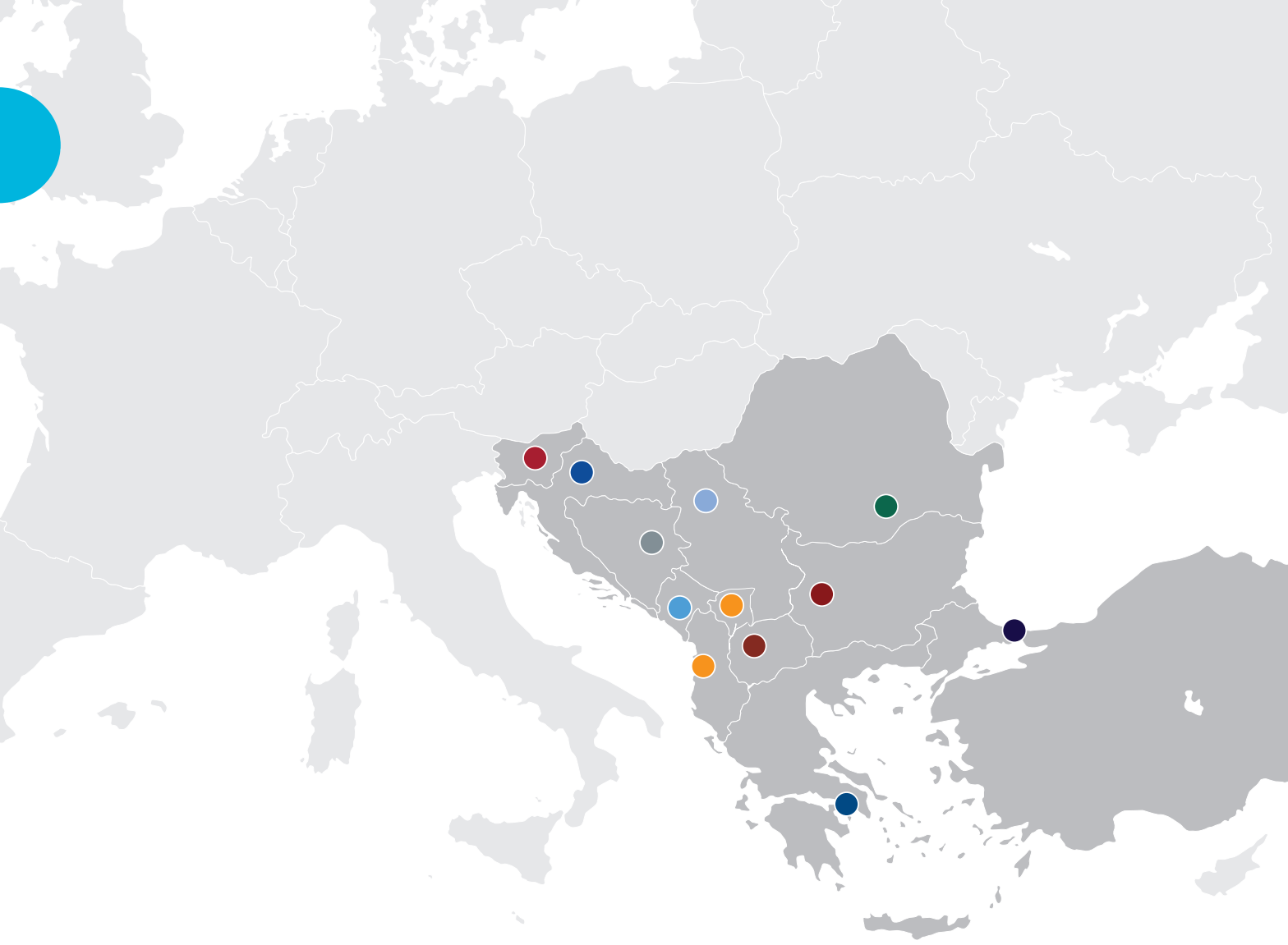

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PREFACE

Dear Partners and Friends of SEE Legal,

South East Europe Legal Group ("SEE Legal") is a unique regional organisation of ten leading independent national law firms covering the twelve jurisdictions of South East Europe. Established in 2003, SEE Legal employs more than 450 lawyers and has an impressive client base of multinational corporations, financial institutions and governmental bodies. The member firms of SEE Legal have advised on most of the landmark transactions in the region in the last two and a half decades and have been continuously ranked as top tier law firms in the main reputable legal directories (Legal 500, Chambers & Partners, IFLR 1000, etc.).

SEE Legal is delighted to be publishing this Guide on Taking and Enforcing Security in South East Europe. We hope that it will prove to be a helpful deskbook resource for inhouse counsels, finance professionals and legal practitioners in dealing with security taking or enforcement in South East Europe.

This guide focuses on the most commonly used types of security interests in South East Europe today (such as mortgages, pledges and financial collateral (where available)). We have highlighted the key aspects of taking and enforcing security interests, including available security, the use of security trustee and/or parallel debt concepts, specifics in relation to certain categories of assets, the degree of control the creditor has over the enforcement process, costs and expenses for creating and maintaining security and the effects of opening of insolvency proceedings on security interests.

As a group we have decided to contribute this guide as part of our various initiatives and guides on legal matters in South East Europe.

Should you have any specific queries regarding taking and enforcing security in South East Europe we would be pleased to hear from you.

Sincerely,

Alina Radu
Head of Banking and Finance Practice Group of SEE Legal

Borislav Boyanov
Co-Chair of SEE Legal

Disclaimer

GLOSSARY

Capitalised terms used in this Guide are used with the meaning ascribed thereto below (unless otherwise specified in any particular section). Terms in English are used for convenience only and may not necessarily reflect the exact name, term, concept or notion as defined and/or understood under the laws of the jurisdiction in South East Europe they refer to.

Brussels Regulation - means Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended to date.

Commercial Register - means a relevant commercial register, trade registry, chamber of commerce or similar register or institution for registration of companies in each jurisdiction.

Enforcement officer - means an enforcement officer, bailiff or similar officer in charge of enforcement proceedings in each jurisdiction.

EU Collateral Directive - means Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended to date.

Movables Pledge Register - means a relevant public register for registration of security/pledges over movable assets in each jurisdiction.

Possessory pledge - means a security interest/pledge which implies delivery of the pledged asset to the pledgee or, if otherwise agreed, to a third party for safekeeping during the existence of the pledge.

Real Estate Registry - means a relevant public register for registration of real estate (immovable) property and rights, transactions and security interests in such property each jurisdiction.

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Rome I Regulation - means Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, as amended to date.

Second Council Directive 77/91/EEC - means the second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, as amended to date.

Shareholders' registry - means a relevant registry/book/ledger of a company which lists the name of its shareholders and is kept by the company/its director(s) or by a third party (e.g. a depository of dematerialised securities).

Third party security – means a security given (whether as undertaking to be jointly and/or severally liable with the main obligor or by granting a security in rem) by a party which is not an obligor under the obligation being secured.

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ALBANIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

According to the applicable Albanian legislation, there are no legal provisions impeding the granting of corporate guarantees, except for the solvency test. A company may guarantee with its movable and immovable properties the obligations of its affiliates. There are no special legal provisions regarding the form of the guarantee, but as aforementioned, there is no legal provision, which impedes and restricts a company to become a guarantor for an affiliate, except for the solvency test (the solvency test as per the Albanian Company Law refers to the prior confirmation by the administrator of the company that (a) the company's assets will fully cover its liabilities, and (b) the company will have sufficient liquid assets to make payments of its liabilities as they fall due in the next twelve months). Generally, a company may grant security (typically by charging its shares or assets) in support of a debt of another person, and there are no statutory limitations for such matters, except for any corporate relevant approvals as required by company laws. This arrangement is also available among individual debtors and or guarantors in which case, obviously, they are not subject to any company law restriction.

1.2 Financial assistance

Albanian Law No. 9901, dated 14 April 2008 On Entrepreneurs and Commercial Companies, as amended ("**Company Law**") is in line with a large part of the capital maintenance rules required by the Second Council Directive 77/91/EEC. However, a remarkable gap in the Company Law is the absence of limitations on financial assistance rules for the purchase of own shares as defined by Article 23 of the Second Council Directive. Therefore, we may conclude that the Albanian legislation does not prohibit financial assistance.

The Company Law provides only a prohibition for a joint stock company to subscribe its own shares or shares of its parent company. This relates to raising capital and represents a safeguard against indirect transactions that serve illegitimate purposes.

As regards limited liability companies, the rules in the Company Law regarding capital maintenance are very limited and there are no provisions on the purchase of a company's own shares.

The types of security available vary depending on the classes of the assets, although the legislation allows various types of security to be created on one and the same class, e.g. movables may be subject to both possessory pledge and non-possessory pledge (however, priorities among conflicting claims on movables are subject to a single set of priority rules).

There are several types of security mechanisms available under Albanian law, which are as follows:

(a) Mortgage

The Albanian Civil Code defines a mortgage as a right in rem of the creditor over the property owned by the debtor or a third person for the purpose of securing an obligation, which can be created by law or by contract. A mortgage secures existing and future claims, providing that the secured claim is properly defined. Any agreement between the mortgagor and the lender in which it is provided that the title over the encumbered property will be automatically transferred to the lender in the event of default shall not be valid.

A mortgage may be created over the following properties:

(i) immovable properties;

(ii) usufructs over immovable properties, except for legal usufructs of parents, as well as over the emphyteutic rights over immovable properties.

A mortgage over future immovable property is permitted, but it may only be filed with the Real Estate Registry as mortgage or immediately after the registration of the mortgaged property.

(b) Possessory Pledge

Under the Civil Code a pledge is a security interest giving actual possession of collateral to the pledgee or a third person as agreed between the parties to be held as security for the fulfilment of an obligation ("possessory pledge" or "pledge").

(c) Securing Charge

The securing charge is a right in rem on a tangible movable property, whether present or future, that secures one or more obligations that arise before or after the execution of the security agreement. The Law on Security charges allows for both possessory and non-possessory security charges. The establishment of the security charge on tangible assets does not require delivery of the

possession of the asset to the creditor or a third party. The law allows the chargor to remain in possession of the charged assets without affecting the validity of the security charge in those possessed assets.

Securing charges are permissible on any type of tangible movable property that has commercial value. Albanian law also allows for securing charges to attach to a property acquired by a chargor after the date the securing charge agreement is signed. However, for social policy reasons, securing charges may not affect the property that a chargor needs for his own and his family living. However, these types of property are nevertheless of no significant value in the context of secured transactions.

(d) Financial Collateral

Under the Payments System Law , only cash and financial instruments such as shares of a joint-stock company or debt instruments may be subject to a financial collateral agreement.

1.4 Creation of security

(a) Mortgage

The creation of a mortgage requires:

(i) a contract entered between the mortgagor and the mortgagee which must be notarised;

(ii) registration in the Real Estate Registry.

A mortgage may secure a future obligation or a conditional obligation. In such case, the secured obligation must be clearly defined.

A mortgage can also be created by a court decision ("judicial mortgage") ordering the payment of an amount of money, the performance of evaluated obligations, or the compensation of future damages and such an order constitutes a title for the inscription of a mortgage over the property of the debtor. A mortgage can also be created on the basis of an arbitration award that constitutes a writ of execution.

Under the applicable law, the mortgagor may keep the possession of the mortgaged asset, use it and dispose of it. The disposal of the asset (until foreclosure), however, does not cancel the mortgage and the mortgage will continue to encumber the asset after the sale, creation of a second mortgage, etc. Regardless of this, usually the mortgagor is contractually prohibited to sell or otherwise dispose of the mortgaged property without the consent of the mortgagee.

(b) Possessory pledge

The pledge agreement between the pledgor and the pledgee must be in writing, otherwise it is invalid. Delivery of the possession of the tangible asset to the pledgee or a person nominated by the pledgor and the pledgee is also required as part of the pledge establishment. A pledge may also secure a future obligation or a conditional obligation. In such case, the secured obligation must be clearly defined.

(c) Securing charge

A securing charge is established when the following three requirements are met:

(i) A written securing charge agreement containing the description of the property subject to a securing charge is signed by the chargor and the chargee. In order to qualify as a securing charge agreement under the Law on Securing Charges, no particular form is necessary and no notarization is required.

(ii) The chargor owns the movable property or is empowered by the owner to create the securing charge. This condition will also be fulfilled when the persons deemed to own the movable property are: a buyer under a sale purchase contract with reservation of ownership, or a person to whom movable property has been consigned for sale, etc.

The parties to a securing charge agreement may agree to create a securing charge over a property which is not owned by the chargor at the moment of execution of the securing charge agreement. However, the securing charge shall come into existence at the moment the chargor acquires rights over the charged property.

(iii) The chargee has bound himself by a contract with the chargor to advance credit or lend money to the chargor or another person or to perform any other obligation for or at the request of the chargor, or prior to execution of the security agreement, the chargee has granted a credit or lent money to the chargor or a third person.

Unlike in the case of mortgages, registration of a securing charge is not mandatory for the creation of the security charge. The security charge is therefore enforceable once it is created by fulfilling the three conditions as provided above.

(d) Financial Collateral

The financial collateral agreement may be entered only between legal entities where at least one of the parties should be a bank, Bank of Albania, the Albanian State, a financial institution, etc.

The financial collateral agreement should be concluded in writing or in electronic form. Further, the possession of the financial instruments and cash should be transferred to the collateral taker (i.e. chargee) or transferred in such manner that the chargee possesses or controls them (e.g. in a special account).

1.5 Perfection and maintenance of security

(a) Mortgage

Any mortgage should be registered with the respective Real Estate Registry, and shall not be enforceable unless so registered. Care must be taken when drafting the mortgage agreement and also when registering the mortgage as a security interest. Inaccuracies in relation to (i) the creditor, (ii) the property's owner, (iii) the property, or (iv) the secured amount, contained in the mortgage agreement or the deed for the creation of mortgage, or in the application for the registration of the mortgage shall render the mortgage invalid.

The Albanian Civil Code provides that the mortgage becomes effective as of the date of its registration including in the case of a future or conditional obligation. The registration number of the mortgage determines the priority rank of creditors over that property. According to the law on Registration of Real Estates , each contract or other document that affects the rights on immovable property must be filed with the Real Estate Registry within 30 days as from its execution, and, if not, a penalty will be enforced. Such penalty is calculated as a percentage of the value of the property.

In the case where different mortgagees file at the same time applications for the registration of mortgages over the same property, the registration will be completed under the same number and such detail will be noted in each mortgage certificate(s). In case of enforcement of the mortgage, such mortgagees (of the same rank in priority) shall be reimbursed on a pro rata basis i.e. in proportion to the respective secured amounts. The registration of a mortgage is valid for 20 years as of the date of its registration, and it shall become invalid if not renewed before the expiry of the aforementioned term.

(b) Possessory pledge

The pledge must be evidenced by a document with a date in order to be enforceable vis-à-vis third parties. The agreement must include a description of the pledged property. Normally, a pledge shall be considered perfected after signing of a pledge agreement and after the pledgee or a third person as agreed between the parties has actual possession of the collateral. However, set out below are cases in which further steps are required for such purpose, depending on the type of the collateral involved:

- in case of pledge over an interest in a company, the pledge must be registered in the book of the company members;
- a pledge over registered shares must be recorded in the shareholders' registry in a joint-stock company;
- in case of a pledge over all or part of the assets used in an enterprise acting as a going concern, the pledge is effective if the assets are entrusted to a third party or a creditor, who shall manage them as an indivisible going concern.

(c) Securing charge

The most common ways to perfect a securing charge are by registration and, to a lesser extent, by taking possession over the charged assets. A perfected securing charge has priority over a non-perfected one. Priority between two or more perfected securing charges is determined on the basis of the order of perfection in one of the ways provided by the law.

The securing charge may be registered for a defined period no longer than 25 years. The function of the registration (or possession) is to provide notice to third parties regarding the existence of the claim for the (present or future) securing charge. Therefore, it establishes the point of time for providing the notice upon which a priority (preference in Albania) over claims can be established.

(d) Financial Collateral

The financial collateral agreement is valid in the case the possession of the financial collateral is transferred to the collateral taker. Alternatively, the financial collateral agreement is also valid if the financial collateral is transferred in such manner that the collateral taker possesses or controls them (e.g. in a special account).

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs incurred by the financed parties involve direct costs related to the establishment and perfection of the collateral (such as notary and registration fees), banking fees, costs for the evaluation of the assets, administrative and legal expenses to prove the good standing of the borrower and/or the collateral provider (if different from the borrower) and the status of the collateral, etc. However, some direct costs will be indicated below as average overall estimate of costs per type of security.

(a) Mortgage

The notary fees for execution of a mortgage deed at present can reach up to approximately EUR 30 (including VAT). The state fee for registration of the mortgage of one immovable property can

reach up to approximately EUR 190. If through a mortgage contract, the mortgage is registered on more than one immovable property, then the state fee applicable for the registration equals the fee for one property multiplied by the number of properties.

(b) Other: pledge, security charge and financial collateral

Some parties may insist on notarisation even if the law does not require this. In these cases the notary fees do not exceed EUR 30 (VAT inclusive). Fees for security charge registrations are in general not substantial (i.e. approximately EUR 10). However, searches in the relevant Movables Pledge Register (the Securing Charge registry) are not very high, as one search costs around EUR 10.

1.7 Recognition of security governed by foreign law

Pursuant to the Law on Private International Law, the ownership, possession and other rights in rem over movable and immovable properties are regulated by the law of the state where the collateral is located. However, it is important to note that pursuant to the Law on Security Charges, the validity, perfection and priority of a securing charge perfected by registration are governed by the law applicable in the jurisdiction where the chargor was located at the time the collateral was charged. According to the law, a chargor is located at his principal place of business, and for companies - the place where such company is incorporated. Further, the validity, perfection and priority of a securing charge on consumer goods are governed by the law of the state where the collateral was located when the securing charge was created.

In addition, when a tangible movable is taken into Albania from another State, the foreign perfected securing charge will have priority over any subsequent securing charge if the foreign charge is perfected within 60 days as of the date it entered Albania. If, on the other hand, the securing charge is not perfected within the 60-day grace period after the tangible property is brought in Albania, its priority will be set only as of the date of registration and it will lose priority to any securing charge that was registered in Albania before the foreign securing charge is registered in Albania.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) Enforcement of obligations secured by a mortgage/ pledge

According to the Albanian Civil Procedure Code ("CPC") , a mortgage or a pledge can be enforced only on the basis of an enforcement order, on the grounds of a final court judgement or an arbitral award further to the issuance of a writ of execution. However, the Albanian CPC provides that "any notary deed containing a monetary obligation as well as the banking credit contracts are considered to be writs of execution".

Upon obtaining such enforcement order by the court, the creditor may forward the enforcement order to the enforcement officer to begin the enforcement.

The enforcement officer will appoint a certified accountant to calculate the monetary obligations up to the date of enforcement. Thereafter, the enforcement officer will proceed with the sale of the collateral and give to the creditor the proceeds obtained from the sale up to the amount owed by the debtor as well as the expenses made in relation to the case. The property is evaluated by the enforcement officer in relation to the value specified in the Real Estate Registry, and if such is not registered in the Real Estate Registry or with the relevant tax authority (the Financial Agency), the property is then evaluated by an appraiser.

During this process the property is generally in custody of the debtor.

Following the 10-day grace period that the debtor is given to pay any outstanding amount to the creditor, the property is then put for sale at auction, which is performed by the enforcement officer. In the case where there are no bidders in the first auction or if the proposed prices have not exceeded the minimum price set out in the first auction, a second auction will be held in conformity with the rules of the first one.

If the property cannot be sold in the second auction, the enforcement officer shall offer the possession of the property to the creditor with the new fixed price regardless of the credit and in case the creditor refuses the property, the security over such property is lifted.

(b) Procedure of enforcement of Security Charges

The security charge agreement is an executive title . In the event of default by the debtor, such agreement shall be enforced through summary court proceedings, i.e. by the enforcement officer upon writ of execution issued by the competent court which vests the agreement with an executory formula. The enforcement procedure according to the Law on Security Charges includes a unique feature of self-enforcement procedure where the creditor and the debtor

may pursue the enforcement proceedings on their own. In case the debtor does not consent to self-enforcement, the creditor must engage the en-forcement officer during the process of seizure. The enforcement officer is not obliged to give any prior notice of seizure to the person in possession of the collateral. Once the property is seized by the enforcement officer, it must surrender it to the creditor for disposition by the creditor in accordance with the provisions of the Law on Security Charges. The creditor may elect to opt out entirely of its right for self-disposition with the result that the enforcement officer must pursue himself the disposition process provided in the Law on Security Charges. The parties are obliged to pay any fees and expenses in relation to the enforcement as provided for in the Regulations of the Security Charges.

Rights of parties to protection

The chargor or chargee or any other party, whose rights are affected by the enforcement, may approach the court and request the following:

- to adopt a decision determining whether the chargor failed to meet the conditions of the security charge agreement;
- to issue an order to protect the rights of any person over the collateral;
- to issue an order to suspend the procedures for seizure or sale of collateral;
- to issue an order giving instructions to the chargee or the enforcement officer regarding the enforcement of the security charge agreement and, when appropriate, an order to the enforcement officer who has seized the collateral to turn it back to the chargor;
- to issue an order requesting a person to act in compliance with the procedure for enforcement of the security charge agreement according to the law;
- to issue an order for seizing and selling the collateral through other procedures, as the enforcement is impossible or impracticable;
- to issue an order forcing a person to pay the expenses of enforcement as provided in the security charge agreement.

The court shall issue the order within 10 days as of the registration of the request.

Delivery of the collateral to the chargee after its seizure

As mentioned above, after seizure of the collateral, the enforcement officer shall hand over the collateral to the chargee or a person duly appointed by the chargee.

The proceeds from the sale shall cover the fees of seizure as provided in the Security Charges Regulation, reasonable expenses for storage, repairing of collateral for the purpose of sale and other reasonable expenses incurred by the chargee, and the outstanding balance shall be utilised to fulfil the obligations under the security charge agreement.

No less than 10 days prior to the sale of collateral, the chargee shall give notice of sale to the chargor and to any other person with a security charge in the collateral subordinate in rank to that of the chargee, but only if the security charge is registered with the relevant Movables Pledge Register (the Securing Charge Registry) before the delivery of the chargor's notice.

The collateral may be sold in whole or in part by public or private sale, including public auction or closed tender, as a whole or in commercial units, but always in a commercially reasonable manner and at a price that is close to the commercial value of the collateral.

Report after disposition

The chargee shall forward to the chargor and subordinate chargees no later than 30 days, upon the receipt of their written request, a written declaration in respect of: (i) the amount received from the disposition of the collateral, (ii) the amount applied to expenses, (iii) the distribution of the amount received from disposition, and (iv) the amount of any surplus.

Payment of obligation and retaining of collateral

After default, the chargor may accept the chargee(s)' proposal to take the collateral or a portion of it in satisfaction of all or part of the chargor's obligations under the security agreement.

The chargee should notify:

(i) the chargor;

(ii) any third subordinate chargee who has filed notice of registration with the Security Charges Registry prior to the day of notice of the chargor.

If no notice of objection is given upon the expiration of 15 days, the chargee is deemed to have irrevocably elected to take the collateral in satisfaction of the secured obligations, as provided in the proposal, and he is entitled to hold and/or sell such collateral free from any ownership title of the chargor and any subordinate secured financing chargee to whom the notice was given.

The right of the chargor to redeem the collateral

At any time before the chargee has hold the collateral or executed a contract in relation to the collateral before the chargee is deemed to have irrevocably elected to retain the collateral, the chargee or the subordinate chargees may receive the collateral upon the fulfilment of the unpaid obligation. In this case, they are obliged to also pay an amount equal to the reasonable expenses of seizing, holding and repairing the collateral for sale. The chargor may waive in writing to redeem the collateral only after the default.

In case the chargee sells the collateral to a buyer in good faith, the buyer acquires the collateral free from the claim of the debtor, any claim subordinated to that of the debtor and to subordinate chargees, even if the requirements of the law have not been complied with.

If the chargee does not comply with the law and causes damage, he should pay a compensation for the damages in accordance with the provisions of the Civil Code.

(c) Procedure of Enforcement of the Financial Collateral

The financial collateral agreement is a writ of execution. In case of default by the debtor, such agreement shall be enforced without the need to call the enforcement related court actions.

(d) Ranking of claims

The Ranking of Claims as provided in the Civil Code ought to be followed in a bankruptcy procedure. More specifically, Article 605 of the Civil Code provides the following ranking of creditors' claims:

(i) Purchase Money claims secured with securing charge;
(ii) claims from salaries work or service relations and alimentary obligations, for a maximum of 12 months;
(iii) claims for unpaid employment benefits with usuries, and also workers' credits for damages due to non-payment of above contributions by the employer;
(iv) claims deriving from remunerations because of death events and health problems;
(v) copyright claims of authors (and their heirs) from complete or partial conveyance of their copyright, for obligations created during the last two years;
(vi) state claims, i.e. obligations owed to the budget and credits of the institute of social security, defined by law;
(vii) claims, secured with securing charges, as per criteria defined by law;
(viii) claims from job or service remuneration and alimentary obligations in excess of the limit defined in (ii) herein;
(ix) remuneration for brokerage under agency contracts, during the last year of remuneration;
(x) claims secured by mortgage or pledge (other than security charge), pursuant to the law, by the value of the things mortgaged of pledged;
(xi) court expenses for the protection of the property and for enforcement actions, made in the common interest of creditors, from the sale proceeds;
(xii) bank claims, which are not included in letter (vii) and claims from voluntary contributions;
(xiii) claims for supply with seeds, chemical fertilizers, insecticides, water for irrigation and for cultivation and collection workings of agricultural productions, over yearly agricultural production (fruits), for which credits have been used.

Pursuant to Article 605, credits defined under item (vii) actually given, are excluded from the order of preference and shall be preferred prior to credits pursuant to item (vi) in the following cases:

- the credit defined under item (vii) above is registered in accordance with the law, whereas the credit defined under item (vi) is not registered;
- the credit defined under item (vii) is registered in accordance with the law before the registration of the credit defined under item (vi).

Essentially these two paragraphs provide protection to secured creditors with respect to advances given prior to registration of for example, tax liens. However, once tax liens are registered, any subsequent advance will be subordinated to the registered tax lien. Creditors therefore should check the registry before advancing any money even in the case of advances that are secured according to the security agreement.

2.2 Private foreclosure

Albania has a two-track system for the enforcement of the enforcement orders: a state enforcement officers service and a private one, functioning simultaneously. The Civil Procedure Code was amended in order to accommodate the new system and improve the execution of decisions. The introduction of a private enforcement officers service served to partially relieve the state enforcement officers service of its caseload. In addition, the private enforcement officers service turns out to be more efficient in cases where the State is a debtor. Furthermore, the changes in the Civil Procedures Code, in particular regarding procedural deadlines, have speeded up the whole process of the execution of judicial decisions.

2.3 Bankruptcy and debtrestructuring proceedings

(a) General

Bankruptcy proceedings in Albania may be instituted against commercial companies, entrepreneurs but also individuals (i.e. consumers).

The bankruptcy proceedings may be initiated either by the debtor itself or by the creditors. This is the only available formal procedure under Albanian legislation for a company in financial difficulties. Once the bankruptcy procedure has been initiated, there is the option for either: (i) the adoption of a reorganisation plan aiming for the survival of the company; (ii) the sale of the debtor; or (iii) the liquidation of the company. The opening of bankruptcy proceedings and especially the implementation of the liquidation of the debtor alternative has certain effects on the security interests and its enforcement.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

Pursuant to the Bankruptcy Law, secured creditors are considered also as insolvency creditors and are entitled to preferential satisfaction compared to the unsecured ones. However, the secured creditors cannot enforce their security immediately. They can enforce their security after the ranking of creditors and the bankruptcy estate is confirmed through a bankruptcy court decision.

(c) Approval of the claims of secured creditors in bankruptcy proceedings (if applicable)

According to the Bankruptcy Law, insolvency creditors shall submit their claims in writing to the bankruptcy administrator within the time period as set out by the Bankruptcy Court in the decision for the opening of the insolvency proceedings. The notification for claims shall detail the nature and cause of the right claimed and the documents evidencing the claim(s) should be attached to this notification.

(d) Challenges affecting secured claims

The Bankruptcy law is unclear about whether the secured claims ought to be enforced out-of-bankruptcy proceeding or whether the secured claims can be enforced after the final ranking of creditors and the size/amount of bankruptcy estate is confirmed through a bankruptcy court decision. The related court practice guides that the secured claims can be enforced after the final ranking of creditors and the size/amount of bankruptcy estate is confirmed through a bankruptcy court decision.

(e) Enforcement of secured claims upon debtrestructuring

The reorganisation of the debtor is possible if the reorganisation plan is approved by the Creditors' Committee/ Creditors' Meeting and the Bankruptcy Court.

The reorganisation plan ought to provide also for the security interest existing at the date of approval of the reorganisation plan and the possible repayment of the secured creditors during the implementation of the reorganisation plan or the possible enforcement of the related security package.

(f) Enforcement of secured claims upon liquidation of the bankruptcy estate

The secured claims can be enforced after the final ranking of creditors and the size/amount of bankruptcy estate is confirmed through a bankruptcy court decision. In the event that the reorganisation plan is not approved (or there is not one), the insolvent company will either be sold or liquidated. If it is liquidated, the bankruptcy administrator will liquidate the entire debtor's asset in order to satisfy the creditors' claims. However, for specific actions such as the sale of the debtor's activity, goods, parts of an immovable property, shares, etc., the approval of the Creditors' Committee (or of Creditors' Meeting if a committee has not been elected) is mandatory.

Ranking of claims

The ranking of creditors is regulated by several articles of the Bankruptcy Law. This law provides that the court procedure shall not begin if there is insufficient money to cover the costs and expenses associated with the procedure. Then, the ranking of claims ought to follow the ranking order as provided by the Albanian Civil Code (Article 605) (please see above).

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement vs. bankruptcy proceedings

Once the insolvency proceedings have been opened, unsecured creditors cannot enforce their rights. All claims against the debtor are suspended and writs of execution cannot be enforced. All pending and new claims should be submitted to the insolvency administrator.

As for the secured creditors, pursuant to the Bankruptcy Law, they are considered as insolvency creditors and are entitled to preferential satisfaction compared to unsecured ones. However, the secured creditors cannot enforce their security immediately.

The Bankruptcy Law provides for the right of the creditors to enforce their claims in accordance with the applicable provisions outside the bankruptcy proceedings in case that the value of the security is lower or equal to the sum of the value of the claimed credit and to the enforcement expenses. However, please note that the implementation of such provisions remains untested in the Albanian courts and there is no related doctrine.

(b) Private foreclosure vs. bankruptcy proceedings

Pursuant to the Bankruptcy Law, the enforcement of the enforcement orders is not allowed during the bankruptcy proceedings.

2.5 Recourse of a secured creditor to self-help remedies

In Albania, mandatory enforcement can be instituted only based on an enforcement order. A secured creditor cannot enforce his security himself in a private sale; the court decision confirming the liquidation of the company guides to the distribution of bankruptcy estate including to the secured creditors.

Upon obtaining such enforcement order by the court, the creditor may forward the enforcement order to the enforcement officer to begin the execution.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

Internationally, a trust is often used to save time and costs when creating security in finance deals in favour of multiple creditors or a changing pool of creditors. In such cases, a security trustee is appointed to hold and manage the collateral under the finance transaction in its own name, but for the benefit of the creditors (i.e. to establish and perfect the collateral, to ensure its prompt maintenance, to undertake foreclosure in the event of default, etc.).

The "trust" and the role of a security trustee (or agent) are not expressly regulated by Albanian law. This poses important practical questions related to the use of a security trustee in finance transactions where the Albanian legal system is relevant.

Generally, under Albanian law, a mortgage and pledge are considered accessory to the secured claim. In particular, as per an expressed statutory rule, the pledge and the mortgage follow the secured claim upon its assignment and are considered cancelled should the secured claim be extinguished.

In the context of the above, some legal practitioners in Albania take the view that a security interest governed by Albanian law is valid only if the person receiving the security is at the same time the creditor.

The aforementioned legal conclusions are not indisputable. However, in practice, the risks of successful challenges of the validity of Albanian law collateral being held by a security trustee do exist. It is relevant to note that Albania is a civil law country.

A possible way to minimize the said risks (which is used in various jurisdictions) could be the creation of a parallel debt in favour of the security trustee equivalent to the secured claims of the creditors.

The enforcement of a parallel debt structure in terms of security has not been tested yet in the courts of Albania, but in principle this should overcome the barriers noted above in terms of the security trustee actually being the creditor of the secured obligation.

However, without that recognised concept of trusts, there is still the risk that the secured assets (which are ultimately for the benefit of the creditors) cannot be ringfenced in the event of bankruptcy of the security trustee as the creditors of the security trustee shall have recourse to those secured assets. The Albanian law does not accept an equitable (beneficial right) as being subject to the right of separation.

No such validity issue appears to be in place if the parallel debt is governed by appropriate foreign laws (e.g. the laws of the State of New York; the laws of England, etc.) in crossborder financings.

3.2 Specifics of taking and enforcing security by a security trustee or agent

No specifics could be identified at a statutory level considering the fact that the role of a security trustee or collateral agent is generally not regulated by the Albanian laws. For the existing practices, please refer to Section 3.3 below.

3.3 Precedents

Considering the legal uncertainties concerning the possible involvement of a security trustee in local transactions – when Albanian law governs all transaction documents (loan, security

agreements, etc.), the security interests are usually held directly by all lenders and not by a security trustee. For the time being, this conservative approach by local creditors seems to be justified.

In cross-border transactions with an Albanian component, security interests are often created and perfected in Albania with the participation of a security trustee or collateral agent. Usually, the security trustee or agent itself is typically organised under a foreign law, which is the recommended approach as no "trust" laws are enforced in Albania.

Should the Albanian law govern a security interest (e.g. a pledge over an aircraft with Albanian registration, etc.), often a parallel debt in favour of the security trustee is agreed by the parties. The parallel debt is again governed by the foreign law regulating the master financing documents.

The use of a parallel debt structure, governed by a foreign law, seems to be dependable as it substantially reduces the risks for the secured creditors to lose the local collateral. Nonetheless, as of the date hereof, we are not familiar with any case law dealing with the validity of parallel debt clauses and/or the recognition and enforceability of security interests held by security trustees.

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BOSNIA AND HERZEGOVINA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

Although the concept of upstream and cross-stream guarantees is recognized by the domestic legal framework, application of such guarantees is rather narrow and ineffective, thus making this kind of security rarely implemented. Namely, upstream and cross-stream guarantees, as means of security for the parent company or company within the same group, represent only a statement from the guarantor that he will, in case the main debtor fails to do so, fulfil his outstanding obligations. This guarantee as such does not represent a writ of execution recognized by the Law on Enforcement Procedure[1] This guarantee only enables the borrower/creditor, to whom it has been issued, to initiate a court procedure (litigation) against the issuer of such a guarantee and request fulfilment of debtor's obligations by the guarantor. Only upon completion of the litigation procedure, assuming that the court decides in favour of the creditor, i.e. when the court's decision becomes final, does the creditor gain a writ of execution enabling him to start an enforcement procedure against the guarantor's property. Therefore, considering the fact that upstream and cross-stream guarantees are rather ineffective as a means of security, it is highly recommendable to obtain some other sort of security such as a mortgage or bank guarantee.

1.2 Financial assistance

According to the Law on Companies[2], a joint-stock company is prohibited from granting and guaranteeing advance payments, loans or credits that shall be used for sale/purchase of its own stocks. The same prohibition of financial assistance is applicable in respect of limited liability companies.

Any contract containing such a provision is considered void, as such assistance would be given in breach of the applicable law. Consequently, the relevant transaction would be rendered void as well.

1.3 Types of security. Most often used type/s of security in practice

The most often used types of security in practice under Bosnian law are as follows:

(a) Mortgage

Under Bosnian law, a mortgage is an interest in a real estate granted by its owner ("mortgagor") in favour of a creditor ("mortgagee") as a security for a debt. Aircrafts and ships are not object of a mortgage, but are subject to a registered pledge (see section below).

In case of enforcement of the mortgage, the mortgagee is entitled to priority in satisfaction of the secured claims from the sale proceeds. This priority is granted regardless of the change in ownership, i.e. the mortgage follows the mortgaged asset and remains with each new owner.

The mortgage can also be created on an ideal ownership portion. Any subsequent partition of the mortgaged collateral does not impact the mortgage itself, because it secures the creditor's debt entirely. It is allowed to create several mortgages on several realties securing a single debt.

The transfer of a mortgage is possible only together with the transfer of the secured debt. The mortgagor is allowed to create a new mortgage on the existing mortgage in favour of a third party, without the mortgagee's consent, however the mortgagor is obliged to inform the mortgagee of such legal action.

(b) Registered pledge

Registered pledges are set up in accordance with the Framework Law on Pledges [3]. Under this Law, pledges securing present or future obligations can be registered. In general, pledges can be created over tangible or intangible movable assets and on existing or future property, including both individually or generically identified property. Thus, registered pledges could be created on:

[1] *Published in the Official Gazette of Federation of Bosnia and Herzegovina No. 32/03, 52/03, 33/06, 39/06, 39/09 and 35/12.*

[2] *Published in the Official Gazette of Federation of Bosnia and Herzegovina No. 23/99, 45/00, 2/02, 6/02, 29/03, 68/05, 91/07, 84/08 and 75/2013*

[3] *Published in the Official Gazette of Bosnia & Herzegovina, No. 28/04.*

(i) Movables, including ships and aircraft (pledge registration in the Aircraft Registry kept by the Civil Aviation Administration is required additionally);
(ii) Receivables;
(iii) Securities;
(iv) Equity shares;
(v) Industrial property rights, etc.

In case of some of the registered pledges mentioned above (i.e. securities), however, it is highly advisable to draft also a notary agreement containing an executive clause, since some courts are still reluctant to accept the registration certificate as a writ of execution, in violation of the legal provisions.

1.4 Creation of security

(a) Mortgage

The mortgage can be created based either on a legal transaction, judicial decision or statute (law).

The creation of a real property mortgage requires:

(i) Notary deed to be executed between the mortgagor and the mortgagee, save for statutory mortgages. Statutory mortgages are acquired simply by fulfilment of conditions prescribed by law. For example, the tax administration acquires a mortgage on the tax payer's property when the tax payer is in default, etc., and
(ii) Registration of mortgage in the Real Estate Registry

Under the Property Law[4], the mortgagor may keep the possession of the mortgaged asset, use it and dispose of it. The disposal of the asset (until foreclosure), however, does not cancel the mortgage and the mortgage will continue to encumber the asset after the sale, creation of a second mortgage, etc. Regardless of this, usually the mortgagor is contractually prohibited to sell or otherwise dispose of the mortgaged property without the consent of the mortgagee. This is usually done when drafting a notary deed on creation of mortgage by means of foreseeing an additional entry in the Real Estate Registry providing prohibition of selling or further disposing of the mortgaged property. However, according to the newly passed Property Law any provision of contract stipulating prohibition of further encumbrance of real estate is considered as null and void.

The mortgage exists only upon registration in the Real Estate Registry. Thus, the time of such registration determines the mortgage priority ranking, meaning that the prior tempore, potior iure – rule applies. Effectively, the date of the mortgage registration is considered as the date of the mortgage acquisition and the earlier registered mortgage is granted a priority in case of enforcement. In case of a bankruptcy procedure, the creditor is entitled to be fully settled out of the mortgaged property.

(b) Registered pledge

Pledge does not exist unless four conditions are fulfilled:

(i) there must be a pledge agreement (no certification by a notary, court or a municipality is necessary for a pledge agreement to be valid);
(ii) the pledge must be registered;
(iii) the person mentioned as pledgor in the registration must be the owner of the property that is the collateral according to the pledge agreement;
(iv) the pledgee (or some other person specified in the pledge agreement or related agreement) is obliged to give credit to the pledgor or to a third person.

Priority between pledges, liens and special ownership rights in collateral is determined simply on the basis of the order in which registrations appear in the Movables Pledge Register.

1.5 Perfection and maintenance of security

(a) Mortgage

The enforcement procedure is carried out by making a book entry in the Real Estate Registry indicating the existence of an enforcement procedure on the particular real estate, by carrying out a real estate appraisal, by selling off the real estate and by settling the mortgagee (the creditor) from the amount acquired through the sale.

When the enforcement is carried out only on a portion of the co-owned property, the creditor and other co-owners are entitled to request the court to offer both the entire property and the relevant portion of the property for sale. Should the achieved sale price for the individual portion of the property be significantly higher in case of selling the entire property, then the entire property shall be sold.

[4] *Published in the Official Gazette of Federation of Bosnia and Herzegovina No. 66/13.*

The co-owners (non-debtors) are entitled to appropriate priority settlement in the value of their respectively owned portions, before the creditor is settled. The co-owners (non-debtors) may alternatively demand surrender of the mortgaged portion in exchange for a deposition of its price value. A change in ownership during the enforcement procedure creates no obstacle for continuing the enforcement against the new owner. Other potential creditors, who have not initiated the enforcement proceedings, are also settled as part of the enforcement procedure, in accordance with the priority rules explained under 1.3 above. In practice, the appraisal of the real estate is usually carried out by a certified court appraiser and the appraised value is the market value on the date of appraisal.

The actual sale of the property is carried out either in a form of an auction sale, or in a form of an immediate bargain. In both cases, the court issues a decree confirming the sale to the winning bidder. Entitled to participate in the auction sale are all interested parties who have paid a deposit in the amount of 10 per cent of the appraised value of the property. The maximum deposit cannot exceed BAM 10,000.00 (EUR 5,112.92). This deposit is returned to the offerors, except for the highest three offers. The creditor is allowed to participate as a potential buyer, but does not have to pay a deposit. The auction sale can take place also in case of a single buyer.

In the first auction sale, the collateral cannot be sold for a price lower than one half of the appraised value. Should the collateral not be sold in the first auction sale, the court shall appoint a second auction sale within 30 days. The collateral cannot be sold for less than one third of the appraised value in the second auction sale. Should the collateral not be sold in the second auction sale, the court shall appoint a third and final auction sale within 30 days, in which no lowest price limitations apply. If the collateral has not been sold in the third auction sale, the court shall suspend the enforcement, which does not prevent the creditor to initiate new enforcement proceedings.

The offeror placing the highest offer is obliged to pay the sale price within 30 days from issuance of the court decree declaring the sale as successful, reduced with the amount of the deposit made. Should the sale price not be paid within the prescribed deadline, the court issues a new decree stating that the collateral has been sold to the next best offeror. If necessary, such decree is issued each time until the third best offeror fails to pay the sale price. In such case, the court declares the sale as unsuccessful and sets a new appointment for a new auction sale.

(b) Registered pledge

The enforcement procedure is launched by the pledgee upon pledgor's default by submitting to the court both the pledge agreement and the registration certificate. Both documents serve as a writ of execution.

The pledgee can either apply for seizure and sale of the collateral by a court appointed officer, or elect to sell the property personally.

Once a pledgee has submitted a motion, the court must issue a decree within eight days from the date the application was submitted. No later than eight days from the day of decree, the enforcement officer must seize the collateral. The person appointed to conduct the sale must give a notice of sale to the pledgor, to any person having an interest in the collateral known to them, as well as to any other person who is identified as a pledgee, not less than 15 days before the sale.

A pledgee could also attempt to avoid enforcement proceedings in court. The law provides that on default by the pledgor under the pledge agreement, the pledgee may seize the collateral without the assistance of the enforcement officer appointed by the court, but only after the pledgor provides a written consent. To allow the possibility, the pledge agreement should contain provisions whereby the pledgee could arrange a public auction or private sale of the movables in the event of a default.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs incurred by the finance parties involve a direct cost related to the establishment and perfection of the collateral (such as notary and registration fees), banking fees, cost for the evaluation of the assets, administrative and legal expenses to prove the good standing of the borrower and/or the collateral provider (if different from the borrower) and the status of the collateral, etc. However, the more substantial direct cost only will be indicated below, as an average overall estimate of cost per type of security is difficult to be made.

(a) Mortgage

The notary fees for execution of a mortgage deed are regulated by the notary tariff and are dependent on the value of the mortgage, i.e. of the value of the secured claim. VAT is charged additionally. The maximum amount of the fee is approximately BAM 2,340 (approximately EUR 1,170).

(b) Registered pledge

The registration of pledges is performed electronically. In order to gain access to the Movable Security Register, it is necessary to open a user account and make a BAM 200 (EUR 102.25) deposit. The total registration fee usually amounts to approximately BAM 13 (EUR 6.64). The fee for maintaining of the registration varies upon duration of the registration. However, for an unlimited duration the fee cannot exceed BAM 50 (EUR 25.56). The same prices model and the maximum fee apply to the extension of the duration. Any cancellation or amendment of the registration is charged BAM 3-4 (EUR 1.5 – 2).

1.7 Recognition of security governed by foreign law

According to the Law on Enforcement Procedure can be considered as a writ of execution the following:

(i) executive court decision and court settlement;
(ii) executive decision issued in administrative procedure and settlement made during an administrative procedure;
(iii) executive notarial deed;
(iv) other deeds defined by the law as writs of execution.

However, the crucial point is that same article of the law stipulating that only a deed issued in Bosnia and Herzegovina can be considered a writ of execution. Therefore, any security governed by foreign law cannot be successfully enforced in Bosnia and Herzegovina without prior conducting the recognition of a foreign decision procedure.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

Judicial enforcement is initiated by means of submitting a motion for execution to the competent court. Upon receipt of a motion, the court decides whether to meet the request set out by the motion or to decline it. Upon reaching enforcement decision, the same is delivered to the enforcement creditor and the debtor. Both parties are entitled to file an objection to the decision within eight days following the date on which the decision was received. Once the court reaches a decision upon the submitted objection, the parties are entitled to submit a complaint to the second instance court against such a decision within eight days following the date on which the decision was received. Neither the objection nor the complaint withhold the course of enforcement proceeding.

Enforcement initiated for the purpose of settling a monetary claim is determined and carried out to the extent necessary for settlement of the respective claim. The Law on Enforcement Procedure stipulates different enforcement actions depending on the subject of the enforcement (real estates, movables, etc.). However, the main enforcement action, stipulated for the majority of enforcement proceedings, can be encompassed by the following actions: (i) appraisal of the assets subject of the enforcement, (ii) sale of the assets subject of the enforcement, and (iii) settlement of the creditor from the amount received by sale of the assets subject of the enforcement.

Sale of the assets subject to enforcement is carried out by means of public auction, with some differences in case of enforcement over a real estate and movable assets.

In case of a sale of real estate, the law foresees conduction of three possible public auctions. In the first auction sale, the real estate cannot be sold for a price lower than one half of the appraised value. Should the collateral not be sold in the first auction sale, the court shall appoint a second auction sale within 30 days. The collateral cannot be sold for less than one third of the appraised value in the second auction sale. Should the collateral not be sold in the second auction sale, the court shall appoint a third and final auction sale within 30 days, in which no lowest price limitations apply, meaning that the real estate can be sold for BAM 1 (EUR 0.51). If the collateral has not been sold in the third auction sale, the court shall suspend the enforcement, which does not prevent the creditor to initiate new enforcement proceedings.

In case of enforcement of movables, the law foresees that two auction sales can take place. In the first auction sale, the movables cannot be sold for a price lower than one half of the appraised value. Should the movables not get sold in the first auction sale, the court shall appoint a second and final auction sale within 30 days, in which no lowest price limitations apply.

The offeror placing the highest offer is obliged to pay the sale price within 30 days from issuance of the court decree declaring the sale as successful, reduced with the amount of the deposited insurance. Should the sale price not be paid within the prescribed deadline, the court issues a new decree stating that the subject of the enforcement has been sold to the next best offeror. If necessary, such decree is issued each time until the third best offeror fails to pay the sale price. In such case, the court declares the sale as

unsuccessful and sets a new appointment for a new auction sale.
As stated above, creditors are settled by means of receiving part of the funds obtained from the sale of the asset which is subject to enforcement. In case of multiple enforcement creditors, they shall exercise their right to be settled in the order in which they acquired the right to settle from that particular asset.

2.2 Private foreclosure

Possibility of private foreclosure is foreseen and stipulated by the Framework Law on Pledges. Namely, the stated law, apart from standard judicial foreclosure, foresees a possibility that a pledgee, on its own and without any help of a court enforcement officer, can physically seize the security from its holder, usually the pledgor, and in that way settle its receivables. However, in order to consider such an action as valid, the pledgor must issue its written consent, allowing the pledgee to detract the security.

2.3 Bankruptcy and debtrestructuring proceedings

(a) General

The bankruptcy proceeding is conducted for the purpose of satisfying the bankruptcy debtor's creditors collectively through liquidation of its property and distribution of the proceeds to the creditors.

The parties to the bankruptcy proceeding are:

- the Bankruptcy Court (the "Court");
- the bankruptcy judge;
- the bankruptcy trustee;
- the interim bankruptcy trustee;
- the Assembly of creditors;
- the Interim Creditors' Committee; and
- the Creditors' Committee.

A bankruptcy proceeding is initiated by a written petition of an authorised person. Authority to file a petition is granted to the debtor and to all creditors who have a legally recognised interest in the conduct of the bankruptcy proceeding. The creditor is obliged to show, by attaching appropriate documentation, that its claim and also the inability of the debtor to make payments, is probable. The Court must consider the petition within 15 days of its filing.

The reason for opening a bankruptcy proceeding is the inability of the debtor to make payments. The debtor is unable to make payments if it cannot meet its accrued and outstanding payment liabilities. The fact that the debtor has paid or is able to pay the claims of certain creditors, wholly or partially, does not, in itself, mean that it has the ability to make payments. As a rule, a debtor is unable to make payments if it fails to pay its outstanding payment liabilities for a period of 30 days.

A competent Court for initiation of the bankruptcy proceeding will be determined in accordance with the location of the headquarters of the legal entity or the residence address of the individual debtor. The bankruptcy proceeding includes all property that belonged to the debtor at the time of the opening of the bankruptcy proceeding, and also the property that the debtor obtained during the bankruptcy proceeding (bankruptcy estate), unless other legal provisions stipulate otherwise. The bankruptcy estate is used to pay the costs of the bankruptcy proceeding; the creditors who, at the time of the opening of the bankruptcy proceeding, had an allowed property claim against the debtor (bankruptcy creditors); and the creditors who acquired the right to assert claims against the bankruptcy estate after the bankruptcy proceeding was opened (creditors of the estate).

According to the type of their claims, the bankruptcy creditors are ranked by priority. The creditors of a lower payment priority may have their claims paid only after the creditors of the preceding payment priority have had their claims paid in full. The bankruptcy creditors of the same payment priority have their claims paid pro rata.

(b) Extraction creditors

A person who has the right to separate recovery of assets not belonging to the debtor (extraction creditor) is not a bankruptcy creditor.

After the opening of the bankruptcy proceeding, at the earliest, the right to separate recovery may be exercised after the reporting hearing. If the asset to be separately recovered is necessary for the continuation of the business operations of the debtor, the bankruptcy trustee may delay the request for separate recovery for a period of 90 days from the reporting hearing.

During the period before the reporting hearing, only a creditor with the right to separate recovery has the right to a claim because of excess deterioration of the asset subject to separate recovery. After the reporting hearing, a creditor with the right to separate recovery has the right to compensation for the use of the asset. Such a creditor is entitled to be fully compensated for any loss in value of an asset after the reporting hearing. If the trustee is unable to preserve the value of the asset through payments to the creditor,

then a creditor with a right to separate recovery is entitled to take the asset after giving the trustee eight days' notice. If an asset for which separate recovery could have been requested before the opening of the bankruptcy proceeding has been sold without authority by the debtor, interim bankruptcy trustee, or after the opening of the bankruptcy proceeding, by the bankruptcy trustee, then the creditor with the right to separate recovery may assume a claim for damages, if it still has not been exercised. The creditor may assume this claim from the bankruptcy estate, if it belongs to the estate and if it can be recovered separately from the estate.

(c) Secured Creditors

Creditors secured by specific assets of the bankruptcy estate are authorised to execute the collateral for their principal, interest, and costs.

The secured creditors are:

(i) holders of mortgages and liens on real estate;
(ii) creditors who have obtained a lien by law, foreclosure, court settlement or agreement;
(iii) creditors to whom the debtor has assigned specific rights as a surety;
(iv) creditors who are entitled to a right of possession.

Secured creditors may be bankruptcy creditors if the debtor is also personally liable to them. They have the right to pro rata payment from the bankruptcy estate only if they abandon their collateral, or if they were unable to obtain payment, in full or in part, in which event they are paid pro rata on the unpaid amount of their claims.

(d) Proceedings

The bankruptcy judge shall schedule a hearing on the grounds for opening the bankruptcy proceeding after receiving the report of the interim bankruptcy trustee, together with the opinion of any expert possibly appointed to assess the debtor's insolvency. The petitioner, the debtor, the interim bankruptcy trustee, and when necessary, the experts are invited to the hearing. The bankruptcy judge shall issue a decision to open the bankruptcy proceeding, or shall deny the petition to open the bankruptcy proceeding, not later than three days after the completion of the bankruptcy hearing.

The decision to open a bankruptcy proceeding includes:

(i) the business name, or the name and surname, and the place of business or the address of the debtor's residence;
(ii) the name and address of the bankruptcy trustee;
(iii) the date and hour of the opening of the bankruptcy.

In the decision to open the bankruptcy proceeding, the creditors are notified to file their claims with the Bankruptcy Court within 30 days.

(e) Legal Consequences of Initiation of the Bankruptcy Proceeding

Initiation of bankruptcy proceedings bears certain legal consequences and fundamental changes to the law and relations. Such changes are aimed towards securing the justice, by preventing the creditors to financially harm the debtor or to treat in the same way the creditors that are in a disadvantaged position.

Article 30 stipulates that the bankruptcy proceeding includes all property that belonged to the debtor at the time of the opening of the bankruptcy proceeding, and also the property that the debtor obtained during the bankruptcy proceeding (bankruptcy estate), unless other legal provisions stipulate otherwise. The bankruptcy estate is used to pay the costs of the bankruptcy proceeding; the creditors who, at the time of the opening of the bankruptcy proceeding, had an allowed property claim against the debtor (bankruptcy creditors); and the creditors who acquired the right to assert claims against the bankruptcy estate after the bankruptcy proceeding was opened (creditors of the estate).

Initiation of the bankruptcy proceedings also changes the nature of different types of claims. Claims that were not due when the proceeding was opened are deemed to be claimed now as due. Non cash claims or claims the cash amount of which is liquidated are stated at the value at which they can be assessed at the time the bankruptcy proceeding was opened. Claims stated in foreign currency or in some accounting unit are recalculated into the domestic currency in accordance with the currency exchange rate that is valid for the location of the payment at the time of the opening of the proceeding.

After the opening of the bankruptcy proceedings, individual bankruptcy creditors may not move for compulsory execution against the bankruptcy debtor or request liens on any property that enters the bankruptcy estate. All proceedings pending at the time of the opening of the bankruptcy proceeding shall be terminated.

It must be noted that the bankruptcy trustee may directly sell the personal property in which the creditors have a security interest or may have it sold at a public auction if he has the property in his possession. However, the bankruptcy trustee will require the consent of the secured creditor for a sale by direct bargaining of real estate property that is mortgaged.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

According to the applicable provisions of the Law on Bankruptcy Proceeding , by opening a bankruptcy proceeding all court proceedings related to the bankruptcy estate are being suspended. Upon opening of the bankruptcy proceeding, the bankruptcy creditors cannot initiate foreclosure against the bankruptcy debtor, nor can they seek security on parts of his assets constituting the bankruptcy estate. Foreclosure proceedings that are ongoing at the time of opening of the bankruptcy procedure shall be suspended.

Upon opening of the bankruptcy proceeding, secured creditors can initiate procedure against the bankruptcy debtor in order to execute their right of foreclosure and security based on general rules of enforcement procedure. All enforcement procedures that have been suspended, which have been initiated by the bankruptcy creditors prior to the opening of the bankruptcy procedure, shall be reinitiated and conducted in accordance with the rules set out by the Law on Enforcement Procedure.

2.5 Recourse of a secured creditor to self-help remedies

Regardless of the fact that secured creditors have some sort of security established over the assets of the debtor, the enforcement procedure is, according to the Law on Enforcement Procedure and the Framework Law on Pledges, a judicial procedure, leaving no space for recourse to self-help remedies.

The only exception from the above stated rule is the possibility given by the Framework Law on Pledges that has been elaborated earlier. Namely, the stated law provides the possibility of seizing the security by the enforcement creditor from the enforcement debtor, however, provided that the enforcement debtor issued its consent for such an action. Having in mind that for a legal and valid detraction a consent issued by the enforcement debtor must be procured, this cannot be comprehended as self-help remedy.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

Neither a security trustee nor a parallel debt concept are recognized under the domestic legal framework. According to the domestic legal framework, the only person authorised to initiate an enforcement procedure and play active role in it, of course apart from the court and enforcement debtor, is the enforcement creditor in whose favour certain securities have been established. Therefore, there is no way of introducing a third party to the enforcement procedure, except by means of signing an assignment agreement between the enforcement creditor and such third party, based on which agreement the enforcement creditor would transfer his receivables towards the enforcement debtor to the third party along with all means of security. Another possibility to introduce third party (security trustee) is by means of including such third party to the main security agreement as a creditor/pledgee, allowing that third party to undertake any and all legal actions against the debtor, however, in its own name and for its own account.

3.2 Specifics of taking and enforcing security by a security trustee or agent

As security agent is something that is not recognized under domestic legal framework, there are no specifics related to taking and enforcing security by such a person. In case that third person comes into place of the enforcement creditor, by means of conclusion of an assignment agreement, such third person would have the same procedural possibilities as its predecessor, i.e. the enforcement creditor. Involving a third party in a security agreement would make all procedural possibilities available to such third party in the same manner that those possibilities are available to the main/genuine creditor.

3.3 Precedents

We are not familiar with any case law in Bosnia and Herzegovina dealing with the validity of parallel debt clauses and/or the recognition and enforceability of security interests held by security trustees.

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BULGARIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

Generally, a third party security (including upstream and cross-stream guarantees) would be legally admissible in most circumstances, subject to corporate benefit considerations and financial assistance limitations (see below).

Bulgarian law does not contain explicit provisions regarding the need of a corporate benefit for a company providing security for a third party debt. There are however certain legal provisions of a general application, which can be considered in that regard:
Thus for example, the Commerce Act[1] requires that certain transactions (including the granting of security over assets of the company whose value exceeds one half of all assets of the company) are concluded only with the prior approval of the shareholders' meeting (or, if the articles of association so allow, the unanimous resolution of the relevant board) of the company, but nevertheless stipulates that, even without such a corporate approval, the transaction would still be valid and binding on the company. As a separate matter, the person(s) who entered into it, may be liable to the company for any damages caused to it[2].

Another article of the Commerce Act requires that a board member must disclose to the board any transaction concluded by him or an affiliate thereof with the company if such transaction falls outside the ordinary course of business of the company or is not at arm's length terms and that entry into such transaction by the company must be approved by the board in advance; however if the transaction is concluded without such a board approval it is still valid and binding on the company, as the person who concluded it may be liable to the company for any damages caused to it, if he/she was aware or could have been aware that there was no approval.

Based on these provisions it can be concluded that, in general, a lack of corporate benefit for a third party security provided by a company incorporated in Bulgaria cannot render the security null and void, but could eventually only trigger liability for the person(s) who entered into it on behalf of the company.

In addition, pursuant to Article 135 of the Obligations and Contracts Act[3], a creditor may ask that certain acts of his debtor which have harmed him be invalidated with respect to such creditor, if the debtor (and if the deal was not for free, also the counterparty) was aware of the harm at the time of performance of such acts. On the basis of this legal provision, if a creditor of a third party security provider challenges the respective transaction and the court determines that the third party security was given without any consideration or for an insufficient consideration, the third party security may be invalidated by the court, if the claimant proves that the creation of the security has harmed him and that, when providing the security, the security provider (and if the provision of security was against a consideration, also the secured creditor) was aware of such harm. A creditor may file such claim in or outside insolvency proceedings of the debtor (in insolvency proceedings it may be also filed by the insolvency trustee(s)).

In insolvency, the creation of a third party security may be declared null and void by the insolvency court with respect to insolvency creditors if the security was provided within one year prior to the date of the insolvency petition (but in any case after the initial date of the insolvency or over indebtedness[4]) or within two years prior to that if the security was provided for a debt of a related party.

Further, transactions for no consideration made by an insolvent debtor within two years prior to the date of filing of the insolvency petition or, respectively, three years, if a related party to the debtor is also a party to such transaction, are also subject to the

[1] *Promulgated in the Official Gazette of the Republic of Bulgaria, Issue No. 48/1991, effective as of 1 July 1991, as amended*
[2] *Article 236 of the Commerce Act*
[3] *Promulgated in the Official Gazette of the Republic of Bulgaria, Issue No. 275/1950, effective as of 1 January 1951, as amended*
[4] *The initial date of insolvency/overindebtedness is to be determined by the court in the court ruling for opening of the insolvency proceedings.*

claw back rules and may be invalidated upon a claim of the bankruptcy creditors or the insolvency trustee. The same applies to undervalue transactions, made within two years prior to the date of filing of the insolvency petition, but not earlier than the initial date of the insolvency or overindebtedness.

For that reason, in all cases of taking security, it is advisable to substantiate a sufficient corporate benefit for the security provider. Although there are no legal provisions or case law confirming this, in our view the corporate benefit could be a general one.

For example, it is common for companies in a group to provide security for loans taken by their parent or one of their affiliates. In such case, even though there is no direct and immediate corporate benefit for the security provider (for example a payment for the granting of the security), it can be accepted that the security provider's corporate benefit derives from the well being of the group as a whole. This argument is stronger if the security provider will receive (even if indirectly) a portion of the financing or will otherwise have another commercial benefit from the financing being secured.

1.2 Financial assistance

By law, a joint-stock company can not give a loan which will be used to finance the acquisition of shares issued by it or secure such a loan. This rule is commonly referred to as "prohibition of financial assistance". In granting a loan, a joint-stock company generally may not accept shares issued by it or by its affiliates as security even when the loan is not related to the acquisition of shares. A contract which contradicts to such imperative provisions of the law is null and void ex lege.

Public companies

According to the Public Offering of Securities Act[5] certain transactions can be concluded by a public (i.e. listed) company only with a prior approval of its shareholders meeting. These include inter alia transactions where:

(a) the listed company provides security, in whatever form, over fixed assets of value exceeding (i) one third of the value of all its assets according to its last balance sheet (whether audited or not) or respectively (ii) two per cent of the same value, where interested parties[1] participate in the transaction; or

(b) the company incurs obligations to a single person or to related persons in an aggregate value exceeding the value referred to in item (a) or, where said obligations are incurred towards interested parties or in favour of interested parties, to an aggregate value exceeding the value referred to in item (a).

Interested parties may not exercise their voting rights when such resolutions are adopted by the shareholders meeting. Therefore, in practice, the votes of minority shareholders could be crucial in case the majority shareholder or persons related to it are considered interested parties in such a financing transaction. Lack of a shareholders' approval adopted in accordance with the legal requirements would lead to the most severe sanction – the transaction being null and void ex lege.

The same rule applies also if a non-public subsidiary of a public company provides security over longterm assets whose value exceeds one third of the value of all assets of the non public company as per its latest balance sheet or respectively two per cent of the same value, if an interested party participates in the transaction.

1.3 Types of security. Most often used type/s of security in practice

The type of security would depend mostly on the type of security asset, although in some cases it is possible to establish different types of security with respect to the same category of assets (for example, a movable asset may be subject to both possessory and non-possessory (registered) pledge, money receivable may be subject to registered pledge and financial collateral, etc.). In general, the following types of security interests exist under Bulgarian law:

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[5] *Pursuant to the legal definition "interested parties" are the members of the management or supervisory bodies of the public company (including individuals representing legal entities sitting on the respective management or supervisory bodies), as well as persons holding, directly or indirectly, at least 25 per cent of the votes in the General Meeting of the company or controlling said company, where said persons or any persons connected therewith:*

- *are a party, a representative of a party or an intermediary to the transaction, or the transactions or acts are effected in favour of the said persons; or*
- *hold, directly or indirectly, at least 25 per cent of the votes in the General Meeting of, or control, any legal person which is a party, a representative of a party or an interdiary to the transaction, or the transactions or acts are effected in favour of any such legal person;*
- *are members of the management body or supervisory bodies of any legal person referred to in the two preceding items.*

(a) Mortgage

The mortgage is a security interest in a real estate or a ship granted by its owner ("mortgagor") in favour of a creditor ("mortgagee") as a security for a debt.

Upon the enforcement of the mortgaged asset, the mortgagee is entitled to priority in satisfaction of the secured claims from the sale proceeds.

(b) Possessory (ordinary) Pledge

Traditionally, such pledges are established on movables, paperbacked securities and receivables as the valid creation of pledge on movables requires the delivery of the possession of the pledged asset to the pledgee or a person nominated by the pledgor and the pledgee ("possessory pledge" or "pledge").

(c) Registered (special) Pledge

Registered (non-possessory, or special) pledges could be set up in compliance with the rules of the Special Pledges Act .

Registered pledges could be created on:

- movables, except for ships and aircraft;
- receivables;
- dematerialised securities (book entry shares in joint-stock companies, non-physical government securities, etc.);
- equity shares in general and limited partnerships, limited partnerships with shares or limited liability companies;
- industrial property rights (rights in patents for inventions, utility models, registered marks, industrial designs, etc.);
- aggregations of assets (i.e. groups of accounts receivables, of machines and equipment, of goods or materials and of non physical securities);
- going concern (ongoing business) of commercial companies and sole traders, defined as aggregation of assets, liabilities and good will. It should be noted that the going concern pledge may include also real estates owned by the pledgor, which are to be individually specified. In such case, the agreement would have, practically, the same legal effect as a mortgage, however its execution would be much cheaper (as in this case the fee for its registration in the Real Estate Registry shall not be calculated as percentage of the amount of secured obligations). Furthermore, the enforcement of such pledge would be also much cheaper and simpler than the enforcement of the mortgage.

(d) Financial Collateral

According to the Financial Collateral Arrangements Act , financial instruments (mainly securities or interests in securities) and monetary claims (on bank accounts or similar) could serve as financial collateral.

Parties to the financial collateral arrangements may be only certain exhaustively listed entities, such as: public bodies, banks, insurance undertakings, investment brokers, financial institutions, etc. Such collateral might be granted also by (or to) merchants (apart from individuals), provided that the other party to the collateral arrangement is a bank or any other of the above regulated entities. The secured obligation could be only financial, i.e. an obligation giving a right to cash settlement and/or delivery of financial instruments.

The two forms of financial collateral arrangements are financial collateral with the creation of a pledge and financial collateral with a title transfer (see below).

Financial Collateral with the Creation of a Pledge

This is an arrangement where the collateral taker obtains a security interest in the relevant financial collateral (e.g. shares, bonds, options, etc.), where the title in the collateral remains with the collateral provider. The collateral taker, however, establishes some form of physical possession or control of the pledged asset. If the pledge agreement allows this, the collateral taker may be entitled to use the granted collateral.

Financial Collateral with a Transfer of Title

This type of financial collateral involves a title transfer (or transfer of all rights) in the financial collateral to the collateral taker, on terms that it or equivalent assets will be transferred back if and when the secured debts are discharged (sometimes also referred to as a "repo agreement").

In general, the most commonly used types of security interest in Bulgaria appear to be the mortgage and the registered pledge. Ordinary pledges are also sometimes used (mostly in respect of paper backed securities where a registered pledge is not possible), and the use of financial collateral in banking transactions is increasing due to it being insolvency safer. For that reason and as discussed above, this Guide will further elaborate on the specifics of the establishment, perfection and enforcement of mortgage, pledge and financial collateral, as having the largest practical significance.

1.4 Creation of security

(a) Mortgage

The creation of a mortgage requires:

- a notary deed executed between the mortgagor and the mortgagee, save for statutory mortgages (for example, a bank is entitled to register a statutory mortgage, i.e., without executing a mortgage deed with the borrower, on a real estate purchased with a loan from the bank), and
- a registration in the Real Estate Registry.

Mortgage on ships is created by a notarised agreement and registration in the Register of Ships kept by the respective sea port. By law the mortgagor may keep the possession of the mortgaged asset, use it and dispose of it. The disposal of the asset (until foreclosure), however, does not affect the mortgage, which continues to encumber the asset after a disposal or creation of a second mortgage, etc. Regardless of this, in practice the mortgagor is usually contractually prohibited to dispose of or encumber the mortgaged property without the consent of the mortgagee.

(b) Possessory (ordinary) Pledge

A pledge is the delivery of possession of an asset to the creditor (or a third party to safekeep it on account of the creditor) by way of security but with ownership of the asset remaining with the pledgor. An ordinary pledge is rarely used in finance transactions in practice.

An ordinary pledge is established by delivery of the possession of the pledged asset to the pledgee. Normally, a pledge agreement in writing is entered between the parties. The pledge is effective vis-à-vis third parties if it has an authentic date (which is usually achieved by making a notarised copy of the pledge agreement). If the pledge agreement is concluded in writing, has an authentic date and the parties have agreed that the creditor may satisfy his receivable out of court, the creditor is entitled to sell the pledged asset or securities himself, if they have a market or a stock exchange price. If the pledged assets are not traded on a stock exchange or another regulated market and hence have no "stock exchange value", then they must have a "market value". This requirement of the law is unclear insofar as any asset for which a buyer is willing to pay a purchase price has, broadly speaking, a "market value". Although not explicitly stated in the law, we believe the idea of the law was to impose a requirement for a sale at a "fair market value", which means that this is the value on which the respective asset might be transferred. To satisfy the above legal requirement, a mechanism for determining the pledged assets' fair market value on enforcement of the pledge is advisable to be agreed by the parties in the pledge agreement (e.g. a value determined by an independent auditor of good repute applying recognised valuation method(s)).

If the above pre-conditions are not satisfied, the enforcement cannot be performed without a court involvement.

The creditor shall be bound to immediately notify the pledgor of the sale and to pay him the remainder of the price obtained.

For specific classes of assets the creation of a pledge requires further steps, such as:

- Aircraft: The establishment of aircraft pledge requires: (i) pledge agreement in writing; (ii) registration of the pledge in the Aircraft Registry kept by the Civil Aviation Administration. There are different views as to the nature of this pledge (whether it is ordinary or special) and, respectively as to whether the possession of the aircraft must be delivered to the creditor for the pledge to become effective. According to the prevailing interpretation of the law, the pledge on aircraft represents an ordinary pledge and therefore the delivery of the possession of the aircraft to the pledgee (or a person authorised thereby) is a requirement for its validity.
- Physical shares: The establishment of a pledge on physical shares requires: (i) if the shares are registered - endorsement for pledge of the share certificates by the pledgor in favour of the pledgee and delivery of the possession of the pledged shares to the pledgee. The pledge must also be recorded in the shareholders' registry of the company in order to become effective vis-à-vis the company; (ii) in case of bearer shares - delivery of the possession of the pledged shares to the pledgee.

In addition, it is highly recommendable to also obtain physical possession of the shareholders' registry of the company issuer of the shares. This is necessary, because a transfer of the pledged shares must be recorded in the shareholders' registry of the company in order to be binding on it. In an enforcement situation the company may not be cooperative with the pledgee (especially if it is under the control of the pledgor) and may refuse to record the shares transfer (even if it has no valid legal ground to do so). It is unlikely that a third party would be willing to buy pledged shares from the pledgee unless such third party has reasonable assurances that his title to the shares will be recorded in the shareholders' registry of the company so that it can exercise all rights and take all benefits of owning the shares.

(c) Registered (special) Pledge

Registered (special) pledges are created on the basis of agreements in writing between the pledgor and the pledgee (for some assets, such as shares of limited liability companies or going concerns, the agreement must be with notarised signatures of the parties). The establishment of this type of pledge does not require delivery of the possession of the pledged asset to the creditor or to a third party. Moreover, by law the pledgor is entitled to dispose of the pledged assets in the normal course of business until a foreclosure procedure is started (although it is customary for contractual restrictions to be included in the pledge or the loan agreement on disposals of pledged assets without the consent of the pledgee, other than some "permitted disposals").

Registered pledge agreements may be executed even with respect to future property or assets described in generic terms.

A registered pledge must be recorded in the relevant Movables Pledge Register (the Central Register of Special Pledges) or in another applicable register (depending on the type of pledged asset) in order to become effective vis-à-vis third parties.

(d) Financial collateral

Financial collateral may be established over money receivables (except cash), financial instruments and loan receivables, which shall be used to secure or otherwise cover the performance of certain financial obligations.

Financial collateral is provided by delivery, transfer, holding, registering or otherwise passing into possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf.

Money claims or book entry securities are deemed delivered to the collateral taker as of the moment when the cash collateral has been credited to, or forms a credit in, the designated account with a bank or the book entry securities collateral has been credited to, or forms a credit in, the relevant account. Physical bearer shares are deemed provided as of the moment they are delivered to the collateral taker, and registered shares - as of the moment of their endorsement and recording in the relevant book.

The provision of financial collateral must be evidenced in writing in a way allowing for identification of the financial collateral to which it applies. For this purpose, it is sufficient to prove that: (i) the book entry securities have been credited to, or form a credit in, the relevant account; (ii) the money claims have been credited to, or form a credit in, the designated account with a bank.

1.5 Perfection and maintenance of security

(a) Mortgage

The creation of a mortgage requires registration in a public register. By this registration the established security interest is also perfected i.e. made enforceable vis-à-vis third parties and acquires priority over other encumbrances (e.g. subsequent mortgages, injunctions, etc.) on the same real estate property which are recorded after the mortgage.

The initial validity of a mortgage registration is 10 years and the initial registration may be renewed before the expiry thereof. If the 10-year period expires and no renewal is made, the mortgage can still be renewed, in which case however it shall rank as from the new registration.

(b) Possessory pledge

The pledge must be evidenced by a document with a true date (normally, a pledge agreement whose date is certified by a notary) in order to be enforceable vis-à-vis third parties.

When the pledge is created on receivables, a notice of the pledge served on the debtor under the pledged receivables would be required in order to render the pledge enforceable vis-a-vis the said debtor and third parties.

The pledge on registered shares is to be recorded in the shareholders' registry of the joint-stock company in order to become effective vis-à-vis the latter.

(c) Registered pledge

The perfection of a special pledge is made through a registration in the Movables Pledge Register and/or in other public registers specified by the law.

When a pledge on receivables is established, a personal notice of the recorded pledge must be served to the debtor under the pledged receivables in order to make the pledge effective vis-a-vis the debtor.

A going concern pledge is to be registered in the Commercial Register. A going concern pledge becomes effective vis-a-vis a third party which has acquired rights in individual assets of the going concern, only if the pledge agreement has been recorded in the relevant publicity register, which is applicable with respect to such assets. If the going concern pledge agreement lists individual assets, the pledge over them shall remain effective even when they have been taken out from the going concern of the pledgor.

Registered pledge on aggregation of assets is also perfected through registration in the relevant public register. The pledge encumbers any assets from the aggregation until they are taken out from the aggregation in the normal course of business or until serving of an enforcement notice to the pledgor when the pledge covers also specific assets. A special pledge record shall be effective for a period of five years from the date of the original recording. A record may continue to be in effect if it is renewed at the pledgee's request before it expires.

(d) Financial collateral

No formal acts or registration in any public register are required for the perfection of a financial collateral, save for (i) a financial collateral by way of pledge of registered shares – it is to be recorded in the shareholders' register of the company in order to be enforceable vis-à-vis the latter; (ii) granting of receivable as a financial collateral is to be notified to the debtor thereunder in order to be enforceable against the latter and third parties.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs, which the finance parties would incur, may involve notary and registration fees

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(a) Mortgage

Notary fees[6] for execution of a mortgage deed depend on the amount of the secured claim, however there is a cap of approximately EUR 3,000 + 20 per cent VAT. The state fee for registration of the mortgage equals to 0.1 per cent of the value of the secured claim, without a cap, therefore in large transactions the registration fee could be substantial. To avoid that fee, a mortgage could be replaced, if commercially acceptable, by a special pledge over the going concern with identification of the real estates.

(b) Other – possessory or registered pledge; financial collateral

Where notarisation of the security agreement is required (or is made at the discretion of the parties), the notary fee would depend on the value of the secured claims but in all cases it shall not exceed EUR 3,000 + 20% VAT. Fees for pledge registrations are in general not substantial.

1.7 Recognition of security governed by foreign law

Specific types of security, such as mortgage and financial collateral arrangements cannot be governed by foreign law in case the secured asset is located/registered in Bulgaria or, respectively, in Bulgarian register.

In the other cases Bulgarian courts would be generally obliged to recognise and enforce a choice of foreign law to govern a security contract. However, in practice, applying foreign law with respect to assets located or registered in Bulgaria would be much more difficult for a local court and this is likely to create both time delays, as well as raise concerns about the proper interpretation and application of the foreign law by the local court.

In addition, a security over assets located in Bulgaria established and perfected under a foreign law might compete with a security over the same asset established and perfected under Bulgarian law in which case it is very likely that the security established and perfected under Bulgarian law will take priority. Therefore, it is not advisable (and very rarely done in practice) to establish a security interest governed by a foreign law over an asset located in Bulgaria.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

Foreclosure of a security interest could be implemented through judicial enforcement procedure in compliance with the Civil Procedure Code[7] (the "CPC"). Secured creditors use it in practice mainly where they do not have recourse to a private foreclosure (e.g. in the case of mortgages).

(b) Enforcement grounds

In order to start a foreclosure procedure the secured creditor must apply for and obtain an enforcement order (together with a decree of immediate enforcement) and a writ of execution issued by the court. Generally, these documents may be obtained on the grounds of a final court judgement or arbitral award containing the secured obligation being enforced. However, it should be noted that:

[6] *The fees are payable in Bulgarian leva (BGN). At present the exchange rate EUR/BGN is fixed, as EUR 1 equals to BGN 1.95583.*

[7] *Promulgated in the Official Gazette of the Republic of Bulgaria, Issue No. 59 /2007, as amended.*

- a pledgee or a mortgagee may obtain the above court acts without prior litigation, on the basis of: the mortgage deed or the notarised pledge agreement evidencing the claims subject to enforcement over the secured assets;
- the court must honour the secured creditor's application if after a prima facie review it concludes that the above instrument or deed is valid (properly prepared) and attest enforceable obligation;
- a refusal of the court to issue the writ of execution can be appealed by the creditor before a higher court instance;
- the debtor could object to the enforcement order before the court and possibly achieve suspension of the enforcement (by appealing the decree of immediate enforcement);
- in the case of objection of the debtor, as described in the preceding paragraph, the secured creditor may file a claim before the court to have its receivables ascertained by a final court judgement or arbitral award, depending on the governing jurisdiction.

In summary, secured creditors are able to obtain writs of execution on the basis of a simplified procedure but in such cases the debtor still has legal remedies to achieve suspension of the enforcement procedure and start of litigation on the merits of the dispute.

(c) Procedure

Enforcement proceedings (named also individual compulsory collection proceedings) are conducted by a public or private enforcement officers in compliance with the provisions of the CPC. The proceedings commence upon application of the creditor accompanied by the writ of execution issued by the court.

In the absence of voluntary payment, the secured assets (or other assets against which the enforcement is instituted) are liquidated through a public sale or other methods prescribed by law.

The liquidation proceeds are distributed by the enforcement officer between the creditors participating in the enforcement (if more than one) as per the ranking of their respective claims established by law.

Certain acts of the enforcement officer could be appealed by the debtor (or in some cases by third parties), which could delay the enforcement procedure.

(d) Ranking of claims

The following claims must be satisfied preferentially in the order in which they are listed:

(i) costs for securing and enforcement of claims - from the value of the property for which they were made, to the creditors in favour of whom these costs were made;
(ii) claims of the State for taxes on a real estate property or a motor vehicle - from the value of that property or vehicle, as well as claims for payments under concession contracts;
(iii) claims secured by a pledge or mortgage - from the value of the pledged or mortgaged asset;
(iv) claims for which a retention right is being exercised - from the value of the retained asset; if the claim arises from costs for maintenance or improvement of the retained asset, it shall be satisfied before the claims under item (iii);
(v) employees' claims arising from employment relationships and claims for alimony;
(vi) claims of the State other than fines.

Claims of the same rank are satisfied proportionately.

(e) Costs

Court fees for obtaining a writ of execution vary depending on the grounds for issuance of the writ. If the writ of execution is issued on the grounds of a court judgement, the fee is insignificant but if it is issued on out-of-court grounds (i.e. mortgage deed, promissory note, etc.), the fee equals to 2 per cent of the value of the enforceable claim.

Fees payable to the enforcement officer vary depending on the nature of the enforcement act. By way of example, they could include:

- fee for repossession of movable asset by force – 2 per cent of the movable asset's value;
- fee for making inventory of a real estate, movable property or physical securities, which precedes their liquidation - 1.5 per cent of the amount of the price of the inventoried property and enforceable amount;
- success fee payable on the collected amount. It is a proportionate fee and if the collected amount is above BGN 100,000 (approximately EUR 51,000) the fee equals to BGN 5,220 plus 2 per cent on the amount exceeding BGN 100,000.

Additional costs are also likely to arise such as payments for legal consultants, property appraisers, depositories, etc. which cannot be quantified upfront.

2.2 Private foreclosure

(a) General

Private foreclosure by the secured creditor is admissible only with respect to specific types of security interest, such as:

(i) special (registered) pledge set up and perfected in compliance with the Special Pledges Act. Please refer to Section 1.6 (c) above;

(ii) possessory pledges securing claims under commercial transactions (commercial pledge), subject to the following pre-conditions:

- the pledge agreement being concluded in writing;
- the date of the pledge agreement being authentic, i.e. indisputably ascertained (usually this is made by a notarisation of the date of the agreement or another document which evidences the existence of the pledge agreement as of a certain date);
- the pledgee to be expressly entitled under the pledge agreement to conduct private sale of the pledged assets in case of default; and
- the pledged asset (movable or securities) to have a market value.

(iii) financial collateral. Please refer to Section 1.4 (d) above.

Foreclosure of other security interests such as mortgages or possessory pledges not meeting the above requirements may be done only by a court procedure under Section 2.1.

(b) Enforcement grounds

The foreclosure may commence without any court order or writ of execution, if the grounds specified in the relevant security documentation (e.g. failure of the debtor to remedy an event of default within a specified period) have occurred, or in the absence of specific provisions – in the event of default as determined by the governing law.

(c) Procedure

(i) Special pledge foreclosure

The pledgee may start non-judicial foreclosure in compliance with the Special Pledges Act. The pledgee has to register the commencement of the foreclosure in the Movables Pledge Register and to serve a notice to the pledgor.

The pledged asset can be sold by the pledgee without involvement of a court or an enforcement officer. The private sale is effected by the pledgee on behalf of the pledgor. The sale proceeds are paid to an account of an independent depository nominated by the pledgee. The depository is responsible to distribute the sale proceeds among all creditors who have recorded rights in the sold property. The remainder of the proceeds (if any) is paid to the pledgor.

In case of enforcement of a going concern pledge, the pledgee may decide to effectuate the sale on an asset-by-asset basis or to sell the pledged going concern as a whole (however there are certain disputes in legal theory regarding the second option). In the latter case the pledgee may also appoint a manager of the going concern with the aim to preserve the business until the sale.

Enforcement of a limited liability company share pledge can be done either by a sale of the pledged shares or by dissolving the company or terminating the pledgor's participation in it and paying the respective liquidation quota corresponding to the pledged shares to the creditor. There are disputes in the legal theory regarding the possibility of the creditor to sell the pledged shares (some legal practitioners believe that only the dissolution/termination of the pledgor's participation in the company is possible, but not the sale of his shares to a third party).

Enforcement of a pledged receivable can be made by either selling the receivable to a third party or collecting it by the creditor himself.

(ii) Foreclosure of a commercial pledge

By law the pledgee has to effect the private sale with the care of a diligent merchant. The pledgee should immediately notify the pledgor about the sale and transfer him any sums exceeding the amount of secured debt of the sale proceeds. Some pledge agreements contain rules on determination of the market value of the pledged asset.

(iii) Foreclosure of a financial collateral

If the financial collateral was provided by way of a pledge the collateral taker is entitled to sell the collateral and apply the sale proceeds in satisfaction of its secured claims or appropriate[8] the financial collateral (i.e. acquire the pledged financial instruments) without any court approval.

[8] *Appropriation of pledged financial instruments and credit claims is possible only if the parties to the financial collateral arrangement have expressly agreed on the appropriation and on the valuation of the financial instruments.*

If the financial collateral was provided by way of a transfer of title to the collateral, the collateral taker can retain title to the financial collateral. After completion of the financial collateral foreclosure (regardless of the manner) any amounts exceeding the amount of the secured claims are to be paid immediately to the collateral provider.

(d) Ranking of claims

The general ranking of claims as described in Section 1.3 above is applicable.

(e) Costs

The official costs related to foreclosure of pledges are not substantial in principle.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

Bankruptcy proceedings may be instituted against commercial companies and sole traders. Individuals not having capacity of a merchant cannot be subject to such proceedings. Debt restructuring within bankruptcy proceedings is possible. In such case the debtor may continue its existence following successful implementation of a reorganisation plan or settlement agreement concluded with the creditors. Such an option is not available in case of bankruptcy proceedings against a bank.

(b) Interim measures affecting rights of secured creditors

The bankruptcy court may admit interim measures on assets of the allegedly insolvent debtor until the bankruptcy petition is resolved on the merits. Such measures may include injunction on real estates, attachment on movable assets and receivables, etc. Such measures may not prejudice the rights of secured creditors, although in cases where foreclosure takes place in parallel with the bankruptcy proceedings (e.g. foreclosure of a registered pledge), a possible security measure on the pledged asset may delay the foreclosure.

(c) Approval of the claims of secured creditors in bankruptcy proceedings

The opening of bankruptcy proceedings is to be registered in the Commercial Register. All creditors with existing claims have to file such claims for approval by the bankruptcy court within one month as of the date of the said registration. Secured creditors are not exempt from such filing requirement.

Within seven days after expiry of the period for the filing of claims by the creditors, the trustee in bankruptcy shall prepare, among others:

(i) a list of the claims which he admits;

(ii) a list of the claims which he rejects.

The lists prepared by the trustee are then made public. The insolvent debtor or any of its creditors may file with the court an objection to a list in writing within seven days of their announcement. Such objection shall be reviewed by the court and lists are to be finally approved by it. Existing claims can be also filed with the court as "additional claims" and accepted in the usual way by the court for two further months after expiry of the initial one month period for filing claims. Creditors with additional claims which have been admitted by the court later on in the process may not contest any claim which has already been admitted by court, or any distribution of liquidation proceeds which has already taken place.

Ultimately, any existing claims, which are not filed within three months as of the registration of the opening of the bankruptcy proceedings in the Commercial Register, shall be precluded. The same rule would apply accordingly with respect to post-bankruptcy claims, which are not filed within three months as of their maturity.

No personal notices to creditors about the commencement of the bankruptcy proceedings are required to be provided under the local laws. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) is directly applicable in Bulgaria. It requires known creditors from EU member states to be served individual notices on the opening of bankruptcy proceedings.

(d) Challenges affecting secured claims

The following transactions may be challenged in insolvency proceedings:

(i) performance of a monetary obligation prior to its maturity, if made within one year prior to the date of filing the petition for opening of insolvency proceedings, or, respectively, two years, if the creditor knew that the debtor was insolvent/over indebted (it is presumed that the creditor was aware of the debtor's insolvency/over indebtedness if the debtor and the creditor are related parties or if the creditor was aware of, or was in a position to be aware of,

circumstances based on which he could reasonably assume the existence of insolvency/over indebtedness of the debtor);

(ii) performance of a due monetary obligation of the debtor if made within six months prior to the date of filing the petition for opening of insolvency proceedings, or, respectively, one year, if the creditor knew that the debtor was insolvent/over indebted;

(iii) creation of a mortgage or a pledge to secure receivables from the insolvent debtor, which were previously unsecured.

The invalidation provisions described above do not apply if:

- in the case of (i) or (ii) above, if the payment falls within the ordinary course of business of the insolvent debtor and (a) is made in accordance with the agreement between the insolvent debtor and its counterparty and either simultaneously with the provision to the insolvent debtor of goods or services of equal value, or within 30 days after the due date of the payment, or (b) after payment is made, the creditor has provided to the debtor goods or services of equal value;
- in the case of (iii) above, if (a) the security was provided prior to, or simultaneously with, the granting of the loan to the insolvent debtor, or (b) the security replaced another security in rem, which was not subject to invalidation pursuant to the respective insolvency provisions or (c) was provided to secure a loan granted for the purposes of acquisition of the secured asset.

Pursuant to the Commerce Act, certain transactions concluded by the insolvent debtor within certain periods of time prior to the date of filing the petition for opening of the insolvency proceedings may be also invalidated upon a petition of the trustee, or, if the trustee fails to file such a petition – by a creditor in the insolvency proceedings. Among these are inter alia:

(i) creation of a pledge or mortgage or granting a personal guarantee to secure third party obligations made within a period of one year prior to the date of filing the petition for opening of the insolvency proceedings, but not earlier than the initial date of insolvency/over indebtedness;

(ii) creation of a pledge or mortgage or granting a personal guarantee to secure third party obligations made in favour of a creditor who is a related party to the insolvent debtor within a period of two years prior to the date of filing the petition for opening of the insolvency proceedings.

Any challengeable transaction may be invalidated by the court upon a claim by the bankruptcy trustee or (in case the trustee fails to file a claim) of any of the bankruptcy creditors. Such a claim must be filed not later than one year after the date of opening of the insolvency proceedings (or the date of resuming opened insolvency proceedings if the same has been suspended).

The invalidity of any voidable transactions shall not affect any rights, which third parties acting in good faith have acquired against consideration prior to the date of registration of the invalidation claim. It should be noted, however, that financial collateral established over assets of the debtor in accordance with the Financial Collateral Agreements Act prior to the date of opening of the insolvency proceedings, shall not be affected by the above provisions – i.e. it shall be valid notwithstanding the time period when it was created.

(e) Enforcement of secured claims upon debt-restructuring

(i) Reorganisation plan

After opening of bankruptcy proceedings a reorganisation plan may be approved with respect to the insolvent debtor, which may provide for deferral or rescheduling of payments, reducing the debt in full or in part, reorganisation of the undertaking, conversion of debt into equity, etc.

Such a plan has to be adopted by the general meeting of bankruptcy creditors and confirmed by the court. Therefore, a reorganisation plan providing for reduction of creditors' receivables may be approved by the general meeting of creditors, even if some creditors do not agree. For that purpose, all creditors with voting rights shall vote separately in the following classes:

1. Creditors with secured claims
2. Creditors with claims deriving from employment contractual relations;
3. Public law claims of the state and the municipalities;
4. Creditors with unsecured claims;
5. Creditors with claims deriving from interest due after the date of opening of the insolvency proceedings; credits granted to the debtor by shareholders; gratuitous transactions or from expenses accrued by creditors in relation to their participation in bankruptcy proceedings.

The reorganisation plan shall be considered accepted if the following conditions have been met:

- the plan is accepted by each separate class by a simple majority of the amount of the claims of such class, and

- the plan is accepted with the votes of the creditors with more than half of the approved claims regardless of the classes which they are distributed in.

If a reorganisation plan is approved by the creditors' meeting and confirmed by the court with a final decision, the claims of the creditors shall be transformed as provided for in the plan. This transforming effect of the plan with regard to the creditors' claims and securities remains unchanged even in cases where the bankruptcy proceedings are resumed by the court on the grounds of non-fulfilment of the reorganisation plan by the debtor. The approved plan is mandatory for the debtor and the creditors whose claims have occurred before the date of the judgement to institute bankruptcy proceedings. Failure of the debtor to comply with the plan could result in re-opening of the bankruptcy proceedings.

(ii) Settlement agreement

As an alternative to the reorganisation plan a settlement agreement may be entered into by the insolvent debtor and its creditors. However this option is rarely utilised in practice as it requires the consent of 100 per cent of the creditors with accepted claims. If the settlement agreement complies with the legal requirements, the court shall issue a decision terminating the insolvency proceedings, provided that there are no pending claims for ascertaining the non-existence of accepted receivables. Again (as with the reorganisation plan) failure to comply with the terms of the agreement could result in restoration of the bankruptcy proceedings and sale of the bankruptcy estate.

(iii) Ranking of claims

The distribution of the liquidation proceeds between the creditors shall be made in compliance with the legally established ranking of the claims. A claim secured by a mortgage, pledge (regardless of its type) or registered injunction or distraint over an asset ranks first from the proceeds of the sale of such asset.

If the sale proceeds from the encumbered asset do not cover the secured claim and the accrued interest thereon in full, the secured creditor participates for the balance in the distribution alongside unsecured claims.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement v. bankruptcy proceedings

The commencement of bankruptcy proceedings stays judicial enforcement, including any individual enforcement actions commenced by secured creditors against the encumbered assets of the debtor. However, if the encumbered assets are already in the process of being sold to the benefit of a secured creditor and, in the opinion of the court, the secured creditor's interests might otherwise be prejudiced, the court may allow the enforcement action to continue.

(b) Private foreclosure v. bankruptcy proceedings

The Special Pledges Act and the Financial Collateral Arrangements Act provide for that the commencement of bankruptcy proceeding shall not impact any proceedings which have already been started pursuant to these two acts, therefore secured creditors with registered pledges and financial collateral may enjoy out of court enforcement of their rights even where the security provider is declared bankrupt.

2.5 Recourse of a secured creditor to self-help remedies

Self-help remedies (for example - repossession of a pledged asset by a pledgee) aimed at changing factual situations are not admissible in Bulgaria. If the security provider opposes to the repossession of the encumbered assets by action or inaction, the secured creditor may repossess such asset for foreclosure purposes only after obtaining a court order and with the assistance of the competent Bulgarian officials (private or public enforcement officers).

In the event of registered pledge foreclosure, if the pledged assets are not handed over to the pledgee voluntarily in order to complete their sale, the pledgee may repossess them with the assistance of an enforcement officer. This is done on the basis of a certificate evidencing the registered pledge and the registration of the start of the foreclosure. In deviation from general rules the assistance of the enforcement officers in this case shall be ensured without the need of obtaining a court enforcement order. However in general, the pledgee is not allowed to itself repossess the assets. However, in cases where the pledged movable asset is not in possession of the pledgor, the enforcement officer shall refuse to repossess it from a third party and shall be only entitled to collect from the pledgor an amount equal to the value of the pledged asset.

In case of financial collateral with the creation of a pledge, appropriation of financial instruments and of credit claims is possible only if in the financial collateral arrangement the parties have agreed on the appropriation and on the valuation of the financial instruments.

Unless otherwise agreed, the realisation of the financial collateral does not require: (i) the giving of a prior notice to the collateral provider; (ii) approval of the terms of the realisation of the collateral by a court, other institution or any other person; (ii) conduct the realisation by a public auction or in any other manner prescribed by law or (iii) lapsing of any additional time period. If, in the event of default, a financial collateral should be realised, the collateral taker shall send information about the discharged financial obligations and their amount to the debtor and the collateral provider not later than on the next day after the realization.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

The "trust" and the role of a security trustee (or agent) are not expressly regulated by Bulgarian law, except for certain limited instances, such as trustee of the bondholders (regulated by the Public Offering of Securities Act and the Commerce Act) or the figure of concealed (indirect) representation, which might be similar to the one of the trustee. This poses important practical questions related to the use of a security trustee in finance transactions where Bulgarian legal system is relevant.

Generally, under Bulgarian law a mortgage and pledge are considered accessory to the secured claim, (i.e. following its "destiny"). In particular, as per an express statutory rule the pledge and the mortgage follow the secured claim upon its assignment and are cancelled if the secured claim is extinguished.

In the context of the above some legal practitioners in Bulgaria take the view that a security interest governed by Bulgarian law is valid only if the person receiving the security is at the same time the creditor. If such a view is accepted, this would mean that a Bulgarian law security interest may only be validly granted separately to each creditor, but not to a security trustee who is not the creditor of the secured claims. The aforementioned legal conclusions are not indisputable.

A possible way to minimise said risks could be the creation of a parallel debt in favour of the security trustee equivalent to the secured claims of the creditors.

The arrangement regarding the parallel debt explicitly provides that a discharge of an amount owed by the borrower to the lenders under the loan agreement discharges an equal amount owed by the borrower to the security trustee and vice versa. This is necessary to give comfort to the borrower that in no circumstances will he owe a double amount.

It is therefore said that the debt owing to the security agent is parallel, i.e. exists in parallel, to the "main debt" owed to the lenders, hence the term "parallel debt".

The way the concept works is that because of the creation of the parallel debt the security agent becomes a creditor on its own legal ground (being the parallel debt). This allows the creation of the security interests in the name of the security agent only. The security agent is the secured creditor of record for the purposes of third parties and recordation in any public register. Thus, any change of lenders in the syndicate does not require retaking of security because the security is and always remains in the name of the security agent.

The parallel debt is typically included in the so called "intercreditor agreement" between the borrower, the lenders and the security agent setting out the contractual terms as to the circumstances in which the security may be enforced (usually when the majority of the lenders so decides), the manner in which it would be enforced and the manner in which the security agent will allocate among the secured lenders any amounts received by it in enforcing the security. If there is no intercreditor agreement, the parallel debt may be included in the loan agreement.

The concept of parallel debt has been developed under common law. Lawyers in some continental law jurisdictions have expressed concerns about the validity of parallel debt under local law.

Their main argument focuses around the need for cause (causa) for any contract to be valid. In particular, some argue that because the security agent does not extend any money to the borrower under the parallel debt arrangement, the debt of the borrower arising from the parallel debt lacks a cause and is therefore invalid. This argument does not sound very compelling. It is explained above what necessitates the need to put in place a parallel debt arrangement. The reasons are legitimate commercial reasons – to avoid unnecessary costs and other administrative burden for the borrower and allow easier transfer of participations in a

lending syndicate. These reasons should in itself constitute sufficient cause for the existence of the parallel debt.

In Bulgaria the concept of parallel debt is not expressly regulated by local law. At the same time, there seem to be no compelling legal arguments against its validity and/or enforceability, especially when the parallel debt is governed by a foreign law (e.g. English law). In Bulgaria the use of the parallel debt concept has not yet been tested in court, but has been widely used in transactions with international element where parallel debt is governed by foreign law (usually English law).

3.2 Specifics of taking and enforcing security by a security trustee or agent

No such specifics exist under Bulgarian law.

3.3 Precedents

In view of the legal uncertainty concerning the possible involvement of a security trustee and using a parallel debt structure in local transactions, in the cases where Bulgarian law governs all transaction documents (including the loan and the security agreements, etc.) the security interests are usually held directly by all lenders but not by a security trustee.

In cross border transactions security interests are often created and perfected in Bulgaria in the name of a security trustee and using a parallel debt structure. The relations between the security trustee /agent and the creditors, as well as the parallel debt are governed by the relevant foreign law, which typically uses such concepts.

As of the date hereof we are not familiar with any case law in Bulgaria dealing with the validity of parallel debt clauses and/or the recognition and enforceability of security interests held by security trustees.

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CROATIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

A third party may freely decide to secure a claim of the borrower as joint and several guarantor or by granting securities in rem. Usually, certain limitations for issuance of the securities may be set forth by corporate documents (i.e. Articles of Association, Deed on Incorporation). In such event, corporate authorizations (i.e., shareholders' resolution, management board resolutions) are required for granting securities. In practice, such authorizations are usually requested in banking and financing transactions.

With regard to the upstream and cross-stream guarantees and securities, one particular issue should be pointed out. Namely, Croatian legal entities usually provide securities to their mother companies- foreign legal entities. In such event, the Croatian legal entity as guarantor has certain additional obligations under the Croatian Foreign Exchange Act[1] . If the Croatian resident grants the loan or issues the guarantees in favour of non-resident, the non-resident has to issue in favour of the resident security interests in the same loan amount or guarantee amount. Any non-compliance with the said provision represents a misdemeanour under the Croatian Foreign Exchange Act, for which a monetary fine in the range of HRK 50,000 (approximately EUR 6,490) to HRK 1,000,000 (approximately EUR 129,870) is prescribed.

Furthermore, certain level of limitation of guaranteeing is usually set forth in the banking and financing transaction. Usually the guarantees of the Croatian legal entities shall not be construed to create any obligation of any person or corporate body to act in violation of the Croatian capital maintenance rules.

1.2 Financial assistance

Under the Croatian Companies Act[2], joint stock companies are generally banned from granting loans or securing the acquisition of its own shares to a third party. The law provides detailed description of the conditions for financial assistance under which joint-stock companies secure the acquisition of its own shares, as well as restrictions for the management board when the members of the joint-stock company's bodies acquire shares and receive a loan or security from joint-stock companies. A legal transaction for acquisition of shares of a joint-stock company, in which joint-stock companies provide deposit, loan or security to a third party, management board/ directors, and members of the supervisory or administrative board, is null and void, provided the legal transaction is not in the best interest of the joint-stock company.

In general, granting loans or securing the acquisition of own shares of a joint-stock company is permitted under the following terms and conditions:

(a) the shares are acquired under the fair trade conditions;
(b) the management board obtaining the general assembly's prior approval adopted by the decision of the votes that represent at least two-thirds of the share capital represented at the general assembly;
(c) the amount of financial assistance that is being given to a third party cannot lead in any case to the decrease of the amount of net assets, so that it falls below the level or amount of share capital and reserves that is required by law or by statute of the company, and which cannot be used for a payment to the shareholders.

The purpose of the abovementioned principles is to achieve financial stability of joint-stock companies.

1.3 Types of security. Most often used type/s of security in practice

Under the Croatian law, there are various types of securities over various types of assets that could be provided to the creditor. The most commonly used are: mortgage, pledge over share quotas and shares, pledge over movables, floating charge, assignment of rights, pledge over bank accounts, etc.

[1] *Official Gazette of the Republic of Croatia No. 96/2003, 140/2005, 132/2006, 150/2008, 92/2009, 153/2009, 133/2009, 145/2010, 76/2013*
[2] *Official Gazette of the Republic of Croatia No. 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013*

(a) Mortgage

Under the Croatian Act on Ownership and other Real Property Rights[3], the mortgage represents a pledge over real estate properties granted by the owner of the real estate property ("mortgagor") in favour of a creditor ("mortgagee") as a security for a debt. The mortgagee does not have any ownership right over the real property and the mortgagor stays the possessor of the real estate property. The only right the mortgagee has is to collect its due and outstanding claims from the purchase price of the real property sold in the enforcement procedure.

(b) Pledges Registered with the Real Estate Registry or Registry of Court's and Notary's Securities of Claims on Movables and Rights ("**Security Registry at the Croatian Financial Agency" or the "Fina Registry**")

The pledge of movables, receivables, shares, machines and bank accounts are regulated by the Croatian Act on Ownership and other Real Property Rights and the floating charge - by the Act on Registry of Courts' and Notary Publics' Security Interests on Movable Assets and Rights[4]. The main characteristic of all said pledges is the mode of their perfection. They are perfected by way of their registration with the Fina Registry. The procedure of registration of the pledges is elaborated in more detail below in Section 1.4 hereof.

1.4 Creation of security

As already stated above, the securities may be created by:

(a) a legal transaction – voluntary pledge;
(b) a court decision – judicial pledge;
(c) virtue of law – statutory pledge.

Since this Guide focuses on the securities created by an agreement (i.e., legal transaction), we will herein elaborate in more detail on the creation of the pledges/ mortgage by an agreement. Under Croatian law, an agreement creating securities must be executed in a certain form, set forth for each collateral, by the applicable law. The required form is a condition for their validity. If the agreements are not executed in the form set forth by the applicable law, they shall be deemed as null and void. In that respect, a mortgage agreement and a share pledge agreement have to be executed in a written form and the signatures on those agreements have to be verified by a public notary while the creation of the pledges registered with the Fina Registry (bank accounts, floating charge, share quotas, machines, movables, receivables, etc.) is subject to the form of a notary deed.In practice, the mortgage agreement and the share pledge agreement are executed in the form of a notarized deed containing an enforcement clause. The enforcement clause is usually included into the other types of pledge agreements as well. A notary deed containing the enforcement clause enables the mortgagee/ pledgee to initiate direct enforcement procedure for the collection of outstanding claims before the competent court, without the need to obtain a final and binding court decision through extensive litigation.

Pursuant to such agreements, the public notary is usually entitled to issue an enforcement confirmation to the agreement (which means that the agreement becomes enforceable) upon the mortgagee/ pledgee's request if the event of default occurs For the purpose of issuing the enforcement confirmation, the pledgee / mortgagee has to submit to the public notary certified statement containing the pledgee's / mortgagee's statement that the event of default occurred and specifying the amount of due and payable secured claims. On the basis of the agreement containing the enforcement certificate, the mortgagee/ pledge is entitled to initiate the enforcement procedure over real property or shares.

1.5 Perfection and maintenance of security

Under Croatian law, all registered securities should be registered in the competent registry; the mortgage in the Real Estate Registry, the share pledge in the Central Depository and Clearing Company and the other pledges (bank accounts, floating charge, share quotas, machines, movables, receivables, etc.) in the Fina Registry. Once perfected, there is no need to maintain already established security. They exist until their deletion from the competent registry.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs incurred by the financing parties involve direct cost related to the establishment and perfection of the collateral (such as notary and registration fees), banking fees, cost for the evaluation

[3] *Official Gazette of the Republic of Croatia No. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 90/2010, 143/2012*

[4] *Official Gazette of the Republic of Croatia No. 121/2005*

of the assets, administrative and legal expenses to prove the good standing of the borrower and/or the collateral provider (if different from the borrower), and the status of the collateral, etc. The public notary fees always depend on the value of the secured claim and the maximum amount of the such fees is approximately EUR 2,700. The registration costs depend on the registry where the security interests are to be registered. The amount of such fees is in the range of EUR 20,00 to EUR 50,00.

1.7 Recognition of security governed by foreign law

Generally, Croatian entities may grant securities governed by foreign law. However, if the securities are perfected under the Croatian law, they must be governed by the Croatian law.

Under Croatian law, it is not possible to recognise the securities governed by a foreign law. The Croatian legal system only recognises foreign court decisions and arbitration awards. That means that the foreign court and arbitration judgements are not directly enforceable in the Croatian jurisdiction but will be the subject of a recognition procedure. If the countries governing the securities and the Republic of Croatia have not entered into a bilateral agreement on recognition of court decisions, the recognition is not by default, but on case-by-case basis. A judgment obtained by courts of the EU Member States shall be recognised and enforced in Croatia subject to and in accordance with the Brussels Regulation. Upon recognition of the foreign court decision, the said decision will represent a valid base for initiation of the enforcement procedure. It is also noteworthy that the Republic of Croatia is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

The enforcement of the securities under Croatian law is a well established process and is regulated by the Enforcement Act[5] . The exclusive right to enforce rights under the security interest documents belongs to the person who is determined in such documents as the pledgee.

(b) Enforcement grounds

The enforcement grounds are specifically stated in the Croatian Enforcement Act. In general, there are two types of enforcement procedures: one initiated based on the issued invoice, bill of exchange, etc. and one initiated based on the agreement in the form of a notarized deed containing enforcement confirmation issued by the public notary. The new Croatian Enforcement Act differentiates the third collection procedure, which is performed directly by the Financial Agency based on the debenture note, from the final and binding court decisions. Since the subject matter of this Guide is the enforcement of security interests created by the agreement, we will limit this section only to the enforcement procedure initiated on the grounds of an agreement executed in the form of a notarized deed containing an enforcement confirmation.

(c) Court procedure

The enforcement procedure is initiated by the mortgagee's or pledgee's enforcement motion based on the security interest agreement containing the enforcement confirmation issued by the public notary. The enforcement procedure is usually initiated against the pledged property. There is also a possibility to initiate the enforcement procedure over the overall asset of the mortgagor/ pledgor but such possibility should be allowed under the agreement. Based on the enforcement motion, the competent court passes the enforcement decision against which the mortgagor/ pledgor has the right of appeal within eight days as of the receipt of the said decision. The appeal does not postpone the execution of the court's enforcement decision. After the court passes the enforcement decision, enforcement actions depending on the classes of asset seizure, are undertaken by the court (e.g., seizure of the bank accounts, sale of real properties movables or rights, etc.).

Court fees

The court fees of the enforcement procedure depend on the value of the secured claim. The maximum amount of the court fee for obtaining the enforcement decision is HRK 5,000 (approximately EUR 667). Additional costs are also likely to arise, such as payments for legal consultants, property appraiser, etc., which cannot be quantified upfront and depend on the value of the secured claims.

[5] *Official Gazette of the Republic of Croatia No. 112/2012, 25/2013, 93/2014*

2.2 Private foreclosure

(a) General

Under Croatian law and according to the provisions of the Act on Ownership and other Real Property Rights[6], private foreclosure is possible only if the subject matter of the pledge are:

(i) movables; or

(ii) rights that are not considered real estate property.

(b) Enforcement grounds

The creditor can exercise its right for a private sale of the pledged asset only if the debtor expressly permits such settlement in written form at the moment of establishing the pledge or afterwards (i.e., agreement).

(c) Procedure

The pledgee can exercise its rights through a public auction or in a different manner if such possibility arises from the legal transaction or law, or if that is the only way to realize his right for settlement given the circumstances. In case the subject matter of the pledge are movables or rights, which have a price at the stock exchange or market, the pledgee can sell the pledged property in a direct sale, but only through a person who is authorized to trade at the stock exchange or to sell such things and rights at a public sale.

2.3 Bankruptcy and debt-restructuring proceedings

(a) Bankruptcy

Bankruptcy procedure is regulated by the Croatian Bankruptcy Act [7]. Pursuant to the Croatian Bankruptcy Act, the bankruptcy procedure may be initiated against the companies and the craftsmen if there are reasons (i.e., insolvency or overdebtness) for bankruptcy. The bankruptcy procedure may be initiated either by the company itself or the company's creditors. Also, the financial agency is obliged to initiate the bankruptcy procedure under the conditions specified by the Bankruptcy Act.

Status of creditor with registered securities

The creditors, having claims secured by mortgage or pledge, have the right to separately collect their claims from the mortgaged/pledged asset independently and outside of the bankruptcy procedure.

Status of creditors with non-registered securities

Creditors who do not have registered securities may report their claims to the bankruptcy officer handling the procedure. If the claims are accepted by the bankruptcy officer, their claims will be paid from the proceeds obtained by selling the debtor's assets pursuant to the distribution provisions set forth by the Bankruptcy Act.

The creditor's claims are classified into priorities (ranks). The lower priority creditors may be satisfied only after the higher priority creditors have been fully satisfied. The creditors of the same priority will be satisfied in proportion to the amount of their claims.

Under the Bankruptcy Act the claims with the higher priority rank by virtue of law are:

(i) the claims of the debtor's current and former workers deriving from employment agreements, in gross sum, up to the date of initiating the bankruptcy proceedings;

(ii) the compensation for the damage suffered due to injury at work or a professional illness;

(iii) severance pay; and

(iv) the claims of the second higher payment priority comprised of all other claims to the debtor, except for those classified as lower priority (general payment priority).

The claims of lower priority rank are in the following order:

(i) interest on claims of bankruptcy creditors, starting as of the day of the opening of the bankruptcy proceedings;

(ii) costs incurred by the creditors during their participation in the proceedings;

(iii) monetary fines for criminal acts or infringements as well as costs resulting from a penalty for a criminal act or infringement;

(iv) claims demanding a free performance by the debtor;

(v) claims for repaying a loan used for substituting the capital of some member of the company, or similar claims.

Claims reported after the period of reporting (claims that are overdue) can be examined at a separate examination hearing. Claims reported three months after the first examination hearing will be rejected. If the claims are denied by the court, the court will direct the creditor to initiate the court proceedings for determination of such claims. Court proceedings might last a year or two, and in practice they are not too expensive.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement v. bankruptcy proceedings

Legal consequences of the opening of bankruptcy proceedings come into effect on the day the notice on the opening of bankruptcy proceedings has been put on the notice board of the court.

[6] *Official Gazette of the Republic of Croatia No. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006,146/2008, 38/2009, 153/2009, 90/2010, 143/2012*

[7] *Official Gazette of the Republic of Croatia No. 44/1996, 161/1998, 29/1999, 129/2000, 123/2003, 197/2003, 187/2004, 82/2006, 116/2010, 25/2012, 133/2012, 45/2013*

The rights of the executive and other bodies of the debtor are transferred to the bankruptcy officer on the day of the opening of bankruptcy proceedings. By the opening of bankruptcy proceedings the rights of the individual debtor to manage and dispose of the assets that should form the bankruptcy estate will be transferred to the bankruptcy officer. Legal proceedings that have commenced prior to the opening of bankruptcy proceedings, involving property that is part of the bankruptcy estate, will be assumed by the bankruptcy officer on behalf of the debtor. If the officer, immediately after continuing with a suspended case, accepts the petition (in this assumed case) or rejects a petition, the other party may claim the costs of the proceedings only as a creditor in bankruptcy. In contrary, such costs will be discharged as debts of the bankruptcy estate. The creditors in bankruptcy may pursue their claims against the debtor only in the bankruptcy proceedings.

(b) Private foreclosure v. bankruptcy proceedings

The creditors in bankruptcy may pursue their claims against the debtor only in the bankruptcy proceedings and proceed as described above.

2.5 Recourse of a secured creditor to self-help remedies

Under the Act on Ownership and other Real Property Rights[8] , the pledgee has the right to protect its pledge against any person denying pledgee's pledge, acting unlawfully, preventing or interfering with the exercise of the pledge by the pledgee. If a pledgee is to exercise those rights before the courts, it has to prove the existence of pledge and the respondent's act of preventing or interfering with the exercise of the pledge.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

The concept of a trust and thus the role of security trustee is not recognized in our jurisdiction. Also, the concept of parallel debt is not upheld.

3.2 Specifics of taking and enforcing security by a security trustee or agent

As already stated above, the security trustee or agent is not recognized under the Croatian law. However, in case of the syndicated bank loans, it is usual to have a security agent registered in the competent registry as the beneficiary of the security interest. In such event, it is important that the relationship among the banks forming a syndicate is regulated, including the right of the security agent to enforce the security interest on behalf of other syndicate members, in a separate agreement, i.e. intercreditor agreement. The security agent will have to act as joint and several creditor of each and every obligation of the borrower towards each finance party. If there is no joint and several creditorship formed between the security agent and banks forming a syndicate, it is questionable whether the security agent could be registered as the pledgee under the Croatian law. There is no court practice to that end and we are currently experiencing legal uncertainty.

Namely, under the Croatian law, the pledge can be established only in favour of the creditor having a particular claim against the debtor; thus, establishing the pledge under the Croatian security documents in favour of the security agent not having any kind of claims against the Croatian obligors, might be challenged as null and void. As a general note there is no publicly available court practice regarding establishing of the security interest in favour of the security agent. On the other hand, the Croatian law does not recognize the concept of parallel debt and such concept has not yet been tested before the Croatian law. Also, there is a legal discussion between the legal scholars that there are arguments based on which the parallel debt might be considered null and void.

To avoid the negative consequences, there are several ways to resolve the problem with the security agent:

a) The security agent becomes part of the bank's syndicate; thus becoming one of the lender, The question which might arise here is whether security agent is eligible to become the lender under the facility agreement.

b) Declaring the security agent as joint and several creditor of each and every obligation of the obligors toward each of the finance party under the finance documents and agreeing that the security agent shall have the right to register on its behalf the Croatian security interest.

3.3 Precedents

The concept of the security agent acting as joint and several creditor of each and every obligation of the borrower towards each finance party has not yet been tested by the Croatian courts.

[8] *Official Gazette of the Republic of Croatia No. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006,146/2008, 38/2009, 153/2009, 90/2010, 143/2012*

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1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

Greek law does not recognise the Group as a separate form of a legal entity per se. To this end, legal entities are to be treated as autonomous regardless of the fact that they may belong to the same group, and the simple fact of affiliation between entities is not by itself legally sufficient to conclude that the affiliates share the same interests.

In that sense, Greek law provides for certain restrictions and limitations regarding intragroup (guarantees or other securities) in order to prevent entering into transactions, which the legislator considers objectively to be to the detriment of the grantor. The relevant legal frame only applies to Greek sociétés anonymes, i.e. companies with a share capital of at least EUR 24,000 limited by shares (save for banks or financial institutions in the ordinary course of business).

Under the Greek Codified Law on Sociétés Anonymes (Article 23a of the Codified Law No 2190/1920[1]) , as amended and currently in force, upstream and side stream lending is, in principle, prohibited while the granting of upstream and side stream guarantees and security interests is subject to extensive limitations. In order for such an upstream and side stream guarantee and/or security to be permitted and valid, the following conditions must be cumulatively satisfied:

(i) the guarantee and/or the security must serve the grantor's corporate interest (and a report of the grantor's Board of Directors ("**BoD**") demonstrating such interest must be submitted to the shareholders' General Meeting ("**GM**") as per below);

(ii) the grantor must maintain the right of recourse against the affiliated debtor in favour of which the grantor grants the guarantee and/or the security;

(iii) the affiliated debtor's creditors enjoying such upstream guarantee/ security shall be satisfied post satisfaction of the claims of the grantor's creditors (existing at the time when publication requirements under (vi) are fulfilled) unless the latter creditors have consented to the debtor's creditors enjoying such upstream guarantee/ security being satisfied in priority;

(iv) a BoD report submitted to the shareholders' GM should demonstrate that the transaction serves the grantor's corporate interest;

(v) the granting of guarantee/ security in favour of the affiliated debtor must be approved by the grantor's GM; and

(vi) the resolution of the GM approving the decision needs to be published in the Official Government Gazette or the company's registered website.

However, the Codified Law No. 2190/1920 was changed (by Law No. 4013/2011[2]) to facilitate intragroup financings: upstream and side stream lending is now permitted and the granting of guarantees and/or securities does not require compliance with the abovementioned conditions, provided that the accounts of the security provider are consolidated with the accounts of the intragroup company in favour of which the security is provided or both sets of accounts (of the security provider and the intragroup company in favour of which the security is provided) are consolidated by the same (third) entity. Furthermore, if the third entity by which the grantor and the recipient of the loan are consolidated is a foreign company (having its seat either in the EU or in a third non-EU country), an equivalent consolidation method must be followed by such entity (theory supporting that IFRS is an equivalent consolidation method).

The rationale behind this amendment, which has been passed during the financial crisis and must have taken into account the lack of liquidity in the financial market, was to permit entities belonging to the same group of companies to raise funds amongst

[1] *Greek Codified Law No. 2190/1920 on Special Provisions on Sociétés Anonymes as recently amended by Laws No. 4281/2014 4156/2013, 4111/2013, 4072/2012, Presidential Decree 86/2011, 4013/2011, 3884/2010 and 3604/2007 hereinafter the "Codified Law No. 2190/1920".*

[2] *Law No. 4013/2011 on the Formation of a Uniform Independent Authority on Public Contracts and Central Electronic Register of Public Contracts – Replacement of the 6th chapter of the Law under No. 3588/2007 (Bankruptcy Code) – Prebankruptcy rehabilitation procedure and other provisions.*

themselves provided the corporate interest of the entities and the group were preserved. Such common corporate interest appears to derive from and be proven by the fact that they somehow need to and ultimately do consolidate. The amended provisions have not yet been tested in practice, hence the courts have not interpreted the new financial assistance frame, which is not as clear as the previous set of rules as per the letter of the law.

All other intragroup agreements require GM approval taken with a two thirds majority vote of the share capital represented in the GM, unless they fall in the scope of the company's ordinary course of business. In practice, such approval may even be given post execution of the agreement unless shareholders representing at least one twentieth of the share capital represented in the GM have not objected thereto. For listed companies, the concepts of a "group" and "related party transactions" are defined in accordance with IAS 24 and such transactions require approval by the GM, even if they qualify as ordinary course transactions, if their value exceeds 10 per cent of the company's total assets.

1.2 Financial assistance

According to the Codified Law No. 2190/1920 (Article 16A), a société anonyme cannot, under the penalty of nullity, grant guarantees or securities in rem with the purpose of acquisition of its shares by third parties, unless the following conditions apply:

(i) The aforementioned transactions are carried out under the responsibility of the solvency, The solvency of the third party or any contracting party, as the case may be, needs to be diligently investigated.

(ii) The aforementioned transactions are carried out following a decision of the General Meeting, in accordance with the relevant provisions of the Codified Law No. 2190/1920 i.e. with the enhanced quorum and majority provided thereunder except if the articles of association of the company provide for higher percentages of quorum and majority[3] . A written report is submitted by the BoD to the General Meeting mentioning the reasons for the transaction, the benefit for the company, the terms of the transaction, the risks for the liquidity and solvency of the company, and the price of acquisition. Such report is subject to publicity requirements of the Codified Law No. 2190/1920.

(iii) The total financial assistance granted to third parties does not in any case result in the reduction of the total shareholder equity to an amount below of what is provided for by the Codified Law No. 2190/1920[4]. The company includes in the balance sheet, among the items of the liability accounts, a non distributable reserve, equal to the amount of the total financial assistance.

In case the contracting parties under (i) above are members of the BoD of the company or the parent company, or the parent company itself, or persons acting in their name but on behalf of the above persons or the parent company, the report under (ii) above needs to be accompanied by a report of a certified auditor accountant, showing that the transaction is not against the company's interest. In these cases Article 23A of the Codified Law No. 2190/1920 described above does not apply.

The restrictions under (i)-(iii) also apply to securities granted by subsidiaries of a société anonyme for the acquisition by third parties of shares of the parent company, as well as by general or limited partnerships in which the company is a general partner.

The restrictions under (i) – (iii) do not apply to transactions carried out within the context of current transactions of credit and financial institutions, as well as to transactions carried out with the purpose of share acquisition by or for the personnel of the company or its affiliates. In any case, such transactions cannot result to the reduction of the total shareholders equity below the amount provided by the Codified Law No. 2190/1920[5].

1.3 Types of security. Most often used type/s of security in practice

As opposed to in personam securities, the enumeration of in rem securities in the general provisions of Greek law (Greek Civil Code[6], hereinafter "GCC") is exhaustive, i.e. the parties may not contractually agree any other type of security. However, as explained below in detail, Greek laws provide for specific features and possibilities for the beneficiaries of securities, depending on the type of the secured claim and the security asset.

The types of security interests governed by Greek law, in brief, are as follow:

(a) Real Estate - Mortgage or Prenotation of Mortgage

[3] *Article 29 par. 3&4, Article 31 par. 1 and Article 16A.*

[4] *Article 44A.*

[5] *Article 44A par. 1.*

[6] *Presidential Decree No. 456/1984 as subsequently amended and currently in force.*

The establishment of a mortgage or of a prenotation of mortgage under the relevant provisions of the GCC (Articles 1257 seq. GCC) is the standard in rem security granted in relation to housing loans or business loans, especially where the funds for the repayment of the loan arise from the disposal or management of the property.

The main differences between a mortgage and a prenotation are:

(i) the nature of the security, since the prenotation is a mortgage conditional upon the issuance of a final ruling adjudicating the secured claim, i.e. a final ruling recognizing the validity and enforceability of the secured claim and the timely registration of such ruling; and

(ii) the legal title of establishment, i.e. for prenotations, a court ruling issued with or without the consent of the borrower under the procedure of interim remedies or payment order and for mortgages, a notarial deed (or court decision or by application of law in some cases).

In view of the considerable costs required for the establishment of a mortgage (notarial, Real Estate Registry registration fees), most banks opt for the establishment of a prenotation, since from the point of view of enforceability, ranking of the security and preferred right to the proceeds of the auction, there is no difference between a holder of a mortgage and a holder of a prenotation, as the latter is treated as a secured creditor of the property. The registration of the mortgage results in the perfection of the security and the determination of its ranking towards other mortgages on the same property, while, as regards prenotations, upon issuance and registration of the final decision adjudicating the claim, the beneficiary obtains a mortgage, and consequently ranking, valid retroactively as from the date of the prenotation.

(b) Pledge on movable assets

Possessory Pledge under the Greek Civil Code provisions

A pledge may be established on movable assets on which the borrower has full, bare or conditional ownership, as well as on transferable rights and claims. In accordance with the GCC provisions, the secured claim (either present or future) should be monetary or assessable in money and should be identifiable, in the sense that the contractual relationship creating the secured claim should be clearly determined in order for any future enforcement proceeding to be possible. The pledge is established by a notarial deed or a document having a certain date (such as documents served by an enforcement officer) and, as opposed to the notional pledge (see below), it requires the delivery of the pledged asset to the pledgee or, if otherwise agreed, to a third party. Moreover, in the case of a pledge on claims, the security is perfected by the notification of the pledge to the third party obligor (Article 1248 GCC).

The perfection of the pledge ensures the right to receive any benefits of the asset (e.g. dividends of shares, etc., unless otherwise agreed), as well as the priority right of the pledgee in auction proceedings.

Notional pledge and floating charge under Greek Law No. 2844/2000[7]

Greek Law No. 2844/2000 introduced the concept of the notional pledge, not expressly covered by the GCC, which, not only is efficient in practice (since it overcomes the burden of the pledgee to undertake the custody and the maintenance costs of the pledged assets), but also reinforces the safety of financial transactions by the introduction of publicity procedures. In particular, under the provisions of the said Law, a notional pledge, i.e. a pledge under which the pledgor reserves the possession of the pledged assets, may be established either on types of movable professional equipment (cars, machinery, etc.) as well as products in the form of raw material, semi processed or completed products ready for sale. Both contracting parties should be businesses or professionals, while the security should be granted for the purpose of covering the needs of the borrower's business or profession.

On the other hand, a floating charge that may be established on a group of movable assets or rights, ensures not only that the pledgor remains in possession of the assets (or rights) but may also dispose the pledged assets, so long as it duly replaces them with similar assets or rights. In addition, the said Law provides that the pledge or assignment of business claims (existing or future), with the exception of claims against consumers, may also be subject to the publicity procedure provided.

Pledge established in favour of banks and financial leasing companies under Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes

[7] *Law No. 2844/2000 on Contracts on Movable Assets or Claims subject to Publicity and Other Provisions of Granting of Securities relating to the formation of a pledge without transfer of possession and publicity of the agreements constituting securities over movable assets.*

Legislative Decree dated 17.7-13.8.1923 provides for security interests granted in favour of credit institutions licensed by the Bank of Greece[8] securing claims that are either existent or non-existent at the time of the establishment of the security. In case the claims are already existent, these may derive from any cause. In case the claims are not already existent, they may be secured by a valid pledge according to the Legislative Decree dated 17.7-13.8.1923, only if they derive from loans, promises for granting of a loan, or credit open account agreements.

The most common security granted under the provisions of the said Legislative Decree is the pledge over claims of the borrower against a third party; in such case, the perfection of the pledge results in the assignment of the claim to the bank. The advantages provided to banks under such provisions are: (i) the extensive right of the pledgees to dispose and collect the secured claims, since the claims are assigned to the former, whereas in the other types of pledges, the pledgee is only entitled to collect the security claims and (ii) the favourable provisions applicable to enforcement proceedings, under which the pledgee is entitled to collect the claim up to the secured amount and refund the surplus to the borrower.

Upon perfection of the pledge, the pledgeelending bank has the possession of the security claims. The argument that the provisions of the said Legislative Decree will also apply to security interests, established in favour of credit institutions lawfully established and operating in the EU, is justifiable and may be validly supported.

(c) Financial Collateral

Greek Law No. 3301/2004[9] transposed EU Collateral Directive into Greek law. The conditions for granting a security under the said provisions are:

(i) at least one of the parties should be, among others (1) a licensed financial institution such as a credit institution, an investment services firm, a financial institution as provided for under Article 2 par. 11 of Law No. 3601/2004, an insurance company, an undertaking for collective investments in transferable securities, a mutual fund, a leasing company, (2) a central bank, European Central Bank or the Bank for International Settlements, (3) certain types of governmental entities such as those managing public debt;

(ii) the other party must be a legal entity; and

(iii) the security is established on (1) cash, (2) financial instruments (shares and other instruments equivalent to shares and bonds and other types of debt instruments, provided they are negotiable on regulated markets, etc.) or (3) credit receivables.

The advantage of the said law is that it provides for the possibility of the secured creditor to use the financial collateral, and to acquire full ownership without a mandatory auction, should an event of default occur. Moreover, the pledgee is protected during enforcement procedures. Finally, the aforesaid law includes ringfencing provisions for financial collateral agreements, since such agreements may not be declared null and void upon commencement of insolvency proceedings subject to certain conditions.

1.4 Creation of security

General comment

One of the necessary elements to be included in each security agreement is the description of the object of the agreement, i.e. the efficient determination of the asset/ claim subject to security. In order for such determination to be sufficient and definite, the description should answer the question whether a particular asset/ claim is covered or not by the security agreement.

As regards the contracting parties, the determination of the security asset/ claims is examined taking into consideration the subjective concepts of the parties. However, a more objective and clearcut definition should be provided where the security agreement involves a claim against a third party in order to ensure the perfection and enforceability of the security agreement.

[8] *The letter of the Legislative Decree provides for submission thereto of companies having the legal form of a société anonyme, provided that such companies have acquired a special administrative permit (granted by the Ministry of National Economy) to use the provisions of such Legislative Decree in their favour. In practice the Legislative Decree applies only to banks and credit institutions licensed by the Bank of Greece and not to sociétés anonymes since the Ministry of National Economy may only grant the special permit, mentioned above, following a legal opinion given by a Committee which was never formed and which was abolished by Article 10 of Law No. 2741/1999 on Uniform Food Control Authority, Other Regulations concerning Matters Falling under the Competence of the Ministry of Development and Other Provisions concerning the introduction of certain amendments to the Codified Law No. 2190/1920 On Special Provisions on Sociétés Anonymes".*

[9] *Law No. 3301/2004 on Financial Collateral Arrangements, Application of International Accounting Standards and Other Provisions which transposed into Greek law the EU Collateral Directive.*

Real Estate

(a) Mortgage

Mortgage may be granted only over real estate property that may be liquidated, as well as over usufruct rights, and may be established by virtue of a notarial deed or a final court decision or by virtue of law. According to the GCC, in order for the security to take effect and establish priority in relation to other mortgagees, a mortgage has to be registered with the Real Estate Registry where the property is located.

(b) Prenotation of Mortgage

A prenotation of mortgage may be established only by virtue of a court decision. According to the GCC, a prenotation of mortgage has to be registered with the competent Real Estate Registry where the property is located in order for the security to take effect and establish priority in relation to other mortgagees. As mentioned above the difference between a mortgage and a prenotation of mortgage is that the former allows immediate satisfaction of the claim (immediate collection by the mortgagee of the relevant proceeds from the enforcement proceedings), whereas a prenotation may delay collection of relevant payment until final adjudication, i.e. final recognition of the validity and enforceability of the underlying claim.

Movable assets (inventory, stocks, etc.)

(a) Possessory Pledge under the GCC provisions

The establishment of a GCC pledge would require a notarial deed or a document having a certain date (such as documents served by an enforcement officer) and (i) in the case of pledge over movable assets, including shares, the delivery of the asset to the pledgee or to a third party (custodian) as agreed, (ii) in the case of pledge over claims, the pledge should be notified to the third party obligor.

(b) Notional pledge and floating charge

Both types of pledges are concluded in writing and the perfection is completed by the registration of a standardised form (including the fundamental provisions of the agreement) with the Movables Pledge Register as per the provisions of Greek Law No. 2844/2000[10] . Upon registration, the priority of payment between the borrower's creditors (pledgees) is determined on the basis of the date of registration of their pledge agreement.

(c) Pledge established in favour of banks under Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes

A pledge on the borrower's claims against a third party obligor is established by a written agreement (no notarial deed is required). Upon perfection of the security, the pledge agreement is binding both upon the borrower and the third party. Notwithstanding the above simplified process, there remains a requirement to notify a pledge over receivables to the debtor of such receivables by an enforcement officer.

Financial collateral

Greek Law No. 3301/2004 provides that, by way of deviation from the general provisions of the GCC, and Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes, as well as any other relevant provision of law requiring a certain form, the establishment, validity and conclusive effect of the financial collateral agreement is not subject to any formal act. However, in relation to in rem financial collateral granted on titles in a dematerialised form and listed on the Athens Exchange, such deviation does not affect the obligation to evidence the establishment of the security by means of a registration with the electronic system run by the Athens Exchange. In such case the security agreement should be certified in writing or by any equivalent means.

1.5 Perfection and maintenance of security

Real Estate

(a) Mortgage

The perfection of the mortgage is effected by the registration of the legal title of establishment in the competent Real Estate Registry. Under the GCC, any person having legal interest for the registration of the mortgage (the lender, the borrower, the bankruptcy administrator) may apply for the registration, acting on its own behalf or on behalf of any third party. Such application should be accompanied by the legal title of establishment, two summaries thereof, as well as any other document or evidence necessary for the registration (e.g. legalisation documents). The bank shall notify the borrower or the third party owner of the property by serving them a copy of the summary of the legal title of establishment within eight days from the registration; the omission of such notification does not affect the validity of the

[10] *Law No. 2844/2000 on Contracts on Movable Assets or Claims subject to Publicity and Other Provisions of Granting of Securities relating to the formation of a pledge without transfer of possession and publicity of the agreements constituting securities over movable assets.*

registration. Any assignment, pledge or change in the terms of the mortgaged claim shall also be noted in the Real Estate Registry.

(b) Prenotation of Mortgage

The court decision establishing a prenotation on a property should be registered in the competent Real Estate Registry under the aforementioned procedure applicable to mortgages, however, the registration should refer to a prenotation. Upon issuance of a non-appealable decision adjudicating the secured claim, the beneficiary should, within a timeframe of 90 days, apply for the conversion of the prenotation into a mortgage.

Charging movable assets (i.e. non-real estate assets, including inventory, stocks, etc.)

(a) Possessory Pledge under Greek Civil Code provisions

As mentioned above, the establishment of a GCC pledge would require a notarial deed or a document having a certain date (such as documents served by an enforcement officer) and (i) in the case of pledge over movable assets, the delivery of the asset to the pledgee or to a third party (custodian) as agreed, (ii) in the case of pledge over claims, the pledge should be notified to the third party obligor. Although there is no provision for a specific form of such notification (it may be performed orally, or in writing, expressly or not), it is recommended that the notification is served by a competent enforcement officer to the debtor or evidenced by a document having a certain date for reasons of legal certainty. Greek Law No. 2844/2000 provides for an option to register a GCC pledge agreement with the public book of the said Law in order to ensure its ranking priority.

(b) Notional pledge and floating charge

The perfection of both types of pledges is completed by the registration of a standardised form (which must include the main provisions of the agreement and be signed by the contracting parties) in a public book kept with the Movables Pledge Register located in the registered seat of the borrower or in the Athens Movables Pledge Register if the borrower is resident abroad. Upon registration, the priority of payment between the borrower's creditors (pledgees) is determined on the basis of the date of registration of their pledge agreement. The publicity of the pledge agreement is not mandatory, nor does it substitute the notification of the third party debtor.

Finally, according to Article 4 of Law No. 2844/2000, said pledges remain in force for 10 years from their registration and they may continue to be in effect if renewed at a pledgee's application to the Movables Pledge Register (which must be also notified to the pledgor) at least three months before the lapse of the aforementioned period of time.

(c) Pledge established in favour of banks under Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes

The written agreement mentioned above, by virtue of which a pledge on the borrower's claims against a third party obligor is established, is perfected by the service of the agreement to such third party by an enforcement officer. Upon perfection of the security, the pledge agreement is binding both upon the borrower and the third party.

Special Pledges

(a) Shares

The provisions of the GCC and/or the Legislative Decree 17.7-13.8.1923 applicable to the perfection of the common pledge apply to the pledge of bearer shares of sociétés anonymes mutatis mutandis, i.e. the pledge should be established by a notarial deed or a private agreement with a certain date (such as documents served by an enforcement officer) in case of a pledge established under the provisions of the GCC and a private agreement to be served by an enforcement officer in case of a pledge to be established under the provisions of the Legislative Decree 17.7-13.8.1923 and the shares have to be delivered to the pledgee. The same applies to the pledge of registered shares of sociétés anonymes, although there is no express provision in the law. A note of the pledge agreement should be endorsed in the body of the shares and signed by both contracting parties, as well as to the shares' and shareholders' registry of the issuer of the pledged shares, although such obligations do not constitute requirements for the perfection of the security, however they are necessary in order to legalise the pledgee towards the company.

(b) Bank Accounts

A pledge on bank accounts is usually established as a security interest in favour of credit institutions:

(i) under the provisions of Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes. Usually the bank in which the account is held is also the bank which benefits from the pledge, but this does not preclude the establishment of a pledge in favour of a party other than the bank where the account is held. The bank account pledge agreement must be served to the account bank.

(ii) under the provisions of Greek Law No. 3301/2004 since financial collateral arrangements may also be established on cash, including bank account deposits. In relation to the perfection of such agreements, please see comments on Movable assets above.

(c) Financial instruments (e.g. securities)

In relation to the perfection of such agreements, please see comments on Financial Collateral under Section 1.4 above.

(d) Intellectual Property

Without prejudice to the possibility and practical importance of establishing securities on intellectual property rights, please see comments on Movable assets, Common pledge under Greek Civil Code provisions above. Depending on intellectual property rights granted as collateral, the parties may need to notify the respective agreement to the authorities in which the relevant right is registered.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs incurred by the financed parties involve direct cost related to the establishment and perfection of the collateral (such as notary and registration fees), banking fees, cost for the evaluation of the assets, administrative and legal expenses to prove the good standing of the borrower and/or the collateral provider (if different from the borrower) and the status of the collateral, etc. However, the more substantial direct cost only will be indicated below as average overall estimate as cost per type of security is difficult to be made.

(a) Mortgage

The notary fees for execution of a mortgage deed, should a mortgage be executed in such manner, ranges from 0.2 per cent up to 1 per cent depending on the secured amount (the higher the amount, the less is the notary's public fee) plus VAT (currently amounting to 23 per cent). Apart from the notary's public fee, in order to register a mortgage there is a fee amounting to 1.3 per cent on the secured amount payable to the Lawyers' Pension Fund. The Registrar's fee for registration of the mortgage amounts to approximately 0.8 per cent of the value of the secured claim plus EUR 60 for issuance of the relevant Certificates and Summary Sheets by the competent Real Estate Registry. In addition, in case the agreement out of which the secured amount arises is subject to stamp duties and such stamp duties have not been paid, then the registration of the mortgage is also burdened with the said amount[11] (currently amounting to 3.6 per cent).

Furthermore, according to Article 14 par. 2 of Greek Law No. 3156/2003[12] , in case of bond loans secured in rem the registration, transfer or deletion of any property rights, such as the registration of a mortgage, in the Real Estate Registry is taxed with the fixed amount of EUR 100, irrespectively of the amount secured, provided that certain requirements are met[13]. Finally, unless otherwise agreed, the registration fees are borne by the borrower.

(b) Prenotation of Mortgage

A prenotation of mortgage costs significantly less than a mortgage, since it can be registered, as mentioned above, only by virtue of a court decision, without involving any notary fees. Therefore, the fees payable are the Registrar's and the Real Estate Registry fees mentioned above: the flat fee is also applicable as per above.. Finally, the cost for the conversion of a prenotation to a mortgage amounts to EUR 9 plus EUR 4.5 per summary sheet issued by the competent Real Estate Registry, depending on each Real Estate Registry, while, the costs for re-registration of a prenotation in the event of change of the beneficiary amount to EUR 100 per registration. The fees payable for the registration of the prenotation are also borne by the borrower.

(c) Notional pledge and floating charge

The registration of a notional pledge or floating charge under Greek Law No. 2844/2000[14] amounts to approximately 0.8 per cent on the secured amount, plus EUR 4.5 per summary sheet issued by the competent Real Estate Registry. Again, the flat fee of EUR 100 is also applicable, as per the above.

1.7 Recognition of security governed by foreign law

In any proceedings brought before Greek courts for the enforcement of contractually agreed obligations, the choice of

[11] *Banking loans are not burdened with stamp duties.*

[12] *Law No. 3156/2003 on Bond Loans, Securitization of Claims and Claims Deriving from Real Estate and Other Provisions.*

[13] *In cases of bond loans governed by Law No. 3156/2003 where there is only one bondholder or only one bond issued or if there is more than one bondholder), then the registration fees to be paid, depending on the relevant Real Estate Registry, may not amount to the fixed sum of EUR 100 but to fees payable in all other cases where no bond loan of Law No. 3156/2003 is involved.*

[14] *Law No. 2844/2000 on Contracts on Movable Assets or Claims Subject to Publicity and other Provisions of Granting of Securities relating to the formation of a pledge without transfer of possession and publicity of the agreements constituting securities over movable assets.*

foreign law will be recognised as a valid choice and such law will be applied in matters concerning the interpretation, substance and form of such agreement, except that a Greek court would not apply foreign law if the latter is considered to be contrary to Greek public order, or Greek rules of mandatory application, and that, under the Greek rules on conflicts of laws, certain matters such as those relating to capacity, are excluded from the choice of law.

The above remarks on the law chosen by the parties, would primarily apply to any security agreement falling within the scope of Rome I Regulation, i.e. mostly assignment of rights by way of security and not rights in rem such as mortgages and pledges. Rights in rem are excluded from the application of Rome I Regulation and if brought before a Greek court, they would fall under the scope of GCC Article 27 Rule on the conflict of laws regarding such rights, whereby the law applicable in such situation would be the law of the location of the encumbered asset. If a court judgement (including a judgement which orders enforcement of foreign law claims in Greece) is obtained in a member state of the European Union (other than Denmark), it will be recognised in Greece, subject and pursuant to the provisions of Brussels Regulation.

A judgement, obtained in a state other than a member state of the European Union or a contracting state to the Brussels Convention or the Lugano Convention, will be recognised in Greece without being reviewed as to the merits and with no further procedure, provided that it meets the following requirements of Article 323 of the Greek Code of Civil Procedure (the "**GCCP**")[15]:

(i) such judgement constitutes res judicata (final judgement) according to the law of the state in which it was rendered;

(ii) such judgement has been issued by a court having jurisdiction according to Greek law;

(iii) the unsuccessful party to the proceedings leading to such judgement has not been deprived of its rights to participate in such proceedings and defend itself otherwise than by application of the rules of procedure applicable to nationals of the jurisdiction of the court which rendered the judgement;

(iv) such judgement is not contrary to a previous judgement issued by a competent Greek court concerning the same dispute between the same parties and constituting res judicata; and

(v) such judgement is not contrary to the Greek principles of boni mores or public policy.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

According to the provisions of the GCCP, enforcement of in rem security must be implemented through judicial procedure, with the exception of certain limited instances provided by law. As a matter of fact, this procedure could be initiated by both secured and unsecured creditors in order to proceed with the liquidation of the debtor's assets (whether subject to security or not), through a public auction. Nevertheless, in practice, the non-secured and non-privileged creditors have less chance to have their claims even partially satisfied out of the proceeds of the debtor's assets.

The aforementioned procedure does not apply to secured creditors under Law No. 3301/2004 with regard to financial collateral, where the creditor is entitled to realise its collateral without any prior judicial or enforcement procedure.

Furthermore, no judicial proceedings are required for liquidation of mortgages or pledges in accordance with the provisions of the Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes; however, enforcement in the process provided under such decree is not followed in practice by the banks due to the fact that the most common security provided by debtors is prenotation of mortgage to which enforcement procedure under such decree is not applicable.

Temporary suspension measures:

During the financial crisis a series of debtor protection measures were implemented which suspended enforcement procedures under certain conditions and terms set out by the respective legislation. However, said suspension measures imposed by law and concerning real estate property in Greece constituting the primary residence of a debtor have been are no longer applicable due to the expiry of the respective temporary legislation. At present, pursuant to the Ministerial Decisions no. 49214/21.07.2015 and 57384/31.08.2015, enforcement actions against debtors are prohibited in general until the end of September 2015. This restriction is likely to be repeatedly extended during the period of capital controls as a protection of debtors against the financial limitations deriving there from.

[15] *The GCCP was codified by the Royal Decree No 657/1971 and was then translated into modern form of speech by the Presidential Decree No 503/1985. Since then it has been amended by various laws, amongst which are the following: 2207/1994, 2915/2001, 2943/2001, 3994/2011, 4055/2012, 4072/2012, 4138/2013, 4139/2013.*

(b) Enforcement grounds

In order to initiate enforcement procedure, a creditor (whether secured or unsecured) must obtain an enforceable title vested with a writ of execution. The five types of enforceable title provided by the GCCP are the following:

(i) final court decisions;
(ii) interim court decisions;
(iii) notarial deeds;
(iv) arbitral awards; and
(v) payment orders ("diatagi pliromis").

Payment orders ("diatagi pliromis") are the most common type of enforceable title and are issued by the competent court within two days to three months following application of the creditor (who also may draft the relevant order to expedite process). The debtor is not heard at that stage. With regard to petitions for issuance of payment orders to be filed as of 1 January 2016 onwards, and pursuant to the provisions of Greek Law No. 4335/2015 which has reformed entirely the judicial and enforcement process ("new GCCP"), creditors who bear a claim against debtors residing abroad have also the right to file for a payment order against the latter.

(c) Procedure

The enforcement proceedings are triggered upon delivery to the debtor by an enforcement officer instructed by the creditor, of a certified copy of the enforceable title together with a notice for payment (Article 924 of the GCCP).

Foreclosure of debtor's assets can start three working days from delivery of such notice, provided that the debt remains due (Article 926 of the GCCP). The enforcement officer drafts a report, describing the seized assets, which then serves upon the debtor, the Tax and the Municipal Authorities. Such report determines, among others, the date and place of the forced sale of the assets, their actual value and the starting price. With regard to enforcement procedures to commence as of 1 January 2016 onwards, and according to the provisions of the new GCCP, the auction date shall be set at least seven months but no later than eight months after the date of the completion of the seizure.

The debtor may object to the enforcement proceedings before the court and possibly achieve suspension of the enforcement by challenging the payment order. Apart from that, the GCCP provides numerous other legal recourses, which can be filed against the acts of enforcement, which very often give to the debtor the opportunity to delay the whole procedure for two to seven years.

Pursuant to the provisions of the new GCCP, the stages during which the debtor may raise objections against enforcement proceedings are limited basically to two, one before and one after the auction. In particular, the debtor may challenge (a) all steps of the enforcement process, as well as the creditor's claim, within 45 days from the foreclosure date and b) the validity of the last enforcement action (i.e. the auction) within 30 days from the auction in case of movable property and within 60 days from the date of the transfer deed's registration to the Real Estate Registry in case of immovable property.

Furthermore, according to the provisions, of the new GCCP if the debtor files multiple annulment petitions against enforcement acts of the same stage, the clerk's office shall set the same hearing date for all of them. Moreover, the debtor is deprived of the right to appeal before the Supreme Court against the judgement of the Court of Appeal, ruling over its petition against the enforcement process or the auction, unless the enforceable title is an arbitral award or a notarial deed, in which case a petition for cassation before the Supreme Court is allowed.

The mandatory auction is conducted by a notary public ("enforcement agent"), appointed by the creditor. When all suspension measures are terminated, the seized assets are liquidated through a public mandatory sale, taking place before the lower instance court of the area where the foreclosed assets are located (Articles 959 and 998 of the GCCP).

According to the current law provisions, the first bidding price of the seized movable assets cannot be lower than two thirds of their actual value, as estimated by the enforcement officer. With regards to seized real estate property, the first bidding price cannot be lower than its taxable value, as set by the Greek Ministry of Finance (Articles 954 and 995 of the GCCP).

Pursuant to the provisions of the new GCCP, the amount of guarantee to be submitted by anyone who wishes to participate in the auction is reduced from 100 per cent to 30 per cent of the minimum auction price (Article 965 of the GCCP).

Moreover, pursuant to the Article 995 par. 1 of the new GCCP, effective for enforcement procedures commencing as of 1 January 2016 onwards, the minimum auction price shall be set at the commercial value of the auctioned immovable property.

A presidential decree stipulating all of the technical details and way of estimation of the commercial value of the auctioned immovable property is expected by 1 June 2016. In the meantime, according to the grandfathering provisions of the new GCCP, the minimum auction price cannot be set lower than the immovable property's taxable value if for the auctioned immovable property an objective value for the calculation of tax is provided. Furthermore, in case of a fruitless auction a new one must be conducted within the next 14 days. No formalities are required for the conduction of the second auction and the minimum auction price must be set at one half of the estimated value of the property.

Creditors, wishing to have an entitlement to the liquidation proceeds, have to announce their claims before the enforcement agent (a copy of such notification needs to be delivered to the debtor and to the enforcing creditor within the same deadline), within 15 days after the mandatory auction. With regard to enforcement procedures commencing as of 1 January 2016 onwards, according to Article 972 of the new GCCP, the deadline within which the creditors have to announce their claims before the notary public is limited to 5 days prior to the auction.

The liquidation proceeds are distributed by the enforcement agent between the executing creditor and the announced ones as per the ranking of claims provided by law (Articles 975 et seq. of the GCCP). Such ranking may also be contested by any party who took part in the proceedings, provided that it has a legitimate interest.

(d) Ranking of claims

After deducting the enforcement expenses (i.e. enforcement agent's fees, enforcement officer's fees, etc.), the following claims shall be satisfied preferentially in the order in which they are listed below as per the provisions of Articles 975, 976 and 977 of the GCCP as presently in force:

(i) claims for the funeral or hospital treatment of the debtor or his wife and children, arising during the last 12 months before the auction date. Compensation claims resulting from over 80 per cent disability of the debtor (except for claims for monetary satisfaction of moral damage) if such claims came into existence before the date of the auction or declaration of the bankruptcy;

(ii) alimony claims of the debtor and his wife and children, arising during the six months preceding the auction date or declaration of bankruptcy. Claims of the State for due but unpaid VAT and increments thereof (Article 33 of Greek Law No. 4141/2013); With regard to enforcement procedures commencing as of 1 January 2016 onwards, the claims of State deriving from unpaid VAT and increments thereof, as well as from unpaid taxes and increments thereof are listed in the following class under (iii).

(iii) teachers', employees' and lawyers' claims arising from employment relationships having arisen in the two years preceding the date of the first auction. As of 1 January 2016, the aforementioned privilege on teachers' claims and on lawyers' fees not of a fixed periodical nature is abolished. Compensation claims grounded on termination of the employment contract are ranked in this class irrespectively of the time when they arose. Claims of Social Security Organisations arising until the auction date or the date of bankruptcy declaration;

(iv) claims of farmers or agricultural cooperatives arising from the sale of agricultural products if they have come into existence in the 24 months preceding the date of the auction or the date of bankruptcy declaration;

(v) claims of the State or of the Municipalities for taxes imposed based on the income produced by the auction property or the nature of the auctioned property and concerning the year of the auction and the year before the auction; With regard to enforcement procedures commencing as of 1 January 2016 onwards, the State's claims for unpaid and due withholding and attributable taxes together with their increments and interest charged thereon are listed in the class under (iii), whereas in the present class are listed State's and Municipalities' claims of any other nature and cause.

(vi) claims of the Athens's Stock Exchange Guaranteed Fund against the debtor if the debtor is an investment firm and the claims of such Fund have come into existence two years before the auction date;

(vii) claims arising from maintenance costs of the foreclosed asset;

(viii) claims secured by a pledge or mortgage;

(ix) claims arising from costs for the production and the recollection of fruits.

Provided that claims for non-payment of VAT under (ii), as well as claims under (iii) have been fully satisfied, then the remaining action proceeds are allocated as follows:

- in the event that there are claims under (ix) and claims under (i), (ii), (iv), (v) and (vi), the latter group of claims is satisfied in priority;
- in the event that there are claims under (vii) and (viii), and under (i), (ii), (iv), (v) and (vi), then the one third of the

remaining auction proceeds is allocated for all claims under (i), (ii), (iv), (v) and (vi) and the remaining two thirds of the auction proceeds are allocated for the claims under (vii) and (viii).

- provided that the aforementioned claims under (i) to (viii) have been satisfied as above, any auction proceeds remaining from the aforementioned one third or two thirds are allocated for the claims of the other of the above two categories, which are not fully satisfied. Finally, any remaining amounts are distributed pro rata to the remaining creditors which have announced their claims.

Claims of the same rank shall be satisfied proportionately, unless the law provides otherwise. With regards to the claims' allocation, the new GCCP provides as follows:

Creditors holding a general privilege (i.e. Social Security Organisations, Public Sector, lawyers and employees) will be satisfied from one third of the auction proceeds, whereas the remaining two thirds will be allocated to the secured creditors. If unsecured creditors have lodged their claims before the public notary, then secured creditors will be satisfied from 65 per cent of the auction proceeds, creditors holding a general privilege shall be satisfied from 25 per cent of the auction proceeds and unsecured creditors from the remaining 10 per cent. If again there are no claims of creditors holding a general privilege, then secured creditors will be satisfied from 90 per cent of the auction proceeds and unsecured creditors from the remaining 10 per cent. Finally, if there are no claims of secured creditors, then creditors holding a general privilege will be satisfied from 70 per cent of the auction proceeds and unsecured creditors from the remaining 30 per cent.

(e) Costs

If the enforceable title is a court judgement or a payment order, the initial court fees are calculated at approximately 1.1 per cent over the amount of the claim. Depending on the nature of the claim, the state fees for the issuance of a writ of execution vary from zero per cent to three per cent over the claimed amount and/or the accrued interest thereof. Furthermore, if the foreclosure is enforced against real estate, the foreclosure should be registered with the competent Real Estate Registry, which fees are calculated at approximately one per cent over the amount of the claim.

Fees payable to the enforcement agent and the enforcement officer depend on the nature of the enforcement act taken from time to time and on the number of auctions that will take place (e.g. if no preferred bidder is chosen in the first auction). By way of estimate, the fees and the expenses of the above persons for conducting all acts of the enforcement proceedings up to the auction are in the range of EUR 4,000 to EUR 8,000. Additional costs are also likely to arise such as payments for legal counsels, property appraiser, etc., which cannot be quantified upfront.

(f) Other significant reforms introduced by the new GCCP

- **Abolition of court hearings;** The new GCCP (Article 237) abolishes open hearings with regard to lawsuits to be filed as of 1 January 2016 onwards; the court process is basically carried out by submission to the court of the relevant litigation claims and counterclaims, as well as of evidence. The case is discussed before the court (1st hearing date), without the physical presence of the litigant parties' lawyers and witnesses, unless the presiding judge considers that witnesses should be examined before the court. In such a case, a 2nd hearing date, within the same judicial year is set to which both parties will be summoned.
- **Parallel enforcement proceedings;** According to the former legal framework, parallel enforcement proceedings initiated by different creditors on the same asset (movable as well as immovable property) were not permissible; however, according to the new GCCP (Articles 958 par. 2 and 997 par. 5) with regard to enforcement procedures to commence as of 1 January 2016 onwards, this restriction is abolished, thus allowing creditors to take over the liquidation process of assets already seized by other creditors.

2.2 Private foreclosure

(a) General

As a general rule, the process of foreclosure and mandatory auction of the debtor's assets is very formal and cannot be replaced by others types of liquidation, such as private foreclosure or private sale of the debtors' assets.

Nevertheless, Greek law provides creditors with two types of extrajudicial enforcement procedure:

(i) According to Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes, which regulates special issues for credit institutions, banks and companies having the legal form of a société anonyme, where the creditor secured by a mortgage or a pledge established by virtue of such decree, such creditor is entitled to proceed with liquidation of the collateral without any former court verification of its claim;

(ii) The advantage of Law No. 3301/2004 on financial collateral arrangements is that it provides for the possibility of the creditor to liquidate its financial collateral only by exercising its contractual right, without a court approval or a mandatory auction or any other formal procedure as described in Section 2 and 2.2(c), should an event of default occur. Such exception applies for financial collateral established on financial instruments and is subject to the following pre-conditions:

- the pledge agreement being concluded in writing;
- the pledged asset (financial instruments) to have a market value.

(b) Enforcement grounds

Foreclosure may start without any enforceable title on the basis of the grounds determined in the relevant finance and security documentation (e.g. occurrence of an event of default as defined therein or failure of the debtor to remedy an event of default within a specified period), or in the absence of specific clauses – upon occurrence of an event of default as determined by the governing law.

(c) Procedure

Legislative Decree 17.7-13.8.1923 on special provisions for sociétés anonymes

If a debtor is in default of meeting its financial obligations, the pledgee or mortgagee serves him, by means of an enforcement officer, a notice for payment. If the debtor fails to pay the amounts due, then the debtor may initiate, through a notary public, an auction for the sale of the pledged or the mortgaged asset. The debtor may challenge in court the notice of payment and the auction itself. In some cases, exercise of such right of the debtor does not result in suspension of the auction proceedings. The general ranking of claims is applicable as envisaged in Section 2.1(d) above.

Law No. 3301/2004

In the event of default:

(i) the collateral taker is entitled to realize, (e.g. sell the pledged collateral and settle its secured claims by the sale proceeds) or appropriate[16] the financial collateral, (e.g. acquire the pledged financial instruments and settle its secured claims with their value) without any court approval, or

(ii) a close out netting provision comes into effect.

The close out netting provision is a provision of a financial collateral arrangement, or in the absence of any such provision, any statutory rule by which, on the occurrence of default the obligations of the parties:

- are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or
- an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

Furthermore, in case of default, the collateral taker's obligation to return to the collateral provider the asset subject to collateral is extinguished, and the collateral taker shall be satisfied by retaining title, even in the case of winding up proceedings in respect of the collateral provider. Again, after completion of the financial collateral foreclosure, (regardless of the manner) the amounts exceeding the secured claims are to be paid immediately to the collateral provider. Enforcement under Law No. 3301/2004 does not provide for any invitation or possibility to other creditors to announce their claims, hence the general ranking of claims envisaged in Section 2.1(d) above does not apply.

(d) Costs

The official costs are generally not substantial.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

The person or legal entity must be qualified to be pronounced bankrupt. The above capacity encompasses by definition most types of legal entities such as Sociétés Anonymes, Limited Liability Companies, General Partnerships, etc. The Greek Bankruptcy Code ("**GBC**")[17] regulating bankruptcy proceedings integrate also options for debt-restructuring plans (the pre-bankruptcy rehabilitation procedure in accordance with Article 99 et seq. of the GBC and the post-bankruptcy reorganisation plan in accordance with Article 107 et seq. of the GBC).

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

[16] *Appropriation of pledged financial instruments and of credit claims is possible only if in the security financial collateral arrangement the parties have agreed on the appropriation and on the valuation of the financial instruments.*

[17] *Law No. 3588/2007 Greek Bankruptcy Code, as amended by Laws No. 3858/2010, 4013/2011, 4055/2012, 4072/2012 and very recently by Law 4336/2015 as analysed below.*

Institution of bankruptcy proceedings and preliminary bankruptcy proceedings (if applicable)

In order for a debtor to be declared in bankruptcy, he must be unable to meet timely its due payment obligations in a permanent and generic way ("cessation of payments"). Moreover, if the cessation of payments is not yet manifested, but is imminent and accompanied by a forecast that the merchant will not have the necessary liquidity to fulfil its current and future monetary obligations in spite of expected collections, the merchant is entitled to file the respective application himself.

Bankruptcy is declared following an application of a creditor, the public prosecutor of the first instance court, or the debtor. In any event, the debtor is obliged to file, without culpable delay, at the latest within 30 days after the cessation of payments, an application to the insolvency court for the declaration of bankruptcy.

The competent insolvency court for declaration of bankruptcy is the multi member first instance court, in the district of which the debtor has its centre of main interests. Interventions of creditors, in favour or against the application for bankruptcy, are also exercised with a statement that is recorded in the minutes (followed by written pleadings).

Provisional measures affecting rights of secured creditors

After the filing of the application for the declaration in bankruptcy, anyone who has a legitimate interest may file an application for provisional measures. The president of the competent court can order any measure he considers necessary to prevent every harmful, for the creditors, change to the debtor's estate or a reduction in its value. Among other measures, the president of the court may order the suspension of individual actions as well as the prohibition of the disposal of assets by or to the debtor.

The suspension of individual actions does not apply to secured creditors in relation to the secured as-sets of the insolvency estate, except for the debtor's assets that are connected operatively and directly with his business activities or with the production unit or the exploitation thereof by the debtor (e.g. factory). Also, the special provisions on the forced execution of financial collateral agreements (Law No 3301/2004) are not prejudiced by the suspension.

(c) Approval of the claims of secured creditors in bankruptcy proceedings (if applicable)

The receiver is obliged to procure for the publication of a summary of the decision declaring bankruptcy inviting the creditors, including the secured creditors, to convene before the Reporting Judge at the time and place which is set at the decision, in order to announce and verify their claims.

The receiver makes specific reference to the time periods within which the announcement should take place, which is one month as of the publication of the decision which declared the bankruptcy in the Bulletin for Judicial Publications of the Lawyers' Fund.
After the lapse of the deadline for announcement, the receiver must draw up a table of all creditors announced, noting the amount of each claim, whether this is accompanied by a lien or security in rem and its ranking.

The verification of claims is made by the receiver before the Reporting Judge and commences three days after the lapse of the deadline for the announcements. The deadline for the verifications is set by the Reporting Judge and cannot exceed one month, but may be exceptionally extended for another two (2) months.

(d) Challenges affecting secured claims

Revocation acts: According to the GBC, the following acts are considered detrimental and are avoided:

(i) Donations and gratuitous transactions in general, as well as these in which the consideration, which was received by the debtor, was disproportionally smaller in relation to his dispensation;
(ii) Payments of non-matured debts;
(iii) Payments of matured debts by another means and not in cash or by the agreed consideration;
(iv) Creation of security in rem, including the registration of prenotation of mortgage or the granting of other securities of contractual nature for pre-existing obligations, for which the debtor had not assumed a corresponding obligation to security, or for securing new obligations that were assumed by the debtor so as to replace those that pre-existed.

Also, every bilateral act by the debtor or payment by him of his matured debts that was made after the cessation of payments and before the declaration of his insolvency may be revoked, if the counter party, at the time the act was conducted, was aware that the debtor has ceased his payments and that act was detrimental for the creditors group. The above acts may be revoked if found to have taken place within a time period of maximum two years

before the declaration in bankruptcy ("suspect period" or "hardening period") except if expressly otherwise provided in the GBC or other Greek specific laws (such as the law on financial collateral agreements, Law No. 3301/2004). However, in case of fraudulent acts of the debtor, the time period of revocation may extend to five years before the declaration in bankruptcy.

(e) Enforcement of secured claims upon debt-restructuring

(i) Rehabilitation procedure

- The procedure may be initiated by debtors facing financial difficulties as well as debtors who have already reached the state of the cessation of payments following a submission of the relevant application together with the necessary documentation before the Bankruptcy Court. If requested by the creditor through the relevant application, the individual enforcement acts against the debtor's assets may be suspended. The suspension, may extend to the claims against guarantors and other co-debtors (in case of serious business or social reasons), whereas it entails the prohibition of the disposal of any immovable property of the debtor (and co-debtors). The suspension does not affect the rights from financial collateral agreement in the sense of Law No. 3301/2004. The rehabilitation agreement shall be concluded within a deadline of four months starting from the date of the issuance of the court decision, which may be extended but in no case exceed twelve months in total.
- The conclusion of the agreement can be conducted either after the respective decision of a creditors' meeting by a quorum of creditors representing at least 50 per cent of the totality of claims and a majority of 60 per cent of claims of creditors represented at the meeting (including at least 40 per cent of creditors secured by in rem securities or holding a special lien or a prenotation of mortgage), or by means of confidential negotiations with creditors representing the above majority percentages (60-40 per cent) of the totality of the claims. In the event that the court proceeds to the ratification of the agreement, then the latter shall have a binding effect even on dissenting creditors.

Unless otherwise provided in the rehabilitation agreement or by special provisions of the law, the ratification of a rehabilitation agreement with creditors does not affect the security contracts with third parties (concerning the provision of securities either personal or in rem).

(ii) Reorganisation Plan

The reorganisation plan is a platform set by frame rules on which the debtor and its creditors arrange on a contractual basis the course of the bankruptcy procedure. The outcome of the reorganisation plan may be either the continuation of the debtor's operation under the existing or a new corporate structure, the sale or lease of the debtor in whole or in part to a third party as a "going concern" or the liquidation and allocation of its assets to the creditors.

The reorganisation plan which shall include all information regarding the debtor's financial status and the likely impact of the plan on the creditor's rights is submitted for approval to the competent court. In case of acceptance, the plan is afterwards submitted for approval to the creditor's assembly (creditors representing 60 per cent of the total claims, including 40 per cent of secured claims). The plan is finally ratified by a court decision, which is binding upon all creditors of any category and constitutes a writ of execution.

Upon the approval of the plan, the bankruptcy proceedings are terminated and the debtor assumes the operation of the business aiming at the fulfilment of the terms of the plan, whereas the creditors assume their claims against the debtor within the terms of the plan.

The rights of in rem secured creditors, such as mortgages, prenotations of mortgages and pledges are not affected unless otherwise specified in the plan. In any event, these rights are maintained in favour of the new claim as this is formulated by the plan, unless the creditor secured by these agreed otherwise.
If the reorganisation plan is not endorsed, the bankruptcy estate is placed into liquidation. Following the liquidation and the distribution of the liquidation proceeds, the bankruptcy procedure is terminated.

The approved plan acquires a binding effect for all creditors of any class and legal form, regardless of whether they have announced their claims or not.

Law No. 4307/2014 on "Measures for addressing the impact of the financial distress and for the enhancement of employment: incentives for the regulation of debts of small businesses and professionals and extraordinary procedures of settlement of business debts", includes an extensive list of persons that fall under

the provisions of this Law and provides an analysis of claims that can be stricken off or limited down depending on the amount of capital and interest due.

The main change introduced by the above Law is that it provides additional restructuring procedures, which may be used for the above categories of debtors, in cases where the debts are owed to creditors (including necessarily at least one financial institution), in addition to those provided by the GBC, such as an "extraordinary procedure for the adjustment of merchants' debts", which may be initiated by the debtor and can have a binding effect for the totality of creditors and an "extraordinary procedure of special administration", which may be initiated by the creditors.

In a manner similar to the provisions on the restructuring procedures of the GBC, in both above procedures, the suspension of the individual enforcement measures of creditors against the debtor may be granted by the competent court; the suspension, if granted, automatically extends to the claims against co-debtors (such as guarantors), whereas it entails the prohibition of the disposal of any immovable property and any business equipment of the debtor and co-debtors.

The acceptance of an application for "extraordinary procedure for the adjustment of merchants' debts" may result in the suspension of enforcement acts of creditors, if so is provided in the agreement with creditors. The suspension in such a case extends to claims against guarantors and co-debtors. On the contrary, the acceptance of an application for an "extraordinary procedure of special administration" automatically results in the suspension of enforcement acts of creditors.

(iii) Ranking of claims

On August 14th, 2015, Law No. 4336/2015 regarding the ratification of the Draft Financial Assistance Facility Agreement with the European Stability Mechanism (ESM) and regulations for the materialisation of the Credit Facility Agreement was voted by the Greek Parliament.

This Law introduced amendments to the already existing GBC, including changes on the provisions concerning the ranking of the claims. This Law shall enter into force as of the date of the signature of the Credit Facility Agreement between ESM, Greek Republic, bank of Greece and HFSF (Hellenic Financial Stability Fund). Therefore, the below mentioned ranking applies to all bankruptcy procedures to be initiated after the effective date of the above Law. After deducting the judicial fees, the fees relating to the administration of the bankruptcy estate, including the remuneration of the receiver, and the claims of the team creditors, the creditors are ranked in the distribution list, as follows:

- the claims from the financing of the debtor of whatever nature, in order to ensure the continuation of its activities and of the payments under the rehabilitation agreement or and the reorganisation plan of the business;
- the outstanding VAT claims, as well as claims arising from labour contracts and claims of the Social Security Organisations;
- The claims held by the Greek State and Local Government Organisations.

The basic change introduced by the above new Law concerns the VAT claims that are now ranked together with the claims arising from labour contracts and the claims of the Social Security Organisations, whereas before its enactment such claims were ranked before them and followed the claims of the Greek State, Social Security Organisations and the claims arising from labour contracts. Lastly, by specific reference of the GBC, the claims of all other creditors (without a general or special privilege) follow the rules for the distribution of the forced sale proceeds provided in the GCCP (please see above under 2.1 for the case that secured creditors are present together with creditors holding general privileges and unsecured creditors) and are satisfied pari passu from the liquidation proceeds of assets of the debtor within the framework of bankruptcy.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement v. bankruptcy proceedings

From the declaration of insolvency all individual recovery measures of the creditors against the debtor for the satisfaction or the fulfilment of their insolvency claims are suspended ipso iure.

(b) Private foreclosure v. bankruptcy proceedings

As mentioned above, the suspension of individual actions does not apply to secured creditors in relation to the secured assets of the insolvency estate. This means that secured creditors may proceed

to or continue the process of enforcement of the secured asset and be satisfied by its sale according to the provisions of the GCCP. However, after the stage of the union of creditors is reached, the procedure is conducted by the receiver.

2.5 Recourse of a secured creditor to self-help remedies

Please see above under Section 2.1.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

The concept of a trust is not, in principle, recognised under Greek law. In the limited occasions where Greek courts have ruled over trust related cases (mostly of hereditary nature), they have not recognised the trust as such but have taken into account the special terms of the trust deed and other evidence to rule as to the ownership of the trust assets on an ad hoc basis. In most cases, the Greek courts acknowledge the trustee to be the owner of the trust property while acknowledging the trustee's liability towards the beneficiaries for any mismanagement of such property[18].

In addition, Greek law does not recognise the right of an entity to receive security on behalf of another, meaning that, in principle, the creditor enjoying such security is to execute itself, on its own name and behalf, the relevant security agreement. While, in practice, it is not customary for syndicated financings with multiple lenders to have all secured creditors executing the respective security agreements, this should be envisaged as the most legally safe, though conservative as approach, solution for the granting of securities to a syndication of lenders.

One deviation from such principle provided under Greek law, is the capacity of the bondholders' agent and the Greek Bond Law (No. 3156/2003)[19] to represent the bondholders and take securities in their name and on their behalf. The bondholder agent is entitled to execute any relevant security document as agent of the bondholders and, subject to a relevant authorisation by the bondholders, proceed with any step necessary with the enforcement of securities and allocation of the relevant proceeds amongst the bondholders. A similar provision is included in Law No. 3389/2005[20], in accordance with which, in case of a Private Public Partnership, where the Private Public Operator ("PPO") has more than one lender, in rem securities may be established in favour of the lenders' agent, appointed in accordance with the relevant credit agreement concluded between the PPO and its lenders. In view of the above concerns, in financing transactions, other than Greek bond loans, where a security trustee is to receive and manage security on behalf of the bondholders, a parallel debt structure is used to establish borrower's obligation to pay to the security trustee any monies due to any of the secured parties, as if the security trustee was the sole lender or if it has a joint and several claim along with the other secured lenders for the full amount of the secured liabilities vis-à-vis the borrower.

This structure, however, has not been tested in practice. If such structure were to be brought before the Greek courts, validity of the parallel debt would primarily be assessed on the basis of the arrangements between the lenders as to the underlying cause for the security trustee's "joint creditor" capacity.

3.2 Specifics of taking and enforcing security by a security trustee or agent

No particular procedure or formality should be identified at a statutory level given that the security trustee or collateral agent capacity is generally not regulated under Greek law. In terms of practice, one could envisage a duly executed power of attorney to the security trustee by the secured lenders authorising signature and management of the security agreements, however this solution has not been used to date since it is the parallel debt structure that prevails in Greek and international legal practice.

3.3 Precedents

Kindly refer to Section 3.1 above on the customary practices of taking security on behalf of multiple lenders.

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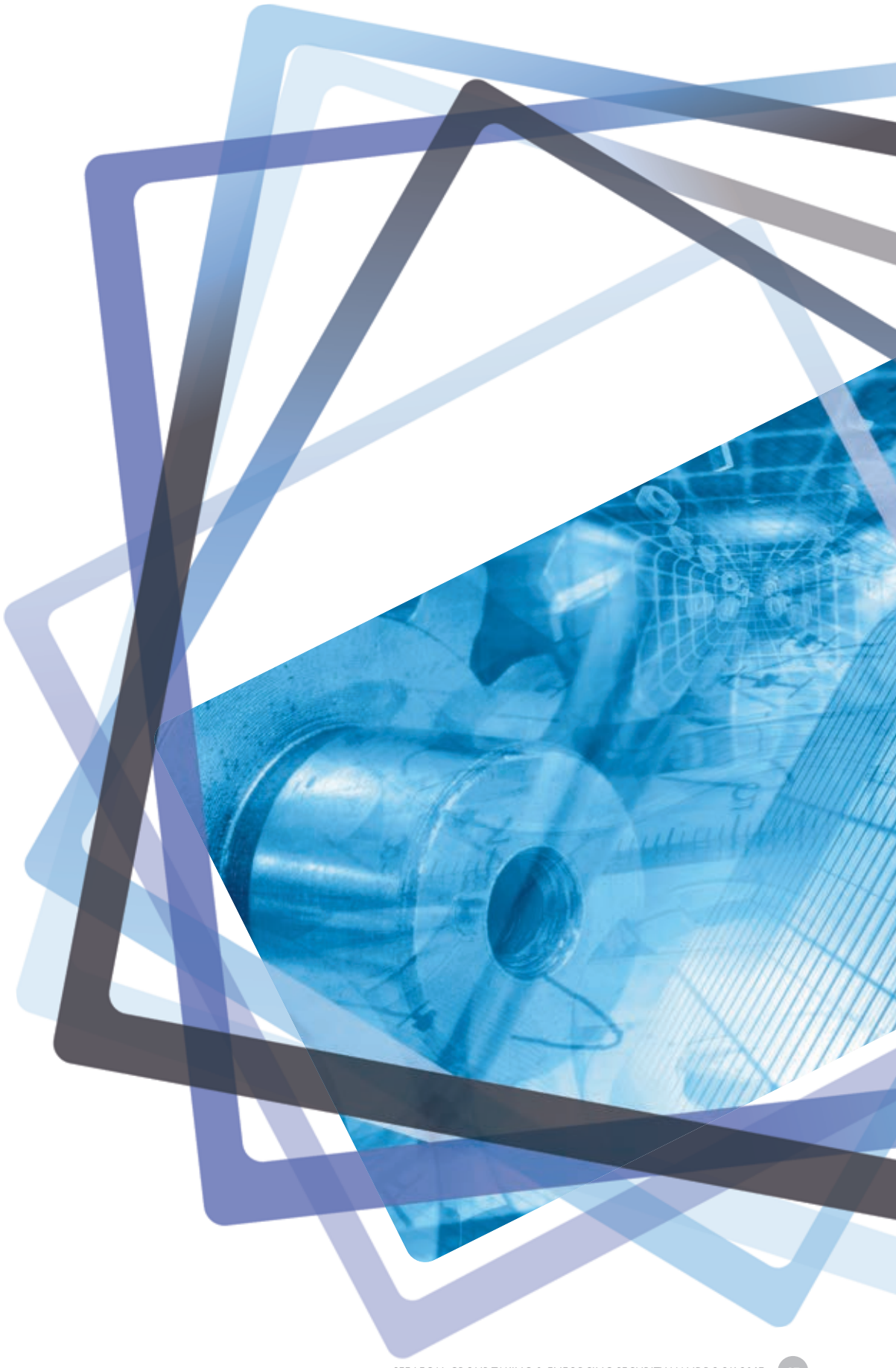
[18] *From a legal theory point of view, this type of judgement results from the application of private international law principles of either automatic recognition (reconnaissance, Anerkennung) of the trust's legal effects in combination with the adaptation method (adaptation, Vergleichungsmethod), whereby the court applies Greek law provision that it considers as equivalent to the trust arrangements.*

[19] *Published in the Official Gazette of the Hellenic Republic on 25 June 2003*

[20] *Private Public Partnerships Law No. 3389/2005, as amended by Law No. 3483/2006, Law No. 3375/2009, Law No. 3746/2009, Law No. 3840/2010, Law No. 3982/2011, Law No. 4013/2011 and Law No. 4146/2013*



KALO ASSOCIATES
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KOS

KOSOVO

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

According to the applicable Kosovo legislation, there are no legal provisions impeding the granting of the corporate guarantees, except for the insolvency test, which by using the balance sheet test permits to verify the solvency of the company under Kosovo law. A company may guarantee with its movable and immovable properties the obligations of its affiliates. There are no special legal provisions regarding the form of the guaranty, but as aforesaid, there is no legal provision which impedes and restricts a company to become a guarantor for its subsidiary and affiliate, except for the insolvency test. Generally, a company may grant third party security (typically by charging its shares or assets) in support of a debt of another person, if such does not contradict the requirements under Article 165 of the Law on Business Organisations[1] (see below).

1.2 Financial assistance

According to Article 165A of the Law on Business Organisations, a joint-stock company may not lend or provide money or any type of credit (including pledging its own shares) to any person or organisation for the purpose of enabling that person or organisation to purchase or acquire, directly or indirectly, whether from the company or a third party, any share or security of the joint-stock company.

This prohibition shall not apply to transactions concluded by banks and other financial institutions in the normal course of business, or to transactions relating to an Employee Shares Scheme, provided that the acquisition would not lead to the net assets becoming less than the statutory capital plus non-distributable reserves. A joint-stock company shall not accept its own shares as security for any obligation owed to the joint-stock company by another person or organisation.

1.3 Types of security. Most often used type/s of security in practice

Kosovo legislation recognises two types of security: (i) security in rem (including pledge and mortgage), and (ii) personal security, such as personal guarantee (bail). There are several types of security mechanisms available under the Kosovo legislation, which are as follows:

(a) Mortgage

According to Article 172 of the Property Law[2] , the mortgage means the creation by agreement or by law of an interest over immovable property, which gives the mortgage creditor ("mortgagee") the right to initiate foreclosure proceedings for such immovable property for the purpose of satisfying the secured obligations which are sufficiently identifiable and have fallen due.

The mortgage is created by agreement between the owner of immovable property unit ("mortgagor") and the mortgagee and by registering it in the competent Real Estate Registry.

According to Article 160 of the Property Law, the mortgage is extended to (i) a principal item, (ii) fruits, and (iii) other fixtures.

Pursuant to Article 174(1) of the Property Law, the mortgage agreement shall be concluded in writing and the signature of the mortgagor and mortgagee is required to be certified at the court of the competent territorial jurisdiction where the immovable property is located or at the public notary. The Property Law provides that in the case of default of the debtor or any other breach of contract, the mortgagee acquires the right to sell the immovable property encumbered by mortgage by submitting a lawsuit at the competent court in order to satisfy the secured claim.

Moreover, the Property Law recognises the commercial mortgage, called "trade association mortgage", which can be enforced by extra judicial means, i.e. without initiation of lawsuit in court. The mortgage is qualified as trade association mortgage if: (i) the mortgagor is a merchant or a business enterprise, and (ii) the mortgagee is a financial institution. The trade association mortgage

[1] *Law No. 02/L-123 on Business Organisations*

[2] *Law No. 03/L-154 on Property and Other Real Rights*

can be subject to foreclosure with consent of the owner of the encumbered property as expressed in the corresponding power of attorney.

(b) Pledge

Under the Property Law, a pledge is a security interest giving actual possession of collateral to the pledgee or a third person, as agreed between the parties, to be held as security for the fulfilment of an obligation ("possessory pledge"). Hence, a non-possessory pledge is effective against third parties (egra omnes) upon registration of the pledge in the Movables Pledge Register.

1.4 Creation of security

(a) Mortgage

The creation of a mortgage requires:

(i) a contract entered between the mortgagee and the mortgagor, which must be certified by the competent court or must be a notarised contract;

(ii) registration in the Real Estate Registry.

Moreover, a mortgage may secure a future obligation or a conditional obligation. In such case, the secured credit must be clearly defined.

The mortgage agreement secures the entire amount of an obligation(s) including unpaid principal and interest, penalties (if any), costs of enforcement and sale of property unit encumbered with mortgage.

The mortgage can be created also by force of law (statutory mortgage). Article 175 of the Law on Property stipulates that a mortgage agreement is void if it provides that the use of the property by the creditor before the maturity of the secured claim is allowed. Moreover, the invalidity of the mortgage contract is caused also if it contains any provision that prohibits the mortgagor to further encumber or sell it.

(b) Pledge

The pledge agreement between the pledgor and the pledgee must be in writing. Notarisation of such pledge agreement is not mandatory. Delivery of the tangible asset to the pledgee or to a person nominated by the pledgor, and the identification of the pledgee is also required for the validity of the possessory pledge. The non-possessory pledge is perfected upon registration of the pledge agreement in the Movables Pledge Register.

A pledge may also secure a future obligation or a conditional obligation. In such case, the secured credit must be clearly defined.

1.5 Perfection and maintenance of security

(a) Mortgage

Any mortgage should be registered with the respective Real Estate Registry, and shall not be enforceable unless so registered. The mortgage agreement must contain at least the following compulsory requirements, such as: (i) names and addresses of the mortgagor and the mortgagee as well as of the debtor of the secured claim, unless he is the same person as the mortgagor; (ii) the exact description of the immovable property which is to be mortgaged, including its location, full address, or (iii) other clear information regarding the location and cadastral number; (iv) a certificate of possession and, if necessary, a certificate regarding the use of the immovable property unit; (v) the amount of the claim secured by the mortgage, including the interest rate; if applicable, the maximum amount agreed upon; (vi) a warning written with capital bold letters that in the case of delayed payment or occurrence of the other stipulations agreed upon, the mortgagee may initiate an enforcement process, which might result in the loss of ownership of the mortgaged immovable property or in eviction from it; (vii) further agreements between the parties if legislation in force requires so; (viii) other elements which are mandatory requirements; (ix) the date the agreement was signed; (x) certified signatures (by public notary or court) both of the mortgagor and the mortgagee. The absence of one of the aforesaid mandatory requirements will trigger the invalidity or nullity of the security.

The Property Law provides that the mortgage becomes effective as of the date of its registration also in the case of future or conditional credits.

Article 118 of the Property Law has endorsed the principle of "first in time, first in rights" with regard to the ranking of security claims over the same property encumbered by several creditors. In the cases when the rights over securities were registered at the same time, they have equal ranking. Therefore, the ranking of claims is determined according to their date of entry (registration) into the Real Estate Registry or Movables Pledge Register. The Property Law does not expressly recognise the pari passu (equal footing) principle.

Moreover, according to Article 119 of the Property Law, any change of ranking of the rights over the same property encumbered by

several claims requires consent of the holder of the rights that is affected by the change of ranking. The priority in ranking is acquired upon registration of such right in the Real Estate Registry or Movables Pledge Register. According to Article 193 of the Property Law, the mortgage agreement is terminated (i) upon termination of the security claim (i.e. credit agreement); (ii) if the mortgagor becomes an owner of the encumbered property; (iii) if the property encumbered is sold to satisfy the secured claim.

(b) Pledge

The pledge is to be evidenced by a certificate (normally, an executed pledge agreement or notarised with mutual consent of the parties) in order to be enforceable vis-à-vis third parties. According to Article 136 of the Law on Property, the agreement must contain a description of the pledge property (item) and of the secured obligation. Normally, a pledge shall be considered as perfected after signing of a pledge agreement and after the pledgee or a third person as agreed between the parties has actual possession of the collateral. However, set out below are cases in which further steps are required for such purpose, depending on the type of the collateral involved:

(i) in case of pledge of an interest in a company, the pledge must be kept in the company's records;

(ii) the pledge of the registered shares of a joint-stock company is to be recorded in the shareholders' registry.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs incurred by the financed parties involve direct cost related to the establishment and perfection of the collateral (such as, notary and registration fees), banking fees, cost for the evaluation of the assets, administrative and legal expenses to prove the good standing of the borrower and/or of the collateral provider (if different from the borrower), and the status of the collateral, etc. However, some direct costs will be indicated below as average overall estimate of the cost per type of security.

(a) Mortgage

The notary fees for execution of a mortgage deed are not determined by the Fees for Public Notary Services approved by the Chambers of Public Notary. The notary fee is determined by the value of a secured obligation and the immovable property encumbered by a mortgage. The fee for registration of the mortgage over one immovable property in the relevant Real Estate Registry can range from EUR 20 up to EUR 200. If through a mortgage contract, the mortgage is registered over more than one immovable property, then the state fee applicable for the registration equals the fee for one property multiplied by the number of properties.

(b) Pledge

As in case of execution of a mortgage deed, the notary fees are not determined by the Fees for Public Notary Services. The notary fees are determined by the value of a secured obligation or by the value of a pledge item. The Movables Pledge Register fees for registration of the pledge is up to EUR 5. Moreover, the Movables Pledge Register's fee for issuance of a declaration for registration of a pledge is 40 euro cents.

1.7 Recognition of security governed by foreign law

Under the Property Law "a foreign security right of any form or denomination which has been validly acquired and is still valid according to the laws of the jurisdiction in which it was created has the effect of a valid and effective right of pledge, if the asset encumbered by the security right is brought on the territory of Kosovo". On the other hand, the mortgage agreement is exclusively governed by domestic law (i.e. Kosovo Law) and it is subject to exclusive jurisdiction of Kosovo Courts.

2. ENFORCEMENT OF SECURITY

2.1 Judicial Enforcement

(a) Enforcement of the obligations secured by a mortgage/ pledge

According to Article 22 of the Law on Enforcement Procedure[3], the enforcement of the mortgage/pledge can be instituted only on the basis of an enforcement order, on the grounds of a final court judgement. However, the pledge can be enforced based on arbitral awards which is a writ of execution, but mortgages can be enforced only based on a final court judgement, because immovable property cases are under the exclusive jurisdiction of the courts.

The Law on Enforcement Procedure provides that the enforcement can be initiated only upon request by the creditor.

[3] *Law No. 04/L-139 on Enforcement Procedure*

However, the Law on Enforcement Procedure provides that "any notary execution documents are considered to be writs of execution". Also, court settlements are writs of execution.

A court judgement which orders the enforcement of the credit is executable if it has received enactment, and if the time limit for voluntary execution has expired. The time limit for voluntary execution starts to run from the day of delivery of the execution order to the debtor until the last day assigned by the court judgement. The time limit for voluntary execution is set by court order.

The sale of sequestrated items is done through the verbal public auction, or through direct settlement between the purchaser on one side and the enforcement officer on the other. The procedure for the sale of items is determined through a court decision in order to achieve the most suitable price for the debtor. A public sale auction is organised by an enforcement officer or by the third person authorised by the court.

According to Article 94 of the Law on Enforcement Procedure, the evaluation of seized inventory will be done by an enforcement authority (i.e. private enforcement officer) or by special expert, the expenses being in charge of the party who proposes the enforcement. During this process the property is generally in the custody of the debtor or creditor or third person as authorised by court.

Moreover, the Law on Enforcement Procedure provides a possibility to organise two rounds/ sessions of public auction. In cases when the second auction has failed, the court may organise another public auction upon request of the execution creditor. Upon the failure of the third session of public auction, the creditor may request from the court and/or private enforcement agent the delivery of encumbered property to the creditor who initiated the enforcement.

These provisions are appropriately applicable to a mortgage.

(b) Procedure of Enforcement of the Shares/Ownership in Business Organisations

The shares or securities also can be subject of enforcement based on a request by the creditor. The competent court for enforcement of shares is the court where the legal seat of the debtor is located. Moreover, to decide on the enforcement proposal against shares and other registered securities and on founding capital or additional capital of a joint-stock company or any other form of business organizations, the private enforcement officer has competence to decide on the enforcement proposal and to carry out its enforcement. Exceptionally, in the case of request from the creditor and upon the consent of the debtor, the shares may be transferred to the creditor in their nominal value, instead of payment. Also the shares may be sold on a stock exchange or by mediation as appointed by court.

Rights of parties to protection

The debtor is entitled to object the petition for execution of credit through objection or appeal. The objection is presented to the court which has issued the decision within 7 days from the day of receipt of the decision. The objection does not have a suspension effect.

Also a third person may present an objection, such objection by third party does not suspend the execution procedure. The aim of the objection initiated by a third party is intended to proclaim the execution order as non-permitted for the part corresponding to the right(s) of such third party.

While appeal against court order which allows realisation of credit can be filed by parties and persons who claim the realisation of their credits from price of the sale of encumbered property. The appeal does not have a suspensive effect i.e. the decision for enforcement will be executed within three days if the petitioner does not propose the adjournment of execution until the issuance of the second instance court decision.

Delivery of the collateral to the pledgee after its seizure

After seizure of collateral, the enforcement officer shall hand over the collateral to the pledgee or the person duly appointed by the pledgee. The proceeds of sale shall cover the fees of seizure as provided in the Law on Enforcement Procedure, reasonable expenses for storage, repairing of collateral for the purpose of sale and other reasonable expenses incurred by the pledgee. The outstanding balance shall be utilised to fulfil the obligations under the security charge agreement.

The collateral may be sold in whole or in part by public auction, as a whole or in commercial units, but always in commercially reasonable manner and at a price that is close to the commercial market value of the collateral.

(c) Ranking of claims

The following claims shall be satisfied preferentially in the order in which they are listed:

(i) expenses of the execution procedure;
(ii) claims of the pledged creditors, which are realised according to priority ranking and before the execution petition;
(iii) claims of the execution petitioner;
(iv) claims of the pledged creditors, which are realised according to priority ranking and after the execution petition;
(v) rewards for personal servitude, which are cancelled upon sale of corresponding real assets.

2.2 Private foreclosure

According to Article 323(1) of the Enforcement Procedure, the private enforcement officer, in the performance of authorizations entrusted to him by this law, shall be appointed by the Minister of Justice in the territory of the basic court. He/she decides on the actions arising from his/her competency in the enforcement of allowed enforcement, and undertakes enforcement actions.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

The Bankruptcy Law[4] defines the conditions and procedures for the liquidation or reorganisation of legal persons in bankruptcy and determines the rights and duties of the parties affected by such proceedings. Limited to our information, the bankruptcy legislation has never been implemented in practice due to the absence of legal infrastructure for implementation of such law and of the licensed bankruptcy administrators. The competent court to handle bankruptcy cases is the Basic Court of Pristina – Commercial Department.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

Institution of bankruptcy proceedings

The Bankruptcy Law provides that a creditor or a group of creditors can submit a bankruptcy petition to a court. As well a debtor can initiate bankruptcy proceedings, upon approval of the board of directors of the company or of the managing body of the company. Once the petition for the initiation of the bankruptcy procedure has been submitted, there is an option for either (i) adoption of a reorganisation plan for endurance of the legal person, or (ii) liquidation of the company.

Provisional measures affecting rights of secured creditors

The secured creditors, pursuant to the Bankruptcy Law, are considered as insolvency creditors and are entitled to preferential satisfaction compared to unsecured ones. However, the secured creditors cannot enforce their security immediately.

(c) Approval of the claims of secured creditors in bankruptcy proceedings

Pursuant to the Bankruptcy Law, insolvency creditors shall submit their claims in writing to the bankruptcy administrator. According to its Article 28, from the date of submission of the petition until the appointment of the administrator, the sale, disposal, alienation, transfer or rental of any property of the estate, in whole or in part, including any transfers for the satisfaction of existing obligations, or creation of pledges or mortgages against the debtor's property, is prohibited unless there is a court decision

(d) Challenges affecting secured claims

According to Article 33 of the Bankruptcy Law, from the date of submission of the petition, all actions or acts of any kind aimed to satisfy the claim against the debtor shall be suspended, due to the imposition of moratorium by the court.

Also, the court may challenge transfers one year prior or after the submission of the petition for initiation of the bankruptcy proceedings if it determines that such transfers: (a) were made for less than the fair value; (b) reduced the total assets in the debtor's estate; (c) were undertaken with the intent to harm the interests of the creditors; or (d) occurred after the submission date of the petition but before the appointment of the bankruptcy administrator.

(e) Enforcement of secured claims upon debt-restructuring

(i) **Reorganisation plan**

The reorganisation of the debtor is possible in case the reorganisation plan is approved by the Creditors' Committee and the Bankruptcy Court. The Creditors' Committee consisting of secured and unsecured creditors is eligible to vote the reorganisation plan. The bankruptcy administrator is obliged to implement and supervise the plan for reorganisation. The reorganisation plan is approved if it is accepted by simple majority (by value of amounts) of each class of creditors.

[4] *Law No. 2003/4 on Reorganization and Liquidation of Legal Persons in Bankruptcy*

(ii) **Settlement agreement**

The Bankruptcy Law does not expressly provide for a settlement agreement as an alternative to the reorganisation plan. However, prior to submission of the petition for the opening of the bankruptcy proceedings, the debtor is not prohibited to try to achieve an out-of-court restructuring.

(iii) **Ranking of claims**

The Bankruptcy Law provides for the following order/ ranking of class of creditors to be satisfied in the case of liquidation due to bankruptcy:

(i) State unpaid obligations (i.e. taxes) if they are prior liens by force of law;

(ii) Secured claims, less reasonable cost of sales expenses;

(iii) Priority claims, including:

- court expenses;
- administrator's expenses;
- administrator's remuneration;
- administrative expenses required for the maintenance and protection of the estate, including expenses due to the continuation of the operation of the debtor after the petition submission date;
- reorganisation expenses in the cases of aborted reorganisation;
- reorganisation financing and credit in the cases of aborted reorganisation;
- payments and expenses for personnel during the time of case administration; and
- creditor's committee expenses.

(iv) Claims for unpaid prepetition employees' wages (limited to two monthly salaries or wages per person);

(v) Unsecured claims, including wage claims not subject to higher priority treatment; and

(vi) Claims of the shareholders, founders, participants or partners of debtor.

As part of the process of the validation of claims, the bankruptcy administrator shall evaluate the validity, extent and priority of claims presented against the debtor and of any related perfected pledges or registered mortgages, and shall submit an objection where adequate grounds to do so exist. Pledges and mortgages shall be valid if they are perfected or registered in accordance with the applicable law.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement vs. bankruptcy proceedings

Upon submission for bankruptcy and imposition of moratorium, all acts and procedures aimed to satisfaction of claims by creditors (each class) will be suspended. All claims against the debtor are suspended and writs of execution cannot be enforced. All pending and new claims should be submitted to the bankruptcy administrator.

As for the secured creditors, pursuant to the Bankruptcy Law, they are considered as insolvency creditors and are entitled to preferential satisfaction compared to unsecured ones. However, the secured creditors cannot enforce their security immediately. With respect to liquidation proceedings initiated directly, the administrator has the exclusive right to sell immovable secured property for the period of ninety (90) days following the case acceptance date, and movable secured property for the period of sixty (60) days following the case acceptance date.

(b) Private foreclosure vs. bankruptcy proceedings

As indicated above, all actions and claims against the debtor will be suspended as a result of imposition of bankruptcy moratorium upon submission. Moreover, as explained above, the private foreclosure is not applicable in Kosovo.

2.5 Recourse of a secured creditor to self-help remedies

In Kosovo, the mandatory enforcement can be instituted only based on an enforcement order. The mortgage or the pledge can be enforced on the grounds of final court judgement or arbitral award further to the issuance of a writ of execution.

Upon obtaining such enforcement order by the Bankruptcy Court, the creditor may forward the enforcement order to the enforcement officer to begin the execution.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

Internationally, a trust is often used to save time and costs when creating security in finance deals. In such cases, a security trustee is appointed to hold and manage the collateral under the finance transaction in its own name, but for the benefit of a syndicate of creditors (i.e. to establish and perfect the collateral, to ensure its prompt maintenance, to undertake foreclosure in the event of default, etc.).

The "trust" and the role of a security trustee (or agent) (as defined above) are not expressly regulated by Kosovo law. This poses important practical questions related to the use of a security trustee in finance transactions where Kosovo legal system is relevant.

3.2 Specifics of taking and enforcing security by a security trustee or agent

No specifics could be identified at a statutory level considering the fact that the role of a security trustee or collateral agent is generally not regulated by the Kosovo laws.

3.3 Precedents

Limited to our information, there is no precedent or jurisprudence in this regard.

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MONTENEGRO

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

Corporate benefit

Under the general rules of the Companies Law[1] ("Companies Law"), the management of the company is obliged to act in the company's best interest, and may be liable to the company and its shareholders in case of breach of this duty. Breach of this duty when granting security does not trigger annulment of security.

1.2 Financial assistance

Under the Companies Law, joint-stock companies are prohibited from granting loans or providing security for acquisition of their shares. Prohibition of financial assistance does not apply to financial organizations or to subsidizing the acquisition of shares by employees of the issuer. The same prohibition applies to limited liability companies with the exception that the prohibition can be removed by a unanimous decision of the general assembly.

A company can take pledge on its own shares only if the amount of the secured claim does not exceed the amount of contribution paid for the pledged shares.

1.3 Types of security. Most often used type/s of security in practice

(a) Mortgage

Mortgage, i.e. pledge on immovable property, is regulated by the Law on Proprietary Legal Relations[1] ("**Property Law**"). A mortgage may be established over: (i) a building; (ii) a land; (iii) a separate part of a building, such as apartment, business premises, garage, etc.; and (iv) a construction permit. Mortgage can also be established on a co-ownership stake in the immovable.

Pledge on aircrafts or ships is regulated by the same rules as pledge on immovable, but shall not be further elaborated in this paper.

(b) Fiduciary transfer of ownership

Fiduciary transfer of ownership is regulated by the Property Law. Fiduciary transfer of ownership assumes transfer to the creditor of ownership on immovable assets or shares for the purpose of securing the creditor's claim. Upon settlement of the claim by the debtor, the creditor is obliged to restore ownership to the debtor and enable undisturbed exercise of ownership rights by the debtor. The encumbered asset remains in possession of the debtor unless otherwise agreed.

(c) Pledge on movables

Pledge on movables and rights, including book entry securities, is governed by the Law on Pledge as an Instrument for Securing Claims[3] ("**Pledge Law**"). Pledge on book entry securities is additionally regulated by the Rules of the Montenegrin Central Depository Agency[4] . There are two types of pledge on movables in Montenegro: possessory pledge, perfected by actual or constructive delivery of the encumbered asset to the pledgee, and registered pledge, perfected by registration in the relevant public registry.

After the introduction of the registered pledge on movables into the Montenegrin legal system in 2002, the possessory pledge lost its commercial relevance. This type of pledge shall not be particularly addressed in this paper.

Registered pledge can be created on:

- movables;
- monetary and other receivables;
- shares;
- intellectual property rights.

It is also possible to create a floating charge on inventory.

(d) Financial Collateral

As of recently, financial collaterals[5] are regulated by the Law on Financial Collaterals , which came into force on 16 August 2012 ("**Financial Collateral Law**").

1 *"Zakon o privrednim društvima", Official Gazette of Montenegro, Nos. 06/02, 17/07, 80/08, 40/10, 36/11 and 40/11*
2 *"Zakon o svojinsko-pavnim odnosima", Official Gazette of Montenegro No. 19/09*
3 *"Zakon o zalozi kao sredstvu obezbjeđenja", Official Gazette of Montenegro, No. 38/02*
4 *"Pravila Centralne Depozitarne Agencije a.d. Podgorica", Official Gazette of Montenegro, No. 40/12*
5 *"Zakon o finansijskom obezbjeđenju", Official Gazette of Montenegro, No. 44/12*

The Financial Collateral Law introduces into the Montenegrin legal system the possibility of granting and taking financial collaterals in accordance with the international market practice among financial institutions, such as the practice documented under the International Swaps and Derivatives Association credit support documentation (including both title transfer and security approach). MFinancial collateral assumes pledge or transfer of ownership on financial instruments, money deposits and account balances or credit claims for the purpose of securing financial obligations. This form of security is available to a restricted circle of users, which includes local and international public organizations and financial institutions.

Pledge on financial collateral other than credit claims entitles the secured party to hold and use the collateral as if it were the owner of the collateral.

1.4 Creation of security

Pledge is created based on a pledge agreement (or a court decision) as iustus titulus. Mortgage, i.e. pledge on immovables, may also be created based on a unilateral statement of the mortgagor. Mortgage agreement or, as the case may be, mortgagor's unilateral statement, has to be executed in the form of notarial deed prepared by a notary licensed at the location of the immovable. The same formal requirement applies to an agreement on fiduciary transfer of ownership over immovables. In line with the market practice, financial collateral can be created pursuant to an oral agreement, provided there is written evidence thereof.

1.5 Perfection and maintenance of security

(a) Mortgage, i.e. pledge on immovables

Mortgage, i.e. pledge on immovables, is perfected by registration in the Real Estate Registry maintained by the Real Property Directorate. Priority is determined based on the day, hour and minute of the filing of an application for inscription of mortgage. There are no further maintenance requirements.

An application for inscription of mortgage can be filed by either the mortgagor or the mortgagee, along with a notarized mortgage agreement or, as the case may be, a unilateral statement of the mortgagor. Documents in a foreign language have to be accompanied with a certified translation into Montenegrin.

Mortgage is deemed perfected when registered in the Real Estate Registry. Inscription can be made upon the finality of the resolution allowing the inscription, after the expiry of eight days from delivery of such resolution to the mortgagor and the mortgagee, provided that no appeal has been submitted. The mortgagor and the mortgagee may waive their right to appeal the resolution, and thus shorten the abovementioned 8-day period.

(b) Fiduciary transfer of ownership

Fiduciary transfer of ownership on immovable assets is deemed perfected in the same manner as the mortgage (see above).
Fiduciary transfer of movables is also registered in the Real Estate Registry maintained by the Real Property Directorate. Fiduciary transfer of shares is perfected by inscription of the transfer in the Central Depository Agency.

(c) Pledge on movables

Pledge on movables, receivables and other claims, securities and intellectual property rights is perfected by filing of a pledge application with the Movables Pledge Register maintained by the Commercial Court in Podgorica. An application for registration of pledge can be filed by the pledgor or the pledgee with a power of attorney of the pledgor (a pledge agreement signed by the pledgor is deemed an authorization to the pledgee to file the pledge application).

In practice, the Movables Pledge Register may require additional documentation, not explicitly required by law, such as an excerpt from the Commercial Register for the pledgor or pledgee, etc. A pledge is valid for a period of three years and can be renewed by the pledgee filing a renewal request not later than within two years and nine months after the initial registration or, as the case may be, previous renewal.

A pledge on shares should be registered with the Central Depository Agency, in addition to the registration in the Movables Pledge Register. Such additional registration with the Central Depository Agency ensures priority over an earlier pledge that is registered solely in the Movables Pledge Register and ensures that pledge will continue to encumber the shares even after they are transferred to a third party. In addition to a pledge, one may register with the Central Depository Agency a blockade on pledged shares, which prevents the owner of pledged shares from trading with the shares.

A pledge on cash and instruments (such as bill of exchange or warehouse receipt) is perfected by physical delivery.

(d) Financial collateral

Perfection of security interest in financial collaterals depends on the type of collateral. Security interest in bookentry securities is perfected by registration with the Central Depository Agency. Security interest in money deposits or account balances is perfected by transfer to the account of the secured party. Security interest in credit claims is perfected at the moment of conclusion of the agreement on financial collateral.

1.6 Costs and expenses for creating, perfecting and maintaining security

The costs relating to registration depend on the type of encumbered asset. Apart from the registration fee, one has to take into account a notarisation fee, as well as the cost of translation of foreign language documents (EUR 10-13 per page).

The notarisation fee depends on the value of the agreement, but is capped at EUR 5,000. Notarisation of a unilateral mortgage statement is capped at EUR 1,000. The fee for registration of pledge or fiduciary transfer of immovables is EUR 65. The fee for registration and renewal of pledge on movables is capped at EUR 10 per pledged asset. The fee for registration of pledge or fiduciary transfer of book entry securities with the Central Depository Agency amounts to 0.05% of the higher of the nominal value and the market value of the relevant. The fee for registration of security interest in shares under the Financial Collateral Law amounts to 0.1% of the higher of the nominal value and the market value of the pledged securities.

1.7 Recognition of security governed by foreign law

Montenegrin law, other than the legislation on financial collateral, does not contain any special rules on the effect of foreign law governed security. Under the general conflict of law rules, the issue of whether a security interest has been validly created as a proprietary right would be, from the perspective of Montenegrin law, governed by lex rei sitae.

As regards the book entry securities or rights arising out of such securities granted as financial collaterals, the following matters are governed by the law of the country where the registry maintaining the account of such securities is located:

(a) the legal nature and proprietary effects of book entry securities collateral;

(b) the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book-entry securities collateral under such an arrangement;

(c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred;

(d) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event.

2. ENFORECEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

The general law on enforcement proceedings explicitly provides that mortgage agreement or, as the case may be, unilateral statement of mortgagor, represent a directly enforceable document. This means the mortgagee may proceed to directly enforce the mortgage in accordance with the law on enforcement proceedings. This enforcement route is pursued via private enforcement officers who have public authorities vested with them by law. Pledge on movables is enforced in accordance with the procedure under the Pledge Law, described in the section entitled "Private foreclosure".

(b) Enforcement grounds

Judicial enforcement of mortgage can be requested based on mortgage agreement or, as the case may be, unilateral statement of mortgagor, declared by the law on enforcement as directly enforceable instruments.

(c) Procedure

Enforcement proceedings are initiated by submission of a motion for enforcement along with mortgage agreement or, as the case may be, unilateral mortgage statement, to a certified public enforcement officer.

The public enforcement officer shall render a resolution granting a motion for enforcement within five days from the receipt of the motion. The debtor may challenge the resolution on enforcement within five days from the receipt thereof. The objection does not have a suspensive effect. The debtor may object to the resolution on enforcement on the following grounds:

(i) the debt has been settled;

(ii) the deadline for payment of the claim has yet not expired or the condition for payment stipulated in the agreement has not yet occurred; or

(iii) the resolution granting the motion for enforcement has been rendered by an incompetent public enforcement officer. The decision of the court on the filed objection may be challenged in the second instance.

The creditor may respond to the objection within three days from the receipt thereof. The decision of the court on the objection may be appealed within five days from the receipt thereof. However, the appeal does not suspend enforcement. Upon obtaining a writ of execution, the pledgor proceeds with enforcement via a public enforcement officer. The enforcement officer will determine the value of the immovable, as market price adequately reduced in case there are surviving third party rights on the property. The asset will be then liquidated on a public auction or in direct sale, as determined by the enforcement officer. There are no rules on the price if the enforcement officer opts for direct sale.

If the enforcement officer decides to proceed with an auction, the pledgor and the pledgee may at any time during the sale agree to sell the pledged asset via direct sale. The initial price at the first auction cannot be less than the assessed value of the asset. If the first auction fails, the initial price at the second auction may not be less than 50% of the assessed value of the asset. In case the second auction fails, the pledgee may authorize the enforcement officer to sell the asset at any price on the third auction.

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2.2 Private foreclosure

(a) Enforcement grounds

Enforcement can be initiated without any public enforcement officers' actions, solely based on the grounds defined as enforcement events in the pledge agreement.

(b) Procedure

Mortgage

Private enforcement starts with the pledgee filing a warning notice to the debtor (and the pledgor, if this is not the same person) informing him/them of its intention to initiate enforcement procedure if the secured obligation is not fulfilled within 15 days (or a longer period determined by the pledgee) from the registration of commencement of enforcement with the Real Estate Registry. The pledgor is not allowed to dispose of the property following the receipt of this notice without the pledgee's consent. The notice of the pledgee's intention to commence enforcement procedure has to be delivered to junior pledgees as well. The notice must contain the following elements: data on the underlying obligation secured by the pledge, data on the pledgor and the pledgee, a statement that the debt is due, description of the pledged property, manner of enforcement and additional deadline for payment of the debt which cannot be shorter than 15 days from the registration of commencement of the enforcement. If the debtor does not pay its debt within the deadline determined by the pledgee, the pledgee may proceed with the sale of the mortgaged property.

Private sale is initiated by sending a notice of sale to the debtor (and the pledgor, if this is not the same person) informing him on the commencement of the sale. This notice has to be delivered to junior mortgagees as well. The notice has to contain the following: time and place of the sale, amount of the outstanding claim, description of the property, conditions of sale, assessment of the costs pertaining to the sale and contact information of the person conducting the sale. This notice has to be published once a week, during two consecutive weeks (whereby the first publication may not be later than 15 days before the designated sale date), in two daily newspapers in Montenegro as well as placed on the property itself.

The pledgee is entitled to sell the mortgaged property after the expiry of 30 days following the day of registration of the notice on the commencement of the sale in the Real Estate Registry. The sale is performed at an auction. The law provides that the pledgee may participate in the auction and offer as purchase price the amount of the secured obligation. The rules regulating public auction in judicial enforcement, i.e. enforcement pursued via enforcement officers, apply mutatis mutandis to the public auction in private enforcement procedure. Pledgee may authorize an enforcement officer, lawyer or real estate agent to perform the sale.

A good faith purchaser of the pledged property acquires the property encumbered with senior pledges but all junior pledges get deleted from the register. The provisions regulating sale in enforcement proceedings conducted by enforcement officesr (see Section 2.1 on Judicial enforcement) find subsidiary application in out-of-court foreclosure process.

The pledgor may file a lawsuit within 15 days from the date of receipt of the notice on the commencement of the sale in order to challenge private foreclosure. According to the law, the challenge does not suspend enforcement unless the pledgor provides evidence that the secured obligation has been fulfilled or is not yet due, the pledge was not validly created or there is a breach of the rules applicable to private enforcement. It is unclear,

however, what is deemed as adequate evidence and at which point the court assesses evidence to determine that what is submitted is indeed evidence capable of suspending enforcement until final decision on the challenge is reached.

Fiduciary transfer of ownership

If the debtor does not settle its obligation when due, the transferee is authorized to sell the asset at auction or retain it at a price determined by an official appraiser. The public auction may take place not earlier than eight days after the notice on the intended sale is received by the debtor (or the transferor, if not the same person). The debtor and/or the transferor have to be notified at the time and the place of the sale. If the asset has a market or stock exchange price, the transferee may sell it at that price subject to the 8 day notice to the debtor and/or the third party transferor.

If the debtor satisfies the creditor's claim before the asset transferred as a security is sold, ownership rights are automatically restored to the transferor. The creditor is entitled, subject to the debtor's approval, to sell the transferred asset before the claim is due and payable if there is a good offer. The proceeds of sale have to be deposited with court or public notary until the claim becomes due.

Pledge over movables assets

In case of breach of the secured obligation, the pledgee may request possession of the pledged asset and if the pledgor does not comply, the pledgee is authorized to initiate enforcement procedure via an enforcement officer for taking over the possession by filing a motion for enforcement based on the pledge agreement as directly enforceable instrument. The pledgor does not have the right to challenge the motion for enforcement. If the creditor is forced to file a motion for enforcement to seek possession of the pledged asset, a hearing shall be scheduled to resolve the following two issues: (i) whether the pledge has been perfected and (ii) whether the debtor is in default. Both grounds are presumed to exist but the pledgor may prove otherwise. A resolution on the motion for enforcement has to be rendered within three days from the filing of the motion. If the motion is granted, the enforcement officer takes possession of the pledged property and delivers it to the pledgee. The resolution granting enforcement can be appealed by the pledgor but the appeal does not have a suspensive effect. After taking possession of the assets, the pledgee may dispose of the asset at a public auction or in direct negotiations, subject to a notice to the debtor (and the pledgee, if not the same person) of the manner, the time and the place of the sale. The pledgee is not entitled to request sale via an enforcement officer. The pledgee is entitled to purchase the pledged assets at the public auction. If the sale is organised as direct sale, the pledgee may purchase the pledged asset only if the asset has a market or stock exchange price. The pledgee may retain the pledged assets against its claim only with the pledgor's written consent or if the pledgor fails to object to the proposal of the pledgee for retention within eight days from the receipt thereof.

Pledge on receivables

Pledge on receivables is enforced by the pledgee giving notice to the pledgor's debtor to make payments directly to the pledgee.

Financial collaterals

In case of default, the collateral taker under a pledge arrangement is authorized to sell, retain or net the collateral. Retention of a financial instrument or set off of collateral taker's claim against the value of the credit claim given as collateral is permitted only if the pledge agreement provides for such retention/set off, as well as for the evaluation of the collateral.

(c) Ranking of claims

The proceeds obtained in private enforcement are distributed as follows:

(i) cost of enforcement, including costs and fees of third parties;
(ii) secured claims;
(iii) secured claims of junior secured creditors (if any);
(iv) any surplus belongs to the owner of the asset.

(d) Costs

The costs of private foreclosure will depend on various factors (manner of sale, number of external advisers engaged, etc.) and cannot be assessed in a general manner.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

Insolvency proceedings in Montenegro may be conducted against legal entities (with several exceptions relating to public bodies and organizations). Insolvency proceedings are initiated by a petition for the opening of insolvency proceedings. Thereafter, preliminary insolvency proceedings take place to determine the existence of one of the statutory grounds for the opening of insolvency proceedings. Upon the opening of insolvency proceedings, the procedure develops as bankruptcy, which assumes sale of assets or sale of debtor as legal entity free of debts, or as reorganization, which assumes re-definition of the debtor's obligations based on a reorganization plan.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

By the decision on the opening of preliminary insolvency proceedings, the insolvency judge may impose provisional measures at the request of the insolvency petitioner or ex officio, to prevent dissipation of insolvent's assets and/or destruction of business documentation, if there is a risk that the insolvent would transfer its property and/or destroy its business documentation before the opening of formal bankruptcy proceeding. Among others measures, the insolvency judge may prohibit or temporarily postpone enforcement against the debtor's property, including exercise of secured creditors' rights. The court may appoint a provisional insolvency administrator. Appeal on decision on the provisional measures will not postpone execution of measures order therein. The insolvency judge may at any time during the preliminary insolvency procedure revoke the imposed measures.

A secured creditor may request for any provisional measure to be suspended if:

- the insolvency debtor or insolvency administrator has failed to adequately protect the secured assets;
- the value of assets in question is depreciating;
- the value of assets in question is lower than the amount of the secured claim of the secured creditor, while the assets are not material for reorganisation.

(c) Impact of the opening of insolvency proceedings on secured creditors

Upon the opening of insolvency proceedings, the court shall set a deadline for creditors to register their claims (both secured and unsecured). The claims have to be reported no later than 30 days after the opening of insolvency proceedings. A hearing for examination of registered claims is scheduled within 60 days from the expiry of the deadline for registration of claims. A final list of all registered claims is compiled at the hearing for examination of registered claims.

(d) Avoidance of security interest created within the suspect period

Any security interest acquired from the insolvency debtor (save from the financial collaterals) within 60 days before the date of opening of the insolvency proceedings is automatically avoided.

In addition, the insolvency administrator or the creditors may contest a transaction representing a regular settlement (settlement of a creditor's claim or providing security to a creditor where the creditor has a pre existing entitlement to such claim or security), which took place within 6 months before the filing of the petition for opening of the insolvency proceedings, if the insolvency debtor was insolvent at the time of the transaction and the creditor was or ought to have been aware of the debtor's insolvency. Any person, associated with the insolvency debtor at the time of the relevant transaction, is presumed to have known about the insolvency or the petition. The aforementioned transactions can be contested also when undertaken after the filing of the petition for opening of the insolvency proceedings, if the creditor was or ought to have been aware of the debtor's insolvency or was aware that the petition was filed.

The suspect period for an irregular settlement (settlement of a creditor's claim or providing security to a creditor where there was no preexisting entitlement of the receiving party to such claim or security) is 12 months before the petition is filed. No knowledge or constructive knowledge of insolvency on the part of the creditor is required in this case. Further, the insolvency administrator may contest a legal transaction of the insolvency debtor directly damaging the creditors if:

- the transaction was entered into within six months before the petition was filed, provided that the insolvency debtor was insolvent at the time and the creditor was aware of that;
- the transaction was entered into after the filing of the petition and the creditor was or ought to have been aware of the debtor's insolvency or was aware that the petition was filed;
- the contested action is a debtor's action or a failure to act that occurred within the period of six months prior to the filing of the petition for opening of the insolvency proceedings and such action or a failure to act has resulted in a loss or a preclusion of a debtor's right.

Legal transactions entered into with the intent of damaging one or more creditors may be challenged if undertaken within a period of five years prior to the petition being filed or thereafter, provided that the debtor's counterparty knew of the debtor's intent. Finally, a legal transaction undertaken at no value or at undervalue, may be contested if it was concluded or taken within the period of five years prior to filing of the petition.

(e) Enforcement of secured claims

Secured creditors form a separate class in any reorganisation plan. An adopted reorganization plan is considered a new agreement between the debtor and the respective creditors.

In case no reorganization plan has been submitted or approved or

honored by the debtor or if the creditors so decide, the court will render the decision on bankruptcy. After the decision has been issued, the insolvency administrator shall commence and conduct the sale of the assets forming the bankruptcy estate. The sale of assets subject to pledge is also performed by an insolvency administrator. The assets are sold at public auction or by a public collection of offers or through a direct agreement. Sale by direct agreement may be conducted only with the prior approval of the Creditors' Committee. Before the sale of an asset subject to a pledge, the insolvency administrator has to notify the secured creditor on the conditions of the sale.

The secured creditor may, within ten days from the receipt of the notification, propose a more favourable method of sale. A secured creditor may request that security measures be imposed to protect the secured creditor from the loss of value of the pledged assets, such as payment of periodical compensation from the loss of value of pledged assets, granting of additional security, participation in the income generated from the asset, etc. An insolvency debtor may be offered for sale as a legal entity, with prior consent of the Creditors' Committee and notification to secured creditors.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

Once insolvency has been opened, no enforcement procedure may be initiated against the debtor's assets and any pending enforcement procedure is terminated.

The insolvency judge may, upon written request by a secured creditor, suspend this prohibition if with respect to the secured property:

- the insolvency debtor or insolvency administrator has failed to adequately protect the pledged assets;
- the value of the pledged assets in question is depreciating;
- the value of the pledged assets in question is lower than the amount of the secured claim of the creditor in question, while such assets are not material for reorganisation.

An exception from the above rule is made in connection to financial collaterals, which can be realized outside of the insolvency proceedings, in accordance with the terms of the agreement providing for the collateral. Initiation or opening of insolvency proceedings does not affect close-out netting under the agreement on financial collaterals.

2.5 Recourse of a secured creditor to self-help remedies

Self-help remedies in relation to security instruments are not allowed under Montenegrin law.

3. ROLE OF SECURITY

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

The concept of trust and security trustee is not recognized under the Montenegrin law. The parallel debt concept has never been tested in Montenegro. The risk associated with such arrangement is in that the agreement between the security agent and the borrower could be perceived as simulated agreement which is null and void under Montenegrin law. Additionally, such arrangement could be potentially challenged under the provisions of the Law on Obligations[6], which require that a contract must have a proper causa (i.e. immediate reason for entering into an agreement) in order to be valid. One could argue that the causa in the agreement between the borrower and the security agent consists in achieving a purpose that is otherwise prohibited (this purpose being to grant security to a person who is not a creditor, which is not possible under Montenegrin law as it defines security as being accessory to the secured claim). However, if there is a genuine joint and several creditorship of the lenders, it is possible to have all lenders registered as pari passu pledgees or to have only one of those lenders registered as a pledgee for the entire debt. In case only one joint and several creditor is registered as a pledgee, such lender may initiate enforcement for the entire debt.

3.2 Specifics of taking and enforcing security by a security trustee or agent

Not applicable.

3.3 Precedents

There is no case law in respect of the concept of parallel debt or recognition of security trustees in Montenegro.

[6] *"Zakon o obligacionim odnosima", Official Gazette of Montenegro, Nos. 47/08 and 4/11*

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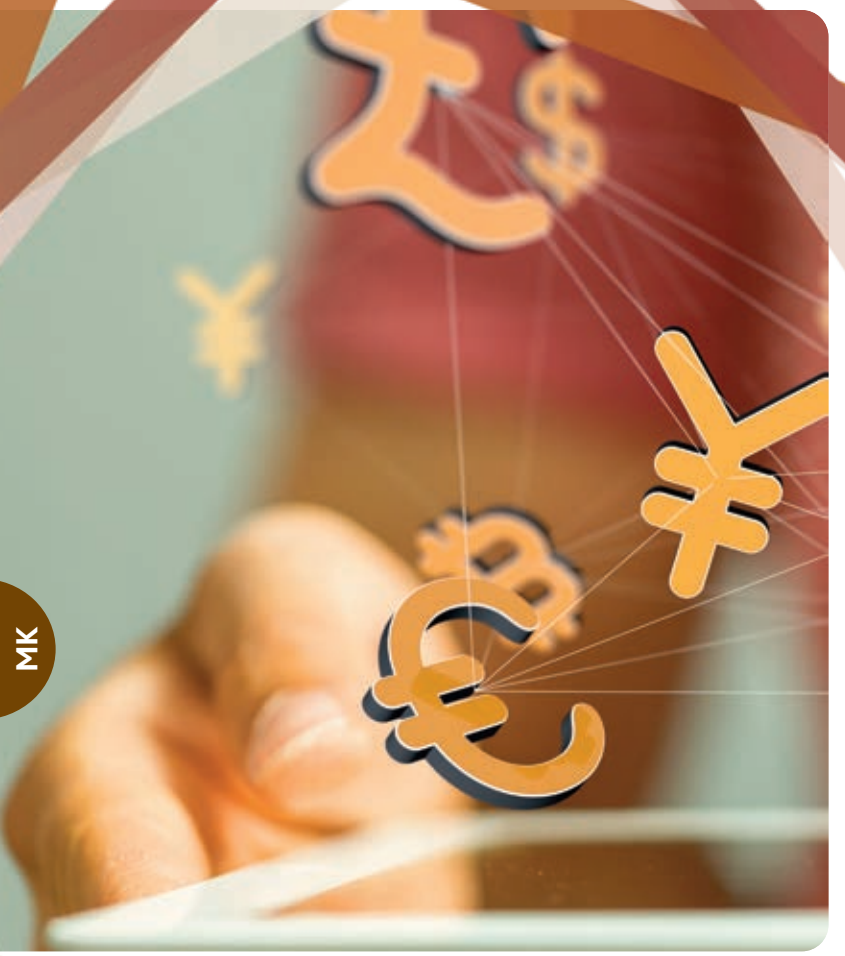

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REPUBLIC OF MACEDONIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

Upstream and cross-stream security (guarantees, pledges) are allowed under Macedonian laws and are common under the financing arrangements. There is no quantitative method in determining the corporate benefit of granting upstream and cross-stream guarantees. General provisions governing interested parties' transactions apply, for which a resolution of the supervisory body or a resolution of the shareholders' meeting would be required.

Furthermore, a company with majority participation[1] is limited in its influence on the controlled company. Such company cannot use its influence in order to make the controlled company undertake legal actions harmful to the latter, or undertake or fail to undertake actions, unless the company with majority participation assumes the obligation to compensate the damages caused to the controlled company. Disclosure of any such transaction is necessary in the annual report of the controlled company, and also, if such company is registered as a reporting joint-stock company, to the Securities and Exchange Commission as a related party transaction, and if it is a listed company, to the Macedonian Stock Exchange.

The management body of the controlled company is required to prepare information on legal transactions which should include the payments and counter payments, while the information on other actions shall include the reasons for their undertaking, as well as the benefit or the damage caused to the controlled company, in a form of a report. When compensating the damage, the method of compensation during the business year shall be separately stated, as well as whether the company was entitled to special benefits and if so, the kind of benefit that it was entitled to. The report shall be prepared in accordance with the principles of due care and accuracy.

The management body of the controlled company should explain in the report whether, under the circumstances known at the moment of undertaking or failure to undertake an action, such undertaking or failure to undertake the action would result in the company suffering any damage. If the company suffered damages, the management body of the controlled company has to state whether the damage has been compensated. The explanation and the statement shall be included in the report on the controlled company's operations.

Members of a management body of a controlled company shall be liable as joint debtors for the damage to the controlled company if, by failing to fulfil their obligations, they omitted to state in the report on the relations between the controlled company, company with majority participation and companies controlled by the latter, the harmful legal transaction or the harmful action, or failed to state that the company has suffered damage from such legal transactions or any other actions and the damage has not been compensated. In case of dispute, they shall be obliged to prove that they have acted with due care and diligence, as expected from them in undertaking fiduciary duties. There is no liability for damage compensation if the undertaken activity is based on a resolution adopted by the shareholders' meeting in accordance with the law.

Further grounds for liability of the company with majority participation are introduced with the corporate law provisions. Under a certain statutory assumption, the members of the management body of the controlled company shall be liable as joint debtors for the damage to the controlled company, stakeholders and creditors who cannot settle their claim in a bankruptcy proceeding against the controlled company, if damages are caused to the controlled company on the basis of such transaction, and if they fail to compensate the damage. However, there shall be no liability for damages if, under the applied standard of a diligent and prudent merchant for the management of the company, the same transaction would have been or not have been carried out by an independent company without being led to such action by the company with majority participation.

[1] *Law on Trade Companies defines a company with majority participation as a company that participates in another company's principal capital with a share of more than 50 per cent, or has more than 50 per cent of all votes on the shareholders' meeting.*

1.2 Financial assistance

The Law on Trade Companies[2] imposes a prohibition on financial assistance by declaring as null and void a transaction by which the company provides a third party with an advance payment, loan, credit, or any type of security for the purpose of acquiring shares issued by that company. This prohibition does not apply for banks and other financial institutions, unless otherwise determined by a separate law, or when the company acquires treasury shares in order to distribute it to its employees under the conditions determined in the law.

Furthermore, if a pledge or any type of security is taken on the company's shares by the company itself or a person acting on behalf of the company, this shall be considered as an acquisition of treasury shares under the applicable law, subject to a maximum allowed percentage of the treasury shares and requiring either cancellation or disposal of such shares if such threshold is exceeded.

1.3 Types of security. Most often used type/s of security in practice

Under Macedonian law, the pledge can be granted as:

- a possessory (non registered) pledge, where the pledge on movables is perfected by transfer of the possession of the pledged assets to the creditor. The right to a possessory pledge is established by entering a pledge agreement and transferring the pledged assets into the possession of the pledgee; and
- a non-possessory (registered) pledge, where transfer of the possession of the pledged assets is not a requirement for perfection. The right to non-possessory pledge is established by entering a pledge agreement, making inventory of the pledged assets and registration of the pledge in the public books in the Movables Pledge Registry i.e. Real Estate Registry. Pledge granted on immovables (mortgage) can be granted only as a non-possessory pledge right.

Fiduciary transfer of ownership and financial collateral are yet to confirm their significance in the practice. Considering that the most common types of security granted in practice are the registered pledge and mortgage, this Guide will further elaborate on the specifics of the granting, establishment, perfection and enforcement of such a pledge.

(a) Mortgage

A mortgage represents a pledge over immovable asset (or assets treated as immovable property by operation of law) granted by the owner of the immovable asset (mortgagor) in favour of the creditor (mortgagee) as a security for the unsettled claims the mortgagee has against its debtor.

(b) Pledge

The pledge may be granted on assets owned by the pledgor, such as any moveable property, securities, claims (intellectual rights and other related rights) or any other rights, and it is established by entering a pledge agreement, making inventory of the pledged assets and registration of the pledge in the public books. The registered pledge is granted by entering a pledge agreement, making inventory of the pledged asset and registering the pledge in the Movables Pledge Register maintained by the Central Registry of the Republic of Macedonia. The pledge over securities is established by entering a pledge agreement, making inventory of the pledged securities and registration of the pledge in the Movables Pledge Registry. This security is registered in the shareholders' registry of the company which issued the pledged shares.

The Law on Contractual Pledge[3] governs the taking and perfecting the contractual pledge. It defines the pledge as a security for monetary and other types of claims, whose value is measurable in monetary terms, which the creditor has with respect to its debtor from certain obligatory relation. For the claims secured by pledge, in case they are not settled within their due date, the creditor can collect them from the value of the pledged assets, or under conditions and manner prescribed by this law, acquire the right of ownership on the pledged assets (lex commissoria).

With the changes of the Law on Contractual Pledge, it is stipulated that the pledge right shall be established over all of the assets of the debtor, including as well the future assets to be acquired by the debtor, if it is not clearly stated which asset owned by the pledgor at the time of entering the contract is pledged. Legal consequences of this provision are yet to be determined in practice, as both the notaries public who certify the pledge agreements as well as the public registries require certain identification of the assets subject to pledge.

(c) Financial Collateral

The passing of the Law on Financial Collateral in 2008 was marked

[2] *Law on Contractual Pledge, published in the Official Gazette of the Republic of Macedonia No. 5/2003, 4/2005, 87/2007, 51/2011, 74/2012,115/2014 and 98/2015.*

[3] *Law on Financial Collateral, published in the Official Gazette of the Republic of Macedonia No.84/2008.*

with an EU "flag" and was done in compliance with the defined goals and deadlines undertaken by the Republic of Macedonia to harmonise its legislation with the European legislation. The law is partially harmonised with provisions of the EU Collateral Directive. The Law on Financial Collateral regulates the conditions and manner of use of financial collateral for claims on the basis of financial collateral agreements. Financial collateral is a financial instrument or cash, which under the financial collateral agreement is used as collateral. Cash only applies to money, which is represented through a credit account, or similar claims for the repayment of money (such as money market deposits), thus explicitly excluding banknotes, while financial instruments refer to shares, bonds and other securities for trading in the capital market. A financial collateral taker may only be a closed list of entities listed as follows:

(i) state authority bodies, municipality bodies, City of Skopje;
(ii) National Bank of the Republic of Macedonia;
(iii) European Central Bank, Bank for International Settlements, International Monetary Fund, European Investment Bank, central banks of member states of the European Union, as well as multilateral development banks;
(iv) commercial banks;
(v) leasing companies;
(vi) brokerage houses;
(vii) insurance companies;
(viii) companies for investment and pension fund management;
(ix) clearing houses, securities depositories and stock exchange markets and
(x) the Health Insurance Fund of the Republic of Macedonia, the Pension Insurance Fund of the Republic of Macedonia and the Depository Insurance Fund.

Other legal entities considered as large commercial entities in accordance with the Law on Trade Companies, shall as well be considered in this group of entities, when they enter financial collateral agreements with these entities. Financial collateral agreements may be entered as financial collateral agreements with a pledge right or financial collateral agreements with a transfer of ownership of financial collateral.

(d) Fiduciary Transfer of Ownership

Fiduciary transfer of ownership is carried out on the basis of court minutes or notary minutes evidencing the agreement of the parties on securing the monetary claim of the creditor, by way of ownership transfer by the debtor of certain assets or claims to the creditor. The debtor can also be a person against whom the creditor does not have a claim to be secured. The due date of the secured claim should be included in the minutes, or at least the manner how it shall be determined. If the right of ownership of immovables is registered in the public books, the minutes of the agreement should also contain a statement of the debtor that it consents entry of the ownership transfer to be made in the public books directly on the basis of the agreement. The minutes may as well include a statement from the debtor that it consents for the creditor to directly, on the basis of the minutes, request coercive enforcement against the debtor for the purpose of handing over the immovables, i.e. movables in possession, after the secured claim becomes due. The minutes containing such statement shall be considered an enforcement document. The right of ownership shall be considered transferred by signing the minutes.

An announcement shall be published in the Official Gazette of the Republic of Macedonia about the transfer of ownership of immovables not being registered in the public books, and of movables, as well as the transfer of the rights, indicating the court that publishes the announcement, the number of the case, the parties, the immovables and movables subject to transfer of the right to ownership, i.e. the transferred rights, as well as the notification that the transfer has been made as a security. The immovables and movables, i.e. the rights shall be indicated in such manner as to determine their identity.

1.4 Creation of security

(a) Mortgage

A mortgage is created following the same procedure as for granting the pledge, further elaborated in Section 1.4(b) below. For a mortgage granted by a trade company or other legal entity, the mortgagor is obliged within 15 days from the day of creation of the mortgage, to submit it for publishing in the Official Gazette of the Republic of Macedonia, being further on obliged to publish it in the first following issue. The same obligation applies for the pledgor who has individually, with several agreements encumbered all of its movable and immovable property in its ownership.

(b) Pledge

The pledge agreement is executed in a written form. This required form is a condition for the validity of the granted pledge. The minimum obligatory elements which this agreement should contain are provided by the law, such as the data of the contractual parties, identification of the debtor if it is not at the same time the

pledgor, description of the secured claim, legal basis, its amount and its due date, including the clausula intabulandi – consent of the pledgor to allow entry of the pledge requested by the pledgee in the Movables Pledge Register, as well as any other relevant fact, including any restriction of the right to transfer the pledge or the right to use or transfer the pledged assets, the right of the pledgee to take possession of the pledged assets in order to keep, maintain or transfer it, in case when the pledge is granted on the basis of the pledge agreement with a capacity of an enforcement document, etc. In practice, the pledge agreements are certified by the notary public or executed in the form of a notarised deed. This form is required if the parties agree to give the pledge agreement the capacity of an enforcement deed on the basis of which foreclosure of the pledge may be undertaken. Please see more details under Section 2, Enforcement of Security.

(c) Financial Collateral

Financial collateral is granted on the basis of financial collateral agreement, certified by a notary public. It may be entered as a financial collateral agreement with a transfer of ownership or a financial collateral agreement with a pledge right. Financial collateral agreement with a transfer of ownership is an agreement including the repo agreements, on the basis of which the right of ownership of the financial instrument or the cash during the secured period is completely transferred from the provider of the financial collateral to the receiver of the financial collateral. Financial collateral agreement with a pledge right is an agreement on the basis of which the right of ownership of the financial instrument, i.e. the cash during the secured period remains with the provider of the financial collateral while the receiver of the collateral acquires a pledge right.

The financial collateral agreement with cash is registered in the financial institution (commercial bank) where the monetary funds of the provider of the financial collateral are kept. The financial collateral agreement with transfer of ownership of financial instruments is registered in the securities depository where the financial instruments are registered. The Movables Pledge Register is the competent registry for entry of the financial collateral agreement with pledge right on financial instruments. The Movables Pledge Register shall notify the securities depository where the pledged securities are kept, regarding the registered agreements and rights resulting from those agreements.

The financial collateral agreement may contain provisions determining (i) an obligation for providing financial collateral or providing additional financial collateral, due to the changes in the value of the financial collateral or in the amount of the secured claim, or (ii) a right to withhold the financial collateral by exchange or trade with other financial collateral of the same value.

(d) Fiduciary Transfer of Ownership

Fiduciary transfer of ownership as a security is created on the basis of court minutes, having effect of a court settlement, or on the basis of minutes prepared by a notary public, as explained under Section 1.3 above.

The same procedure applies when transfer of ownership is carried out on the shares or stocks in a limited liability company. The notarial act or solemnised private document with appropriate content replaces the agreement of the parties entered in the minutes referred to above. The notary public shall specify only those activities that prohibit disposal with stocks, other securities and shares the parties agree on. The notary shall without any delay notify the trade company for each prohibition, and for conducting the prohibition for the purpose of security, it shall notify the Central Registry of the Republic of Macedonia and the Central Securities Depositary for the prohibition on having at disposal shares, and the manager of the limited liability company for the stocks.

Unless otherwise determined by the agreement, the transferor shall not lose the right to vote nor the right to participate in the profit because of the granted security until the creditor becomes a lawful owner.

1.5 Perfection and maintenance of security

(a) Mortgage

Perfection of the mortgage is carried out by entry of the mortgage agreement in the public books maintained by the Real Estate Registry. An obligation for publication of the mortgage in the Official Gazette of the Republic of Macedonia is imposed on the mortgagor, though it is not a perfection requirement. Governed by the same Law on Contractual Pledge, obligations to maintain the value of the mortgaged assets and the legal remedies available are the same for both the creditors secured with a mortgage and the ones with a pledge.

Once perfected, the mortgage remains to encumber the mortgage assets until it ceases in the procedure of enforcement, or if the secured claim is settled, on the basis of a notarized

statement by the secured creditor allowing for deletion of the mortgage, as well as on the basis of other grounds as stipulated in the Macedonian Law on Contractual Pledge. There is no requirement for renewal of granted mortgage. This, as well, applies to the pledge.

(b) Pledge

Once registered in the Movables Pledge Register, the pledge is perfected. The date of filing of the pledge agreement in the Movables Pledge Register is the date of priority, while the actual registration may take up to few business days. When the pledged asset is a claim, the pledgor's debtor needs to be notified in writing about the granted pledge by the pledgor as its creditor. Otherwise, the pledge shall have no legal effect. The pledgee shall be entitled to any requests that are considered necessary for protection of its pledge right.

All provisions that are related to protection of a real (proprietary) right shall be accordingly applied to the claims by the pledgee for the purpose of accomplishing the pledge right. In case the pledgor in any way decreases the value of the pledged asset or in any other way deteriorates its condition, the pledgee is entitled to require from the pledgor to reinstate the pledged asset in its original state. If the pledgor does not comply, the pledgee may request from the court to order the pledgor to restrain from such actions. In case the pledgor fails to do so, the pledgee may require collection of the claim secured by the pledge even prior to the maturity date, in accordance with the provisions of the law applicable to the enforcement of the pledge.

Furthermore, in case the pledgor undertakes actions or fails to take actions that pose a threat or obviously decrease the value of the pledged asset, the pledgee is entitled to require from the pledgor to, without further delay, stop such actions, and if the pledgor fails to restrain from such actions, the pledgee shall be entitled to request coercive settlement from the value of the pledged asset prior to the maturity date. In case it is proven that the pledged asset has a legal or material defect, the pledgor, upon request of the pledgee, shall be obliged to remove the defects on the pledged asset, or otherwise it shall be obliged, within a certain deadline, defined by the pledge, to allow registration of another pledge in the Movables Pledge Register, or in the Real Estate Registry, in case of a mortgage.

(c) Financial Collateral

Financial collateral is created on the basis of the financial collateral agreement, entered in a written form and certified by a notary public, as explained under Section 1.4(c) above. If the collateral is granted as a pledge right, the receiver of the financial collateral has the right to have at its disposal the pledged financial instruments, i.e. cash, only if the provider of the financial collateral had explicitly authorised him thereof. If the receiver of the financial collateral has disposed of the pledged financial instruments, i.e. cash, it is obliged, at the latest on the agreed due date of the secured claim, to provide an equal financial instrument for exchange, i.e. cash. The financial collateral agreement can stipulate that the receiver of the financial collateral on the due date of the secured claim, instead of providing an equal financial instrument, i.e. cash, for exchange, to give a settlement statement. If the conditions for enforcing the collateral occur prior to providing equal financial collateral for exchange, then the receiver of the financial collateral can perform close out netting.

In case of financial collateral agreement with transfer of ownership, the receiver of the financial collateral may dispose of the financial instruments, i.e. the cash. Unless otherwise determined with the financial collateral agreement, the receiver of the financial collateral can immediately, as soon as the conditions for enforcing the collateral are met, withhold the cash transferred for collateral, i.e. the financial instrument, or it can sell the financial instrument in order to collect the secured claim. The extra funds from the sale shall be transferred to the provider of the financial collateral. Same conditions apply for providing an equal financial instrument i.e. cash, default in which entitles the receiver to undertake close out netting.

(d) Fiduciary Transfer of Ownership

Unless otherwise determined by the agreement referred to above, the debtor shall be authorised to further use the assets, ownership of which is transferred to the creditor, and the creditor must neither alienate nor encumber the assets. Such a transfer by the creditor is null and void and exposes the creditor to the damages suffered by the debtor. The general duties of the creditor in a case of transferred claim as a security, unless otherwise agreed between the parties, are related to (i) undertaking measures necessary for keeping the transferred claim, (ii) collecting the interests, and (iii) collecting the transferred claim, i.e. receive the settlement when it becomes due.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs incurred by the contractual parties involve a direct cost related to the establishment and perfection of the security (such as notary fees and registration fees, etc.), cost for the evaluation of the assets, if the parties agree on evaluation instead of contractual value, costs related to the translation of the documents, and the notarisation of the translations, etc. The notary fees always depend on the value of the secured claim. If the value of the secured claim exceeds the amount of MKD 60 million (approximately EUR 1 million), the notary's fee is EUR 1,000 or EUR 500, if the notary prepares the notarisation of the pledge agreement, excluding the costs for notarisation of the translation, which may significantly vary depending on the necessary documents. Fees for pledge registrations are in generally not substantial. Fees for registration of mortgage, however, may be up to MKD 62,000 or approximately EUR 1,000 if the value of the secured claim exceeds EUR 1 million; and up to MKD 124,000 or approximately EUR 2,000 if the value of the secured claim exceeds EUR 5 million.

1.7 Recognition of security governed by foreign law

In general, the governing law for the accessory legal deed, unless otherwise stipulated by the deed itself or law or by an international treaty, is the law governing the main agreement. Where the security interest is granted as a contractual arrangement, and the security documents are governed by a foreign law selected by the parties, the choice of law is admissible according to the Macedonian conflict of law provisions under assumption that such a security is not granted as a real (proprietary) right pledge. Further, for any immovables located on its territory, the Macedonian laws, both substantive and procedural, have exclusive applicability.

Under the International Private Law[4], a foreign judgement rendered by a foreign court will be equalised with a judgement passed by a domestic court and shall have legal effect only when recognised by a domestic court. It will be recognised and enforced in Macedonia without re-examination of the merits if such judgement meets the prerequisites for recognition prescribed by Macedonian law. A final judgement will meet the presumptions for recognition if, inter alia, Macedonian courts did not have exclusive jurisdiction over the subject matter of the original proceeding and enforcement of the judgement does not violate public order of Macedonia. Same conditions apply for recognizing an arbitral award. Upon recognition, the foreign court judgement has an equal legal force as a Macedonian court judgement and will be enforced without re-examination or relitigation of the matters thereby adjudicated.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

The pledgor and the pledgee may agree to give the pledge agreement the capacity of an enforcement deed before or after the registration of the granted security in the Movables Pledge Register. The agreement shall have the status of enforcement deed if it is certified or composed by a notary public and if it contains statement given by the contractual parties by which they consent for the pledge agreement to have the capacity of enforcement deed. In case the pledge agreement acquires the capacity of enforcement deed prior to the entry in the Movables Pledge Register, and such a registration is not carried out, the pledge agreement loses its capacity as an enforcement deed. In practice, this is the most common approach of entering the security agreement for granting pledge right.

Though the Law on Contractual Pledge allows for the pledge agreement to be entered in written form, without the capacity of an enforcement deed, such manner in entering the pledge agreement is rarely seen, if not at all, in practice. A pledge agreement with the capacity of enforcement deed enables the creditor to initiate a direct enforcement procedure for the collection of outstanding claims without the need to obtain final and binding court decision, order or writ through extensive litigation procedure.

Under Macedonian law, foreclosure of security interests granted on the basis of the pledge agreements with capacity of an enforcement deed cannot be implemented through a judicial enforcement procedure, as such enforcement procedures are no longer conducted by the courts, i.e. court officers, but rather by enforcement officers, as officials that are appointed by the Minister of Justice and that have public authorisations under the Law on Enforcement[5].

[4] *Law on International Private Law, published in the Official Gazette of the Republic of Macedonia No. 87/2008 and 156/2010.*

[5] *Law on Enforcement, published in the Official Gazette of the Republic of Macedonia No. 35/2005, 50/2006, 129/2006, 8/2008, 83/2009, 50/2010, 83/2010, 88/2010, 171/2010, 148/2011 and 187/2013.*

Further, foreclosure of pledges granted on the basis of the pledge agreement with capacity of enforcement deed, is done: (i) by a notary public, in accordance with the provisions of the Law on Contractual Pledge; (ii) by an enforcement officer, in accordance with the provisions of the Law on Enforcement; (iii) by an agency for sale for movables and immovables, in accordance with the provisions of the laws that regulate its establishment and operation; or (iv) by a broker, in accordance with the provisions of the Law on Securities[6] and other regulations regulating trading with securities on the stock exchange.

2.2 Private foreclosure

(a) General

Under the provisions of the Law on Contractual Pledge, the pledgor and the pledgee are free to determine the commercial manner for sale of the pledged asset in the pledge agreement, i.e. they are free to determine through which authorised entity, as listed in Section 2.1 above, the foreclosure procedure shall be conducted.

If the parties have not chosen one of the commercial manners for sale of the pledged assets, nor have they chosen an authorised entity for enforcement of the foreclosure of the pledge, the pledgee shall have the right to choose, at its discretion and option, the authorised entity who will enforce the foreclosure of the pledge.

The Law on Contractual Pledge provides for two cumulative conditions in order for the pledgee to be entitled to initialise the enforcement procedure:

(i) the debtor to be in a default; and
(ii) the pledge agreement to have a capacity of an enforcement deed.

As said above, pledge agreements with an enforcement clause have the capacity of enforcement deeds and enable the creditor to initiate direct enforcement procedure for the collection of outstanding claims without the need to obtain final and binding court decision. In practice, all the pledge agreements are entered with such a capacity.

(b) Procedure

Under the Law on Contractual Pledge, the enforcement procedure starts upon request for enforcement of pledge right which the pledgee submits to the notary public. This request must contain at least the following:

(i) Registration details of the pledgee and the address on which the delivery of the documents shall be done;
(ii) Registration details regarding the pledgor and the address on which the delivery of the documents shall be done. This is the address, which is stated in the security agreements. However, if the address is different from the one determined in the security agreements, then the pledgee is obliged to submit a certified statement by the pledgor on the change of the address of the pledgor;
(iii) Description of the pledged assets;
(iv) Amount of the monetary claim which is due by the debtor;
(v) Explicit authorisation for the notary public to undertake the enforcement procedure in the name and on behalf of the pledgee, in accordance with the provisions of the Law on Contractual Pledge.

The following documents shall be enclosed with the enforcement request, in original, transcript and/or copy form certified by a notary:

- enforcement notary deed for the granted pledge right (pledge agreement with an enforcement clause);
- proof of ownership of the pledgor on the pledged assets; and
- proof of registration of the pledged right in favour of the pledgee in the relevant public registry.

The notary public is obliged to submit the enforcement request to the pledgor, as well as to the relevant public register (the Movables Pledge Register, or the Real Estate Registry, as applicable) in order for the public register to record the fact that the enforcement procedure against that pledged assets is initiated. If there are any other secured creditors who have pledge rights on the same pledged assets, they should be notified as well.

In case when the pledge agreement has a capacity of an enforcement deed, and if an event of default occurs, the maturity of the claim is determined on the basis of a written statement of the pledgee certified by a notary public, which will explicitly state the term and the condition breached by the pledgor that caused

[6] *Law on Securities, published in the Official Gazette of the Republic of Macedonia No. 95/2005, 25/2007, 7/2008, 57/2010, 135/2011, 13/2013, 188/2013, 43/2014 and 15/2015.*

maturity of the claim. On the basis of such statement, the notary public issues the Certificate of enforceability of the pledge agreement in a form of a notary deed.

Prior initialising the enforcement procedure, the pledgee is obliged to notify the pledgor through an authorised notary public or through an enforcement officer, as subject entitled to undertake the enforcement procedure.

If the pledge agreement does not stipulate the commercial manner of sale of the pledged assets, the notary public shall perform the sale by a public auction.

Elements which should be taken into consideration in determining the purchase price are stated in the Law on Contractual Pledge:

- market value as on the date of evaluation by an authorised appraiser, not lower than the value of the secured claim on the date of the perfection of the pledge right;
- costs of the enforcement procedure;
- interests accrued on the unsettled due amount of the claim until the date of the public auction.

In any time as of the initialising of the enforcement procedure, upon joint request of the pledgee and the pledgor, the pledged assets may be sold by way of direct agreement, under conditions agreed by the pledgee and the pledgor.

Minute of the direct agreement is executed by the notary public, pledgee and the pledgor, and the purchaser of the pledged assets. If the public auction fails, and the sale of the pledged assets is not done in the term of 60 days as of the date of initiating the enforcement procedure, it is considered that the pledgee has acquired ownership on the pledged assets, unless the pledgee in a term of eight days, as of the date on which the conditions for acquiring of the ownership are met, does not deliver to the notary public a statement that the pledgee does not want to acquire the ownership right on the pledged assets. The value for which the pledgee has acquired ownership on the pledged assets is equal to the amount of the claim which settlement is sought, increased with the costs of the enforcement procedure and the interests on the claim accrue until acquiring of the ownership.

In a case of fiduciary transfer of ownership, default of the debtor entitles the creditor through a notary public or enforcement agent, within 15 days as of the default, to notify the debtor and submit a request that the asset with the transferred right to ownership is to be sold or the transferred right be converted into money by a notary public or enforcement agent.

The debtor is obliged: (i) to determine the lowest price the assets could be sold for, (ii) to authorise the notary public or to request the enforcement agent to carry out the sale of the assets, and (iii) to submit its statement granting his consent for the sale, as well as consent to advance the costs of the sale and consent to beforehand settle the claim of the creditor including the interests and costs, as well as the sales tax from the amount obtained from the sale.

The lowest price determined by the debtor must not be lower than the secured claim, increased for the anticipated interests and costs of the creditor that shall become due or incur until the expiry of the deadline as of which the notary public or the enforcement agent must sell the pledged assets or convert the right into money, as well as the anticipated sales tax.

If the notary public or enforcement agent fails to sell the pledged assets within three months as of the day when the creditor has authorised them thereof, it shall be deemed that the creditor has waived the right to request sale of the pledged assets. In such case, it shall be deemed that the creditor has become the lawful owner of the assets or the lawful holder of the rights that are transferred, for the price that matches the amount of the secured claim including the interests and the costs, as well as the sales tax. However, this will not apply if the creditor notifies the debtor, within 15 days after the expiry of the deadline of three months through the notary public or enforcement agent, that it does not want to keep the assets, i.e. the right as a substitute to the payment of the secured claim.

If the creditor becomes an owner of the pledged assets, the secured claim shall be considered paid.

(c) Ranking of claims

In cases when there are several pledges by different creditors established on the same assets as collateral, the priority of settlement of their claims from the value of the pledged collateral is determined in accordance with their priority - the date of the entry of the pledge in the Movables Pledge Register, or the Real Estate Registry. If the date of the entry is the same, the priority in the settlement is determined in accordance with the time of

receipt of the application for registration of the pledge in the Movables Pledge Register, or in the Real Estate Registry. Applications submitted on the same date and time have equal treatment regarding the settlement of the claims.

The priority of the secured creditor also applies in cases when the pledged assets are bought by the first ranking pledgee on a public auction. In that case lower ranked pledgees shall settle their claims from the sale price only to the extent of the remaining amount left after the claim of the first ranking pledgee, who settled its claim with purchase of the pledged assets, by paying only the difference between its claim and the price achieved on the public auction. If any of the lower ranking pledgees purchase the pledged assets, the first ranking pledgee shall be the first to settle its claim from the achieved price.

If the same pledged assets were used for securing claims of several pledgees that fall due in different times, with the maturity date of the claim of any pledgee, it is considered that the secured claims of all the pledgees became due at that time.

All monies received as a purchase price shall be applied in the following order of priority:

(i) all costs and expenses incurred by the pledgee after the public announcement on the sale was published, and are related to protection and increase of the value of the pledged assets;
(ii) all costs and expenses incurred by the pledgee in connection with enforcement of the security (the reimbursement of the notary);
(iii) in or towards payment of the secured claim or such part of them as is then due and payable in accordance with its terms;
(iv) in or towards payment of the secured claims or such part of them as is then due and payable in accordance with its terms for the rest of the pledgees (if any), in accordance to their priority; and
(v) in payment of the surplus (if any) promptly to the pledgor.

(d) Costs

Both the notaries and enforcement agent use official tariffs passed by their association when undertaking the enforcement of the pledge.

Notary's fees for undertaking any official actions in connection with the enforcement of the pledge right are approximately EUR 15. The value of the pledged assets is relevant when determining the notary's fees which should be paid to the notary for the purposes of preparation of a minutes within the procedure for enforcement of pledge, which in any case cannot exceed approximately EUR 400. For the preparation of the sale minutes or agreement for the sale in a form of a notary deed, the notary is entitled to 50 per cent of the value of the notary prize.

With enforcement officers, the value of the secured claim shall be relevant in determining the related costs and the fees to which the enforcement officer is entitled. For example, for a secured claim which exceeds EUR 200,000, the costs are EUR 150 and the fee is 1.2 per cent of the achieved sale price, but in any case not less than EUR 1,600.

2.3 Bankruptcy and debt-restructuring proceedings[7]

(a) General

A bankruptcy procedure aims to achieve collective settlement of the creditors by liquidation of the debtor's property and distribution of the funds for settlement of the creditors' claims, or by concluding a special contract for settlement of claims established as a part of the reorganisation plan directed towards maintaining of the debtor's business venture. The settlement of the claims may also be performed with a reorganisation prior commencement of the formal bankruptcy procedure.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

Institution of bankruptcy proceedings and preliminary bankruptcy proceedings (if applicable)

An insolvency of the debtor is stipulated as a condition for commencing a bankruptcy procedure or reorganisation. The debtor is considered insolvent if, within a period of 45 days, from any of its accounts, maintained by any payment operation institution, no payment could be made on the valid grounds for payment.

With the latest changes of the Bankruptcy Law a forthcoming future insolvency of the debtor is also stipulated as a ground for initiating the bankruptcy procedure against the debtor. The legal consequences of the opening of the bankruptcy procedure have a legal effect from the next day when such an announcement is

[7] *Bankruptcy Law, published in the Official Gazette of the Republic of Macedonia No. 34/2006, 126/2006, 84/2007, 47/2011, 79/2013, 164/2013,29/2014 and 98/2015.*

being displayed on the notice board. As one of the main consequences is that the creditors of the debtor may settle their claims only in the bankruptcy proceeding. As of the opening of the bankruptcy procedure none of the creditors of the debtor may request security of neither their claims nor foreclosure on the debtor's asset, or part of it. Any ongoing enforcement procedures and granting security at the time of the opening of the bankruptcy procedure is terminated.

Provisional measures affecting rights of secured creditors

The bankruptcy judge may with commencement of the preliminary bankruptcy proceeding, ex officio or upon request, determine all the injunctions which shall prevent any detriment of the financial status of the debtor or its assets which may adversely affect the creditors. This may include, inter alia, a general prohibition with the assets of the debtor, as well as prohibition or temporarily prolongation of the enforcement of security against the debtor.

(c) Approval of the claims of secured creditors in bankruptcy proceedings (if applicable)

For the opening of bankruptcy proceedings the creditors are informed with an announcement notice.

The notice shall be published on the bulletin board in the Official Gazette, and in two daily newspapers that are distributed on the territory of the Republic of Macedonia. The notice must be displayed on the notice board on the same day on which the decision to open the bankruptcy proceedings is reached. All the creditors report in writing their claims, by filing proof of the claim and the secured claim. The secured creditors also state the part of the assets on which they have a security and the amount of the secured claim. All the creditors are obliged to report their claims within the time period specified in the notice for the opening of the bankruptcy proceedings. If the creditor has missed this deadline, the trustee will ask the bankruptcy judge to dismiss the application as untimely.

(d) Challenges affecting secured claims

All legal actions undertaken before the opening of the bankruptcy procedure, which hinder the equitable settlement of the creditors (damaging the creditors), or which place certain creditors in a more favourable position, can be challenged by the bankruptcy trustee on behalf of the bankruptcy debtor and the bankruptcy creditors in accordance with provisions of the Bankruptcy Law.

If the bankruptcy creditor is given or enabled a security interest or settlement, within the last three months prior to the proposal for opening of the bankruptcy procedure, such granted security to the bankruptcy creditor can be challenged if at the time when such security was granted, the debtor was insolvent and the creditor knew or must have known about the insolvency.

A legal action, which gives or enables a bankruptcy creditor to receive a security interest or settlement can be challenged if such action was taken after the filing of the proposal to initiate the bankruptcy procedure and if at that time the creditor knew or must have known of the debtor's insolvency or the proposal to initiate the bankruptcy procedure.

It shall be considered that the creditor knew of the debtor's insolvency or of the proposal to initiate the bankruptcy procedure if he was familiar with the circumstances on the basis of which it may be concluded that the debtor was insolvent or a proposal to commence a bankruptcy procedure has been filed.

An action giving a bankruptcy creditor or enabling him a security interest or security he was not entitled to claim or did not have the right to request in that manner and at that time, can be challenged as well, if it was taken:

(i) within the last 30 days prior to filing the proposal to initiate the bankruptcy procedure;
(ii) within the 90 days prior to filing of the proposal to initiate the bankruptcy procedure and if the debtor was insolvent at that time;
(iii) within the last 90 days prior to filing the proposal to initiate the bankruptcy procedure and at that time the creditor new that the bankruptcy creditors would be damaged as a result of that action.

An action by the debtor, which directly damages the bankruptcy creditors, can be challenged if it was undertaken:

(i) within the 90 days prior to filing the proposal to initiate the bankruptcy procedure if at that time the debtor was insolvent and if the other party new of his insolvency;
(ii) after the filing of the proposal to initiate the bankruptcy procedure and if at the time the action was undertaken he knew or must have known about the insolvency or about the proposal for initiation of a bankruptcy procedure.

An action the debtor has taken in the last 10 years prior to filing of the proposal for initiation of a bankruptcy procedure or afterwards, with the intention of damaging its creditors, can be challenged if the other party knew about the debtor's intentions at the time when the action was undertaken.

(e) Enforcement of secured claims upon debt restructurin

Reorganisation Plan

Prohibition on obstruction in formal restructuring, when voting for acceptance of the reorganisation plan, is imposed on the secured creditors. Namely, if the necessary majority has not been achieved during the voting, it will be considered that the voting group consisting of secured creditors has given its consent if:

(i) the creditors who form this group do not suffer any loss or damages by acceptance of the plan for reorganisation, in comparison to their situation without that plan; and

(ii) the creditors who form this group, to some reasonable extent participate in the amount of economic value belonging to the participants in accordance with the provisions of the reorganisation plan.

(f) Enforcement of secured claims upon liquidation of the bankruptcy estate

(i) Procedure

Secured creditors are entitled to a separate right of enforcement on the assets subject to their security. The trustee carries out the sale of immovables by a public auction in accordance with the applicable provisions of the Bankruptcy Law. In the decision for sale, it shall be registered that the immovables are sold in a bankruptcy proceeding. The enforcement agent shall reimburse the costs of the sale and transfer the funds to the bankruptcy account. The trustee shall settle the claims of the secured creditors in accordance with the priority applicable in the enforcement procedure.

As for the movables, the trustee is entitled to freely dispose and sale the pledged assets to a third party, by prior notifying the creditor on the intended sale. It will allow for the secured creditor to suggest more favourable manner of sale of the assets, or as well transfer the assets to the secured creditor.

The financial collateral agreement and the rights acquired thereon, including the rights to enforce the collateral, continue to be valid even after a bankruptcy or liquidation procedure is initiated or ongoing against the provider or receiver of the collateral. The rights or obligations acquired on the basis of financial collateral agreement cannot be limited or disputed during the bankruptcy procedure by a bankruptcy trustee or other participant in the procedure. The rights acquired on the basis of a financial collateral agreement, remain to be valid even in regard with the interests which until the day of initiating a bankruptcy or liquidation procedure still have not become due.

A financial collateral agreement cannot be stated null and void in case it has been concluded 90 days before adopting a decision on initiating bankruptcy or liquidation procedure. As an exception, the financial collateral agreement shall be considered valid if the receiver of the financial collateral proves that when concluding the financial collateral agreement, had no knowledge and could not have any knowledge that conditions for initiation, i.e. opening of bankruptcy or liquidation procedure, have been fulfilled.

(ii) Ranking of claims

Creditors in bankruptcy procedure are ranked in payment orders. The lower ranked creditors may collect their claims only if the higher ranked creditors are settled in full. Creditors in the same payment order are settled proportionally.

Secured creditors as creditors with separate rights of enforcement may exercise their rights as other creditors of the debtor in the bankruptcy procedure if they waive their right to separate enforcement or if their claim is not settled in full until the distribution of the bankruptcy assets.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

Enforcement v. bankruptcy proceedings

As of the opening of the bankruptcy procedure, the secured creditors may commence against the debtor enforcement procedure for foreclosure and security in accordance with the applicable rules for enforcement of security. The terminated enforcement procedures, which commenced prior opening the bankruptcy procedure, shall continue under the applicable rules of enforcement procedure. If the secured creditor with a right to separate settlement commenced an enforcement procedure on the immovables owned by the debtor prior the bankruptcy procedure is opened, then the sale of the immovables shall be carried out in accordance with the earlier commenced enforcement procedure.

2.5 Recourse of a secured creditor to self-help remedies

Self-help remedies are in general prohibited under Macedonian laws.

In cases when the pledgor fails to fulfil the obligations arising from the pledge agreement, and the pledge agreement has the capacity of an enforcement deed, the pledgee may request a foreclosure after he has notified the pledgor, as well as the other registered pledgees, if any. Upon this notification, the pledgee is entitled to undertake protective measures in regards to the pledged asset, in order to protect or increase its value. In order to achieve this, the pledgee may request from the court to adopt a decision to cease the pledged asset from the pledgor and transfer it into possession of the pledgee. In case that is not possible or in case it is in the best interest of the pledgee, upon pledgee's proposal, the court shall assign an administrator who will take care of the pledged asset until the final realisation of the pledge.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

The concept of security trustee, or of trust arrangements, is not expressly recognised under Macedonian law. Furthermore, Macedonia is not a party to the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

Relevant guidance in determining who can be a party to a pledge agreement, as a security arrangement, is provided by the provisions of the Law on Contractual Pledge.

The Law on Contractual Pledge defines that the pledge, as an accessory legal deed, secures the monetary claim (i.e. claim which value can be expressed in monetary terms) that the creditor has with respect to its debtor from a certain obligatory relation. A secured creditor is defined as any person that has a certain monetary claim in relation to its debtor.

The mandatory elements of the security agreement are the legal basis for the claim that is being secured with the pledge, its amount, and the final repayment date, as well as the description and the maximum amount of the claim which is secured. The monetary claims are considered as sufficiently identified in case the creditor, the debtor, the legal basis and the amount, the type of the claims, are determined. Based on strict interpretation of these provisions, only the creditor may be a secured creditor - no third party may be secured on its behalf.

Furthermore, the practice of registering and enforcing security granted under Macedonian law has shown that both the notaries public (authorised to certify the security documents) and the public registries (perfecting the security) interpret that pledge as a security interest governed by Macedonian law is valid only if the person receiving the security is at the same time the creditor under the financing agreement. Namely, security is granted and registered separately to each creditor, but not to a security trustee who is not at the same time the creditor of the secured claims.

Having in mind the foregoing, parallel debt structure may be used as the bypass structure to overcome the imposed, by the practice, necessity and burdensome legal exercise of registering each creditor in the financing transactions as a secured creditor. Created as an undertaken obligation of the debtor to pay to the security agent the sum of money in currency and in the amount equivalent to the claims of the creditors, the security granted for the parallel debt complies with the definition of the pledgee under the Law on Contractual Pledge. The definition states that the security agent as a secured creditor is granted a security on its own behalf as a creditor under the parallel debt for the full amount of the claims under the financing agreement.

Used mainly in crossborder financing, the parallel debt structure is governed by foreign laws. As such, in a case of dispute, its validity shall be assessed in accordance with the applicable law, while its enforceability shall be allowed if it is not contrary to the public policy of Macedonia.

However, the parallel debt concept is not common and rarely tested in practice, and there is general unfamiliarity of this concept. So any alternative take in describing the secured claim in the security documents needs to be balanced with the uncertainty and potential risks surrounding the parallel debt concept in our legal environment.

3.2 Specifics of taking and enforcing security by a security trustee or agent

Once the concept of parallel debt is incorporated in the financing agreement, under which the security agent is the creditor for the

total claim under the financing agreement, no specific formalities are followed in granting the pledge and registering the security agent as the secured creditor, as for any other pledge. In this structure, only the security agent is entitled to undertake foreclosure in the event of default of the debtor.

Although arguments may be provided whether under Macedonian law the security trustee may be registered as the secured creditor, the potential risks in implementing this structure in practice exist.

3.3 Precedents

Driven mostly by the lack of practice involving a security agent, as well as incorporating the parallel debt structure in the local security agreements, conservative approach is followed in granting the security to each of the creditors. As of the date of publication of this Guide, there is no case law dealing with the granting of the pledge under the parallel debt clauses, though the practice shows that few such transactions have been entered in which the security was granted only to the security agent as the creditor under the parallel debt. There is no case law in recognition or enforceability of security interests held by security trustees.

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ROMANIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

Generally, under Romanian law, security or other guarantees, which are created by a company to support an obligation of a third party, might raise corporate benefit issues to the extent the security grantor does not derive sufficient corporate benefit from entering into the transaction. While the issue is complex and requires the analysis of multiple aspects under Romanian law, it can be summarized as a legal requirement for a company to derive or seek to derive a certain commercial benefit upon entering into a transaction. It follows that, absent of such a commercial benefit, a transaction could be set aside for such reasons. Because Romanian law does not recognize the concept of group interest or benefit, the matter of corporate benefit is particularly relevant in third party security situations, where a company in the relevant group secures the obligations of another.

Generally, it is considered that under Romanian law a company should only perform activities which are directed towards the obtaining of profit. Potentially, third party security may be challenged in a Romanian court on the following grounds:

(a) lack of legal cause (commercial reasoning) underlying the transaction – there is an exposure to this risk, particularly where there is no or very limited direct benefit for the security grantor; and

(b) lack of legal capacity – the granting of security might be considered as not being within the limits of the authorized scope of activity of the company, as set forth by the law and its constitutive documents.

In assessing the existence of the corporate benefit, the following should be considered:

- Romanian legislation and practice lack objective criteria for assessing corporate benefit, leaving this aspect, in case of a challenge, at the discretion of the court; and
- there is no conclusive legal practice under Romanian law to sustain the concept of "group benefit" and, therefore, an assessment of potential benefits of securing debt should be made by reference to a company's own individual position, and not to benefits deriving at group level.

In limited circumstances, a lack of corporate benefit for the company, together with other factors (such as the misuse of the company's assets) may lead to criminal liability of the directors and other persons involved. Finally, it is relevant to note that in an insolvency scenario, Romanian insolvency regulations provide specific (and stricter) rules for the assessment (and potential unwinding) of transactions, as well as specific conditions for liability of parties responsible for the insolvency of the company.

1.2 Financial assistance

The Romanian Companies Law provides that a company may not lend or create security to support the acquisition of its own shares by a third party. Essentially, this means there is a prohibition against Romanian companies creating security for a lender financing the acquisition of their shares. Exceptions under Romanian law include (i) transactions of credit or other financial institutions in the usual course of business and (ii) employee share acquisition schemes. The provisions prohibiting financial assistance are listed in the section of the Romanian Companies Law concerning joint stock companies, raising a debate as to whether these provisions are also applicable to limited liability companies or not. Further, it is noteworthy that Romanian law does not recognize any "white wash" procedures.

1.3 Types of security. Most often used types of security in practice

The most common form of security interest over immovable and movable assets in Romania is the mortgage (ipotecă). Furthermore, the legislation allows creation of various types of security as follows:

[1] *Law No. 287/2009 on the Civil Code is in force as of 1 October 2011 as per Law No. 71/2011 on the application of Law No. 287/2009. The Civil Code was republished in the Official Gazette No. 505/15.07.2011.*

(a) Mortgage

The new Civil Code[2] uses a unified concept of "mortgage" which applies to both immovable and movable assets. This is in contrast with previous legislation which referred to mortgages over real estate[3] and "security interests" over movable assets (garantii reale mobiliare). However, notwithstanding the uniformisation of the terminology, there are still notable differences in terms of creation, publicity requirements (and related costs) as well as the enforcement regime, between mortgages over real estate (notably more formalistic and costly) and mortgages over movable assets. Creation of a mortgage does not require dispossession, unlike the pledge, which is validly created only by taking possession of the respective assets, as detailed below.

(b) Possessory Pledge

Movable assets, including negotiable titles issued in materialized form, may be subject to possessory pledges. This type of security involves the dispossession of the encumbered asset until full repayment of the secured obligations.

(c) Other types of security

Retention of title as security

Romanian law does not generally recognize retention of title for security purposes, which may come into conflict with certain provisions of the Romanian Civil Code which prohibit any arrangements that might allow a lender to automatically acquire ownership over a secured asset as a means of security without undergoing security enforcement procedures.

However, a seller may retain the title over the sold assets to secure certain obligations of a purchaser, such as the payment of the purchase price.

Liens and retention rights

Certain preferential rights of payment of unsecured creditors are legally recognized, such as, for instance, the legal mortgage of the seller of an immovable asset over the respective asset for the payment of the sale price.

Also, we note that, as an element of novelty, the new Civil Code expressly regulates retention rights in favour of the holder of an asset until payment by the owner of the expenses incurred by the holder with the respective asset or compliance with its contractual obligations.

Assignment of receivables as security

Another form of security used is the assignment of receivables for security purposes, although as opposed to movable mortgages over receivables, assignment of receivables for security purposes does not benefit from a clear legal regime.

(d) Financial Collateral

General

The EU Collateral Directive has been implemented in Romanian law by the Government Ordinance No. 9/2004 on financial collateral arrangements.

Generally, securities, credit claims or money credited to an account can be offered as collateral for securing financial obligations which give a right to cash settlement, delivery of financial instruments or both.

Financial collateral arrangements which benefit from the separate legal treatment envisaged by the Collateral Directive are only available to a limited group of entities. In order to be qualified as financial collateral, both the collateral taker and the collateral provider must be either:

(i) a public authority (excluding certain publicly guaranteed undertakings);

(ii) a central bank, including the European Central Bank and other international banking institutions such as the Bank for International Settlements, the International Monetary Fund and the European Investment Bank;

(iii) a financial institution subject to prudential supervision, including credit institutions, investment firms, insurance undertakings, Undertakings for Collective Investment in Transferable Securities (UCITS) or investment management companies; or

(iv) a central counterparty, settlement agent or clearing house, or person, other than a natural person, who acts in the name or on behalf of any one or more persons that includes any bond holders or holders of other forms of securitized debt or the other institutions mentioned above.

[2] *Before the enactment of the new Civil Code, mortgages were regulated by the Civil Code from 1864.*

[3] *Before the enactment of the new Civil Code, security interests were regulated by Title VI of Law No. 99/1999 on certain measures for acceleration of the economic reform.*

Both title transfer and security financial collateral arrangements are recognized, as described below.

Title transfer collateral arrangements

Under this type of collateral arrangements, which includes repurchase agreements, a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations.

Security collateral arrangements

Under security collateral arrangements, a collateral provider provides financial collateral by way of security to or in favour of a collateral taker, and the full or qualified ownership of, or full entitlement to, the financial collateral remains with the collateral provider when the security right is established.

1.4 Creation of security

(a) Mortgage

Immovable mortgage

Mortgages over immovable assets are made under mortgage agreements authenticated by a Romanian public notary. The notary public oversees the signing of the mortgage agreement and ensures communication with the Real Estate Registry, for the purpose of the registration of the mortgage.

This typically means:

(i) requesting excerpts for authentication from the Real Estate Registry, which show the legal status of the real estate to be mortgaged and block the register, not allowing any registrations during the validity of the excerpt;

(ii) verifying the legal title and the fiscal status of the real estate (ensuring that the mortgagor has valid title and that there are no unpaid debts to the tax authorities); and

(iii) overseeing the signing (which includes checking the authorities for signing) and the registration of the mortgage with the Real Estate Registry.

As a novelty element under the new Civil Code, mortgages over immovable assets are now referred as being effectively "created" by way of registration with the Real Estate Registry. This means that entering into the mortgage agreement would no longer be sufficient, as the mortgage would take effect only after registration with the Real Estate Registry.

However, this change under the Civil Code will only take effect after the cadastral works corresponding to the relevant administrative unit in which the real estate is located, are finalized. Until cadastral works are finalized, the registration of the mortgages with the Real Estate Registry will have the same effect as in the past, i.e. to serve notice to third parties and render the mortgage enforceable towards third parties.

Immovable mortgage agreements, like movable mortgage agreements, are not valid unless the amount for which the mortgage was created can be reasonably determined on the basis of the mortgage agreement itself. Furthermore, the agreement must provide the parties, the purpose of the secured obligation and a (sufficient) description of the mortgaged assets.

Movable mortgage

A movable mortgage can be created by concluding a security agreement as a private deed (unlike immovable mortgage agreements, it does not need to be notarised or authenticated). According to the Civil Code, a movable mortgage is perfected once: (a) the secured obligations come into existence; (b) the mortgagor acquires rights over the secured assets; and (c) the conditions for the publicity of the mortgage are fulfilled.

A movable mortgage agreement is valid only if it includes "a sufficiently precise description of the secured assets" and, where the mortgage is created over universality of assets or receivables, if the respective agreement clearly describes the "nature and content" of the respective universality. A description such as "all present and future movable assets of the debtor" is considered to be insufficient.

(i) Bank Accounts

Movable mortgages can be created over bank accounts. In order for the security to be validly created, an exact identification of the bank account (i.e. bank account number) needs to be included in the security agreement (each individual account should be specifically identified in the security agreement).

Perfection of mortgages over bank accounts is achieved by registration of the mortgage with the relevant Movables Pledge Register (the Electronic Archive for Security Interests in Movable Property)and by obtaining control over the mortgaged bank account.

Control over a bank account may be obtained by: (a) the mortgagee being the account bank; (b) the mortgagee, the mortgagor and the account bank agreeing in writing that the account bank will comply with the instructions of the mortgagee regarding disposal of the amounts in the mortgaged bank account; or (c) the mortgagee becoming holder or joint account holder of the mortgaged bank account. A mortgagee which has control over a mortgaged bank account will be preferred by law to a secured party having a mortgage over the same bank account even if the latter registered its claim with the Movables Pledge Register before the controlling mortgagee obtained control over the bank account.

Enforcement of security over bank accounts has the effect of blocking the bank account with regards to outgoing payments, but does not affect incoming cash flow.

(ii) Intellectual Property

Intellectual property can be secured with movable mortgages. In addition to typical movable mortgages registration formalities, security granted over intellectual property rights such as patents, utility models, trademarks, designs must be registered with the State Office for Inventions and Trademarks ("Trademark Office") in order to be enforceable against third parties. Please note that procedures involving registrations or amendments to existing registrations in the registries kept by the Trademark Office may prove lengthy, and terms of about 60 days should reasonably be considered.

(iii) Receivables

Movable mortgages may also be created over receivables. Publicity of mortgages over receivables is achieved by registration of the mortgage with the Movables Pledge Register and, in certain cases, by additional registration formalities (for example, mortgages over rent receivables deriving from lease agreements over real estate need also to be registered with the relevant Real Estate Registry). Likewise, if the mortgaged receivable is secured with an immovable mortgage, registration formalities should be observed with regards to both mortgages, which means that the security over receivables also needs to be registered with the Real Estate Registry.

(iv) Shares

Movable mortgages may also be created over shares of joint stock companies or limited liability companies by entering into a mortgage agreement in the form of a private deed. Generally, the security agreements must be registered with the shareholders' registry kept by the director(s) of the company whose shares are mortgaged, or in the case of listed companies, with the shareholders' registry kept by the Central Depository.

(v) Aircrafts and ships

Mortgages can also be created over aircrafts and ships pursuant to specific validity and perfection requirements in accordance with special legislation governing such assets (they are not governed by the Civil Code). For instance, unlike movable mortgages created under the Civil Code, mortgages over aircrafts are generally concluded by way of a notarised deed. Also, publicity formalities for mortgages over aircrafts and ships include registration with the relevant registers where such assets are registered.

(b) Possessory Pledge

Generally, in order to create a pledge, the relevant creditor (or a person appointed in this respect by the creditor, if the debtor agrees) must take or, as the case, keep possession of the respective asset, for security purposes, with the consent of the debtor. Although not expressly required by law, it is advisable to conclude the pledge by way of a written agreement.

Pledges over negotiable titles can be created by taking over or endorsement of the title, as applicable.

(c) Financial collateral

Financial collateral arrangements are not subject to particular formalities, but in order to be covered by the separate legal treatment envisaged by the Collateral Directive, as implemented in Romanian legislation, certain requirements must be met, including:

(i) the financial collateral needs to be provided to the collateral taker or the person acting on his behalf – meaning that it should be transferred so as to be in possession or under the control of the collateral taker;

(ii) the transfer mentioned above needs to be properly evidenced – meaning that the evidence must allow for the identification of the financial collateral to which it applies (for instance, the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account).

Only certain assets may be offered as financial collateral:

- financial instruments, such as shares in companies, bonds or other forms of debt instruments which are negotiable on the capital market;

- cash, which refers only to money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits; and
- credit claims, which essentially refer to loans granted by credit institutions or other authorized entities in an European Economic Area States.

1.5 Perfection and maintenance of security

(a) Mortgage

Immovable mortgage

In order to be enforceable against third parties, immovable mortgages must be registered with the Real Estate Registry in which the mortgaged property is registered.

A mortgage over an immovable asset will extend over the constructions, improvements and accessories of that asset, even if these are created subsequent to the mortgage agreement.
Furthermore, mortgages over future constructions are generally permitted. Such mortgages can be temporary registered with the relevant Real Estate Registry.

Accordingly, it seems possible to create a mortgage over land, over any future constructions to be built on the relevant plot of land (which will be subject to a provisory registration), and in such case the mortgage will progressively extend over the constructions to be built on the land and any improvements thereof. The Civil Code also refers to mortgages over universality of assets which may include immovable assets. In such cases, in order to be effective, the mortgage over each of the mortgaged immovable property must be registered with the relevant Real Estate Registry.

Movable mortgage

Perfection of a movable mortgage implies fulfilment of the following conditions: (i) the secured obligation must exist; (ii) fulfilment of the conditions for the publicity of the mortgage; and (iii) the mortgagor has acquired rights over the secured assets. As regards opposability requirements, these typically include registration of the security with the Movables Pledge Register, but additional/other requirements may apply, depending on the type of assets that are being secured, as described in Section 1.4 (Creation of security) above. The registration of mortgages with the Movables Pledge Register is valid for five years as of the initial registration and must be renewed before the expiry of this term in order to preserve the ranking of the mortgage.

(b) Possessory Pledge

Publicity formalities may consist in (i) dispossession of the asset, or (ii) registration of the pledge with the Movables Pledge Register.

Perfection of possessory pledges over negotiable titles requires the remittance or, as the case may be, the endorsement of the respective negotiable title. The maintenance of the pledge implies that the pledgee continues to keep possession of the respective asset, or, as applicable, that the endorsement of the negotiable title remains valid. However, the pledge will not be considered released if the creditor: (i) unwillingly losses the possession, by act of a third party, (ii) has temporarily released the asset to the debtor or to a third party, for valuation or repairing purposes, or (iii) provides the asset to a higher ranking creditor or in case of a take over for enforcement purposes.

(c) Financial collateral

Typically, no particular formalities should be required in order to ensure the validity, priority, opposability, enforcement or admission as evidence of the financial collateral agreement, as long as:

(i) the financial collateral has been properly provided and evidenced, as described above; and
(ii) the agreement is evidenced in writing or other equivalent manner which is legally accepted.

1.6 Costs and expenses for creating, perfecting and maintaining security

(a) Mortgage

Immovable mortgage

Notary costs differ according to the value of the secured amount. For values exceeding RON 500,000 (approximately EUR 113,000), the minimum notary fee is of RON 1,285 (approximately EUR 290) plus 0.07 per cent of the secured amount for the amount exceeding RON 500,000. The registration fee with the Real Estate Registry is of 0.1 per cent of the secured amount plus RON 100 (approximately EUR 24) for each mortgaged property.

Movable mortgage

Registration with the Movables Pledge Register requires filling a standard form (sending a copy of the security agreement is not necessary) and is subject to a registration fee of approximately EUR 20 for the initial registration (irrespective of the value of the secured claim) and of approximately EUR 15 for each amendment/extension of the initial registration with the Movables Pledge Register.

(b) Other – possessory pledge; financial collateral

Registration of possessory pledges and financial collateral arrangements with the Movables Pledge Register is subject to similar fees as mentioned above.

1.7 Recognition of security governed by foreign law

Choice of law and choice of forum clauses in security agreements will be upheld under Romanian law as long as they are valid under EU private international law legislation (Rome I and Brussels I Regulations, as regards contractual obligations). However, with regards to the security itself, as a general rule, Romanian law applies the lex rei sitae principle. This means that if assets are located in Romania at the time the security is granted, the creation, perfection and effectiveness of the security will be assessed under Romanian law irrespective of any choice of law clauses in the security documents.

Certain exceptions to this principle apply with regards to movable assets. The lex loci debitori principle will apply to: (a) movable assets destined to be utilized in several states, (b) intangible assets, and (c) certain negotiable titles (see exceptions below). This means that securities over such assets will be assessed according to the law where the debtor is situated at the time the security is granted. Other exceptions may apply as well:

(a) the legal regime of assets that are being transported from one jurisdiction to another will be governed by the laws of the jurisdiction where the goods departed from, unless the parties agree otherwise;
(b) securities over shares or bonds are assessed according to the law where the issuer has its registered headquarters, or, for state bonds, the law of the issuing state;
(c) securities over financial instruments that are tradable on a regulated market are assessed according to the law of the state where the regulated market is registered; and
(d) securities over mineral resources, oil, gas or certain related receivables are assessed according to the law of the state where they are exploited.

Although there are generally no restrictions with regards to choice of forum clauses in security documents, exclusive jurisdiction rules apply with regards to immovable property. That is why Romanian courts will have jurisdiction over proceedings related to mortgages over immovable property situated in Romania. It is common that whenever a security interest is granted with respect to assets located in Romania, parties agree that security documents will be governed by Romanian law and accept to submit disputes to Romanian courts.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

Judicial enforcement of mortgages is generally regulated by the new Civil Procedure Code[4] entered into force in 2013 ("**CPC**") and also by certain provisions in the new Civil Code entered into force in 2011. The procedure can also be followed by unsecured creditors that have a certain, liquid and due receivable against the debtor.

(b) Enforcement grounds

As a precondition for initiating enforcement proceedings against a debtor, a creditor needs to have a valid writ of execution. Under Romanian law, mortgage agreements which are validly created are generally regarded as writs of execution. If, however, the mortgage is accessory to a foreign law governed agreement, a Romanian court of law may take the view that such mortgage may not be enforced unless the agreement generating the secured obligations is a writ of enforcement or a court decision or writ of enforcement is obtained as a prerequisite for approving the enforcement of the mortgage agreement.

According to a very recent amendment of the Civil Procedure Code by Law No. 138/2014, effective as of 19 October 2014, as a precondition for starting enforcement proceedings, mortgage agreement must be vested with executory formula (investite cu formula executorie) by the court and the initiation of the enforcement proceedings must be approved by the enforcement officer (executor judecatoresc) (incuviintarea executarii silite)[5].

(c) Procedure

Enforcement of mortgages is subject to mandatory provisions of Romanian law, which, as mentioned above, generally include, as a prerequisite for starting the enforcement procedure, the vesting

[4] *Law No. 134/2010 on the Civil Procedure Code, republished in the Official Gazette No. 545/03.08.2012*

[5] *Prior to this amendment, mortgage agreements, as writs of execution, did not need to be vested with executory formula and the competence for approving the initiation of enforcement proceedings belonged to the court of law.*

of the mortgage agreement with executory formula by the court, the approval of the initiation of the enforcement proceedings by the enforcement officer and strict procedural requirements. Enforcement of immovable mortgages is governed by the Civil Procedure Code, whereas rules governing enforcement of mortgages over movable assets are included in the Romanian Civil Code and the Romanian Civil Procedure Code.

As both the Romanian Civil Code and the Romanian Civil Procedure Code are relatively new legislation (entered into force in 2011 and 2013, respectively), it is not clear how certain provisions on enforcement measures set forth in each of them should be interpreted and applied in correlation with each other, which may create procedural difficulties in enforcing the mortgage. Furthermore, the Romanian Civil Code and the Romanian Civil Procedure Code have generated a limited amount of practice and case law and Romanian courts and practitioners have yet to express their views in connection with most of the ambiguous provisions set forth under this legislation. As a consequence, there is a degree of uncertainty affecting the correct interpretation and application of the provisions of the Romanian Civil Code and the Romanian Civil Procedure Code.

(d) Enforcement of mortgage over immovable assets

Enforcement of immovable mortgages is performed in accordance with the provisions of the Romanian Civil Procedure Code. The process is driven by a court enforcement officer under court supervision. Generally, the enforcement of immovable assets can be achieved either through: (i) amicable sale (performed by the debtor himself); (ii) direct sale (performed by the enforcement officer); or (iii) public auction sale.

Public auction procedure

Once the debtor is informed about the approval of the enforcement, the enforcement officer may appoint, if he deems necessary, a receiver (administrator sechestru) in charge with managing the income and the relevant costs and expenses of the asset and the debtor/ mortgagor will no longer be entitled to manage the immovable property. If the debtor is appointed as receiver, the enforcement officer will hand over the immovable to the debtor or, in case of refusal, will draft a delivery receipt minutes which will be deemed as delivery receipt.

After the evaluation of the assets and fulfilment of the publicity formalities regarding the sale, the sale will be organised by the enforcement officer in subsequent steps, starting with a first session in which the assets will be offered for sale at the valuation price.

In case the asset is not sold during the first session, the public auction is postponed for another session, to be held no later than 30 days. The starting price for the second session will be reduced to 75 per cent of the valuation price. If there are at least two bidders and the starting price is not offered, the asset will be sold at the highest bid, but in no case for a price lower than 30 per cent of the valuation price.

Furthermore, if the asset is not sold in the second session, the enforcement officer may organize a third session upon the creditor's request. The starting price will be reduced to 50 per cent of the valuation price. In case there are at least two bidders, the asset may be sold at the highest offered price. Further, the asset can also be sold if there is at least one bidder willing to buy for the starting price for this session.

The creditor may participate in the public auction, but he may not adjudicate the asset for less than 75 per cent of the valuated price.

Enforcement proceeding against the general proceeds derived from immovable assets.

This procedure represents an alternative procedure to the enforcement of the immovable assets and cannot be used in case the enforcement proceedings have already been initiated against the relevant immovable property.

The object of such procedure may be represented by all present and future proceeds derived from the immovable assets.Following the approval of the enforcement, at the creditor's request, the enforcement officer may appoint a receiver for the management of the proceeds derived from the immovable assets. The receiver can be either the creditor, the debtor or a third party.

Generally, the main procedural steps to be followed in such procedure are:

- a request submitted to the enforcement officer;
- preliminary enforcement measures as described above (vesting of the mortgage with executory formula by the court and approval of the enforcement by the enforcement officer);
- appointment of the receiver by the enforcement officer;
- publication of the enforcement action; and
- handover of the immovable asset by the enforcement officer to the receiver.

(e) Enforcement of mortgages over movable assets

Enforcement of movable mortgages under the Civil Procedure Code

In accordance with the Civil Procedure Code, after the vesting of the mortgage agreement with executory formula, the approval of the enforcement procedure by the enforcement officer and the summoning of the debtor, the enforcement officer may seize the relevant assets of the debtor in case it fails to pay the amount provided in the relevant summons for payment.

As a general rule, in case the debtor does not pay the amount due within one day as of the communication of the enforcement officer's summons, the enforcement officer will seize the debtor's assets. In case there is a real threat that the debtor intends to dispose of the goods, upon the request of the creditor or of the enforcement officer, the court may order the seizure of the debtor's assets together with the communication of the summons for payment to the debtor. The enforcement of movable assets can be achieved through: (i) amiable sale (performed by the debtor himself); (ii) direct sale (performed by the enforcement officer); or (iii) public auction sale (which is the most common means of enforcement).

The auction sale is organised by the enforcement officer, after the evaluation of the assets by the enforcement officer (either in accordance with the average market prices, or, more frequently in practice, through an evaluation expert appointed by the enforcement officer) and fulfilment of the publicity formalities for the sale. The enforcement officer will be entitled to perform the auction procedure if the debtor does not pay its debt within 15 days as of the date the assets were seized (or immediately after the seizure, if the goods are subject to destruction or are perishable). According to the Civil Procedural Code, the sale by public auction will take around two to four weeks.

The sale is run in subsequent steps, starting with (i) a first session, in which the assets will be offered to be sold at the value shown in the valuation, and may be reduced to 75 per cent of the valuation, which may be followed by (ii) a second session, in which the assets may be sold at 50 per cent of the valuation or even less, if there is no offer for 50 per cent.

The creditor may not adjudicate the assets for a price lower than 75 per cent of the evaluation price. However, if the asset is not sold in the last auction session, a creditor may take over the asset in exchange for debt for the price established for the final auction session (which is usually 50 per cent of the evaluation price.)

The amount obtained from the sale of such assets will be distributed in accordance with the waterfall of payments detailed in Section (f) (Ranking of claims) below.

Enforcement of movable mortgages under the Civil Code

The enforcement procedures set forth in the Civil Code entitle the creditor, in case the debtor fails to comply with its obligations, to:

(i) take over the assets by its own means (see Section 2.2 (Private foreclosure) below) or with the help of an enforcement officer; (ii) sell the mortgaged asset; (iii) take over the mortgaged assets in exchange for the mortgaged debt; or (iv) take over the mortgaged assets for the purpose of administration, until full repayment of the mortgaged debt.

(i) Sale of the mortgaged asset

According to the provisions of the new Civil Code, as recently amended by Law No. 138/2014, effective as of 19 October 2014, the sale of the mortgaged assets can be performed on the basis of the mortgage agreement invested with executory formula by the court of law. According to the Civil Procedure Code, the sale of the mortgaged assets under the Civil Code is subject to approval by the court, without the intervention of the enforcement officer. The sale can be achieved either through public sale or a direct negotiation, if certain conditions are met (such as observing the reasonable commercial rules).

In the security agreement the parties may include in advance provisions concerning the method of sale of the mortgaged assets. Before the sale, the mortgagee must: (i) send a notice to relevant persons (including the debtor, mortgagor, guarantors, co-debtors, all mortgagees having registered mortgages over the asset or other secured creditors whose security has become opposable to third parties by other means and all other persons which have raised any claim regarding the asset, if known); and (ii) register the application with the Movables Pledge Register.

(ii) Taking over the mortgaged asset in exchange for debt or for purpose of administration

These particular enforcement methods are a novelty under the new Romanian Civil Code, subject to very strict conditions provided by law, and given the relative novelty of these procedures, they have not been, to our knowledge, tested in practice.

Specific features of these enforcement procedures under the Civil Code include:

- The takeover of the mortgaged assets in exchange for the mortgaged debt is subject to the debtor's written consent which must be issued subsequent to the initiation of enforcement. The takeover of the relevant asset by the creditor extinguishes the secured obligation and the creditor can no longer exercise any personal action or pursue an enforcement action against the debtor, even if the value of the asset taken over does not cover entirely the secured obligation.
- The takeover of the mortgaged assets for the purpose of administration essentially consists in taking over the management of the movable assets of the mortgagor and applying the proceeds obtained in order to gradually discharge the secured obligations. However, given the novelty of this procedure and the fact that it has not yet been tested in practice, there is a degree of uncertainty affecting the interpretation and application of its provisions (for example, it is rather unclear how the procedure would apply to shares or other intangible assets).

Enforcement of mortgages over certain types of assets

(i) Receivables

Under the Romanian Civil Code, a mortgage over receivables generally confers the secured creditor, when the conditions to initiate enforcement are met, with the right to take over the debt title, request and obtain payment of the receivable, or sell the debt and collect the relevant price, all within the limits of the secured amount.

As a side remark, we note that, according to the provisions of the new Civil Code, mortgages over receivables entitle the mortgagee to request direct payment of the mortgaged receivables, on their maturity, from the debtor of the mortgaged receivables, even if the secured obligations are not due and payable (the amounts thus paid will be deducted from the secured obligations).

(ii) Bank accounts

Enforcement of mortgages over bank accounts over which the secured creditor has obtained control (see Section 1.4 above for the formalities for obtaining control over accounts) may be achieved by requesting the account bank to release the account balance in favour of the secured creditor.

If the account bank is the secured creditor, enforcement may be achieved by setting off the account balance against the secured debt. Enforcement of mortgages over accounts may be difficult in practice when the secured creditor is not the account bank and the mortgagee does not obtain control over the respective account in accordance with the Civil Code.

(iii) Shares

Enforcement of mortgages over shares in limited liability companies (parti sociale) is subject to a set of limitations, generally as a result of lack of specific provisions, or effective practice (including lack of practice in relation to some of the more recently added provisions in the Romanian Civil Procedure Code). Typically, the general principles and enforcement rules will govern the enforcement process to the extent they can be applicable to shares, given their particular nature as non tangible assets subject to a special legal framework set by the Company Law.

Other limitations may also arise as a result of Romanian corporate legal requirements in connection with transfers of shares in limited liability companies, which may impact the enforcement over shares process, particularly if the mortgage does not cover 100% of the shares issued by the relevant company at the time of enforcement.

The sale of shares during the enforcement proceedings can only be achieved through amicable sale or public auction. A direct sale by the enforcement officer is not included among the list of options available when enforcing shares.

Although there are no express legal provisions in relation to the valuation of social parts during the enforcement process, in practice, it appears to be more common that enforcement officers appoint evaluators for the purpose of determining the price of the shares. In addition to the formalities typically applicable to enforcement proceedings over movable assets, the enforcement officer carrying out enforcement over shares is required to prepare a tender book, comprising information on the company whose shares are being enforced.

The tender book will be communicated to the creditor, the debtor, the company, and its shareholders, which are entitled to raise objections. The enforcement officer will issue a ruling with regard to any objection, and continue accordingly, organizing the sale through the auction procedure.

(f) Ranking of claims

The Romanian Civil Procedure Code sets forth a mandatory order for the repayment of creditors in enforcement proceedings. According to the waterfall of payments set forth by the Civil Procedure Code, the amounts obtained from enforcement will be distributed to the creditors in the following order:

(i) receivables representing costs related to court proceedings, preemptive measures, enforcement costs, other costs for maintenance of the assets of the debtor, as well as costs and expenses incurred for the common good of the creditors;
(ii) claims secured by mortgages, pledges or other priority rights;
(iii) wages or other similar claims;
(iv) budgetary receivables;
(v) receivables deriving from state loans;
(vi) claims for damages caused to public property by unlawful acts;
(vii) receivables from banking loans, rents, etc.
(viii) claims from fines owed to state or local budgets; and
(ix) other receivables.

Generally, claims of the same rank shall be satisfied proportionately, unless the law provides otherwise (e.g. priority of mortgages according to the date of registration).

Priority given to perfected mortgages

Perfected movable mortgages have priority over movable mortgages which are not perfected. For example, a mortgage which has been registered first, but the other conditions for its perfection have not been met, will rank below a mortgage which was registered later, but which meets the other conditions for perfection.

Conflict between mortgages over bodies of assets and mortgages over individual assets

Generally, priority is given to whichever mortgage is either perfected or registered first, as applicable.

Conflict between movable and immovable mortgages

If the same assets are secured both with a movable and an immovable mortgage, and the two are registered in the same day, priority will be given to the immovable mortgage.

(g) Costs

Fees payable to enforcement officers vary depending on the nature of the enforcement act. For example, according to Law No. 188/2000 regarding enforcement officers, the maximum fee that may be charged by enforcement officers in case of enforcement of monetary receivables of over RON 100,000 (approximately EUR 22,000) is of RON 6,300 (approximately EUR 1,400) plus a percentage up to 1 per cent of the value of the receivable subject to enforcement exceeding RON 100,000 (approximately EUR 22,000).

Additional costs are also likely to arise such as court fees or payments for legal consultants, property appraiser, etc. which depend on the particularities of the case.

2.2 Private foreclosure

Under Romanian law, a form of private foreclosure is regulated only with respect to mortgages over tangible movable assets - please see in this respect Section 2.5 below (Recourse of a secured creditor to self-help remedies). However, the private enforcement procedure regulated by the Civil Code is based on rules which have only been recently enacted[6] and, to our knowledge, haven't been consistently tested in practice.

Foreclosure of Financial Collateral

Generally, unless the parties agree otherwise, enforcement of financial collateral can be initiated upon the occurrence of an event of default and is not conditioned by the obligation to deliver a prior enforcement notice or to obtain a court approval. Close out netting clauses included in financial collateral arrangements are legally recognized and may be enforceable even after the opening of reorganization or liquidation proceedings or other measures against the collateral provider such as initiation of attachment procedures.

This, however, does not apply to credit claims provided as collateral. The new Romanian Law No. 85/2014 regarding insolvency and prevention of insolvency proceedings (the "**Insolvency Law**") includes special provisions with regard to certain qualified financial contracts (such as agreements on transactions with derivatives, repo/reverse repo agreements, buyback/sellback agreements or certain securities loan agreements), whereby transfers or other obligations under such agreements or under bilateral netting agreements (including guarantee arrangements under master

[6] *A similar private enforcement procedure has been regulated in Romania before the enactment of the Civil Code, under Title VI of Law No. 99/1999 on certain measures for acceleration of the economic reform, but such was not frequently used in practice. However, the private enforcement procedure regulated by Law No. 99/1999 is still applicable to the security interests created according to its provisions.*

netting agreements) are valid and enforceable against an insolvent guarantor of a counterparty and may be recognized as a basis for registering claims in insolvency proceedings.

The new Insolvency Law also includes provisions whereby the judicial administrator/liquidator or the relevant court of law may not (save where there is evidence of fraudulent intent) request the cancellation of operations with derivative financial instruments, including the execution of a netting agreement based on a qualified financial contract.

2.3 Bankruptcy and debt-restructuring proceedings

General

Under Romanian law, insolvency proceedings can currently be initiated only against companies and merchants. A new law governing insolvency proceedings of natural persons has been recently enacted and published in the Official Gazette[7] but has not yet entered into force (it is scheduled to apply as of 26 December 2015). As a rule, the opening of insolvency proceedings suspends any individual judicial and extrajudicial measures of enforcement taken against the debtor's assets, which will be dealt with collectively within the insolvency procedure (with certain exceptions, as detailed in Section 2.4 below).

Also, as a rule, the opening of the insolvency procedure freezes any accrual of interest, default interest, penalty or any other amount whatsoever, save for certain limited exceptions.

Are recognised in insolvency only the claims of creditors that have been filled within the applicable term for admission of receivables and further verified and registered by the judicial administrator in the table of claims. If a creditor fails to register its receivable in the table of claims, it loses the right to participate in the insolvency procedure and further, to claim the debts against the debtor, even after the closing of the insolvency procedure (save for certain exceptions expressly regulated by law, such as employees' claims which are registered ex officio by the judicial administrator in the table of claims). The claims of secured creditors will be registered as secured claims in the final table of claims up to the amount of the market value of their security (evaluated in insolvency). If the value of the debt is higher than the value of the secured asset, the secured creditor will be registered in the table of claims for the balance as an unsecured creditor. However, if the asset is sold at a price which is higher than the valuation, the difference between the actual price paid and the valuation is distributed to the secured creditor. Any perfection formalities, including registration of security interests or mortgages with the relevant publicity registers performed after the initiation of the insolvency proceedings, are not opposable against registered creditors.

Challenges affecting secured claims. Claw back.

Certain transactions concluded by the insolvent debtor within the applicable claw back periods may be set aside in insolvency. Claw back periods range between 6 months (e.g., for transactions concluded at an undervalue, creation of a preference right, including by way of security, for a claim which otherwise would have been unsecured or early repayments of debts if the original due date was a date after the commencement of the insolvency proceedings) to 2 years prior to the opening of insolvency proceedings (e.g., for fraudulent transactions concluded with the intention of all parties to defraud creditors' rights, or transactions concluded by the debtor with its shareholders holding a participation of at least 20 per cent of its share capital or its directors).

Reorganisation plan

At the end of the observation period (which should not exceed twelve months), the debtor will either have a reorganisation plan approved by the creditors and confirmed by the court or will enter into bankruptcy whereby the debtor's business will cease and all its assets will be liquidated. Where a reorganisation plan is approved, the creditors may recover an amount of their claims against the debtor as set forth in the reorganisation plan or may suffer rescheduling of debts, amendments and/or haircuts, as the case may be.

Liquidation of assets in bankruptcy and priority of claims

In case of liquidation of the debtor's assets in bankruptcy, the secured creditors will have priority in respect of the proceeds derived from the sale of the collateral as long as the security was properly registered prior to the opening of the insolvency procedure.

There are two separate payment waterfalls: (i) for secured creditors, and (ii) for unsecured creditors.

(i) The funds obtained from the sale of the collateral will be distributed with priority to the secured creditors in the following priority order:

[7] *Law 151/2015 regarding insolvency proceedings of natural persons, published in the Official Gazette no. 464 dated 26 June 2015*

1. Costs for asset liquidation (including maintenance and conservation costs and fees to utility providers after initiation of the insolvency proceedings and professional fees of any receiver/liquidator or independent experts hired during insolvency procedure);
2. Receivables of secured creditors incurred after the initiation of the insolvency procedure, including the principal, interests and ancillary rights; and
3. Receivables of other secured creditors, including the principal, interests, penalties and other costs and expenses.

Furthermore, a secured creditor is entitled to participate at any distribution performed prior to the sale of its collateral asset. Such amounts will be deducted from the price obtained from the subsequent sale of the collateral asset, if this is necessary in order to prevent the secured creditor from receiving more than it would have if the secured assets had been sold prior to such distributions.
(ii) The last creditors to be paid are the unsecured creditors, which will be satisfied after the full satisfaction of creditors from a superior category in the following priority order:

1. costs of the insolvency procedure, including expenses incurred during the procedure to preserve the debtor's estate, for the continuation of the debtor's activity and the consideration payable to the liquidator and other experts appointed during the proceedings;
2. claims resulting from financing granted to the debtor within the observation period, in accordance with the Insolvency Law;
3. employees' claims;
4. claims resulting from the continuation of the debtor's activity after the commencement of the insolvency procedure and damages for the termination of contracts in accordance with the provisions of the Insolvency Law, as well as claims of third parties acting in good faith that have returned the assets or their value after a claw back claim in accordance with the Insolvency Law;
5. budgetary claims;
6. claims representing amounts owed to third parties, based on alimony obligations, or any obligations of regular payment intended to insure basic means of survival (to the extent applicable);
7. claims resulting from: (i) bank loans (including ancillary expenses and interest); (ii) the supply of products, services or works; and (iii) rents;
8. other unsecured debts; and
9. subordinated claims, in the following order: (i) receivables of third parties acting in bad faith which have returned the assets or their value after a claw back claim in accordance with the Insolvency Law; (ii) shareholder loans, in the case where the shareholder owns at least 10 per cent of the debtor's share capital or has at least 10 per cent of the share capital or voting rights in the debtor's general meetings of shareholders; and (iii) receivables deriving from gratuitous acts.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement v. bankruptcy proceedings

As mentioned above, the opening of insolvency proceedings suspends, as a rule, any individual measures of enforcement taken by creditors against the debtor's assets. As an exception from this rule, the suspension will not apply in certain limited cases provided by law, of which of relevance may be:

(i) claims filed against the joint debtors and/or third party guarantors; or
(ii) judicial claims aimed at determining the existence and amount of claims against the debtor, which are incurred after the initiation of the insolvency proceedings. The creditors of such claims may make, during the observation or reorganisation period, a payment request which will be verified by the judicial administrator.
(iii) Also, the insolvency judge can lift the suspension for the benefit of the secured creditors upon their request, only with respect to the secured assets and only subject to the fulfilment of certain requirements:

- the value of the collateral is covered by the value of the secured receivable and the asset does not have essential significance for the success of judicial reorganization plan or, if the asset is part of a functional ensemble, the separate enforcement of the security over the asset does not diminish the value of remaining assets from debtor's ownership; or
- when the secured receivable is not protected enough by the collateral as a result of one of the following reasons:

(i) the value of the collateral was reduced or there is a real danger that it would suffer a considerable reduction;
(ii) the value of the secured receivable of a mortgagee having a subsequent rank was reduced as a consequence of accrual of interest, increases or penalties of any kind to a secured receivable with prior rank;
(iii) the asset is not insured against the risk of damage or destruction.

In the second case, the insolvency judge can reject the request to lift the suspension if the judicial administrator or the debtor proposes, as an alternative, the adoption of certain measures to protect the secured receivable, such as making regular payments in favour of the creditor to cover the reduction of the collateral's value or to reduce the amount of the debt below the reduction rate of the collateral's value.

(iv) Also, as an exception to the suspension of enforcement actions, the amounts held in accounts that are subject to mortgages, as well as amounts subject to cash collateral, may be released by the judicial administrator/liquidator to the secured creditors upon demand. However, in order to ensure the necessary resources for the continuance of the debtor's current activity during the observation period, the judicial administrator may use the respective funds, with the approval of the secured creditor or, if the secured creditor refuses to give its consent, by granting the secured creditor an adequate protection as provided by the Insolvency Law.

(b) Private foreclosure v. bankruptcy procedure

As a rule, following the opening of the insolvency procedure, all private enforcement measures against the assets of the debtor are suspended by law. As an exception, the new Civil Code provides in case a creditor has taken over an asset for the purpose of administration as detailed in Section 2.1 (e) of Chapter 2 (Enforcement of security) above, the administration does not cease upon commencement of the bankruptcy proceedings of the debtor. However, the law does not provide any further guidance on how the two procedures would be correlated and interact and, to our knowledge, such provisions have not yet been tested in practice.

2.5 Recourse of a secured creditor to self-help remedies

According to the new Civil Code, a creditor may be able to self-enforce a mortgage over tangible movable assets, after sending a notification in this respect through an enforcement officer.
However, the creditor is not entitled to use coercion if the debtor opposes to the taking over the relevant asset.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

It is also possible to create a trust (fiducie) under the rules of the new Civil Code. However, the regime can be regarded as somewhat inflexible because of registration formalities or formal requirements (including notarisation requirements).

Moreover, Romanian law now recognizes trust relationships created under a different legal regime than the Romanian one. This allows foreign lenders to pick a familiar structure when enforcing security over assets placed in Romania (for instance, to appoint a UK law security trustee). Romanian law allows lenders to appoint a third party as agent and enable him to act on their behalf in what concerns the management of security over movable assets. However, such is not expressly regulated with respect to security over immovable assets.

3.2 Specifics of taking and enforcing security by a security trustee or agent

An agent appointed by the mortgagee generally has the same rights and obligations as the mortgagee. The agent is entitled to perfect the movable mortgage, and maintain or modify the registration of the respective mortgage. Furthermore, the agent is liable towards the beneficiaries of the movable mortgage for its acts performed in relation to the movable mortgage.

Considering the above, the relevant regulations do not provide any special or derogatory provisions with regards to enforcement by a trustee or agent, considering that such have the same rights and obligation as per the beneficiaries of the mortgages.

3.3 Precedents

As mentioned above, the general rules on trust (fiducie) and the role of the agent in case of movable mortgages have been very recently enacted in Romania. Having said that, it is difficult to assess an eventual outcome of enforcement of a security by a trustee/security agent.

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SERBIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

The Serbian Foreign Exchange Act[1] imposes limitations on the possibility of granting security by Serbian residents other than banks for the obligations of non-resident entities. Serbian residents other than banks are not allowed to provide security for the obligations of a non-resident to another non-resident, subject to narrow exceptions of no general relevance.

In the domestic context, Serbian companies may grant security for the obligations of third parties. There is no explicit corporate benefit rule in the context of granting security for the obligations of third parties. However, under the general rules of the Companies Act [2] ("Companies Act"), the management is obliged to act in the company's best interest and is liable for damages to the company and the shareholders in case of a breach of this duty.

1.2 Financial assistance

Under the Companies Act, limited liability companies and joint-stock companies are prohibited from granting loans or providing security for acquisition of their shares. An agreement concluded contrary to this rule is null and void. There is no exception to financial assistance prohibition. In addition, limited liability companies and joint-stock companies are not allowed to take pledge over their issued shares.

1.3 Types of security. Most often used type/s of security in practice

(a) Mortgage, i.e. pledge on immovables

The pledge on immovables, i.e. mortgage (hipoteka) is regulated by the Mortgage Act[3] ("**Mortgage Act**"). The mortgage may be established over: (i) a building; (ii) a land parcel; (iii) a separate part of a building, such as an apartment, business premise, garage, etc.; and (iv) building under construction (including separate part(s) of building under construction). A mortgage can also be established on a co-ownership stake in immovable property.

(b) Pledge on movables

The pledge (zaloga) on movables and rights (including IP rights and quotas in limited liability companies, but excluding securities) is governed by the Law on Pledge on Movable Assets Registered in the Movables Pledge Register[4] ("**Movables Pledge Law**"). There are two types of pledges on movables in Serbia: possessory pledge, perfected by actual or constructive delivery of the encumbered asset to the pledgee, and registered pledge, perfected by registration in the relevant public registry. After the introduction of the registered pledge on movables into the Serbian legal system in 2003, the possessory pledge lost its commercial relevance.

A registered pledge can be created on:

(i) movables;
(ii) receivables;
(iii) shares in partnerships or limited liability companies;
(iv) intellectual property rights;
(v) book entry securities (shares or bonds).

The Movables Pledge Law explicitly allows that a pledge may be taken on a "group of movable assets, such as goods in a particular warehouse or store, inventory in the function of an ongoing business, etc". The current position of the Movables Pledge Register is that a pledge on monies in a bank account found from time to time cannot be registered. Only on a specific account balance in existence at the time the pledge application is filed can be registered. A pledge can also be established on a co-ownership stake in an asset.

1.4 Creation of security

(a) Mortgage, i.e. pledge on immovable

Mortgage, i.e. pledge on immovables, is created based on either a

[1] *Zakon o deviznom poslovanju, Official Gazette of the Republic of Serbia, Nos. 62/2006, 31/2011 and 119/2012*
[2] *Zakon o privrednim društvima, Official Gazette of the Republic of Serbia, Nos. 36/2011, 99/2011 and 83/2014 – other law3*
[3] *Zakon o hipoteci, Official Gazette of the Republic of Serbia, Nos. 115/2005, 60/2015 and 63/2015*
[4] *Zakon o založnom pravu na pokretnim stvarima upisanim u registar, Official Gazette of the Republic of Serbia, Nos. 57/2003, 61/2005, 64/2006 and 99/2011*

mortgage agreement or an unilateral statement of the mortgagor. Mortgage agreement (or, as the case may be, a unilateral mortgage statement) has to be prepared by a Serbian notary public in form of notarial deed (javnobeleznicki zapis). Alternatively, the parties may draft mortgage agreement/unilateral mortgage statement and have it solemnized by a Serbian notary public. However, unlike a notarial deed, a solemnized mortgage agreement/unilateral mortgage statement does not represent a directly enforceable document (see section 2.1 below).

(b) Pledge on movables

A pledge over movables or intangibles (rights) is created based on a pledge agreement or a court decision as iustus titulus. The pledgor must own the movable asset or the right over which it wishes to create a pledge. The pledgor may also undertake to pledge "future" rights or movables, provided that these rights or assets are sufficiently specified. Whether a future asset or right is sufficiently specified in the pledge agreement is often open to interpretations. There is therefore an inherent dose of uncertainty involved with pledge on future assets. Pledge on "future" asset is deemed created once the pledgor acquires the right or, as the case may be, the asset.

According to the Movables Pledge Law, the pledge agreement must be made in writing and contain specific elements such as the date of signing, the names and other identifying information of the contracting parties, as well as details about the object of pledge and the claim thereby secured. As a general rule, additional formalities, such as notarisation, are not required. However, an agreement on pledge on quota in a limited liability company or a partnership has to be legalized by a notary public . The same requirement applies to the agreement on pledge on shares on a non-listed joint-stock company. An appostille may be required if the notarisation of the pledge agreement takes place in a country with which Serbia does not have a bilateral treaty dispensing with this requirement.

(c) Pledge on book entry securities

This type of pledge is created based on a pledge agreement or a court decision as iustus titulus. Notarisation of the pledge agreement is not required.

1.5 Perfection and maintenance of security

(a) Mortgage, i.e. pledge on immovables

Mortgage, i.e. pledge on immovables is perfected by registration in the Real Estate Registry. Priority is determined based on the day, hour and minute the application for inscription of mortgage was filed. There are no further maintenance requirements. An application for inscription of mortgage based on mortgage agreement can be filed by either the mortgagor or the mortgagee, while the application based on unilateral mortgage statement of the mortgagor may be filed only by the mortgagee. The following is required to be submitted to the Real Estate Registry along with the application:

(i) a mortgage agreement or, as the case may be, a unilateral statement of the mortgagor in the form of notarial deed or solemnized instrument (see Section 1.4 above);
(ii) a copy of the loan agreement or other underlying document containing the secured obligation;
(iii) a copy of the construction permit in case mortgage is being established on a building under construction (or a part thereof).

Documents in a foreign language must be accompanied with a certified Serbian translation. A mortgage is deemed perfected when registered in the Real Estate Registry. Inscription can be made after the resolution allowing the inscription becomes final, which is after the expiry of 15 days from delivery of such resolution to the mortgagor and the mortgagee provided that no appeal has been submitted within this time period. The mortgagor and the mortgagee may waive their right to appeal the resolution and thus shorten the referenced 15-day period. Secured creditors may appoint one of them or a third person to act as security agent with the power to undertake, on behalf of the secured creditors, any legal act aimed at protecting and enforcing the mortgage.

(b) Pledge on movables

Pledge on movables, receivables, quotas in partnerships or limited liability companies and intellectual property rights is registered by inscription in the Movables Pledge Register, maintained by the Serbian Agency for Business Registers. An application for the registration of the pledge can be filed by either the pledgor or the pledgee. The following is required to be submitted to the Movables Pledge Register along with the application:

(i) a pledge agreement (notarial legalization is required for a pledge on quotas in limited liability companies);
(ii) an original or a certified copy of the loan agreement or other underlying document containing the secured obligation.

Documents in a foreign language must be accompanied with a certified Serbian translation. In practice, the Movables Pledge

Register may require additional documentation not explicitly required by law, such as an excerpt from the Commercial Register for the pledgor or pledgee, etc.

(c) Pledge on book entry securities

A pledge (zaloga) on book entry securities registered in the Central Registry of Shares, Depository and Clearing House ("**CSDCH**"), such as shares of listed companies, is regulated by the Rules of the CSDCH . A pledge on book entry securities is registered with the CSDCH via member broker or member-custody bank. Book entry securities are effectively pledged by transfer from the pledgor's proprietary account to the pledge subaccount of the proprietary account. Shares held in a custody account cannot be pledged. Pledged shares cannot be traded. The following has to be delivered to the broker or custody bank in order to have the pledge on book entry securities registered:

(i) a pledge agreement;
(ii) a loan agreement or other underlying agreement containing the secured obligation;
(iii) if the pledgee is a non-resident lender and the pledgor - a resident entity, evidence that the loan agreement has been registered with the National Bank of Serbia;
(iv) an excerpt from the Commercial Register for the pledgee.

Documents in a foreign language have to be accompanied with a certified Serbian translation. The broker, i.e. custody bank, may require additional documentation, such as an excerpt from the Commercial Register for the pledgor or the pledgee, etc.

1.6 Costs and expenses for creating, perfecting and maintaining security

The costs relating to registration depend on the type of encumbered asset. Apart from the registration fee, one has to take into account notarisation fees, as well as the cost of translation of foreign language documents (EUR 10-13 per page). The notarisation fee for preparation of notarial deed depends on the value of the transaction, but is capped at approximately EUR 5,000 plus VAT. The fee for preparation of a unilateral mortgage statement is 60 per cent lower than the fee for preparation of mortgage agreement. The fee for registration of pledge on immovables depends on the value of the secured claim and may amount from approximately EUR 170 to a maximum of approximately EUR 1,250. The fee for registration of pledge on movables is capped at approximately EUR 50 per pledged asset. The fee for inscription of pledge on book entry securities depends on the tariff of the chosen broker or custody bank and can be charged as a lump sum or as a percentage of the market value of pledged book entry securities.

1.7 Recognition of security governed by foreign law

Serbian law does not contain any special rules on the effect of foreign law governed security. Under the general conflict of law rules, the issue of whether a security interest has been validly created as a proprietary right would be, from the perspective of Serbian law, governed by lex rei sitae.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

Judicial enforcement of security by filing a motion for enforcement and pursuing the procedure under the general law regulating enforcement proceedings is available with respect to a pledge on immovables and a pledge registered in the Movables Pledge Register. Judicial enforcement is not available with respect to a pledge on book entry securities.

(b) Enforcement grounds

With respect to a mortgage, i.e. pledge on immovables, a mortgage agreement or, as the case may be, a unilateral statement of a mortgagor, represents a directly enforceable document provided it is produced in the form of a notarial deed and further provided it contains specific statements of the mortgagee entitling the creditor to access the mortgaged immovable, enforce the mortgage out of court and confirming that the mortgagee is aware of the consequences of enforcement.

With respect to a pledge registered in the Movables Pledge Register, judicial enforcement is rarely pursued. It can be initiated based on an excerpt from that register. If the due date cannot be ascertained from the excerpt, the pledgee has to provide the court with written evidence that it has requested from the debtor to pay the claim (it is typically sufficient to send a delivery confirmation via registered mail).

(c) Procedure

Judicial enforcement of pledge is initiated by the submission of a motion for enforcement to the competent court (the Commercial Court if the pledgor is a commercial entity), along with the

mortgage agreement (statement) or, as the case may be, excerpt from the Movables Pledge Register. The court is supposed to decide on the motion for enforcement within five days from the receipt thereof, and to deliver the decision to the petitioner within further five days. The deadline for the debtor's objection is five days from the receipt of the decision, while the deadline for the decision on the objection is also five days. The objection does not have a suspensive effect. An objection can be raised on the following grounds:

(i) the debt has been settled;
(ii) the deadline for payment of debt has yet not expired or the condition for payment stipulated in the agreement has not yet occurred; or
(iii) the resolution granting the motion for enforcement has been rendered by an incompetent court.

The decision of the court on the objection may be appealed. However, the appeal does not suspend enforcement. Upon obtaining a resolution granting its motion for enforcement, the pledgor will proceed with enforcement via court appointed enforcement officer or private enforcement officer. The enforcement officer will evaluate the pledged property and organize its sale at a public auction or directly to a buyer. In case of immovables, the evaluation has to be on the market price on the date of evaluation, adequately reduced in case there are surviving third party rights on the property.

There are no rules on the price if the enforcement officer opts for direct sale. The statute only contains a rule that the auction shall be pursued if the asset to be sold is of greater value or if it is expected that the auction might generate higher proceeds than the direct sale. If the enforcement officer decides to proceed with the sale at auction, the pledgor and the pledgee may at any time during the sale agree to sell the pledged asset in a direct, bilateral, sale. The initial price at the first auction is no less than 60 per cent of the assessed value of the asset. If the first auction fails, the initial price at the second auction is 30 per cent of the assessed value of the asset.

If the second auction fails, the pledgee is entitled to either keep the pledged asset at 30 per cent of the assessed value or request that it be sold in direct sale for a price freely determined in agreement with the buyer. If the asset could not have been sold in direct sale, the pledgee is entitled to retain it at 30 per cent of its assessed value.

The above rules on judicial enforcement (except for the rules specific to immovables) also apply to the sale of quota in a limited liability company or IP rights. With respect to a pledge on quota in a limited liability company, it should be mentioned that the remaining shareholders may have the right of first refusal (such right exists unless excluded in the foundation act). If the foundation act of a limited liability company provides that the company has to approve any transfer of quotas, the Companies Act provides that the company may, instead of granting approval, designate a buyer of its own choice. It has not yet been tested whether this rule applies to the sale of a pledged quota and if it applies, how it works, given that the main principle of pledge law is to maximize the proceeds of the sale.

(d) Ranking of claims

Sale proceeds in a judicial enforcement procedure will be applied to the costs of enforcement and then to the claim of the secured creditor. The secured creditor has priority over junior secured creditors, as well as unsecured creditors.

(e) Costs

The costs of enforcement must be paid in advance by the pledgee and are compensated from the proceeds of the sale in priority to the secured claim. The administrative fee for obtaining a court resolution on enforcement depends on the value of the claim, and it ranges from the minimum fee of approximately EUR 35 to the maximum cap of approximately EUR 3,300. The costs of enforcement depend on whether enforcement is pursued via court appointed enforcement officer or a private enforcement officer.

The costs of a private enforcement officer depend on the value of the claim and include:

(i) a fee for preparation of documents ranging from approximately EUR 25 to EUR 400 plus 0.1 per cent of the value of the claim that exceeds the amount of approximately EUR 100,000;
(ii) a fee for each particular field action, in the amount ranging from approximately EUR 10 to EUR 200 plus 0.05 per cent of the value of the claim that exceeds the amount of approximately EUR 100,000;
(iii) a fee for each particular written action (i.e. petition, letter, etc.), in the amount ranging from approximately EUR 5 to approximately EUR 80 plus 0.02 per cent of the value of the claim that exceeds the amount of approximately EUR 100,000;

(iv) a success fee, in the amount ranging from approximately EUR 25 to approximately EUR 3,200 plus 0.1 per cent of the value of the claim that exceeds the amount of EUR 100,000.

Apart from the abovementioned direct costs of enforcement, there may be additional costs, such as costs of publication of sale notices, etc.

2.2 Private foreclosure

(a) General

Private foreclosure is available with respect to:

(i) a pledge inscribed in the Movables Pledge Register (movables, IP rights, receivables, quotas in limited liability companies or partnerships);
(ii) a mortgage, i.e. pledge on immovable;
(iii) a pledge on book entry securities.

(b) Enforcement grounds

Enforcement can be initiated without any court order, solely based upon the grounds defined as enforcement events in the pledge agreement.

(c) Procedure

Mortgage, i.e. pledge on immovables

Private foreclosure of mortgage is available if the mortgage agreement or, as the case may be, a unilateral statement of a mortgagor is in the form and with the content described in Section 2.1(b) above. Private foreclosure is initiated by the mortgagee filing a warning notice to the debtor (and the mortgagor, if different from the debtor).

The notice must contain reference to the relevant mortgage agreement and the mortgaged asset; a description of the event of default; the activities that the debtor has to undertake in order to avoid the sale of the mortgaged asset, the deadlines for their performance and a warning that the mortgaged property will be sold if the debtor does not perform the said activities within the prescribed deadline; the data on the mortgagee's representative, if any. If the claim is not settled within 30 days from the receipt of the warning notice, the mortgagee is supposed to send a notice of sale to the debtor (and, as the case may be, the mortgagor), with the same content as described above with respect to the warning notice plus information on the manner of sale.

Simultaneously with the notice of sale, the mortgagee files a motion for registration of foreclosure with the Real Estate Registry, along with (i) a copy of the warning notice; (ii) a copy of the mortgage agreement or unilateral mortgage statement; (iii) a statement that the debtor has not settled its debt; and (iv) evidence that the warning notice and the notice of sale have been sent to debtor, mortgagor and other mortgagees). The Real Estate Registry shall render a decision on registration of foreclosure within seven days from the date of the filing of the motion. The debtor (and, as the case may be, the mortgagor) has the right to appeal the decision within 15 days from receipt thereof. The appeal can be filed on the following limited grounds: the claim does not exist; the mortgage does not exist; the claim has not become due; or the claim has been settled. A decision on the appeal is supposed to be rendered within 15 days from the date the appeal is filed, and is considered final and binding.

After 30 days from the final and binding decision on registration of foreclosure, the pledgee is entitled to sell the mortgaged property, either via public auction or in direct sale. Prior to the sale, the pledgee must obtain an evaluation of the property. In case the property is not sold within the period of 18 months from the date when the decision on registration of out-of-court foreclosure became final and binding, the decision on registration of out-of-court foreclosure shall be set aside. The mortgagee may thereafter initiate judicial enforcement procedure. A public announcement of the auction must be published in a daily newspaper at least 30 days prior to the auction. The mortgagee is obliged to send a notice of the auction to the debtor (and, as the case may be, the mortgagor) and any third party that may have any right to the mortgaged property.

The initial auction price is set at 75 per cent of the appraised value (60 per cent on the second auction). As an alternative to auction, following the period of 30 days from the date when the decision on registration of foreclosure becomes final and binding, and prior to initiating the public auction, the mortgagee is entitled to sell the property in direct sale at a price which cannot be lower than 90% of the property's appraised value. If the first auction is unsuccessful, the mortgagee is entitled to dispose with the property in direct sale, at no less than 60% of the valuation. In case of direct sale, 15 days prior to concluding a sale and purchase agreement, the mortgagee is obliged to send a notice to the debtor and, as the case may be, mortgagor and any other third party that may have any right to the mortgaged property, setting a deadline for payment of the debt.

The proceeds collected in the foreclosure process have to be deposited to an escrow account at a bank or a public notary. Such account is ringfenced from the creditors of the mortgage creditor. The proceeds are distributed as follows:

(i) cost of enforcement, including costs and fees of third parties;
(ii) secured claim(s) in order of their priority (i.e. the day, hour and minute of filing the application for inscription of mortgage);
(iii) any surplus belongs to the mortgagor.

Pledge on movables

Private foreclosure is initiated by a notice to the debtor (and the pledgor, if not the same person as the debtor). Simultaneously, with sending a notice of foreclosure, the pledgee is obliged to register the commencement of foreclosure with the Movables Pledge Register.

As of receipt of the foreclosure notice, the debtor (or, as the case may be, the pledgor) cannot dispose of the pledged asset. Moreover, the debtor is obliged to handover the asset to the pledgee and cooperate with the pledgee in the conduct of the private foreclosure. If the pledgor refuses to allow the pledgee to take over the possession of the pledged asset, the pledgee may file a motion with the competent court to order the pledgor to deliver the pledged asset to the pledgee. Such motion can be filed based on the excerpt from the Movables Pledge Register evidencing the pledge. If the pledged asset is of such nature that physical possession thereof cannot be taken, or if the interest of the pledgee mandates that the asset is not handed over, the pledgee may request that the court appoint an administrator to take care of the pledged asset. The court shall decide on the motion to order delivery within three days from the receipt thereof and the resolution is supposed to be enforced within another three days. The pledgor may appeal the resolution granting the pledgee's motion within three days from the receipt thereof on grounds that the secured claim has not matured, that pledge does not exist, or that the debt has been settled. Any of these grounds must be substantiated. Objection does not suspend enforcement.

Irrespective of whether the pledgee has resorted to the court for assistance in obtaining possession, the pledgee is entitled to request from the court to organize a judicial sale. Judicial sale is the only available option when the pledgor does not have the status of commercial entity or private entrepreneur. Judicial sale can be performed as auction sale or, if the asset has market or stock exchange price, as direct sale to a buyer. As part of the judicial sale process, the court may decide that the pledgee is entitled to retain the asset or sell it in a direct deal for the price determined by an expert in case the costs of public sale would be disproportionate to the value of the pledged assets.

Alternatively to the judicial sale, if the pledgor is a commercial entity or a private entrepreneur and the pledge agreement provides for out-of-court sale, the pledgee may pursue such private sale after the expiry of a 30-day period from the date when the commencement of foreclosure was registered with the Movables Pledge Register (the 30-day grace period does not apply if a judicial sale is requested).

If the pledged asset has market or exchange price, the pledgee may retain the pledged asset or sell it at that, if so provided in the pledge agreement. If the asset has no market or exchange price, the pledgee may sell the pledged asset in any manner which a reasonable and diligent person could choose, taking due care of the interests of the debtor (and, as the case may be, the pledgor). Finally, the pledgee may sell the asset at an auction, if this is specifically provided in the pledge agreement. The pledgee is obliged to give advance notification to the debtor (and, as the case may be, the pledgor) regarding the place and the time of the sale. If the debtor (and, as the case may be, the pledgor) did not participate in the sale, the pledgee is obliged to notify them of the circumstances relevant to the sale without delay, including the reached sale price and the cost of the sale. On specific aspects of enforcement of pledge on quota in a limited liability company, see Section 2.1 (c).

The pledgor may challenge private foreclosure of pledge on movables by filing a lawsuit with the court on the following grounds: (i) the secured claim or the pledge does not exist, (ii) the secured claim is not due and payable or (iii) the debt has already been settled. Such claim does not suspend unless the pledgor submits an official public document (javna isprava) or a notarized private instrument evidencing any of the abovementioned grounds. The court is required to act with urgency.

Pledge on receivables

A pledge on receivables is enforced by the pledgee providing notification to the pledgor's debtor that payments are to be made directly to the pledgee. Such notice has to be accompanied with

an excerpt from the Movables Pledge Register and can be sent to the debtor of the pledged receivable even before the enforcement of pledge is declared. In the latter case, the pledgee who has collected the pledged receivable is obliged to keep it in trust for the pledgor and can apply the collected receivable against the secured debt only once enforcement is initiated. The provisions on commencement of foreclosure and pledgee's right to challenge private enforcement, set out above in relation to pledge on movables, apply mutatis mutandis to enforcement of pledge on receivable.

Pledge on IP rights

The rules on private enforcement of pledge on movables apply mutatis mutandis to private enforcement of pledge on IP rights.

Pledge on book entry securities

The pledge agreement must explicitly provide for the creditor's right to initiate private foreclosure. Private foreclosure is initiated by the pledgee giving a warning notice to the debtor or the pledgor, if not the same person. The creditor may proceed with the sale of the pledged shares within eight days from the date of the warning notice, by sending to the debtor (and, as the case may be, the pledgor) a notice of the date of the intended sale and the manner of sale. The sale of pledged shares of a listed company is performed at the regular stock exchange trading session or in a special OTC transaction according to the rules governing a "block sale" (those rules prescribe a minimum volume that can be traded in one block and a maximum deviation from the average trading price in a reference period). The proceeds of the sale are paid to the pledgor's account held with its broker. The broker is obliged to immediately transfer the proceeds to a special purpose account of the pledgee, but not more than the amount of secured debt (the surplus, if any, is transferred to the debtor's account).

(d) Ranking of claims

The proceeds of enforcement are distributed as follows:

(i) cost of enforcement, including costs and fees of third parties;
(ii) secured claim;
(iii) secured claims of junior pledgees;
(iv) any surplus belongs to the pledgor.

A foreign pledgee must open a non resident bank account in Serbia for the receipt of enforcement proceeds and may repatriate those proceeds upon obtaining a certificate from the tax authority confirming that there are no outstanding taxes owed by the pledgee. If the pledgor is a foreign person and the pledged asset consists of shares of a listed company, the pledgor may be subject to a capital gains tax, in which case the additional requirement for the issuance of the mentioned tax certificate will be that the pledgor has paid the capital gains tax accrued on the sale of pledged shares, if any.

There are also statutory liens under Serbian law, such as statutory lien of carrier, commission agent, forwarding agent and warehouse operator or construction contractor. A statutory lien has priority over pledge registered on the same asset. Where there is a possessory pledge and a registered pledge over the same movable asset, the possessory pledge has priority over a later registered pledge if the possessory pledge agreement is notarized.

(e) Costs

The costs of private foreclosure will depend on various factors (manner of sale, number of external advisers engaged, etc.) and cannot be assessed in a general uniform manner.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

Insolvency proceedings are initiated by a petition for the opening of insolvency proceedings. When the petition is filed by a creditor, preliminary insolvency proceedings take place to determine the existence of one of the statutory grounds for the opening of insolvency proceedings. Upon the formal opening of insolvency proceedings, the procedure develops as bankruptcy, which assumes the sale of assets or the sale of insolvency debtor as legal entity free of debts, or as reorganization, which assumes redefinition of the debtor's obligations based on a reorganization plan.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

By a decision on the opening of preliminary insolvency proceedings, the insolvency judge may impose provisional measures at the request of the petitioner or ex officio, to prevent changes in the insolvent's assets and/or destruction of business documentation if there is a risk that the debtor would transfer its property and/or destroy its business documentation before the opening of insolvency proceedings. Among others measures, the insolvency judge may prohibit or temporarily postpone enforcement against the debtor's property, including exercise of secured creditors' rights. The court may appoint a preliminary insolvency administrator. No appeal is allowed to the decision on provisional measures. They remain in force until the conclusion of preliminary insolvency proceedings but may be revoked by the

insolvency judge at any time during the preliminary insolvency proceedings. A secured creditor may request that any provisional measure be suspended if:

- the insolvency debtor or the insolvency administrator has failed to adequately protect the secured assets;
- the value of assets in question is depreciating;
- the value of assets in question is lower than the amount of the secured claim (as evidenced by evaluation made by an authorised expert, which evaluation cannot be older than one year before the opening of the insolvency proceedings) and the assets are not material to reorganization.

(c) Impact of the opening of insolvency proceedings on secured claims

Upon the opening of insolvency proceedings, the court shall set a deadline (from 30 to 120 days from the date of publication of the decision on the opening of insolvency proceedings in the Official Gazette of the Republic of Serbia) for creditors to register their claims (both secured and unsecured). The sale of assets subject to pledge is also performed by the insolvency administrator. The assets are sold at public auction or by public collection of offers or through a direct agreement. Sale by direct agreement may be conducted only with the prior approval of the Creditors' Committee. Before selling an encumbered asset, the insolvency administrator has to notify the secured creditor of the conditions of the sale. The secured creditor may, within ten days from the receipt of the notification, propose a more favorable method of sale. Exceptionally, the court may allow the secured creditor to perform a privately organized sale. Secured creditors must be paid within three days from the sale of the pledged asset. A secured creditor may request that security measures be imposed to protect the secured creditor from the loss of value of pledged assets, such as payment of periodical compensation for the loss of value of the assets, granting of additional security, participation in the income generated from the asset, etc.

An insolvency debtor may be offered for sale as legal entity, with prior consent of the Creditors' Committee and a notification to the secured creditors. If the secured creditors object, the court shall decide on such proposal within five days, taking into account whether the sale of the debtor as legal entity would evidently result in a less favourable recovery for the secured creditors. If it finds an objection justified, the court may, inter alia, postpone the sale and order that a new feasibility assessment be made or order that the pledged assets be sold separately.

Secured creditors form a separate class in a reorganisation plan. An adopted reorganization plan is considered a new agreement between the debtor and the respective creditors.

(d) Avoidance of security taken during suspect period

Any security interest acquired within 60 days before the date of the opening of insolvency proceedings is automatically avoided. Based on the decision of the insolvency judge, the appropriate pledge registry where such right has been inscribed shall delete the security inscription from their records.

In addition, the insolvency administrator or the creditors may contest a transaction (including granting of security by insolvency debtor) representing a regular settlement (settlement of a creditor's claim or providing security to a creditor where the creditor has a pre-existing entitlement to such claim or security), which took place within six months before the filing of the petition for the opening of insolvency proceedings, if the insolvency debtor was insolvent at the time of the transaction and the creditor was or ought to have been aware of the debtor's insolvency. ed. The suspect period for an irregular settlement (settlement of a creditor's claim or providing security to a creditor where there was no pre-existing entitlement of the receiving party to such claim or security) is 12 months before the petition is filed. No knowledge or constructive knowledge of insolvency on the part of the creditor is required in this case. Further, the insolvency administrator may contest a legal transaction of the insolvency debtor directly damaging the creditors if:

(i) the transaction was entered into within six months before the petition was filed if the insolvency debtor was insolvent at the time and the creditor was aware of that;
(ii) the transaction was entered into after the filing of the petition and the creditor was or ought to have been aware of the debtor's insolvency or was aware that the petition was filed;
(iii) the contested action is a debtor's action or a failure to act that occurred within the period of six months prior to the filing of the petition for opening of the insolvency proceedings and such action or a failure to act has resulted in the loss or a preclusion of the debtor's right.

Legal transactions entered into with the intent of damaging one or more creditors may be challenged if undertaken within a period of five years prior to the petition being filed or thereafter, provided that the debtor's counterparty knew of the debtor's intent. Finally, a legal transaction undertaken at no value or at undervalue, may be contested if it was concluded or taken within a period of five years prior to the petition being filed.

Ranking of claims

When a pledged asset is sold, the costs of sale are settled as a priority. Thereafter, the proceeds are applied against the secured claim. Any surplus belongs to the bankruptcy estate.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

Once insolvency has been opened, no enforcement procedure may be initiated against the debtor's assets and any pending enforcement is terminated. The insolvency judge may, upon a written request of a secured creditor, suspend this moratorium if, with respect to the pledged assets:

(i) the insolvency debtor or the insolvency administrator has failed to adequately protect the pledged asset;

(ii) the value of the pledged asset in question is depreciating;

(iii) the value of the pledged asset in question is lower than the amount of the secured claim of the creditor in question (as evidenced by evaluation made by an authorised expert, which evaluation cannot be older than one year prior to the opening of the insolvency proceedings) and such assets are not material to reorganization.

2.5 Recourse of a secured creditor to self-help remedies

Self-help remedies in relation to security instruments are not allowed under Serbian law.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of a security trustee. Parallel debt concept

Serbian law explicitly recognizes the role of security agent only in the context of pledges registered in the Movables Pledge Register (movables, receivables, quotas in limited liability companies). A security agent is authorized by law to undertake actions for the purpose of protection and collection of the secured claim. It should be noted that the Movables Pledge Register is of the position that the security agent inscribed in the Movables Pledge Register as pledgee is not entitled to issue a release statement or file an application to delete or modify a pledge without special authorization to do so from the pledgee. In cases where the use of security agent is not recognized, parties may contemplate the use of parallel debt structures. However, the parallel debt concept has never been tested in Serbia. The risk associated with such an arrangement is in that the agreement between the security agent and the borrower could be perceived as a simulated agreement which is null and void under Serbian law. Additionally, such an arrangement could be potentially challenged under the provisions of the Obligations Act[5] which require that a contract must have a proper causa (i.e. immediate reason for entering into an agreement) in order to be valid. One could argue that causa in an agreement between a borrower and a security agent consists of achieving a purpose that is otherwise prohibited (this purpose being to grant security to a person who is not a creditor, which is not possible under Serbian law as security is defined as being accessory to the secured claim). However, if there is a genuine joint and several creditorship of the lenders, it is possible to have all lenders registered as pari passu mortgagees/pledgees or to have only one of those lenders registered as a mortgagee/pledgee for the entire debt. If only one joint and several creditor is registered as a mortgagee, such lender may initiate the foreclosure proceedings for the entire amount of debt. It is also possible to register a co-mortgage in favour of separate multiple lenders with equal rank. However, such mortgage can be enforced only if all separate claims are due and payable and only if all mortgagees act in a coordinated fashion.

3.2 Specifics of taking and enforcing security by a security trustee or agent

Because of the narrow language of the relevant statute, the Movables Pledge Register has taken the position that the security agent registered as pledgee in this registry is not entitled to issue a release statement or file an application for deletion or modification of pledge as part of its general authority to act as security agent, but requires a special authorization from the secured creditor to do so. In insolvency proceedings, the security agent has the status of pledge creditor, i.e. a creditor holding security on the assets of the insolvency debtor for the debt of a third party. The rights of pledge creditors do not substantially differ from the rights of secured creditors, except that pledge creditors are not eligible for the creditors' assembly or the board of creditors.

3.3 Precedents

There is no case law on the use of a security agent or a parallel debt concept.

[5] *Zakon o obligacionim odnosima, Official Gazette of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89, and 57/89, Official Gazette of the Federal Republic of Yugoslavia, No. 31/93 and Official Gazette of Serbia and Montenegro, No. 1/2003*

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SLOVENIA

1. SECURITY

1.1 Third party security (upstream and cross-stream guarantees and security). Corporate benefit

There is no clear-cut legal provision or court jurisprudence discussing the conditions under which a Slovenian company can grant a guarantee or security or make an intragroup loan or what the consequences for any breach of limitations are.

Generally, a company can only grant a guarantee, security or intragroup loan if such guarantee, security or intragroup loan is allowed by the company's objects (is intra vires) and if there is sufficient corporate benefit. If the guarantee, security or intragroup loan is not covered by its objects or if there is insufficient corporate benefit, this could lead to the guarantee, security or intragroup loan being invalid. It should be noted that legal transactions concluded by a company with third persons which go beyond its objects entered in the register or otherwise permitted transactions shall be valid unless the third person knew or should have known about the transgression of powers. Furthermore, if the parent company ordered or approved the decision of its subsidiary[1] to grant guarantee or security or make a loan to it or another intragroup entity, the parent company and its management could be held liable for any resulting losses suffered by the subsidiary's creditors or shareholders[2] .

Security granted by the company could be challenged on the basis of an actio pauliana (inside or outside bankruptcy proceedings) or by the "lifting of the corporate veil" (spregled pravne osebnosti) which – if successful – results in shareholders of the company becoming liable for the debts of the company. Finally, any provision of a guarantee or security and the making of intragroup loans is subject to the capital maintenance and solvency rules.

1.2 Financial assistance

A company may generally provide financial assistance in relation to the subscription for or acquisition of its business share(s) or shares in any holding company of that company. Given the lack of court jurisprudence, such financial assistance should be arguably within the object of the company (intra vires) and fulfil corporate benefit requirements. However, such financial assistance is limited and can not violate:

(a) capital maintenance rules (assets, which are required in order to preserve the subscribed capital and bound reserves, may not be paid); and

(b) solvency rules (rules regulating capital adequacy of companies, liquidity and solvency and relating legal requirements).

There are also some other legal provisions that restrict financial assistance. For example, this includes a pledge over the target company's shares as a security for bank financing which may not be recognized for the purposes of reducing the credit risk and decreasing minimum prescribed capital of Slovenian banks; also, a subsequent merger of the target company with the acquiring company is subject to the consent of the target's shareholders, creditors, and employees. Certain tax rules (e.g., those relating to payment of the dividends or interest) also need to be considered when a financial assistance is being contemplated.

The Companies Act[3] further provides prohibitions on:

(i) financial assistance that would be provided by a joint-stock company (delniška družba, abbreviated: d.d.) as a target company (e.g. a prohibition on pledging shares or other assets of the company that is subject of a public bid for acquisition); and on

(ii) returning the shareholder's contributions into a joint-stock company (or on such contributions bearing interest with the exceptions of payment of dividends and payment for any acquisition of the company's own shares provided it is expressly allowed in ZGD -1 – note that the applicable

[1] *Such relationship between the parent company and the subsidiary can constitute an actual concern (dejanski koncern).*

[2] *As a rule, the company's management is not liable to the company's creditors for the debts of the company. Nevertheless, creditors may file a lawsuit for payment of damages on the basis of breach of the managing director's duties that caused damage to the company if the company is not able to settle its liabilities towards the very same creditors. Another legal basis giving right to pursue payment of damages on the basis of liability of the managing director can arise in case of bankruptcy proceeding provided that the managing director breached his duties that arise when the company has become insolvent (as provided by the insolvency legislation).*

[3] *"ZGD-1", Zakon o gospodarskih družbah, Official Gazette of the Republic of Slovenia No. 42/06 as amended*

exceptions are extremely limited). In particular, it is (under this concealed payment doctrine) impermissible to make any payments for contributions or services of a shareholder exceeding the real value thereof.

1.3 Types of security. Most often used type/s of security in practice

Security interest can only be created on an asset by asset basis whereby a security interest can be created on more than one asset at the same time[4]. The following types of security are commonly used in practice in Slovenia:

(a) Mortgage

A mortgage is a security interest in a real estate granted by its owner (mortgagor) in favour of a creditor (mortgagee) as a security for a debt. Generally, claims secured by a mortgage take priority in respect of the proceeds from the sale of mortgaged real estate.

(b) Pledge over movables[5] (possessory pledge (pignus), non-possessory pledge)

A pledge of movables is a security interest similar to a mortgage. The Slovenian law differs between:

(i) Possessory pledge over movables (pignus)

A possessory pledge is a form of security interest granted over movable assets to secure the payment of a debt or performance of some other obligation where the creditor (pledgee) retains possession of the debtor's (pledgor's) property until the debt has been fully paid or performance of some other obligation is performed in full. Due to its limitations (the owner not being able to use the pledged movables), it is very rarely used in business practice.

(ii) Non-possessory pledge over movables

A non-possessory pledge is a form of security interest granted over movable assets to secure the payment of a debt or performance of some other obligation where the creditor (pledgee) does not hold physical possession of the asset in question (this remains with the pledgor), only certain legal rights.

(c) Pledge of receivables

A pledge of receivables is a pledge where the pledgee has the right to collect the pledged receivables at maturity and satisfy its claim from the proceeds. The remaining proceeds are distributed to the pledgor.

(d) Share pledge

A distinction should be made between the pledge of a business share in a limited liability company (zastava poslovnega deleža) and the pledge of book entry securities in a joint-stock company. A pledge of a business share in a limited liability company is commonly used as a security in Slovenia. In this respect this Guide shall focus on the pledge of a business share in a limited liability company. A pledge can also be created on other property rights[6] (such as trademarks, etc.); however, such security is not commonly used in Slovenia.

(e) Financial Collateral

Financial collateral is governed by the Financial Collateral Act[7] ("ZFZ") implementing the EU Collateral Directive. The ZFZ lays down special rules for financial collateral entered into by specific financial market participants and is only applicable to some types of entities[8]. The financial collateral can only be provided to secure claims to pay a certain amount of money or claims for the delivery of financial instruments.

The ZFZ differs between two types of financial collateral:

(i) assignment of a financial instrument, cash or bank loan for security purposes (Financial Collateral Assignment); and

Financial Collateral Assignment is a financial collateral under which a collateral provider's right on a financial instrument, cash or bank loan is – for the duration of financial collateral – transferred to a collateral taker.

(ii) pledge over financial instrument, cash or bank loan (Financial Pledge).

Financial Pledge is a financial collateral under which a collateral provider's right on a financial instrument, cash or bank loan remains with the collateral provider, and a pledge over the aforesaid financial instrument, cash or bank loan is created to the benefit of the collateral taker.

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[4] *The exception is a non-possessory pledge over inventories of a certain type of goods, of a certain minimum value and located at a certain designated place.*

[5] *Movable property is any material object which is not real estate (Article 18 of the Law of Property Code, Stvarnopravni zakonik, Official Gazette of the Republic of Slovenia No. 87/02, as amended).*

[6] *According to the Law of Property Code, a property right is a right that is transferable and whose value can be expressed in monetary terms.*

[7] *Zakon o finančnih zavarovanjih, Official Gazette of the Republic of Slovenia No. 47/04, as amended.*

[8] *The Financial Collateral Act applies to (inter alia) the following Slovenian entities: the Republic of Slovenia, the Bank of Slovenia, credit institutions, insurance companies, investment funds, investment fund management companies, central clearing securities corporation, Health Insurance Institute of Slovenia, Pension and Disability Insurance Institute of Slovenia, Slovenska odškodninska družba, Kapitalska družba, other companies and funds established by the Republic of Slovenia, other regulated (supervised) financial organizations under the banking and financial services legislation and certain commercial companies when entering into financial collateral agreements with above listed entities.*

(f) Assignment of receivables for security purposes

Assignment of receivables for security purposes (fiduciarna cesija) is a security interest where the pledgee is entitled to the collection proceeds of the assigned receivables if the secured claim is not settled upon its maturity, but in case of bankruptcy of either the assignor or the assignee, the assigned receivables are considered to be the estate of the assignor (please see Section 1.6(f) for details).

(g) Assignment of movables for security purposes

Assignment of movables for security purposes (fiduciarni prenos premicnin v zavarovanje) is a form of security of a claim where movables remain in the direct possession of the transferor or a third person on his behalf.

1.4 Creation of security

General comment: One of key elements that should be included in each security agreement is the description of the object of the agreement, i.e. the secured obligations and asset pledged under the respective security agreement should be specifically determined. This is of particular importance with respect to security that can only be validly created by entering into an agreement in the form of a directly enforceable notarial deed[9] (e.g. non-possessory pledge over movables).

(a) Mortgage

A mortgage can be created over a geographically defined part of the earth's surface including all components (i.e., real estate within the meaning of the Law of Property Code[10])[11] . In accordance with the principle superficies solo cedit, a building erected on the land is an integral part of the real estate and is therefore covered by the mortgage.

Certain limited exceptions to this rule, however, exist under Slovenian law. A mortgage may be established by virtue of law, court order or a contractual agreement (executed either in "plain" written form or in the form of a notarial deed). A mortgage grants priority in relation to other subsequent mortgages upon its registration with the Real Estate Registry[12].

(b) Pledge over movables

A pledge over movables can be created over any asset that is not real estate (or part of real estate). The Slovenian law differs between:

(i) Possessory pledge over movables

Such pledges are rarely created, as they require the pledgee to take possession of the pledged asset. A pledge over movables is created upon:

- execution of an agreement of pledge over movables; and
- delivery of pledged movables to the pledgee.

(ii) Non-possessory pledge over movables

As a rule, the creation of non-possessory pledge over movables requires that an agreement in the form of a directly enforceable notarial deed is entered into. With respect to certain types of movable property such as inventory, equipment, motor vehicles and animals, registration of the non-possessory pledge in the Register of Non-Possessory Liens and Seized Movable Property is also required.

(c) Pledge of receivables

It is created by way of an agreement and notice on creation of pledge to the debtor(s) of the pledged receivables. The debtor of pledged receivables may, after receiving the notice of pledging, make a valid execution only to the pledgee.

(d) Share pledge

The following is required for the share pledge to be validly created:

- agreement in the form of a notarial deed;
- notification of the management of the company that its share(s) are pledged;
- registration of the pledge in the court/business register.

Additional rules apply if shares of a joint-stock company (that are required to be issued as book-entry securities) are pledged (please see Section 1.6(d) below for further details).

(e) Financial Collateral

Generally, no formalities are required for validity of the agreement on financial collateral.

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[9] *According to Article 4 of the Notaries Act (Zakon o notariatu, Official Gazette of the Republic of Slovenia No. 13/94, as amended), a notarial deed (a document fulfilling certain elaborated formality requirements) may represent an enforcement title under certain conditions – inter alia if the debtor expressly consents to the direct enforceability of the deed and if the obligation of the debtor falls due. The consent can be given in the same or a separate notarial deed.*

[10] *If a mortgage is executed by a written agreement (not notarial deed), the pledgee needs to file a lawsuit (actio hypotecaria) against the debtor in default prior to filling for enforcement.*

[11] *For vessels (ships) and aircraft, specific rules are provided in separate special legislation. For aircraft, for example, a registration of a mortgage in the aircraft register is made only upon a court decree ordering such registration.*

[12] *The Real Estate Registry (zemljiška knjiga) is a public register where rights relating to real estate and facts of legal relevance associated with the real estate are recorded.*

(f) Assignment of receivables for security purposes

Assignment of receivables for security purposes does not require any specific formalities. However, in practice, agreements on assignment of receivables for security purposes are usually entered into in the form of a notarial deed (please see Section 1.6(f) for details).

(g) Assignment of movables for security purposes

This security is created by way of an agreement in the form of a directly enforceable notarial deed. It is not very common in Slovenian business practice.

1.5 Perfection and maintenance of security

Depending on the type of assets that are granted for security purposes, different main steps need to be taken, such as:

(a) Mortgage:

A mortgage is perfected upon registration of the mortgage in the Real Estate Registry, which is carried out by making a book entry in the Real Estate Registry. The registration is carried out by the competent court upon a proposal of the owner or the creditor. Owner's notarized registration permission is required. The time of filing of the registration proposal shall define the ranking of a mortgage, and the registration shall have retroactive effect. It should be noted that with regard to the Slovenian Real Estate Registry, the principle of good faith applies; any person acting in good faith and relying on the information on rights entered in the Real Estate Registry shall not suffer any detrimental consequences for doing so.

(b) Pledge over movables

(i) Possessory pledge over movables

Following the execution of the agreement on creation of pledge, a possessory pledge over movables is perfected upon delivery of pledged movables into direct possession of the pledgee.

(ii) Non-possessory pledge over movables

In general, a non-possessory pledge over movables is created on the basis of an agreement entered into in the form of a directly enforceable[13] notarial deed. However, with respect to non-possessory pledge over inventory, equipment, motor vehicles and animals, registration of the non-possessory pledge in the Movables Pledge Register is required for the respective non-possessory pledge to be perfected.

If a non-possessory pledge is registered with the Movables Pledge Register, one may not rely on the argument that he was not aware of the information of the pledge entered in the Movables Pledge Register. On the other hand, anyone who relies on information of the pledge entered into the Movables Pledge Register and acts conscientiously in legal transactions shall not suffer detrimental legal consequences.

(c) Pledge over receivables

Pledge over receivables is perfected upon the execution of an agreement and notice on creation of pledge to the debtor(s) of the pledged receivables.

(d) Share pledge

Following the execution of the share pledge agreement in the form of a notarial deed, the following is required for the perfection of the share pledge:

- notification of the management of the company that its share(s) are pledged;
- registration of the pledge in the court/business register.

Special rules apply to pledge of shares of a joint-stock company (that are required to be issued as book entry securities). According to the Book Entry Securities Act[14] one obtains a pledge over (book entry) securities upon entering of the pledge in the central register of book entry securities of the Central Depositary Company or KDD (the "KDD Register"). A pledge over book entry securities shall have effect vis-à-vis a third party upon entering of such right in the KDD Register.

(e) Financial Collateral:

According to Article 7 of the ZFZ a collateral provider fulfils its obligation to establish financial collateral over cash or a financial instrument[15] :

- by transferring cash or a financial instrument into possession of the collateral taker (or its representative); or
- by ensuring the entry of the right to the benefit of the collateral

[13] *This means that only claims in respect of which the debtor and creditor can agree to be directly enforceable (certain conditional claims, guarantees, revolving loans, credit lines and similar that do not fulfil the statutory conditions) may be secured by a non-possessory pledge over movables.*

[14] *Zakon o nematerializiranih vrednostnih papirjih, Official Gazette of the Republic of Slovenia No. 2/07, as amended.*

[15] *Financial instruments are shares and other securities, bonds and other forms of debt instruments, intended for trade on the capital market; securities issued by the issuer of the shares or bonds, which give the right to buy, sell or exchange (swap) the respective securities for other securities of the issuer, and exercise of such right results in entering into an agreement between the holder of the aforementioned right and the issuer on buying-in, selling or exchange of the securities (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing (Article 3 of the Financial Collateral Act).*

recipient in the register where the financial instruments are kept (for example for book entry securities, when the collateral provider issues an order to KDD to register a pledge in the KDD Register).

In terms of a bank loan as financial collateral, a collateral provider is required to enter into an agreement on transfer of bank loan for security purposes or agreement on creation of pledge over a bank loan (as applicable).

(f) Assignment of receivables for security purposes

Slovenian law does not envisage any formalities with respect to assignment of receivables for security purposes. It should, however, be noted that in the event of the assignor's bankruptcy, the assignee is entitled to receive a separate payment of its secured claims from the assignor's bankruptcy estate only if the agreement on assignment of receivables for security purposes is entered into in the form of a notarial deed. In light of the above, an agreement on assignment of receivables for security purposes is usually entered into in the form of a notarial deed.

(g) Assignment of movables for security purposes

This security is perfected upon execution of an agreement in the form of a directly enforceable[16] notarial deed.

1.6 Costs and expenses for creating, perfecting and maintaining security

Costs that the parties incur in the process of creation and perfection of security in Slovenia are in general notary fees and registration fees, banking fees, cost for the evaluation of assets, administrative fees and attorney's fees relating to confirmation of standing of the borrower and/or the collateral provider (if not the borrower), the status of the collateral, etc. Translation costs may also be incurred in the process of creation of security, and can be relatively high in complex international transactions (they depend on the number of pages that need to be translated (approximately EUR 40 per page (1,500 characters)). Costs and expenses for creating, perfecting and maintaining security depend on the type of the security and the complexity of the transaction. Therefore, it is difficult to make a general estimate for each type of security.

The notary fees for execution of an agreement on creation of a security in the form of a notarial deed depend on the value of the secured amount, and can reach up to EUR 1,378 (plus VAT, if applicable). It should be noted that in addition to the above fee, the notary public also charges notary office expenses. These can be rather high as a copy of each page of the notarial deed amounts to 50 euro cents. The fee for registration of security (if applicable) is in general not substantial. Generally, there are no court fees for maintenance of a mortgage or a share pledge and similar.

1.7 Recognition of security governed by foreign law

As a rule, the Slovenian courts recognize the choice of foreign law as a valid choice of law. However, mandatory provisions of Slovenian law, including those pertaining to public order, conflict of laws, rules relating to one's capacity, will apply regardless of whether the parties specify a foreign choice of law clause. The rules set forth by the Rome I Regulation and – for matters falling outside the scope of the Rome I Regulation – the rules of the Slovenian Private International Law and Procedure Act[17] shall apply. According to the above, security interests in certain specific assets, such as real property located in Slovenia , shall be governed by the laws of Slovenia (as a matter of overriding mandatory rules of the Slovenian law). Hence, security interest in such types of assets governed by foreign law is unlikely to be recognized by the Slovenian courts or other competent authorities. Furthermore, the application of the bankruptcy legislation may not be excluded[18].

If a court judgement is obtained in the European Union, the competent Slovenian court will enforce the same without re-examination of merits under provisions of Council Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Slovenia is also a signatory to the Lugano Convention[19], which means that a judgement given in a relevant jurisdiction is recognised in Slovenia without any special procedures. The enforcement of security governed by foreign law in Slovenia will be subject to Slovenian laws on enforcement (e.g., the course of enforcement proceedings, time limits, etc.).

[16] *Please see also footnote No. 10.*

[17] *Similar also for shares in Slovenian companies, movable assets located in Slovenia, bank account receivables held by Slovenian banks (in market practice, the bank shall cosign or at least be required to acknowledge the account pledge and shall insist on Slovenian law choice).*

[18] *For example, it was mentioned above that receivables assigned for security purposes represent a part of the bankruptcy estate of the assignor and, under certain conditions, the assignee shall have a priority repayment right over proceeds of such receivables. It is highly likely that this rule of the Law of Property Code shall be applied by Slovenian courts as mandatory rules, even in case the assignment is to be government by laws other than those of Slovenia.*

[19] *Convention of 16 September 1988 on jurisdiction and the enforcement of judgements in civil and commercial matters.*

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

Upon the debtor's default, a creditor can recover its claim against the debtor (or collateral provider, if different than the debtor) by initiating an enforcement procedure in compliance with the Law of Property Code and the Enforcement and Securing of Civil Claims Act[20]. Such an enforcement procedure may be initiated by any (secured and non-secured) creditor of the debtor in default.

(b) Enforcement grounds

A foreclosure procedure may be initiated by the creditor on the basis of a an enforcement title. According to ZIZ the following is considered an enforcement title:

(i) an enforceable court decision (judgement or arbitration ruling and payment order or other court or arbitration order) and a court settlement;

(ii) a directly enforceable notarial deed; or

(iii) other enforceable decision or instrument stipulated to be an enforcement title by a law, a ratified and published international treaty or a legal act of the European Union that is directly applicable in Slovenia.

The enforcement title is suitable for enforcement if it states the creditor and debtor, and the subject, type, scope and time of fulfilment of the obligation[21]. If an agreement on creation of a security is entered into in the form of a directly enforceable notarial deed, such secured creditor may initiate the enforcement procedure against the debtor in default (or collateral provider, if different than the debtor) on the basis of that notarial deed and a statement sent and delivered to the debtor (and the provider of collateral, if not the debtor) stating the default (without necessity of prior litigation).

It is worth noting that in Slovenia agreements on creation of a security (other than those where private foreclosure is provided for; see Section 2.2 below) are generally entered into in the form of a notarial deed as in such case the creditor is – upon an event of default – not required to file a lawsuit against the debtor in default and initiate a lengthy and potentially costly litigation.

(c) Procedure

In Slovenia, enforcement procedure is conducted by the court and, depending on the proposed enforcement measure, the enforcement officer who carries out the direct actions of enforcement and insurance of claims (i.e. physically carry out enforcement - they carry out attachment, etc.). The enforcement proceedings start when the creditor files an enforcement proposal with the competent court. The competent court decides on the enforcement proposal by issuing a resolution allowing the proposed enforcement (or a resolution on rejecting the proposal for enforcement).

The court sends the respective resolution to the debtor, who may – within (as a rule) eight days since its receipt – file a grounded opposition against the decision of the court. In case of filing of the opposition, the court examines the formal merits of the claim[22]. Due to the backlog of court cases in Slovenia this might take up to two years or more, depending on the subject of the enforcement (e.g. real estate vs. bank account receivables). Provided that the debtor in default fails to fulfil its obligations voluntarily, the court appoints an enforcement officer who first repossesses the encumbered assets (or other asset against which enforcement is allowed) and then sells them pursuant to the Slovenian rules of enforcement. As a rule, the court organizes a public auction where the encumbered assets are to be sold. If the public auction is successful and the encumbered assets are sold, the creditor – depending on the ranking of the claim – receives repayment of its claim from the proceeds of sale of the encumbered assets. It should be noted that in the course of enforcement procedure, encumbered assets may also be sold by way of entering into a direct agreement with the buyer (i.e. without holding a public auction), however, such type of sale is usually used in case of selling goods of lower value.

(d) Ranking of claims

As a general rule, mature tax obligations of the debtor shall be repaid before any other debtor's obligations. This priority does not apply when the debtor's tax obligation is repaid from an asset pledged as a security that is registered in an appropriate register (e.g. Real Estate Registry), where the registered mortgagee, shall be repaid first. In the event where more than one creditor enforces monetary claims against the same debtor and against the same asset (object) of

[20] *Slovenian legislation also regulates a special type of enforcement procedure, namely the so-called enforcement procedure on the basis of an authentic document. In the enforcement procedure on the basis of the authentic document, a creditor may initiate (a direct) enforcement procedure against the debtor before a specific department of the Ljubljana Court (the "COVL Court") on the basis of an invoice or another "authentic document" (such as a cheque, a bill of exchange, an authentic excerpt from book of accounts and similar).*

[21] *Such requirements result in certain claims not being eligible for such a concept. Please also see footnote No. 10.*

[22] *Generally, the fulfilment of formal conditions for the enforcement and potential restraints for it.*

enforcement, their claims shall be satisfied in the order (according to time) in which the creditors acquired the right to have their respective claims repaid from the object in question (i.e., a pledge over the object of enforcement). For example, in the course of an enforcement procedure, one obtains a pledge over real estate when a note on enforcement resolution is entered in the Real Estate Registry.

A pledge over movables is in the course of an enforcement procedure obtained when the respective movables are seized.

Creditor's claim shall be repaid in the following manner:

(i) cost of the enforcement procedure (i.e. court and enforcement officer's fees) which are prepaid by the creditor(s);

(ii) default interest accrued from the maturity date of the claim until payment of the claim; and

(iii) the principal amount of the claim.

(e) Costs

Costs of enforcement procedure in general consist of court fees and enforcement officer's fees (if applicable). Court fees among others depend on the number of enforcement measures (e.g. sale of movables, the sale of real estate, etc.) and the fact whether the debtor filed an opposition against the court's resolution allowing enforcement; such court fees are in general not substantial. The enforcement officer's fees also depend on the allowed enforcement measures and complexity of a particular case. Therefore, it is difficult to make a general estimate of costs in an enforcement procedure. In addition, attorney's fees shall also be incurred in an enforcement procedure and may be, up to a limited amount, repaid from the enforcement proceeds.

2.2 Private foreclosure

(a) General

Private foreclosure is primarily regulated by the Law of Property Code, and is allowed with respect to the following assets:

(i) Movables

The pledgee and the pledgor must agree on out-of-court sale in the security agreement (possessory pledge on movables) whereby such an agreement should be concluded in writing. Existence of an agreement on an out-of-court sale is assumed for the security agreements which are considered to be commercial (b2b) agreements according to the Code of Obligations[23].

Specific rules on procedure and diligence must be followed (see Section 2.2 (d) below).

In event of a non-possessory pledge over movables, private foreclosure rules apply when (and if) the movables are upon default delivered to the possession of the pledgee[24].

(ii) Other property rights

According to Article 191 of the Law of Property Code, provisions on pledge of movables apply also to the pledge of other property rights (which are not claims or securities), unless otherwise provided by the law. This means that an agreement on out-of-court sale can be reached also in case of a share pledge.

(iii) Securities

In case of marketable securities which have a stock exchange or market price, the pledge can also be realised with the sale of the securities on the organized market by an authorised broker. The sale can be carried out within eight days from the day the creditor or authorized broker on his behalf has informed the debtor that he shall sell the securities. Notification thereof must be sent to the debtor with registered post.

(b) Notarial sale

The ZFZ introduced the possibility of an out-of-court enforcement of (notarial) mortgages[25] in November 2013. Its application is limited to certain qualified mortgages and to certain participants in the financial markets. Based on the Constitutional Court's decision the use of all relevant new provisions of the ZFZ is temporarily suspended (until the court's final ruling)[26].

[23] *Obligacijski Zakonik, Official Gazette of the Republic of Slovenia No. 83/01, as amended.*

[24] *The agreement on establishment of a non-possessory pledge over movables (which shall as a precondition be in a form of a directly enforceable notarial deed) shall define the right of the pledgee to request delivery of the pledged movables, upon which it is by virtue of law assumed that the parties have agreed on the private out-of-court sale of the assets. If the pledgor fails to deliver the movables as requested, the pledgee may either (directly) enforce the delivery (and perform the out-of-court sale) or enforce the secured claim by requesting a court sale.*

[25] *A mortgage established with an agreement on securing a claim with a mortgage is entered into in the form of a (directly enforceable) notarial deed.*

[26] *In its Decision no. U-I-196/14-12, Official Gazette of the Republic of Slovenia No. 74/14 the Constitutional Court argued that the implementation of the ZFZ could have damaging effects which would be difficult to remedy. Namely, the damage that could be caused to debtors due to continuation of the notarial sales (if they indeed proved to be unconstitutional) would be greater than the damages incurred by the creditors according to the Constitutional Court. This is allegedly due to the fact that the majority of the encumbered real estate represents underlying assets for the performance of the debtor's activity and loss of such assets would cause irreparable damage to the debtor/pledgor, whereas on the other hand, the creditors may (inter alia) (i) demand enforcement by way of collection of unbinding offers based on ZIZ and (ii) claim late interest, which both mitigates the damages incurred by the creditors to such an extent that the possible damage incurred by the debtors could be greater.*

The following conditions were (amongst others) provided under ZFZ for the notarial sale:

The following conditions were (amongst others) provided under ZFZ for the notarial sale:

(i) the notarial mortgage and a corresponding note on direct enforceability are validly entered into the Real Estate Registry;

(ii) the secured claim is due and was not paid;

(iii) The mortgagee fulfils certain conditions; among others, it has to be either a credit institution within the meaning of Article 4, Point 1 of the Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[27] , a Member State central bank, the European Central Bank, the International Monetary Fund and the European Investment Bank, the Bank for International Settlements, a multilateral development bank as defined in Directive 2006/48/EC, national Bank Assets Management Company or another specific purpose company established for activities based on the act providing measures for stability of banks;

(iv) The debtor and the owner of the pledged real estate registered in the Real Estate Registry (i.e., the mortgagor) fulfil certain conditions; among others, they have to be large, medium sized or small[28] companies (and not micro companies);

(v) The notarial mortgage has a first ranking (with respect to the date of its establishment) in comparison to other possible mortgages and/or land debts which are entered into or prenoted in the Real Estate Registry with respect to the pledged real estate.

(c) Enforcement grounds

A private foreclosure can be performed without having to obtain any resolution of the court; it can be performed on the basis of a contractual agreement on the grounds fixed in the relevant finance and security documentation, (e.g., failure of the debtor to remedy an event of default within a specified period).

(d) Procedure

The Law of Property Code regulates out-of-court sale of movables whereby the respective provisions apply mutatis mutandis also with respect to out-of-court sale of other property right.

If the secured claim is not settled at maturity, the pledgee may sell the pledged movable(s) at a public auction or at an exchange price or a market price. The sale may be carried out as from eight days after the day on which the pledgor notified the debtor of the secured claim, as well as the pledgor (if different than the debtor), of its intention to do so. The pledgee must inform both in due time of the date and place of the sale. The pledgee may pay its claim from the proceeds of the sale, together with interest and costs, and is obliged to deliver any surplus to the pledgor. Any provisions of a security agreement providing a different method of out-of-court sale as described above are null and void. In case of a non-possessory pledge over movables, the pledgor should – if the debtor fails to settle the secured claim at maturity - deliver the movables (object of the security), into the direct possession of the pledgee. With the delivery of the pledged movable into the direct possession of the pledgee, a pledge is acquired on the movable (pignus), whereby an agreement on an out-of-court sale is presumed to exist.

(e) Ranking of claims

The general ranking of claims is applicable as described in Section 2.1(d) above.

(f) Costs

The costs relating to private foreclosure depend on the assets that are subject of sale.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

Under Slovenian law, two general types of insolvency proceedings are provided for. All to a certain extent create a creditors' moratorium or otherwise give the debtor (its estate) protection from enforcement of the creditors' claims against it:

(i) compulsory settlement (aimed at reorganizing the existing company and decreasing the amount of existing obligations and/or postponing their payment); simplified compulsory settlement (the aim of this procedure is the same as with the compulsory settlement, but the procedure itself is simplified and entails the participation of a notary public);

(ii) bankruptcy proceedings (aimed at termination of the bankrupt debtor while distributing the remainders of its estate amongst the creditors). There are generally three types of bankruptcy

[27] *ZFZ does not (yet) take into account that the said directive was repealed by Directive 2013/36/EU. A credit institution was defined in the Directive 2006/48/EC as "an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account".*

[28] *A small company is a company which fulfils two of the following three criteria: i) has less than 50 but more than 10 employees, ii) its total revenue from sales does not exceed EUR 8,800,000 but exceeds EUR 2,000,000 or iii) its assets exceed EUR 4,400,000 but do not exceed EUR 2,000,000.*

proceedings: (1) bankruptcy proceedings over a legal person – a company (aimed at liquidation of the company); (2) bankruptcy proceedings over a natural person; and (3) bankruptcy proceedings over a legacy.

It is worth noting that the latest amendments of the Slovenian insolvency legislation foresaw an additional type of proceedings – a preventive restructuring. Its aim is to allow a debtor who is not insolvent, but for whom it is likely that it will become insolvent within one year's time, to restructure its financial liabilities. The debtor performing preventive restructuring proceedings must obtain the consent of creditors holding at least 75 per cent of all financial claims in order for the preventive restructuring to become valid (a higher majority may be agreed between the debtor and the creditors).

Once the restructuring becomes valid, it has (with minor exceptions) an effect also on the creditors with financial claims who did not consent to the restructuring. With regard to the secured financial claims such an agreement may provide for postponement of the maturity of secured financial claims or changes in interest rates, if consent of secured creditors holding at least 75 per cent of all secured financial claims is obtained.

Given the fact that in practice the bankruptcy proceedings over a legal person are most common and commercially most important, this section of the guide focuses on this type of proceedings.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

Institution of bankruptcy proceedings and preliminary bankruptcy proceedings (if applicable)

Bankruptcy proceedings are conducted with the purpose to realize the interest of the creditors to be repaid simultaneously and in equal proportion as other creditors that are (in relation to the bankrupt debtor) of equal legal position.

In the preliminary bankruptcy proceedings the court reviews whether procedural and material prerequisites for initiation of the (main) bankruptcy proceedings are fulfilled[29].

The proposal for initiation of the bankruptcy proceedings may be filed by(1) the debtor himself;(2) a personally liable shareholder of the debtor;(3) the Public Guarantee, Maintenance and Disability Fund of the Republic of Slovenia in the name and on behalf of the employees of the debtor; or by (4) the creditor of the bankrupt debtor.

In order for the court to allow the initiation of the main bankruptcy proceedings (in cases where the creditor proposes the initiation of bankruptcy proceedings), the creditor must prove presumptively that he has a claim towards the bankruptcy debtor, that the bankruptcy debtor is in delay with the payment of his claim for more than two months and that the debtor has become insolvent[30].

The court serves the creditor's proposal for initiation of the bankruptcy proceedings to the debtor. Within 15 days from the day of the receipt of the proposal the debtor can (i) file an opposition to the creditor's proposal claiming that he is not insolvent or that the creditor's claim does not exist or can (ii) file a proposal for postponement of decision making regarding creditor's proposal for initiation of the bankruptcy proceedings because there is a prevailing possibility of a successful financial restructuring of the debtor. If the debtor does not oppose the creditor's proposal for initiation of the bankruptcy proceedings within the given time period, it is deemed that the debtor is insolvent and the court issues a resolution on initiation of the bankruptcy proceedings. The same applies if the debtor does not succeed with his opposition / proposal.

Provisional measures affecting rights of secured creditors

There are no provisional measures that would refer only to the rights of the secured creditors.

On the basis of the proposal of a creditor for initiation of bankruptcy proceedings or on the basis of a proposal of any other creditor who may prove its claim against the debtor, the court may issue an interim injunction for securing monetary claims of all creditors of the insolvent debtor. By such interim injunction the court prohibits the debtor (and its management) to dispose of its assets or restricts the disposal of the debtor's assets in such a way that the debtor may dispose of its assets only in case if it obtains a prior consent of the court.Such an interim injunction is valid (in effect) only until the initiation of the bankruptcy proceedings.

[29] *One of the procedural prerequisites for initiation of the bankruptcy proceedings is the payment of the court fee, which amounts to EUR 246 and of the advance payment for the costs of the bankruptcy proceedings, which amounts to approximately EUR 3,500.*

[30] *Insolvency is a situation where the debtor within a longer period of time is not able to settle all his liabilities falling due within such a period of time ("continuous illiquidity"), or becomes insolvent on a long-term.*

(c) Approval of the claims of secured creditors in bankruptcy proceedings (if applicable)

A right to a separate payment/settlement of its claims is the right of a creditor to be repaid from certain assets of the insolvent debtor before the claims of other creditors of such an insolvent debtor are paid from such assets. The following rights are considered to be rights to a separate settlement:

(i) a pledge (e.g. mortgage, pledge over movables, pledge of receivables, share pledge, etc.);
(ii) right of retention; and
(iii) right of assignee in case of assignment of movables or receivables for security purposes (in case of bankruptcy over the assignor).

A creditor with a right to separate settlement is a creditor who, in insolvency (bankruptcy) proceedings, reports a claim secured by the right to separate settlement.
Initiation of the bankruptcy proceedings does not affect the right to a separate settlement nor the claim secured by the right to a separate settlement.

Generally, a creditor must report his right to a separate settlement as well as the claim secured by such a right in the bankruptcy proceedings within three months from the day of the initiation of the bankruptcy proceedings. In case the creditor fails to do so, the right to a separate settlement as well as the claim secured by such a right to a separate settlement cease to exist.

The administrator shall make a definite statement within one month[1] following the expiry of the time limit for lodging the application for recognition of a claim on any claim lodged in due time, whether he recognises or contests the reported claim(s).

The administrator makes his statement in the form of a list of tested claims (i.e., basic list of tested claims), which is submitted to the competent court. If the administrator decides to negate the existence of a certain claim, a description of the facts indicating that the claim, or the negated part thereof, does not exist, must be included in the basic list of tested claims.

The court shall publish the basic list of tested claims within three working days following its receipt. Upon publishing of the basic list of tested claims, the administrator shall be precluded from contesting the claims he recognized in the basic list of tested claims.

Any creditor may lodge an objection to the basic list of tested claims within 15 days from the date of its publishing if one of his claims lodged in due time is missing from the list, or if specific data[31] of such claim are not correct.It is also noteworthy that any creditor may contest the existence of the claim of another creditor within one month after the publishing of the basic list of tested claims. Any claim shall (in principle) be deemed recognised if it is recognised by the administrator and if it is not contested by any of the other creditors. If the right to separate settlement of a (secured) creditor is contested by either the administrator or contested by another creditor, the respective creditor shall, within one month following the publication of the resolution on testing claims, file an action with which it shall demand the priority payment of his secured claim from the assets which were subject of the right to separate payment. If also the claim of the secured creditor was negated, the creditor shall also have to (within the same timeframe) demand that the existence of his negated claim is established[32]. In case the secured creditor does not file the action in due time, his right to separate settlement and/or his claim (if also negated) shall cease to exist.

(d) Challenges affecting secured claims

After becoming insolvent, a company may not make any payments nor assume any new obligations, with the exception of those which are essential for the continuing operation of the company. The management or other bodies of the company may not execute any actions which would contribute to the unequal treatment of creditors that are in an equal position towards the company.
The actions of the bankrupt debtor may be challenged under the following (cumulatively met) conditions:

(i) the challenged action was carried out during the challengeability period (the period as of the beginning of the 12 months prior to the introduction of bankruptcy proceedings up to the initiation of bankruptcy proceedings);
(ii) the action resulted in the unequal treatment of creditors (objective condition of challengeability); and

[31] *This specific data is: - identification data of the creditor who has lodged the claim; -the principal amount (glavnica) of the lodged claim; and -the capitalised amount of interest, and the amount of costs claimed.*

[32] *If the administrator negated the claim, the creditor shall file the complaint against the debtor in bankruptcy. If another creditor negated the claim, the creditor shall file the complaint against the creditor that negated its claim.*

(iii) the person to the benefit of which the action was performed was, at the time when such action was performed, aware of or should have been aware of the fact that the debtor was insolvent (subjective condition of challengeability).

The objective condition of challengeability is fulfilled provided that the consequences of the debtor's action are either a decrease in the net value of assets of the debtor in bankruptcy, due to which other creditors can only receive payment for their claims in a lower portion than if the action had not been performed, or a person to the benefit of which the action has been performed, has acquired more favourable payment conditions for a claim against the debtor in bankruptcy.

Rebuttable presumptions with respect to the fulfilment of the above two conditions are foreseen in the Slovenian legislation.
A challenging action may be filed within six months following the publication of the decision on initiation of bankruptcy proceedings. A challenging claim may be exercised by the bankruptcy administrator on behalf of the debtor in bankruptcy; or by any creditor entitled to perform actions in the proceedings, on his own behalf and on the account of the debtor in bankruptcy.

(e) Enforcement of secured claims upon debt-restructuring
When a company becomes insolvent, the management is obliged to draw up a report on financial re-structuring measures within one month following the occurrence of insolvency. If there is a probability of a minimum of 50 per cent for the successful execution of a financial restructuring, the result of which would be regained liquidity and solvency of the company, the insolvent debtor may proceed either with an informal workout (by increase of share capital; sale of dispensable assets etc.) or a formal compulsory settlement (if the management assesses that the measures of the informal workout would not be successful).

A motion for the initiation of compulsory settlement procedure may be filed by an insolvent debtor or a personally liable shareholder of the debtor and the competent court subsequently decides upon the initiation of the compulsory settlement procedure. The debtor needs to prove that it is insolvent and demonstrate the probability of a minimum of 50 per cent (i) that the performance of the plan of financial restructuring shall enable a financial restructuring of the debtor upon which it shall regain short and long term liquidity; and (ii) that the creditors shall get better terms for payment of their claims than they would in the bankruptcy procedure of the debtor.

With the compulsory settlement petition, the insolvent debtor shall offer its (regular) creditors to agree on reducing their ordinary claims and suspend their payment time limits.

Compulsory settlement is adopted if voted for by the creditors whose total weighted amounts of claims are at least equal to 6/10 of the sum of the weighted amounts of all the recognised and plausibly demonstrated claims. In case the required majority is met, the court confirms the compulsory settlement. In case the compulsory settlement is not adopted, the court stays the compulsory settlement procedure and automatically initiates the bankruptcy procedure.

Secured creditors are not affected by the compulsory settlement proceedings[33]. The enforcement of such claims is thus generally also unaffected by the compulsory settlement. It is noteworthy that creditors with secured or priority claims, therefore, (in principle) do not have the right to vote on the adoption of the compulsory settlement proposal.

(f) Enforcement of secured claims upon liquidation of the bankruptcy estate

(i) Procedure
The administrator shall start to carry out actions for the realisation of the bankruptcy estate immediately upon the drawing up of his opening report. The realisation of the bankruptcy estate shall be performed through public auctions (either by raising the basic price or by way of reducing the initial price) or by invitation to make offers, whereby the debtor in bankruptcy undertakes to conclude a sales contract with the auctioneer who will offer the highest price.
In distributing an individual special distribution estate (proceeds from the sale of the respective collateral), a claim shall (in principle) be considered secured by the right to separate settlement to the assets that belong to such special distribution estate if the claim and the right to separate settlement have been applied for recognition in bankruptcy proceedings timely and duly recognized.

(ii) Ranking of claims
In bankruptcy, a secured claim shall be repaid with the same priority as outside bankruptcy (see Section 2.1(d) above).

[33] *Again, only to the amount of the value of collateral.*

If the assets which belong to an individual special distribution estate are subject to more rights to separate settlement (several mortgages, for example), claims secured by such rights shall be paid by priority order of acquisition of such rights[34] .The remaining assets forming the special distribution estate (if any are left), after the full amount of claims is paid, shall be transferred into the common distribution estate.

If the special distribution estate is insufficient to cover the entire claim of the secured creditor(s), payment of the unsecured part(s) of such claim(s) shall be made from the general distribution estate (the secured creditor shall participate for the balance in the general distribution along with the credi-tors with unsecured claims, if this margin was timely reported as an "ordinary" claim).

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement v. bankruptcy proceedings

The commencement of bankruptcy proceedings generally stays judicial enforcement.

Namely, the initiation of bankruptcy proceedings shall have the following effects on enforcement proceedings initiated before the initiation of bankruptcy proceedings:

(i) in case the creditor has not yet acquired the right to separate settlement until the initiation of bankruptcy proceedings, the enforcement proceedings shall end;

(ii) in case the creditor acquired the right to separate settlement but the sale of the pledged assets has not yet been executed, the enforcement proceedings shall be stayed with the initiation of the bankruptcy proceedings;

(iii) in case the creditor acquired the right to separate settlement and the sale of the assets was executed[2], the enforcement proceedings shall not be affected by the initiation of the bankruptcy proceedings.

(b) Private foreclosure v. bankruptcy proceedings

As mentioned above, the collateral over the property of the bankrupt debtor shall be enforced through court, but the law provides for an exception with respect to the rights to a separate settlement that can be executed out-of-court (by means of private foreclosure). Namely, if according to the general rules applicable to the right to a separate settlement, the creditor has the right to an out-of-court sale of the collateral, the creditor retains the right to a separate settlement also after the initiation of the bankruptcy proceedings (i.e., the creditor does not have to lodge the right to a separate settlement and the claim secured with such a right in the bankruptcy proceedings).

It should also be noted that if the value of the assets encumbered with the right to a separate settlement is lower than the value of the claim secured by the right to a separate settlement, a part of the claim that cannot be repaid from the proceeds of the realized assets is treated as an ordinary, unsecured claim. If the creditor does not lodge such an ordinary, unsecured claim in the bankruptcy proceedings within three months from the publication of the initiation of the bankruptcy proceedings such a claim ceases to exist .

2.5 Recourse of a secured creditor to self-help remedies

In Slovenia any possessor has the right to self-help against a person who without justification disturbs his possession or deprives him of it, under the condition that the danger is direct, that the self-help is immediate and urgent and that the method of self-help is appropriate to the circumstances in which the danger exists[1].

However, in practice, self-help remedies are in most cases not possible in Slovenia (i.e., a self-help repossession of a pledged asset by the pledgee). In case the collateral provider opposes the repossession of the encumbered assets which are in his possession, the collateral taker may not repossess such an asset alone, but for foreclosure purposes can ask the court to do so.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of trust and the role of security trustee. Parallel debt concept

There is no available court case discussing the issue of a security trustee or security agent. However, generally it could be argued that the concept of trust would not be recognized under Slovenian law as it is generally established that under Slovenian law it is only possible to grant security in favour of a person who is the creditor to the relevant secured obligations (a so called principle of accessority/privity is generally applied under which the security shall follow the destiny of the secured claim).

[34] *In practice this might prove to be difficult to manage, as it is in most cases very difficult to predict the value that shall be achieved from sale of the mortgaged assets.*

A parallel debt mechanism and/or agreement of joint and several creditorship is often used in practice to ensure that any Slovenian security which is granted at signing not only secures the claims of the original finance parties, but also of any additional finance parties. It is worth noting that the instrument of parallel debt might also not be enforceable given the fact that under Slovenian law it arguably lacks the economic basis (causa) on the side of the security agent[35] .

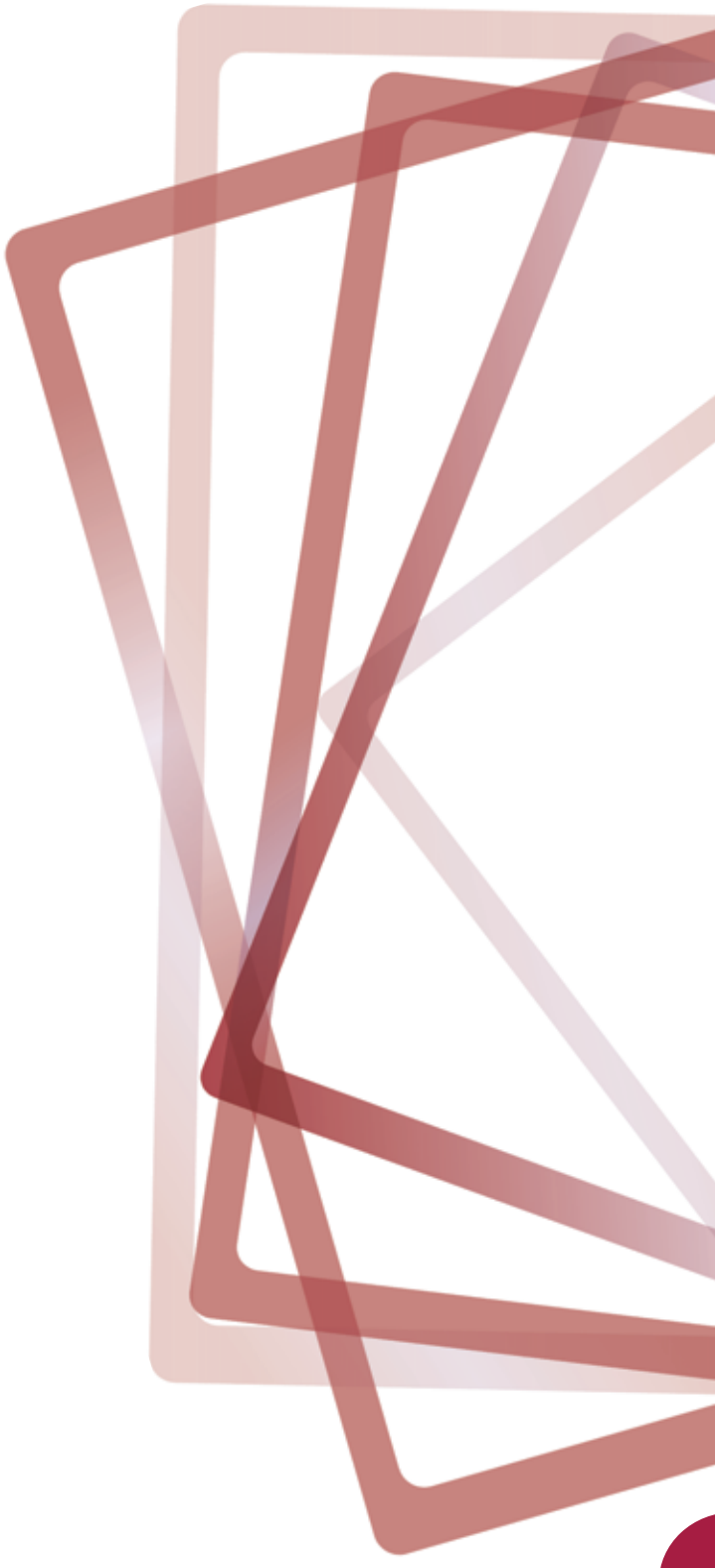
Therefore, we would usually propose that the Slovenian security documents include all the creditors (the security agent might have an administrative role or not) in order to assure full enforceability of Slovenian security documents. Such approach could be costly as it requires involvement of all the original lenders at execution and enforcement and the need to take additional actions and incur further costs in case of any subsequent changes (e.g., change in registration, transfer of receivables assigned for security purposes).

3.2 Specifics of taking and enforcing security by a security trustee or agent

No specifics could be identified at a statutory level considering the fact that the role of a security trustee or security agent is generally not regulated by Slovenian laws. Please also see Section 3.1 above for details on the customary practices of taking security on behalf of multiple lenders.

3.3 Precedents

Please see Section 3.1 above for details on the customary practices of taking security on behalf of multiple lenders.



[35] *It should be noted though, that if the concept is recognized under the foreign law governing the facility agreement being secured in Slovenia, such foreign law (including the security agent concept) should generally be acknowledged by Slovenian courts when enforcing security; specifically if the secured claims are governed by a law of an EU Member State and if the payment of parallel debt has a debt-reducing effect towards the lender(s). As this has not been confirmed by court practice the creditors need to accept certain risks.*

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TR

TURKEY

1. SECURITY

1.1 Third Party Security and Guarantee (Upstream and Cross-stream Guarantees and Security) and Corporate Benefit

A third party can personally guarantee the obligations of a debtor as a surety/guarantor or secure the obligations of a debtor by granting collateral. Turkish law provides for two types of guarantee obligations: guarantee and surety. The obligation of a surety is, unless otherwise agreed, secondary to the underlying obligation. Accordingly, the beneficiary must exhaust its remedies against the principal before calling on the surety. If, however, the surety agrees to be a "joint surety", the beneficiary can call on the joint surety before pursuing the principal debtor, provided that the debtor (i) is in delay in the performance of its debt and disregards the creditor's warning for the performance; or (ii) is clearly insolvent. Guarantee, on the other hand, is a separate and independent obligation from the underlying obligation. The beneficiary can call on the guarantor to pay the debt as soon as the underlying obligation becomes due.

If a third party, which grants a guarantee or security, is a parent company, the restrictions provided by the Turkish Commercial Code[1] regarding upstream guarantees and financial assistance restrictions will be applicable.

Under Article 195 of the Commercial Code, where a trading company, whether directly or indirectly, (i) holds the majority of voting rights in another trading company; or (ii) is entitled to elect the majority of members of another trading company's board of directors, who may adopt decisions themselves; or (iii) constitutes and holds the majority of voting rights in the other trading company together with other partners based on a partnership agreement; or (iv) a company dominates another company by way of contract or otherwise, the first company is called the parent company and the other is called the affiliated company. In addition, a trading company that owns the majority of the shares of another trading company or the number of shares that will allow it to adopt decisions to direct the latter is presumed to be the parent company. A parent company dominating another company through one or several affiliated companies is indirect domination.

Under Article 202 of the Commercial Code, the parent company cannot use its dominant position in a manner to cause damages to the affiliated company. Accordingly, the affiliated company cannot be forced or directed to assume liabilities or debts, such as taking over a business or assets, a debt transfer, a transfer or reduction of profits, the creation of an encumbrance over its assets, the provision of surety and a guarantee or aval (guarantee of bills), unless the (i) resulting loss is equalized and compensated within the relevant activity year; or (ii) a right of claim in an equivalent value is granted to the affiliated company by the end of that operating year with a statement on when and how the loss will be equalized. Otherwise, the affiliated company's shareholders can claim compensation of the resulting damages and losses from the parent company and the members of the parent company's board of directors, who caused the damages and losses. Furthermore, the affiliated company's creditors can request the affiliated company's damages and losses to be compensated.

These restrictions apply to cross-stream guarantees as well.

Turkish courts have accepted that the giving of upstream and downstream guarantees provide a corporate benefit. Nevertheless, this jurisprudence must be interpreted within the framework of the legal restrictions brought by the Commercial Code.

1.2 Financial Assistance

The financial assistance prohibition was introduced into EU law in 1976 in Article 23 of the Second Council Directive 77/91/EEC . In 2006, the European Commission amended the directive, loosening the tight financial assistance restriction on public companies. Under the amended Directive, public companies are allowed to provide financial assistance, as long as the financial assistance does not plunge the distributable reserves and the concerned transaction fulfils certain predefined shareholder and creditor protection measures. Although the Commercial Code was actually discussed by the subcommissions of the Turkish Parliament and finalized after

[1] *Law No. 6102 published in the Official Gazette of the Republic of Turkey dated 14 February 2011, No. 27846*

the Second Council Directive 77/91/EEC was amended, it unfortunately does not reflect the latest provisions and, instead, adopts the directive's provisions as they were prior to the amendment.

Article 23 is very similar to Article 380 of the Commercial Code, which prohibits financial assistance in buy-out transactions. Article 380 prohibits a joint stock corporation from granting any advance payment, monetary loan or security to a third party for the purpose of that third party acquiring the company's shares, unless (i) the transaction falls within the scope of activity of credit and financial institutions; or (ii) advance payment, monetary loan or security is granted to the employees of the company or to the employees of the company's affiliates, for the purpose of facilitating the acquisition of company shares by these employees.

Under Article 379 of the Commercial Code, a joint stock corporation is allowed to acquire or accept as a pledge its own shares, provided that the total nominal value of such shares does not (or, as a result of a transaction, will not) exceed 10 per cent of the company's initial or issued capital. Accordingly, a joint stock corporation can acquire or accept as a pledge its own shares up to the said threshold provided that the shareholders' general assembly authorizes the board of directors regarding the acquisition or pledge of shares.

Conditions Relating to Net Assets

Under Article 379 of the Commercial Code, following the payment for such acquisition, the remaining net assets of the joint stock corporation must be equal to at least the total sum of the non distributed mandatory reserve funds and the joint stock corporation's share capital.

Condition of Payment of Share Prices

Shares that can be acquired in accordance with Article 379 of the Commercial Code are the shares, the price of which is fully paid.

Unlimited Acquisition Exception

Under Article 382 of the Commercial Code, the company can, however, acquire and buy back its own shares without being subject to the limitations set forth under Article 379, if and when:

(i) it is applying the law's provisions allowing the reduction of its initial capital or issued capital;
(ii) it is a requirement of the principle of universal succession;
(iii) the transaction arises from a legal purchase obligation;
(iv) subject to payment of full price of the shares, it aims to recover and collect an outstanding debt owed to the company through the compulsory execution proceedings; and
(v) the company is trading securities.

Moreover, under Article 383 of the Commercial Code, a company can acquire and buy back its own shares without consideration as well, if their total value has been paid.

1.3 Types of securities. Most often used types of securities in practice

The most often used types of securities in Turkish law practice are:

(a) pledge over movables;
(b) pledge over receivables;
(c) pledge over company shares;
(d) assignment of receivables;
(e) pledge over trademark;
(f) commercial enterprise pledge; and
(g) mortgage.

1.4 Creation of Security

(a) Pledge over Movables

Under Article 939/1 of the Turkish Civil Code[2], in order to create a pledge over a movable, physical possession of such movable must be transferred to the pledgee unless otherwise stipulated by laws. There are certain exceptions to this, particularly where the movable(s) in question is a type of property that is subject to registration with a certain authority (e.g. motor vehicles, ships, and aircrafts).

(b) Pledge over Receivables

Under Article 954 of the Civil Code, a pledge can be created over assignable receivables subject to the agreement of the parties by entering into a written pledge agreement between the pledgor and pledgee.

(c) Pledge over Company Shares

The establishment of a pledge over a company's shares is different for limited liability partnerships and joint stock corporations. This distinction derives from the different nature of shares. In joint stock

[2] *Law No. 4721 published in the Official Gazette of the Republic of Turkey dated 8 December 2001, No. 24607*

corporations, share certificates are qualified as negotiable instruments, while, in limited liability partnerships, share certificates (representing the initial share capital) are ordinary bills.

A pledge over the shares of a limited liability partnership must be established by a written agreement and the parties' signatures must be notarized. In addition, the approval of general assembly of partners must be obtained in a meeting of the general assembly of partners, if required by the articles of association of a limited liability partnership. Partners of a limited liability partnership can give their written approval as well and the pledge will be deemed to have been approved without a meeting of general assembly of partners. The general assembly of partners cannot reject the pledge unless there is a just cause. If the general assembly of partners does not reject the application of the pledge's establishment within three months following the application, the pledge establishment will be deemed approved by the general assembly of partners. Although not legally required, it is advisable for the pledge to be registered with the shareholders' registry for evidentiary purposes.

The Commercial Code, which entered into force in 2012, provides that registered share certificates can be issued to represent the share capital of a limited liability partnership. Although some scholars suggest that these share certificates are not required to be delivered to the pledgee, the majority of them opine that the pledge will not be established unless the share certificates are delivered to the pledgee.

Shares certificates of a joint stock corporation are negotiable instruments and, under Article 956, a written agreement is not required for the establishment of pledge over negotiable instruments. Accordingly, a pledge over a joint stock corporation's shares can be established with the delivery of share certificates to the pledgee, if the share certificates are bearer share certificates; and (ii) with the endorsement of the share certificates to the pledgee or with the delivery of share certificates to the pledgee together with a declaration of delivery, if the share certificates are registered share certificates.

(d) Assignment of Receivables

In accordance with Article 183 of the Turkish Code of Obligations[3], unless otherwise stipulated by laws or agreed in written form, a creditor can assign its existing or future receivables to a third party without the debtor's consent, pursuant to a written agreement between the creditor (assignor) and the assignee.

(e) Pledge over Trademarks

In accordance with Article 18 of the Decree Law No. 556 regarding the Protection of Trademarks[4], a registered trademark can be pledged independent from the commercial enterprise. A pledge over trademark is registered with the Trademark Registry and publicly announced.

(f) Commercial Enterprise Pledge

Under Turkish law, in order to establish a pledge over movable assets, physical possession of such assets must be transferred to the pledgee in order to perfect the pledge. However, in a commercial enterprise pledge, this requirement is not applicable by virtue of Article 4 of the Law on Commercial Enterprise Pledges[5].

Article 4 of this law provides that a commercial enterprise pledge can be established by a written pledge agreement between the pledgor and pledgee to be executed before a notary public. The pledge agreement must be registered with the Commercial Register at the place where the commercial enterprise has its registered address. Otherwise, the pledge will not come into effect.

The amount of the receivable, for which the commercial enterprise pledge is established, must be specified in TRY currency, regardless of the currency of the receivable. If the amount of the receivable is not definite, the maximum amount of security granted under such pledge must be duly registered with the relevant Commercial Register. Under Article 3 of the Law on Commercial Enterprise Pledge, a pledge registered over a commercial enterprise includes the following:

(i) Trade name and commercial title
(ii) Machinery, equipment, tools and motorized transportation vehicles, allocated to the operation of the commercial enterprise as of the date of registration of the pledge
(iii) Intellectual property rights such as licences, trademarks, patents, models, drawings, etc.

One or more of the instruments listed above can be exempted from the pledge, except for the trade name, commercial title and movable operational installations of the commercial enterprise.

[3] *Law No. 6098 published in the Official Gazette of the Republic of Turkey dated 4 February 2011, No. 27836.*
[4] *Decree Law No. 556 published in the Official Gazette of the Republic of Turkey dated 27 June 1995, No. 22326*
[5] *Law No. 1447 published in the Official Gazette of the Republic of Turkey dated 28 July 1971, No. 13909*

A commercial enterprise pledge does not include real property where the commercial enterprise subject to the pledge is located. In order to establish a pledge over such real property, a mortgage agreement must be executed between the parties subject to the procedures explained below.

(g) Mortgage

Under Turkish law, a mortgage can be created over real estate property as security for any kind of receivable, whether present, future or contingent. Under Article 875 of the Civil Code, a mortgage over real estate property will secure the following:

(i) Principal amount of the debt
(ii) Default interest and legal charges
(iii) Contractual interest accrued during the three year term preceding the commencement of bankruptcy proceedings against the debtor or proceedings for foreclosure of the real estate property and interest to be accrued from the last maturity date.

Unavoidable expenses, including insurance premiums paid by the mortgagee for the protection of the real estate property are also secured by the mortgage.

Under Article 862 of the Civil Code, a mortgage registered over a real estate property constitutes an encumbrance over the real estate property and its integral and additional parts. If additional construction is made after registration of the mortgage, the subsequently constructed buildings will, automatically and without any amendment to the mortgage agreement or re registration with the Real Estate Registry, become subject to the mortgage. However, movable assets in the real estate property, other than the ones registered with the declarations column in the records of the Real Estate Registry as an accessory, will not fall within the scope of the mortgage.

1.5 Perfection and Maintenance of Security

1.5.1 Perfection of Security

(a) Pledge over Movables

Under Article 940/2 of the Civil Code, a pledge over a movable, which is legally required to be registered with the relevant public registry, must be registered with the relevant registry in order to perfect the pledge over the said movable and, in such case, physical possession of such movable is not required to be transferred to the pledgee.

(b) Pledge over Receivables

As explained in Section 1.4 (b) above, a written pledge agreement over present and future receivables is not required to be registered with any register or authority for perfection.

(c) Pledge over Shares

Although, according to majority opinion, the registration of a pledge over shares with the relevant shareholders' registry (the share ledger) is not a validity condition, it is important to register such pledge with the relevant shareholders' registry (the share ledger) for evidentiary purposes. Registration of such pledge with the relevant shareholders' registry (the share ledger) will prevent third parties' (including the company itself) claiming good faith in conducting any transaction regarding the pledged shares.

(d) Assignment of Receivables

The agreement for the assignment of receivables mentioned in Section 1.4 (d) does not need to be registered or filed with any governmental authority as a perfection requirement. However, it is advisable for the assignment to be notified to the debtor, as, otherwise, the debtor paying the receivable to the assignor in good faith will be released of its payment obligation and the assignee will not be able to request payment

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(e) Pledge over Trademarks

The pledge over trademarks must be registered and published in the Trademark Registry upon application of either the pledgee or the pledgor for perfection of the pledge.

(f) Commercial Enterprise Pledge

If the commercial enterprise pledge includes assets that have special registries such as trademarks, motor vehicles, etc., following the registration of the commercial enterprise pledge with the relevant Commercial Register, the commercial enterprise pledge must also be registered with such other special registry offices.

(g) Mortgage

The perfection of a mortgage requires a mortgage agreement to be entered into by and between the mortgagor and mortgagee before the Real Estate Registry where the real estate property subject to the mortgage is located. The Real Estate Registry must also register the mortgage itself, in the relevant title deed registry.

1.5.2 Maintenance of Security

Once a security is established according to the conditions explained above and such conditions remain in place (i.e. the possession of the moveable remains at the pledgee, registration of the mortgage is not cancelled, etc.), there are no subsequent or ongoing formal or procedural requirements that must be undertaken to maintain or continue the validity of the security interest. Having said that, obligations of the secured creditor of a pledge over movables must be noted. The pledgee must take all precautions in good faith to maintain the collateral. Under Article 945 of the Civil Code, the secured party will be responsible for the damage arising from losing, tearing or otherwise damaging the collateral it holds, if it is unable to demonstrate its due care while preserving the collateral and that occurrence of these events were not caused by its failure.

1.6 Costs and Expenses for Creating, Perfecting and Maintaining Security

Costs incurred by the financed parties involve direct costs related to the establishment and perfection of the collateral such as notary and registration fees, banking fees, cost for evaluation of the assets, administrative and legal expenses to prove the good standing of the borrower and/or the collateral provider, (if different from the borrower) and the collateral's status, etc.

Please find below a list of the major legal costs and expenses that will be incurred in relation to creating, perfecting and maintaining a security:

(a) Registration with the Real Estate Registry

A fee at the rate of 4.55 per cent of the value of the secured claim will apply for the registration of a mortgage with the Real Estate Registry. Under Article 123 of the Law on Fees, facility transactions, security transactions concerning such facility and transactions for repayment of facility that are carried out by banks, foreign lending institutions and international institutions are exempt from this registration fee.

(b) Notary Fees

In the event the notarization of the security agreement is required (or is effected at the will of the parties), the notary fees would not be substantial. Notary fees are calculated by the notary public based on the pledge value. The cap for the notary fee for 2015 is TRY 26,891.50 (approximately EUR 10,000 as of mid January 2015).

(c) Execution Fees

If the loan is not duly repaid and execution proceedings have been initiated against the borrower, the following fees, each applicable only in relation to the separate, corresponding phase of the execution proceedings and only to the extent that such phase is pursued, will become payable (provided that execution proceedings have been initiated for the full secured claim):

(i) a fee at the rate of 4.55 per cent of the value of the secured claim will apply over the payments made by the borrower following the notification of the payment order to the borrower (to be paid by the borrower);

(ii) a fee at the rate of 9.10 per cent of the value of the secured claim will apply over the payments made by the borrower following seizure of the assets of the borrower but before such assets are disposed by means of public auction (to be paid by the borrower);

(iii) a fee at the rate of 11.38 per cent of the value of the secured claim will apply over the monies collected by means of public auction (to be paid from the sales proceeds upon public auction).

(d) Stamp Tax

Under the Stamp Tax Law[6] (the "STL"), any agreements, undertakings and assignment related documents with a monetary commitment will be subject to stamp tax at 0.948% of the amount indicated under such agreement[7]. However, Table 2/IV/23 of the STL regulates an exception to the said rule, wherein "any documentation regarding the facility by banks, foreign lending institutions and international institutions of loans, the securities related to the same and any documents related to the repayment of such loans" will benefit from a stamp tax exemption. In this regard, no stamp tax will apply for the documents regarding such facility, securities or repayment, provided that a loan is facilitated by a bank, foreign lending institution or an international institution. Any loans facilitated by another person or an entity will still be subject to stamp tax at the above rate.

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1.7 Recognition of Security Governed by Foreign Law

Under Article 21 of the International Private and Procedural Law[8], the legal perfection (which includes validity and publicity requirements) of rights in rem such as a pledge is subject to the laws of the jurisdiction where the assets are located. In the event

[6] *Law No. 488 published in the Official Gazette of the Republic of Turkey dated 11 July 1964, No. 11751*

[7] *The cap for the stamp tax for 2015 is TRY 1,702,138 (approximately EUR 628,000 as of mid-January 2015)*

[8] *Law No. 5718 published in the Official Gazette of the Republic of Turkey dated 12 December 2007, No. 26728*

of assets being carried at the time of legal perfection of a right in rem, the law of the destination place will apply. Accordingly, if the assets are located or destined in Turkey, the security agreement will be governed by Turkish law. Even if parties have designated a foreign law, Turkish courts verify the perfection conditions required in accordance with Turkish law. If these conditions are not satisfied, the security is not valid. As for the pledge over receivables, parties are allowed to choose the applicable law. Otherwise, the law of the country, to which the agreement is most connected, will apply.

Assets that are not located in Turkey can be subject to foreign law. Recognition of foreign judgements by Turkish courts may be limited by consideration of public policy as provided in Article 54(c) of the International Private and Procedural Law. If the conditions under Article 54 (except for Article 54/a) are satisfied, the security interest will be recognized under Turkish law. These conditions are as follows:

i. The foreign court judgment must have become "final and binding" with no recourse to appeal or similar review process under the laws of the relevant country.
ii. The subject matter of the judgment must not fall under the exclusive jurisdiction of Turkish courts or the decision must not be given by a court, which finds itself competent to solve the dispute, although it has, in fact, no relation with the subject the matter of the dispute or with the parties, provided that the defendant of the lawsuit raised these objections before that court.
iii. The decision must not be in conflict with Turkish public policy.
iv. The party, against whom the recognition of the judgment is sought, must have been "duly served" or must have been made fully aware of the proceedings and given the full opportunity to represent/defend itself in the trial.

If the security interest is created pursuant to a security agreement governed by the laws of another jurisdiction, Turkish law does not impose any additional requirement (such as notarisation, registration, filing of security agreement or security interest) for recognition of the validity of the security agreement (regardless of the location of the collateral or the law chosen to govern the security agreement) other than the abovementioned requirements for perfection. Thus, the secured party will have a valid security interest in the collateral so far as Turkish laws are concerned.

2. ENFORCEMENT OF SECURITY

2.1 Judicial Enforcement

(a) General

Foreclosure of security interests can be implemented through a judicial enforcement procedure in accordance with the Turkish Execution and Bankruptcy Law[9].

(b) Enforcement Grounds

To the extent there is an event of default under the finance documents and provided that the secured creditor is not restricted from commencing enforcement proceedings, the right to enforce the security will arise.

(c) Procedure

The following procedures must be followed by the secured party, in order to foreclose the collateral:

(i) a written request should be made by the secured party to the relevant enforcement officer, in order for it to serve a payment order to the obligor or the pledgor;
(ii) in the event the contents of the payment order are not objected to by the obligor or the pledgor within seven days from the date of receipt of the payment order and the debt is not paid within the same period, the secured party can request the sale of the collateral through a public auction;
(iii) after the sale of the collateral through a public auction, the sale proceeds (after execution expenses and charges) will be paid to the secured party by the execution office;
(iv) if the debtor or the pledgor objects to the contents of the payment order within seven days, the secured party can file a lawsuit against the objecting party before the competent execution or civil court;
(v) in the event the judgement is in favour of the secured party, the secured party will be able to proceed with the sale of the collateral through a public auction to be conducted by the relevant execution office.

(d) Ranking of Claims

For security over movables, the ranking of claims is determined according to the establishment date. However, the parties can agree otherwise.

[9] *Law No. 2004 published in the Official Gazette of the Republic of Turkey dated 19 June 1932, No. 2128*

The ranking of the mortgage rights depends on the degree, under which they have been established. Mortgage rights registered under a particular degree will rank after the mortgage rights registered un-der the preceding degrees, but prior to those registered under the succeeding degrees. Accordingly, mortgages registered in different degrees will not be treated as pari passu. This is of particular importance in the event of foreclosure proceedings, because the proceeds of the real estate property are distributed to mortgagees in accordance with the ranking of each degree. In this respect, the first degree mortgagee will have priority to receive proceeds of the mortgaged real estate property in an amount equal to the security amount registered under such degree for that particular mortgagee. If there is a remaining surplus, mortgagees that have established mortgages in the following degrees will be entitled to a payment in accordance with the ranking of their degrees. A mortgagor and a mortgagee may execute agreements whereby the mortgagee may move up to prior ranking degrees if they become vacant. This is called the "Free Degree System". Agreements granting the mortgagee the right to benefit from the Free Degree System do not confer upon the mortgagees rights in rem unless annotated to the Real Estate Registry.

Please also refer to Article 206 of the Execution and Bankruptcy Law, explained below.

(e) Costs

Costs associated with the enforcement of security can be grouped as follows:

(i) Enforcement Charges

- Application fee - TRY 27,70 (approximately EUR 10 as of mid January 2015);
- Advance fee - 0.5 per cent of the amount of receivable; this advance fee will be deducted from collection fee;
- Collection fee - 11.38 per cent of the amount of receivable collected through foreclosure of pledge (to be paid from the sales proceeds upon public auction).

(ii) Enforcement Expenses

- Expenses associated with sale of the security interest
- Attorney fees payable in accordance with the most recent tariff (as published in the Official Gazette) in force at the time of judgement, together with the other court expenses.

These costs are initially paid by the secured party and then reimbursed by the security provider. The costs are updated and published annually.

2.2 Private Foreclosure

Although it is not stipulated in Turkish law, according to Turkish scholars, the pledgee and pledgor can agree on the private sale of pledged movable assets by the pledgee. Enforcement of a mortgage over real estate property can only be accomplished via public auction, and no private sale arrangements can apply. According to scholars, the pledgee must be given authority to enforce the pledge via a private sale, only after the debt becomes due.

(a) The advantage of a private sale is that it may provide a quicker and simpler means of enforcing the pledge, than a public sale. There are no procedures/steps envisaged under Turkish law (i.e. appointment of a receiver, etc.) in relation to the mechanics of a private sale process. As such, the terms and conditions of the private sale process should be agreed upon between the parties.

(b) In addition, it is widely accepted that the pledgee must use this right in good faith. Accordingly, the pledgee must (i) enter into a commercially reasonable transaction; (ii) sell the asset as soon as possible, if, in particular, there is a risk of the asset's value decreasing; and (iii) sell the asset at its market price. If the pledgee does not act in good faith, he may be required to compensate the owner's damages arising from private sale.

(c) Some scholars opine that, in a private sale, the pledged asset must be sold to third parties. The requirement to sell the movables to a third party arises from the principal of lex commissaria. Under Article 949 of the Turkish Civil Code, any agreement between the pledgor and the pledgee allowing the pledgee to become the owner of the pledged chattels (i.e. movable assets including the shares) is null and void. An undertaking by the pledgor to transfer the movables to the pledgee via a private sale or an out of court settlement will be caught by the principle of lex commissaria and will therefore be null and void. Similarly, if, in the event of the pledgor's default, the pledgee exercises its right to a private sale and purchases the movables itself rather than selling them to a third party, this sale will also be caught by the lex commissaria principle and will be null and void.

However, if the opinion that "the pledgee must be given the authority to enforce the pledge via private sale only after the debt becomes due" is accepted and the pledgee will be given the right to enforce the pledge via private sale after the debt becomes due, the principal of lex commissaria will not apply. Accordingly, the pledgee will not be required to sell the pledged asset to third parties.

(d) The costs will depend on the mechanics of the private sale process (i.e. if the parties opt to appoint experts, expert fees will accrue).

2.3 Bankruptcy and Debt-restructuring Proceedings

(a) General

Under the Turkish Execution and Bankruptcy Law, bankruptcy is a status to be determined by commercial courts, which declare the debtor's inability to cover its debts by its assets. The debtor can request its own bankruptcy by declaring its insolvency, before suspending its payments and before waiting for its creditors to apply for execution proceedings. In principle, under Turkish law, bankruptcy is applicable only to merchants for their due but unpaid debts.

The competent authority for bankruptcy proceedings is the "bankruptcy" office at the place where the principal place of business of the debtor is located. The commercial court at the same location will decide on bankruptcy.

(b) Status of the Secured Creditors at the Initial Stages of the Bankruptcy Proceedings

Under Article 206 of the Execution and Bankruptcy Law, claims of the secured creditors will have priority over those of the unsecured creditors.

Under Article 206 of the Execution and Bankruptcy Law, the ranking among the claims of the unsecured creditors are as follows:

(i) Certain claims of employees and labour pension funds as specified in Article 206 of the Execution and Bankruptcy Law;
(ii) Claims of third persons, the management of whose assets has been given to the debtor because of a custody or guardianship;
(iii) Claims qualified as privileged by virtue of law[10];
(iv) Unprivileged claims (i.e. claims which do not fall within the categories above).

Creditors can object to the ranking scheme in two ways:

(i) The creditors are entitled to object to the ranking scheme, on the ground that the bankruptcy administration did not comply with the bankruptcy law related provisions. These objections must be filed within seven days following the announcement of the ranking scheme. Execution courts will examine these objections.
(ii) The creditors can also object to the dismissal (or partial acceptance) of their receivables (i.e. the amount of their receivables), their ranks as well as the other creditors' ranks in the ranking scheme. These objections must be filed within 15 days following the announcement of the ranking scheme. Commercial courts will examine these objections.

(c) Challenges Affecting Secured Claims

Within one month after declaration of the bankruptcy, the creditors will register themselves with the bankruptcy office. After the registry period provided for the creditors expires and the bankruptcy administration is elected, the bankruptcy administration examines the registrations and prepares a list of creditors and their receivables (i.e. ranking scheme), stating the orders of the creditors for the payment, submits the relevant list to the bankruptcy office and notifies the creditors by way of announcement.

Upon registration of receivables to the ranking scheme, one creditor can object to the registration of a claim or to the rank of the registered claim. This is applicable for secured claims as well. This objection must be raised within 15 days upon publication of the ranking scheme, before the commercial court of the place, where the bankruptcy is declared. There is no special procedure for challenging secured claims.

If the commercial court finds the objection rightful, it will decide the creditor to be deleted from the ranking scheme.

(d) Enforcement of Secured Claims upon Debt-restructuring

Under Turkish law, there are three ways of debt-restructuring: konkordato; restructuring through compromise (the restructuring through a compromise procedure is applicable only for capital companies and cooperatives); and postponement of bankruptcy. Banks and insurance companies are not entitled to propose amicable restructuring as a debtor. Therefore, for the purpose of this study, only konkordato and postponement of bankruptcy will be examined.

Konkordato allows the debtor to compromise certain liabilities in accordance with a plan. It may be proposed by the debtor. The debtor, with the intention of benefiting from the konkordato provisions submits a konkordato plan to an execution court together with a petition, stating the reason for its konkordato request.

[10] *For example, under Article 21 of the Law on Procedure of Collection of Public Receivables, public receivables will be in the third rank.*

On the other hand, a creditor, having the right to request bankruptcy can also initiate the konkordato procedure for the debtor by submitting its petition, stating the reason for its konkordato request. Following the konkordato request, the execution court would take the necessary measures for the protection of the debtor's assets.

The konkordato request will be announced by the execution court. Within ten days following the announcement date, the creditors can request the rejection of such konkordato request.

The execution court will examine the konkordato request and decide whether or not such konkordato request is appropriate. If found appropriate, the court will grant a (maximum) three month period and appoint a konkordato officer. During this period, all execution proceedings related to the debtor will be suspended and new execution proceedings against the debtor cannot be filed.

The debtor will be able to continue to perform business activities under the control of the konkordato officer. Additionally, in important transactions such as granting pledge, acting as a guarantor, transferring its real property, permission of the execution court must be taken by the debtor.

During the three month period, creditors can initiate foreclosure proceedings against debtor. However, the execution officer cannot decide on protective measures or sell the pledged asset.

During the three month period, creditors can initiate foreclosure proceedings against debtor. However, the execution officer cannot decide on protective measures or sell the pledged asset.

(e) Enforcement of Secured Claims upon Liquidation of the Bankruptcy Estate

Pledged assets form part of the bankruptcy estate. The creditor's privilege right arising from the pledge is reserved. The bankruptcy administration sells the pledged asset within a most reasonable and suitable time and pays the creditor's receivable from the sale proceeds after deducting the protection and selling expenses. Creditors, whose receivables are secured with pledge, will also be able to address foreclosure proceedings against the bankruptcy estate.

2.4 Competition of Bankruptcy Proceedings with Other Enforcement Proceedings

By the opening of bankruptcy, all debts of the bankrupt debtor that are a part of the bankruptcy estate become due. The only exception to this rule is the foreclosure of mortgages. The debts that have been secured by the mortgage of the debtor's immovables will not become due with the opening of bankruptcy. When the debt, secured by mortgage, becomes due, the creditor will be able to foreclose the mortgaged immovable. This is possible even after the debtor is declared bankrupt. In such case, foreclosure proceedings will be addressed to the bankruptcy estate.

The proceedings initiated against the debtor before its bankruptcy will be suspended and will be foreclosed by the finalisation of the bankruptcy decision. No new proceedings can be initiated against the debtor, as long as the liquidation of bankruptcy continues. Lawsuits filed by or against the debtor before the bankruptcy decision will be suspended as well. However, unlike execution proceedings, these lawsuits will not be stopped and may be decided to be continued at the second creditors' meeting. In this event, the bankruptcy administration can pursue these lawsuits.

2.5 Recourse of a Secured Creditor to Self-help Remedies

The secured creditor has a right of recourse to debtor's other assets if its claims are not satisfied by the enforcement of security. On a separate note, as a self-help remedy of the secured creditor, the right of lien must be mentioned. Article 950 of the Civil Code provides that where a creditor is in possession of movables (such as cash/securities) with the debtor's consent, he can retain the possession of them until his claim is satisfied, provided that the debt becomes due and, by its nature, closely connected to the moveable retained. Such connection is always held to exist where the parties are in trade or business, and the possession and the claim arise from their business relations.

The retained movable property must have a selling value; thus, convertible into cash. Under Article 951 of the Civil Code, the lien must be in accordance with the obligations undertaken by the creditor, the instructions given by the debtor during or prior to the delivery of possession of the property subject to lien to the creditor and public policy. However, under Article 952 of the Civil Code, in the event the debtor becomes insolvent and, provided that the delivery of the movable has occurred prior to the announcement of insolvency of the debtor, or, if such delivery has occurred

thereafter, the creditor has become aware of the debtor's insolvency after the delivery, the creditor will have the statutory right of lien even if his claim is not yet due and even if the conditions stipulated in Article 951 are not met. In this respect, under Turkish law, as long as the abovementioned criteria are met, the lien will be deemed duly created or perfected.

3. ROLE OF SECURITY TRUSTEE

3.1 Recognition of Trust and the Role of Security Trustee. Parallel Debt Concept

Under Turkish law, "trust" is not recognised as a legal concept. However, under Article 9 of the International Private and Procedural Law, which governs the conflict of laws rules, the capacity and authority of an entity is subject to the laws of its jurisdiction, and such an entity is recognised as a legal entity from a Turkish law perspective if it is recognised as a legal entity in its jurisdiction. Therefore, under Turkish law, a trust established and administered in any jurisdiction will be recognised as a legal entity having the capacity and authority to own assets and carry on business in accordance with its articles of association or bylaws.

In practice, it is common that both foreign and local security agents (trustees) take security on behalf of lenders/creditors. This is realised through making the security agent party to the local security documents (i.e. the security agent becomes a pledgee/mortgagee/assignee under the security documents and directly assumes rights and obligations arising from the security documents). The enforcement proceedings may exclusively be initiated by the security agent against the security provider before execution offices in Turkey. The lenders/creditors would have no claims under the security documents unless they are designated as pledgor/mortgagor/assignor under the security documents. In the event of foreclosure of the security, the security agent receives the proceeds and distributes them amongst the lenders/creditors in accordance with the provisions of the agreement between them. The provisions on distribution of the proceeds would only be applicable amongst the security agent and the lenders/creditors and would not be enforceable against the execution office. In other words, the execution office would not take into consideration the provisions of the agreement between the security agent and the lenders/creditors and would give the proceeds of the security to the security agent in its entirety. In case the security agent fails to distribute the proceeds amongst the lenders/creditors, the lenders/creditors would only have contractual claims against the security agent.

Under Turkish law, parallel debt is not a requirement but rather a tool for protection against the consequences of novation, which is used often under English law to transfer the loan. Under Turkish law, security is considered to be of accessory nature since it is linked to the principal obligation. Therefore, transfer of the principal debt by novation extinguishes the principal debt, as well as the security. A parallel debt obligation ensures that security will not fall away as a result of a transfer by novation and enables a changing class of beneficiaries to take the benefit of security. This way, there would be no need to have separate transfer arrangements and any potential hardening period issues would be avoided. The associated security documents will secure the debt owed to the lenders and the parallel debt owed to the security agent. Thus, even if the loan is transferred by novation, the security would continue to secure the parallel debt.

The common view in the Turkish market is that parallel debt would be recognised under Turkish law in accordance with the acknowledgement of abstract debt, provided under Article 18 of the Turkish Code of Obligations. Nevertheless, there is no court precedence to support this view and this issue remains yet to be tested.

3.2 Specifics of Taking and Enforcing Security by a Security Trustee or Agent

Please refer to our response in Section 3.1.

3.3 Precedents

Please refer to our response in Section 3.1.

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