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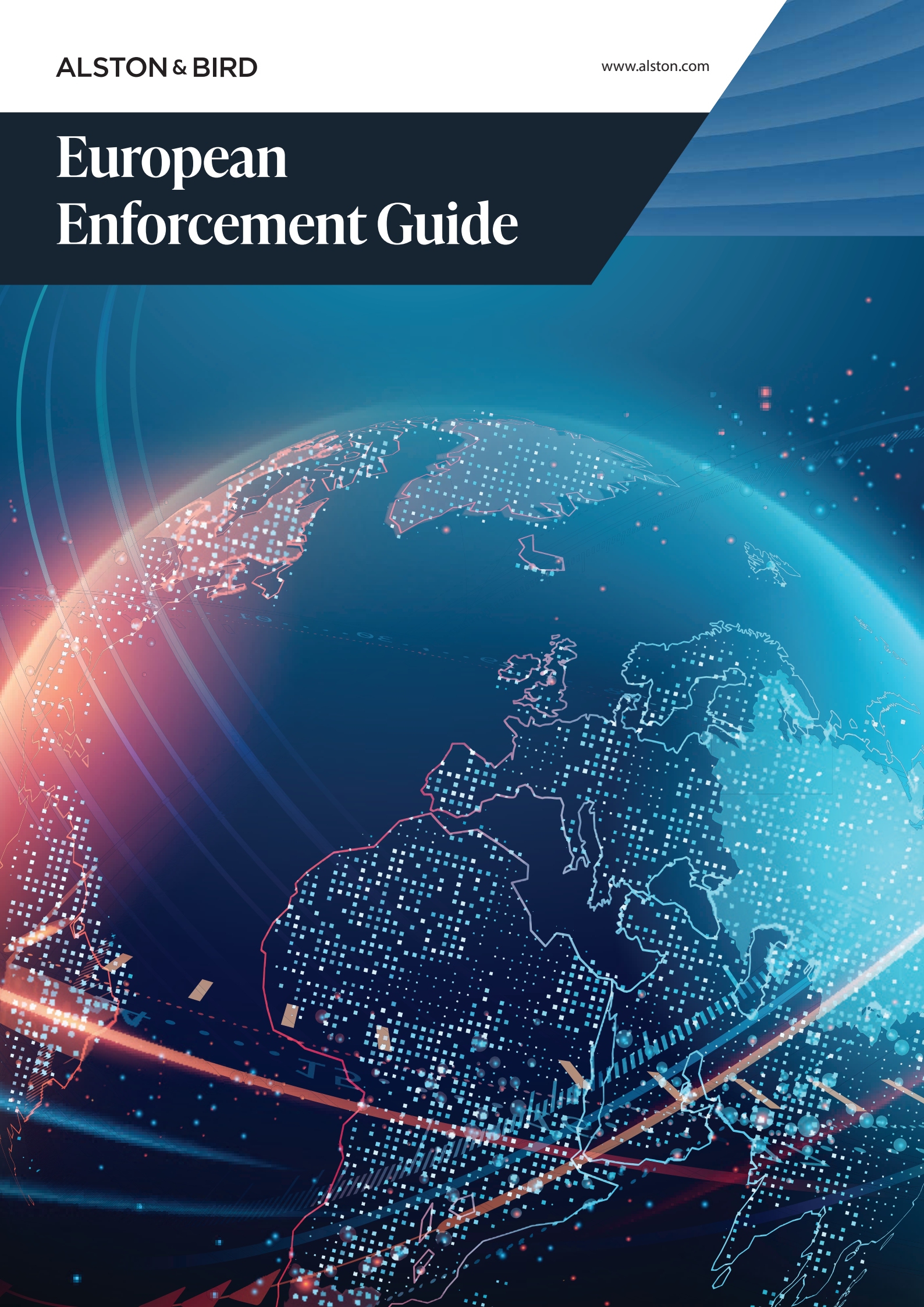
European Enforcement Guide



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In the current economic climate, it is important that lenders understand how they can enforce security and debt claims, to help in assessing options in the event of default by their customers, and when structuring new lending. It is also increasingly common that a bank lending to customers in their own country will lend ancillary facilities, or take guarantees and security, from foreign subsidiaries and counterparties.

The purpose of this comprehensive European guide is to give an overview of the steps that need to be taken to enforce both secured and unsecured claims across a range of key European jurisdictions.

On a country by country basis, this guide gives an overview of how to:

- enforce and realise security in that country,
- enforce unsecured debt claims, and
- enforce a debt *cross-border* (i.e., by obtaining a judgment in one country and enforcing it in another).

The guide has been prepared by a firm in our network of best in class local counsel in each relevant jurisdiction, who act regularly in enforcing secured and unsecured claims for banks, both on a domestic and a cross-border basis. You will see contact details for each firm in their respective country section.

If you have any questions or need case specific advice, please do not hesitate to contact us.

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Note On Legislative Framework For Cross-Border Enforcement

The central legislation, which governs cross-border enforcement within the EU, comprises principally of: (i) the Brussels Regulation, for judgments given in proceedings commenced before 10 January 2015; and (ii) the Recast Brussels Regulation, which applies to judgments given in proceedings commenced on or after 10 January 2015.[1] Both (referred to collectively in these notes as the Brussels Regulations) have direct effect within EU Member States.[2]

As between EU Member States and the European Free Trade Area states, Iceland, Norway, and Switzerland (but excluding Liechtenstein), the Lugano Convention applies as enacted in each jurisdiction, for example by the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131) in the UK.

The Brussels Regulations and the Lugano Convention are drafted in materially the same terms, although there are some divergences. For the purposes of this note, the Brussels Regulations and the Lugano Convention are deemed to have the same effect (unless otherwise stated) and are referred to together as the Regulations where the context permits.

Under the Regulations, a party who has obtained judgment in another EU Member State applies for recognition of that judgment to a nominated central authority in each given EU Member State or certain of the EFTA countries (i.e., Iceland, Norway, and Switzerland (but excluding Liechtenstein), together the EFTA Countries).

In recent years, in recognition of the increasingly international nature of trade and financing, various efforts have been made to introduce a framework for cross-border insolvencies. For lenders with security over real estate located in the European Union, the EC Regulation will be relevant.

The EC Regulation introduced an ordered regime that applies where an insolvent company has affairs that extend into more than one EU Member State. Insolvency in one EU Member State is now automatically recognised, without further need for formalities or court applications, throughout the EU. The EC Regulation gives guidance and definition to the respective roles of officeholders where more than one set of insolvency proceedings have been brought against the same debtor in various member states. From a secured creditor's perspective, it provides a mechanism for the recognition of security interests and the enforcement over, and recovery of, a debtor's assets anywhere in the EU.

NOTE AND DISCLAIMER

Please note that this guide does not encompass the recovery of consumer debts. Further, whilst parts of the guide deal with formal insolvency procedures, as well as their effects upon the rights of a secured creditor to recover its debts, the guide does not deal with formal insolvency regimes comprehensively. If you require guidance on either of these issues, please contact any of the lawyers whose contact details are provided in this guide.

The information contained in this document is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for appropriate legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Alston & Bird and any contributing law firm can take no responsibility for actions taken based on the information contained in this document.

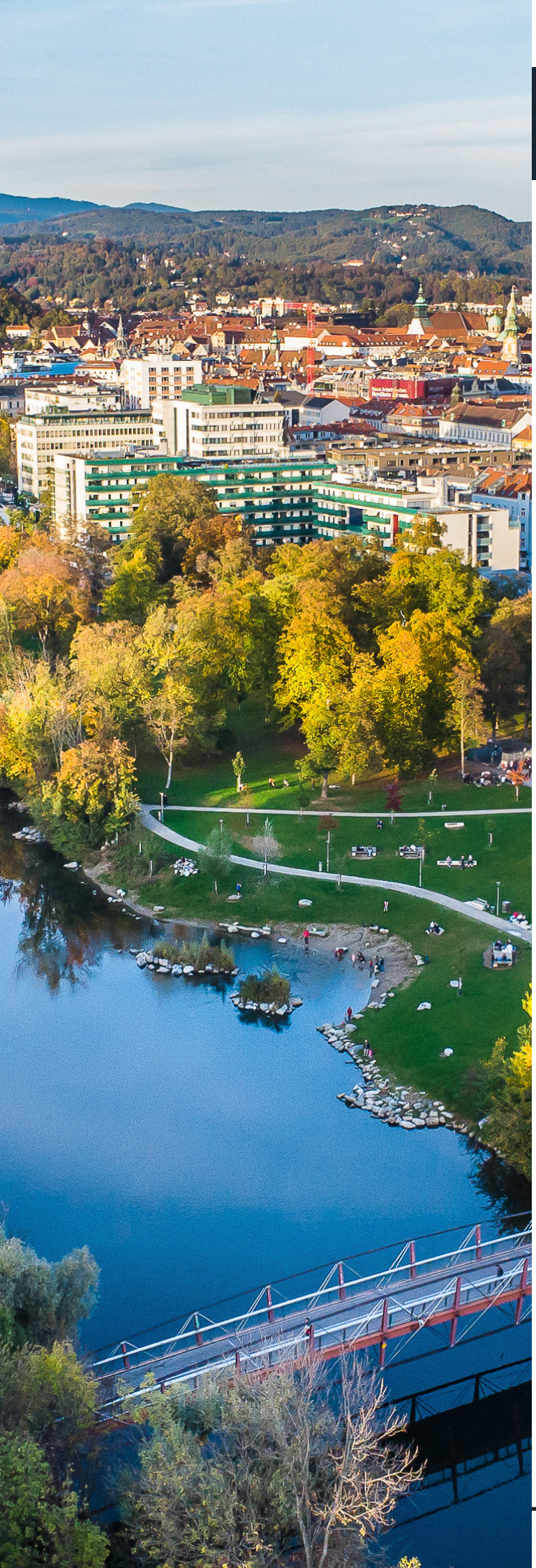
1 Older provisions, namely the Brussels Convention of 1968, have largely been superseded by the Brussels Regulations, except in relation to jurisdictional matters concerning dependant territories of member states. However, much of the case law relating to the Brussels Convention remains relevant, as its purpose is the same as the Brussels Regulations and many provisions are similar.

2 Save only to note that the application in Denmark of Regulation (EU) 1215/2022 is subject to entry into force of legislation implementing it.

Contents

Glossary

Brussels Regulation	Regulation (EU) 44/2001
EC Regulation	Regulation (EC) 1346/2000
ECB	European Central Bank
EFTA	European Free Trade Area
EIB	European Investment Bank
EU	European Union
EU Member State	Member state of the EU
European Order for Payment Procedure	Created under Regulation (EC) No. 1896/2006 to allow courts in an EU Member State to serve payment orders on debtors for monetary claims
European Small Claims Procedure	Created under Regulation (EC) No. 861/2007 to allow for simplified enforcement of claims up to €5,000
European Order for Uncontested Claims Procedure	Created under Regulation (EC) No. 805/2004 for uncontested claims.
Lugano Convention	Lugano Convention 2007
Recast Brussels Regulation	Regulation (EU) 1215/2012
UK	United Kingdom



Austria

Pursuant to Austrian law, unsettled claims of secured and unsecured creditors may be enforced by way of court proceedings, but there may also be alternative options available. In particular, in financing transactions involving financial institutions/banks as lenders, consensual (out-of-court) restructuring is usually the option preferred by all parties. Secured creditors, who enjoy preference over any other (unsecured) creditors, usually pursue out-of-court enforcement rather than court proceedings.

In insolvency proceedings, the debtor's assets are usually subject to administration by insolvency administrators and secured creditors usually have a claim of separation either to receive the asset (*Aussonderungsanspruch*) or its value after its sale (*Absonderungsanspruch*). The regular enforcement system does not apply in insolvency proceedings. Therefore, the overview below only applies outside of insolvency proceedings.

Enforcement of Security

Austrian law recognises various types of security rights, and lending transactions typically involve pledges (*Pfandrechte*) over various asset classes such as shares, receivables, bank accounts and, to the extent relevant, intellectual property rights and other movable assets. For real estate property, the security is referred to as a *Hypothek* (mortgage). A pledge is a right *in rem*, enforceable *vis-à-vis* third parties, and it grants priority to the secured creditor *vis-à-vis* lower ranked secured creditors and unsecured creditors. Other types of security rights include, among others, security assignments (*Sicherungsabtretung*) and title transfers (*Sicherungsübereignung*).

Personal guarantees (including abstract guarantees and sureties (*Bürgschaften*)) are also very commonly used instruments in terms of credit support. Guarantees do not create a security *in rem* over a certain asset but reduce the creditor's default risk by enabling such creditor to assert its claim against the third-party guarantor (an individual or a company). For the purposes of the below overview, a creditor benefiting from a personal guarantee only will be considered an unsecured creditor.

A security *in rem* is validly created, with effect *vis-à-vis* third parties, by entering into a security agreement and performance of the necessary public act(s) (i.e., the perfection steps). The perfection steps required for the creation of a security interest depend on the asset class:

- a mortgage over *real estate* must be registered in the Austrian land register (and is, together with certain intellectual property rights, the only type of security that is registered in a public register);
- *receivables* and *bank accounts* are pledged by either notifying the third-party debtor/account bank, or by recording the pledge in the security providers books and accounts;

- the perfection requirements for the pledge of shares depend on the type of shares. In case of company shares that are not certified by transferable documents (particularly shares in limited liability companies which constitute the Austrian equivalent of PLCs), the company must be notified of the pledge. For shares in joint stock corporations, the rules for the pledge of movable assets apply;

- security over *movable* assets (e.g., machines, inventory, or vehicles) can be granted under Austrian law if certain publicity requirements are met. In general, movables need to be delivered to the secured party in order to effect a valid security interest. However, Austrian law also provides for ways to perfect pledges in relation to a majority of goods (*Gesamtsachen*), such as, for instance, inventories. Such inventory must, however, be so substantial (*umfangreich*) such that handing over all goods is not feasible (*untunlich*). In order to perfect a security interest on such inventory the publicity requirements usually consist of segregation of the pledged goods in a way that prevents access by the pledgor to the goods. However, such segregation may also be achieved by appointing a storekeeper (*Lagerhalter*) of the pledgee/secured party who controls access and disposal to/of the inventory and keeps the goods at the premises of the pledgor.

Once the security has been validly established, as a general rule, the creditor is entitled to enforce the security as soon as the secured obligations are not paid in full when due.

The enforcement of security *in rem* can either take place by way of court proceedings or by out-of-court realisation of the security.

(a) Out-of-Court Enforcement

The enforcement of security in out-of-court proceedings is common practice in Austria.

The Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* (ABGB)) stipulates that only security rights in movable physical assets can be enforced in an out-of-court sale by way of public auction, or provided the assets have an objective market value (*Marktpreis*) or a stock exchange price (*Börsenpreis*). In particular, securities such as bonds and stocks may be realised in a private sale, in which case the assets must be sold directly at a price not less than their market value/stock exchange price.

The parties to the security agreement may agree on alternative ways of out-of-court enforcement by analogously applying the rules on enforcement of physical assets. For example, security over receivables (e.g., trade receivables, intra-group receivables, insurance receivables, etc.) is commonly enforced by collecting the receivables and setting off the payments received against the secured obligations. Also, if a security agreement over certain financial instruments (bank accounts, securities, etc.) is concluded between a financial market participant and a company (legal entity or sole entrepreneur), the parties to the security agreement can agree on the applicability of the Austrian Act on Financial Collateral (*Finanzsicherheitengesetz* (FinSG)), which implements the Financial Collateral Directive (2002/47/EC). The FinSG facilitates the creation of security over financial instruments, as well as the out-of-court enforcement of such financial collateral. The FinSG is *lex specialis* in relation to general Austrian civil law and may, in certain aspects, supersede the perfection and enforcement rules of the **ABGB** provided in this overview.

When agreeing on alternative ways of out-of-court enforcement, Austrian debtor protection rules must be taken into account. These stipulate, for example, that any amounts realised in excess of the secured obligations must be returned to the security provider, and that the creditor may not enforce the security by appropriating the pledged asset in the case of default (*lex commissoria*).

In order to initiate an out-of-court sale of the security asset, Austrian civil law stipulates that the security provider must be informed about the creditor's intent to enforce the security, and the amount of the unsettled claims. The enforcement of the security is permissible after the expiry of a period of one week (in B2B transactions) or one month (in B2C transactions). There are certain exceptions to this general rule, for example, in case the goods in question are perishable.

If the security assets are sold by way of an out-of-court sale (private sale or public auction, as applicable), the value of the security assets must be assessed first (detailed provisions as to the valuation procedure are typically included in the respective security agreement) and, in principle, also sold at this or at a higher price.

(b) Court Enforcement

In order to initiate court enforcement, the creditor must first obtain an enforceable title (a judgment or a notarial deed, which is enforceable in Austria).

As regards judgements, the following should be noted: if the security asset is property of the debtor of the unsettled claim, an action in relation to the underlying claim must be brought (*Schuldklage*). In cases where the security asset belongs to a third party, the creditor must directly sue the third-party security provider in order to obtain permission to enforce the pledge (*Pfandrechtsklage*).

On the basis of an enforceable title, the creditor may initiate enforcement proceedings in accordance with the Austrian Enforcement Act (*Exekutionsordnung* (EO)).

The following enforcement options are available to the creditor:

Public Sale

Real estate and moveable assets are usually sold by way of public auction. Assets which have a stock exchange price (*Börsenpreis*) may also be sold by way of a private sale. In particular, the latter applies to certain securities such as stocks and bonds. The secured creditor will be satisfied in accordance with where its security ranks.

Share pledges are usually enforced by way of a public auction. Any creditor is free to bid in a public auction or, if the shares have a stock exchange price (*Börsenpreis*) and are sold by way of private sale, buy the shares directly.

Forced Administration

Mortgages over real estate may also be enforced by way of forced administration. If the creditor chooses to file the relevant application, the court appoints a public administrator to whom the owner's right to use and administer the respective real estate is transferred. The public administrator is to submit a bill on a yearly basis. The proceeds are then distributed and secured creditors are satisfied according to the rank of their securities.

An application for forced administration is often filed in addition to a motion for public sale of the property, in order to make sure that it is properly managed until it is sold to the highest bidder.

Enforcement of Security over Receivables

Court enforcement of a security over receivables usually occurs through the court ordering: (i) the security provider to refrain from disposing of the respective receivables (*Verfügungsverbot*); and (ii) the concerned third party (e.g., a business partner of the security provider, an insurance company, a group company, etc.) to refrain from making any payments to the security provider in relation to the respective receivables (*Zahlungsverbot*).

Subsequently, the creditor is entitled to collect the respective receivables from the third-party debtor.

Enforcement of Unsecured Debt

(a) Out-of-Court Remedies

Depending on the specific circumstances, and apart from consensual negotiations on debt restructuring (e.g., negotiations on additional securities), an unsecured creditor may have certain options that it may exercise without cooperation of the debtor, and which do not require immediate initiation of court proceedings, for example:

- setting off the unsettled claims against counterclaims by the debtor (*Aufrechnung*);
- if the unsettled claim stems from an agreement that both parties have entered into in the course of their business activities, the exercising of the creditor's right to retain all assets owned by the debtor which have come into its possession due to their business relationship (*unternehmerisches Zurückbehaltungsrecht*); and/or
- sale and transfer/assignment of the claims towards the debtor to a third party.

(b) Obtaining Judgment/Execution Proceedings

An unsecured creditor must first obtain an executory title that is enforceable in Austria. Under certain conditions, the creditor can also request interim remedies in the form of preliminary injunctions (*einstweilige Verfügungen*) in order to secure the monetary claims of the creditor, either before or during litigation proceedings. Preliminary injunctions may include for example, an order for the freezing of bank accounts or attachment of the debtor's assets, including real estate.

If the debtor does not comply with the final judgement (or enforceable notarial deed), the title can be enforced. In order to initiate enforcement proceedings, the creditor must file an application for enforcement with the competent court and request an appropriate enforcement measure, which depends on the assets of the debtor (seizure and subsequent sale or administration of real estate property, seizure and subsequent sale of moveable assets, seizure and collection of receivables, seizure and subsequent sale of other assets such as shares or intellectual property rights, as already outlined above).

Additionally, an unsecured creditor can also apply for a court order that a mortgage be registered regarding any real estate belonging to the debtor (*Zwangshypothek*). The creditor may then later apply for either forced administration, or the public sale of the property without being required to obtain an enforceable title again.

Enforcement of Foreign Judgments

Enforcement of foreign judgments is subject to recognition in Austria of the respective decision. The Recast Brussels Regulation provides for the facilitated recognition and enforcement of judgements of the courts of other EU Member States. For other countries, the existence of specific treaties on the recognition and enforcement of judgements is required. The below framework applies to foreign court judgments rendered within the EU that are to be recognised and enforced in Austria.

(a) Enforcement in Civil and Commercial Matters

As a general rule, courtesy of the Recast Brussels Regulation, judgements of courts of other EU Member States in civil and commercial matters are recognised and can be enforced in Austria without substantive review of the judgment. In particular, a separate recognition proceeding by an Austrian court is not required. However, a recognition would be refused under certain circumstances (e.g., a violation of public policy, irreconcilability with another judgement, violation of mandatory provisions on jurisdiction, etc.).

(b) Enforcement of Uncontested Claims

The European Order for Uncontested Claims Procedure for uncontested claims provides for a similar, simplified enforcement procedure in respect of uncontested claims (e.g., settlements in court, default judgements, notarial acknowledgements). The European Enforcement Order must be issued by the court of origin upon a party's request. Upon the court-of-origin's certification that the underlying decision meets the requirements as stipulated in this Regulation, the provision of the original of such certification, as well as a copy of the underlying decision/document, is sufficient for initiating enforcement proceedings in Austria.

(c) Enforcement on the Basis of a European Order for Payment

The aim of the European Order for Payment Procedure is to simplify cross-border proceedings concerning claims in civil or commercial matters. A European Order for Payment issued by a court of an EU Member State is recognised and enforced in Austria, and a declaration of enforceability is not required. The European Payment Order can only be obtained for monetary claims, and there is no cap on the amount in dispute.

The competent court is determined in accordance with the Recast Brussels Regulation. If Austrian courts have jurisdiction, all applications for issuing a European Order of Payment must be filed with the District Court for Commercial Cases in Vienna. If the debtor does not dispute the claim within thirty days after being served with the payment order, the competent court will declare the payment order enforceable. If the debtor contests the claim, civil proceedings will be initiated (unless otherwise stated by the claimant in the initial application).

(d) Enforcement of Minor Claims of up to €5,000.00

For claims of up to €5,000, an even more simplified procedure is available pursuant to the European Small Claims Procedure. Proceedings under this Regulation are initiated by the filing of a standard form (in Annex A of the Regulation). After being served with the standard form, the defendant has the possibility to reply within thirty days. The entire proceedings are conducted in writing. A judgment based on such standard form is recognised and enforceable in Austria without a separate declaration of enforceability being required.

The competent court is determined in accordance with the Recast Brussels Regulations. If Austrian courts have jurisdiction, the application must be filed with a District Court.

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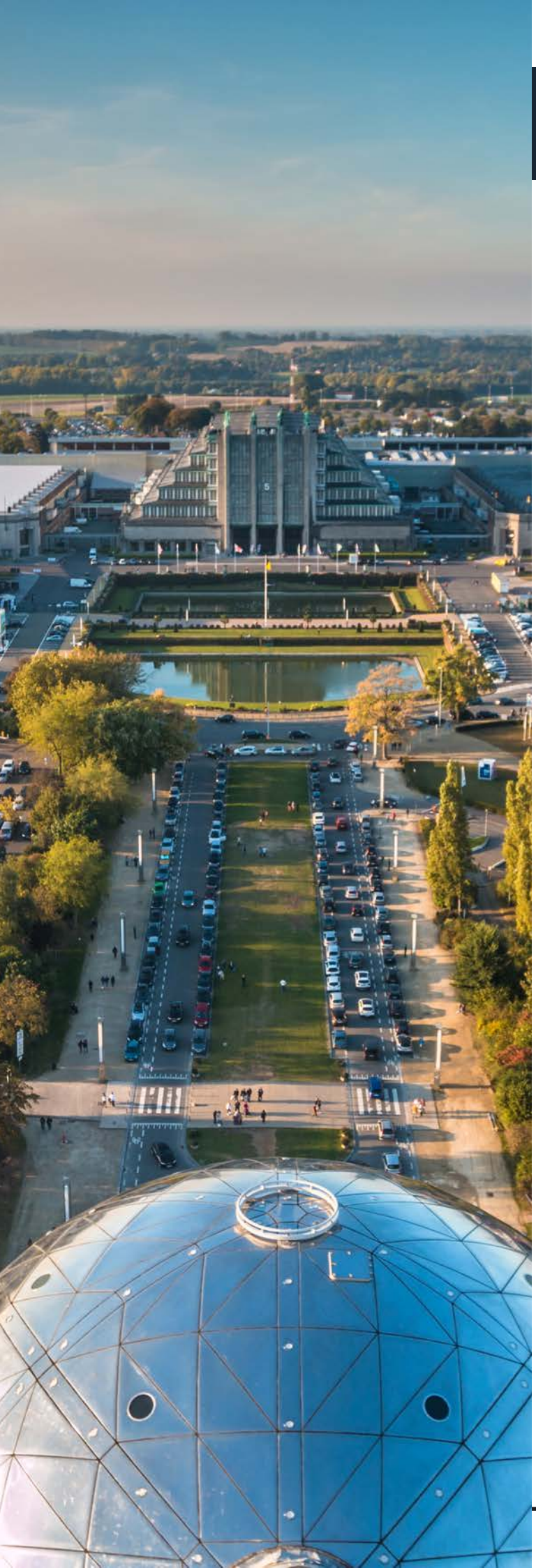

Belgium

The below overview describes certain aspects of the rights and obligations of secured and unsecured creditors under Belgian law as of 1 May 2023.

Enforcement of Security Interests

Security rights under Belgian law are divided into two categories:

- *In rem* security interests (*zakelijke zekerheidsrechten/sûretés réelles*) strengthen the position of a creditor by creating a security interest over certain assets of the debtor, enforceable *vis-à-vis* third parties, and grant the secured creditor priority over unsecured creditors (or lower ranking secured creditors) in case of enforcement of those security interests.
- Personal security interests (*persoonlijke zekerheidsrechten/sûretés personnelles*) do not create a security interest over a particular asset of the debtor, but they will grant the creditor the right to turn to a third party for payment of its claim against the debtor. For the purposes of the below overview, a creditor only benefiting from a personal security interest will be considered as an unsecured creditor (as it shall not enjoy a priority right over the debtor's assets).

A *typical* security package under Belgian law includes a pledge over receivables and bank accounts, a share pledge, a business assets pledge (a business assets pledge is, to a certain extent, similar to the English law concept of floating charge), and, as the case may be, a pledge over specific movable assets. In addition, parties can agree to have a mortgage over real estate.

(a) Enforcement of Share Pledges

Unless provided otherwise in the share pledge agreement, the pledgee may enforce the pledge by proceeding to the sale of the pledged shares, without prior notice or a prior court decision. The enforcement may also take place by appropriation by the pledgee of the pledged shares, provided this means of enforcement and the valuation methodology are agreed upon by the parties in the share pledge agreement.

The amount of the secured claim shall be offset against the value of the shares sold or appropriated.

Although no prior authorisation by the courts is required for the enforcement of a share pledge, the parties may do an *a posteriori* check of the conditions of enforcement of the pledge or the amount of the secured claim.

(b) Enforcement of Receivables and Bank Account Pledges

A receivables pledge is enforceable against the underlying debtor(s) upon notification of the pledge by the pledgor to the underlying debtor(s), or acknowledgement by the underlying debtor(s) of the pledge (but the notification by the pledgor is sufficient). A receivables pledge is enforceable against third parties (other than the underlying debtor(s)) by the mere conclusion of the pledge agreement).

Any monies standing to the credit of a bank account, pledged by means of a pledge over bank accounts, are considered a receivable of the pledgor against the bank with whom the account is held.

From the moment of such notification or acknowledgement by the underlying debtor, the underlying debtor may only validly discharge its obligations by paying in the hands of the first ranking pledgee, typically after receipt of a further *enforcement notice* (unless otherwise directed by the parties). In other words, following notification to the underlying debtor of the enforcement of the receivables pledge, the pledgee shall be entitled to: (i) receive directly the amounts due under the pledged receivables, followed by (ii) a set-off of the amounts collected against the outstanding amount of secured debt.

Where a pledge over a bank account is enforced, the account bank will typically be notified of the enforcement by the pledgee, requiring it to pay the funds then standing to the credit of the pledged account directly to the pledgee. No prior court authorisation is required in order to proceed with the enforcement of a receivables or bank accounts pledge.

(c) Enforcement of Business Assets Pledges and Pledges Over Specific Movable Assets

A business assets pledge is a pledge granted over a company's business assets (*handelszaak/fonds de commerce*) generally. A debtor can also pledge specific movable assets. Business assets pledges and pledges over specific movable assets are perfected *vis-à-vis* third parties by registration in the online Belgian National Pledge Register. The enforcement takes place by way of private sale (or lease) or public auction or, provided this was agreed upon by the pledgor, by way of appropriation of the pledged assets by the pledgee. The pledgee must notify to the pledgor of its intention to enforce the pledge at least ten days in advance (reduced to three days in cases where the pledged assets are perishable goods) by registered letter. Such notification must indicate: (i) the outstanding amount of the secured claim at the time of notification, (ii) a description of the pledged assets, (iii) the contemplated manner of enforcement of the pledge, and (iv) the right of the pledgor to obtain release of the pledged assets by discharging the secured claim.

(d) Enforcement of Mortgages

A mortgage may be enforced by executory seizure (*uitvoerend beslag/saisie-exécution*) of the mortgaged property. Such executory seizure is based on an enforceable title (*uitvoerbare titel/titre exécutoire*), which may be obtained in two manners.

(i) The notarial deed establishing the mortgage may qualify as an enforceable title. In order to do so, an executory title provision must be included in the notarial mortgage deed, and the mortgage deed must accurately describe the (secured) claim owed by the debtor.

(ii) An enforceable title may also be obtained by a prior court authorisation, i.e., an enforceable judgment of a Belgian court in relation to the underlying claim and in relation to the enforcement of the mortgage.

The creditor must send the debtor a summons to pay (*commandement/bevel*) and register such summons if necessary. Within six months after the summons to pay, the creditor must deliver a notice of seizure (*exploit/exploot*) and must register it (*transcrit/overgeschreven*).

The creditor must then instruct a bailiff to levy a seizure of the property, and request the court to appoint a notary public who will organise and supervise the sale of the mortgaged property by way of public auction or private sale. Subject to, as the case may be, claims of any higher-ranking secured creditors, the secured creditor will have a preferred position, with respect to the sale proceeds, up to the secured amount specified in the mortgage deed.

Enforcement of Unsecured Debt

An unsecured creditor may take the following actions in the case of default of its contractual counterparty, upon prior formal notice to its debtor formally requesting it to execute its obligations:

(a) ***Exceptio non adimpleti contractus: a creditor may suspend the execution of its obligations under an agreement if the debtor fails to fulfil its own obligations thereunder.***

(b) **Proceed to the termination of the agreement** when the default of the debtor is sufficiently important, or in case of a default agreed by the parties. The debtor may also terminate the agreement before the occurrence of an event of default, in the event that it may reasonably believe that its debtor will not satisfy its obligations, after sending it a notice requiring it to provide sufficient assurance that it will satisfy its obligations.

(c) **Proceed to setting-off** the debt owed by the debtor to the creditor against monies owed by the creditor to the debtor (*schuldvergelijking/compensation*). The set-off mechanism requires that both debts be certain, fixed and payable. The right to set-off can be limited in insolvency proceedings or in attachment proceedings.

(d) **Proceed to the seizure of its debtor's assets, including in the hands of a third-party debtor by way of garnishment (third-party order (***derdenbeslag/tiers-saisie)).*

In any event, the creditor who does not obtain payment of its debt by its debtor may turn to the guarantor or the entity guaranteeing the obligations of its debtor.

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BULGARIA

Enforcement of Secured Debt

Bulgarian law allows for enforcement of security, both within and outside formal insolvency proceedings. Depending on the type of security taken, enforcement which is not part of formal insolvency proceedings could be out-of-court, or following a court administrated process.

The most common types of security under Bulgarian law include: (i) mortgages, (ii) non-possessory pledges, and (iii) financial collateral. The type of security to be taken will depend on the available collateral and will determine the procedure and scope of the enforcement rights of the creditor. However, each of the different security instruments has the same ranking outside insolvency and within insolvency proceedings.

(a) Mortgage

The mortgage is a security instrument creating rights *in rem* in favour of a creditor over property of the mortgagor (the debtor or a third-party mortgagor). Mortgages can be created only over immovable property, construction rights (superficio), and other real estate rights, as well as with respect to ships or aircraft.

When enforcing a mortgage, the secured creditor has the right to request a public official (a bailiff) to sell the mortgaged property, and to receive the proceeds from such sale in satisfaction of its claim. The sale process is organised by the bailiff as a public auction, which is subject to strict regulations under the local law, and is also subject to the control of the courts. The secured creditor is not entitled to take possession or ownership of the mortgaged property directly as a satisfaction of its claim, but has the right to participate as a buyer in the public auction and to bid with its claim.

The contractual mortgage is established by means of a written contract in the form of a notarial deed registered with the Real Estate Registry in Bulgaria. The registration of the mortgage is a condition for its establishment and validity. Creation of a mortgage involves payment of certain notarial and registration fees calculated as a percentage of the secured debt.

The law permits several mortgages to be established on one real estate asset, in which case the order of priority is always the order of their registration with the Real Estate Registry. Any intra-creditor arrangements providing for a different order cannot be enforced and will not be recognised by the court, the enforcing bailiff, or the bankruptcy administrator.

Under the Bulgarian Civil Procedure Code, the creditor shall be entitled to commence enforcement of the security under the mortgage deed by directly obtaining a court order for immediate payment, together with a writ of execution.

The court payment order and the writ of execution are issued in a formal procedure where the creditor does not (yet) have to prove the existence of its claim, but only to file a standard application form supported with certain documents evidencing the legal relationship giving grounds to the claim, as well as to pay a statutory fee of 2% on the material interest of the claim. On the grounds of the writ of execution, the creditor shall be entitled to commence enforcement proceedings through a bailiff.

Thus, the mortgagee is not obliged to first obtain a final and effective court judgment in order to enforce its rights under the mortgage, which significantly reduces the time and costs for enforcement. However, the debtor has the right to object against the so served order for immediate payment, which will open an ordinary claim-existence procedure, whereby the creditor will have to prove its claim and seek the court's final judgement on the matter.

Bulgarian law provides for a high priority ranking of the liabilities secured by the mortgage. In case of enforcement outside bankruptcy – generally, the mortgage will rank in priority against any other claims except for: (i) costs and expenses related to enforcement or preliminary relief measures of other creditors, who are confirmed to have rights with respect to the mortgaged property, and (ii) tax claims but only to the extent directly related to the mortgaged property. In case of bankruptcy proceedings commenced against the debtor, mortgagees have first-ranking priority before any other claims, including tax claims or employee claims.

(b) Non-Possessory (Registered) Pledge

Along with the mortgage, the other most commonly used security instruments include non-possessory (registered) pledges. Registered pledges are a type of security instrument that creates limited rights in rem over certain types of assets, without the need for physical transmission to, or control by, the creditor. Assets that may be provided as security under a non-possessory registered pledge include: (i) movable assets (including unfinished goods and raw materials, and excluding ships and aircrafts); (ii) machinery and technical facilities; (iii) receivables, book-entry securities, and shares of collective investment schemes; (iv) company shares in limited liability companies, collective or limited partnerships with a share capital; and (v) rights over patents, trademarks, industrial design, and certificates for plant sorts and animal species. A registered pledge can also be established over floating pools of all types of assets eligible to be pledged (which includes immovable property), as well as the entire or part of a going concern (commercial enterprise of a company).

Registered pledges are created pursuant to a written agreement. By way of exception, in order for registered pledges over certain collateral only (equity shares in Limited Liability Companies (an LLC) and going concerns) to be valid, the pledge agreement requires notary certification of the signatures of the parties. The registered pledge is perfected with the filing of an application with a public register. The application shall specify the debtor, the secured creditor, the collateral, the details of the secured obligations, and any conditions related to the security. The relevant register for all types of receivables and movables is the Central Pledges Registry (CPR), while for shares in LLCs and going concerns it is the Commercial Registry, for book-entry securities – the Central Securities Depository, for real estate – the Real Estate Registry, and for intellectual property rights – the Patent Office. With the registration of the pledge the security interest is deemed established and has priority vis-à-vis all other: (i) unsecured creditors, or (ii) the secured creditors who have registered their pledge at a later date as well as, (iii) with respect to any person who has acquired the pledged assets after the perfection date.

As in the case of mortgages, the secured creditor is not entitled to acquire the collateral as set-off of the debt through the pledge enforcement procedure. The pledgee's rights are strictly limited to the sale of the pledged collateral and satisfaction of its claims from the sale proceeds.

One of the main benefits of the registered pledges is that they can be enforced out-of-court, without the need for obtaining prior judgment, writ of execution, or any other form of court action. The foreclosure starts with the secured creditor's filing of a formal statement with the relevant public registry with which the pledge is registered, and sending a separate foreclosure notice to the pledgor. As of the moment of filing of the foreclosure statement, the secured creditor is entitled to take possession of the pledged asset and/or take measures to preserve its value. As of that moment, the floating charges freeze and crystallise with respect to any assets that are considered part of the floating pool. The secured creditor may choose the sale method (as opposed to the procedure under the Bulgarian Civil Procedure Code). However, the secured creditor is required to act with the care of a good merchant. For the purposes of the foreclosure, the secured creditor must appoint a depository for collection and distribution of the proceeds from the sale. Upon the sale of the collateral, the depository draws a list of the secured creditors, and distributes the foreclosure proceeds in accordance with their priority.

It should be noted that in the event of foreclosure of a registered pledge over an equity interest in an LLC (OOD or EOOD) the secured creditor is not entitled to sell the security interest or become its beneficial owner. The only method for satisfaction

of the secured debt is either through liquidation of the wholly owned LLC, or by redemption of the equity interest by the LLC. Both of these methods can effectively result in the liquidation of the issuer, and the sale of the assets. For that reason, in practice, this security interest is very rarely enforced and is mostly used as a negative pledge protection.

Bulgarian law provides for a high priority ranking of the liabilities secured by pledges (both possessory and nonpossessory), equal to the ranking of a mortgage, (please refer to the mortgage section above) either in the procedure of private enforcement, or enforcement in insolvency proceedings.

(c) Financial Collateral

Financial collateral arrangements are currently regulated by the Financial Collateral Agreements Act, which implements EU Directive 2002/47/EC and EU Directive 2009/44/EC of the European Parliament with respect to financial instruments, cash deposited in bank accounts, and credit claims. Pursuant to the Financial Collateral Agreements Act, the financial collateral arrangement has to be executed in written agreement between the parties. In addition, it is required that the collateral should be delivered, transferred, held, registered, or otherwise designated so as to be in the holding or under the control of the collateral taker, or of a person acting on the collateral taker's behalf.

With respect to the security provided as financial collateral, it is essential that, if provided for in the pledge agreement, the creditor may use and dispose of the assets granted as security (but on the maturity date of the secured obligations must return to the debtor equivalent assets). However, in terms of its enforceability, the financial collateral agreement should contain: (i) provisions that explicitly entitle the creditor to dispose of the assets, and (ii) the procedure to do so. Nevertheless, in case the security provided as financial collateral is credit claims, the creditor does not have the right to use and dispose of these credit claims. In addition, there are certain types of bank accounts that cannot be provided as financial collateral, such as checking accounts (current accounts).

(d) Possessory Pledges

Creation of a possessory pledge requires that the pledged asset be held by the secured creditor. There is no specific form of valid pledge agreement, however, to avoid disputes and ambiguity, the pledge has to be executed in written form and dated, and has to contain details regarding the security asset and the secured liabilities. Compliance with these requirements entitles the creditor to commence enforcement on the pledged security by obtaining a court order for immediate payment, with a writ of execution as described above, instead of filing a claim and obtaining a court judgment.

Creation of a pledge over shares in a joint-stock company as security in favour of banks is a relatively common practice with respect to credit facilities. Under Bulgarian law, shares can be issued either as materialised or as book-entry shares. A pledge over book-entry shares is a non-possessory (registered) pledge, and its establishment follows the general procedure described under the non-possessory pledges section above. Pledge over materialised shares is a possessory pledge, and it is established by execution of a written share pledge agreement, endorsement of the share certificates as a pledge in favour of the secured creditor, registration of the pledge with the shareholder's book of the company, and the actual transmission of the pledged shares to holding of the secured creditor. So that the secured creditor establishes a priority vis-à-vis any third party, the share pledge agreement and the endorsement should both be executed with date certification made by a public notary. Furthermore, to perfect the share pledge with respect to the company which has issued the shares, the pledge should be recorded in the shareholders' book of the company with the date of the record certified by a notary public. Enforcement of the security interest under the possessory pledge over materialised shares in a joint-stock company involves an attachment and seizure of the shares by the bailiff who deposits the shares in an escrow bank account. Following these actions, the creditor may choose for either the shares to be sold by the enforcement agent through public tender, or to be awarded to exercise shares rights in lieu of payment.

The ranking of creditors with a possessory pledge is equal to that of the mortgagee and the pledgee with a registered pledge in its favour, (please refer to mortgage and registered pledges sections above) either in the procedure of individual enforcement, or the enforcement in insolvency proceedings.

(e) Guarantee

Under a guarantee, one entity (or natural person) assumes liability towards a creditor for the performance of a third party's obligations under an agreement (e.g., a loan agreement). The guarantor would therefore become jointly and severally liable with the borrower for the performance of the secured obligations, whereas usually whenever the borrower does not pay an amount due under the agreement, the guarantor would become liable to pay the amount as if it were the principal obligor. This means that once the guarantor performs an obligation of the borrower, that obligation of the borrower is accordingly extinguished, and *vice versa*. Guarantees under Bulgarian law can cover future or conditional obligations. Importantly, the guarantor cannot guarantee more than the obligations of the borrower to the creditor, and cannot be subject to more stringent conditions compared to the borrower (e.g., higher interest obligations or shorter periods

for payment). In addition, the guarantor who has performed an obligation may request from the borrower the principal, interest, or expenses which the guarantor has made under the obligation, whereas the guarantor may make the request after notifying the borrower of the claim against the guarantor. The guarantor will remain liable following the maturity of the primary obligation if the creditor makes a claim against the borrower in a period of six months from maturity, even if the guarantor has limited the guarantee for the period until the maturity of that obligation.

(f) Bank Guarantee

The bank guarantee is a unilateral agreement by a bank to perform the obligations of an obligor (specified in advance) to a creditor under a financial agreement. The main difference with the guarantee is that the bank is not jointly liable with the obligor, and the bank would only perform the obligations of the obligor if the obligor is in default of that obligation. The bank guarantee under Bulgarian law (aligned with the Uniform Rules for Demand Guarantees 2010 revision, ICC Publication #758/in force as of 1 July 2010) needs to contain, including but not limited to: the details of the beneficiary (the creditor), amount of the guarantee, unconditional warranty by the bank to fulfil the guarantee, subject of the guarantee, and period of the guarantee. In practice, the bank guarantee would be provided as a conditional bank loan – if the bank performs the obligations of the obligor under that loan agreement pursuant to the bank guarantee, then the payments made by the bank become the subject of a bank loan extended to the obligor, with the applicable interests and fees and the payment made under the bank guarantee as the principal amount.

Enforcement of Unsecured Debt

Under Bulgarian law, no special formalities are needed for an unsecured financing agreement to be valid and effective. However, notarisation of the agreement has certain advantages for lenders other than banks (i.e., other financing institutions), as it entitles the creditor to obtain a court order for immediate payment, together with a writ of execution, and to commence enforcement within the procedure described above in relation to secured debts.

Considering the general EU principle of the right of free cross-border service providing within EU Member States, EU banks should have all of the Bulgarian law enforcement rights written above. However, Bulgarian court practice can be inconsistent at times on this matter.

Contractual/Legal *Self-Help* Remedies

(a) Set-Off

Set-off is a common instrument for payment of monetary counter debts owed between two parties to a legal relationship. Under Bulgarian law, the payment obligations of the two parties have to be valid and binding *vis-à-vis* the parties and the receivable of the party initiating the set-off (the active party), and must be due, payable, and liquid. The set-off is deemed to be effected by way of notification to the other party. The law does not require any specific form of notification, but the set-off cannot be made subject to any conditions or periods of time. Upon receipt of the notification for set-off by the passive party, the debt of the lower amount is deemed paid-off as of the date on which the prerequisites for set-off are met (i.e., when the receivable of the active party becomes due and payable).

(b) Direct Debit

Another common self-help instrument for the Bulgarian market is the direct debit consent, by which the debtor is entitling the creditor to withdraw directly from the debtor's bank account up to a certain limit. The direct debit consent may be conditional or unconditional, limited to specific amount or unlimited. The debtor has to provide its operating banks with the consent, and has to provide a copy of the consent to the creditor in whose favour it is given. Ordinance No.3 of Bulgarian National Bank stipulates the requisites of the direct debit in Bulgarian currency (BGN). Direct debit requisites and procedures, with respect to amounts in foreign currency, depend on the payment system used by the respective bank.

(c) Judicial Enforcement

Obtaining a Court Order and Writ of Execution Without Filing a Claim

Bulgarian Civil Procedure Code provides a shorter procedure for enforcement of debts that are documented by specific documents, some of them, for example, pledge/mortgage agreements have already been mentioned above (Qualifying Documents). Qualifying Documents include, among others: (i) extracts from the credit statement of a licensed bank (considering the general principle of freedom to provide cross-border services, EU banks should have the same rights as local banks, but Bulgarian court practice is inconsistent on this matter); (ii) notary deeds, settlements, or other contracts with notary certifications of the parties' signatures; (iii) contractual mortgages; and (iv) promissory notes or letters of credit, etc. Where the creditor has these documents, or its claim is not more than BGN 25,000 (approx. €12,782), it is entitled to obtain a court order for payment together with a writ of execution, without the need to first obtain a court judgment confirming

the amount due. The issuance of such writ of execution requires the payment of a statutory fee of 2% of the claimed amount.

The writ of execution entitles the creditor to start enforcement. However, the debtor is entitled to object to the enforcement of the writ of execution without the need to prove the grounds of such objection. In that case, the creditor either has to file a court claim (for which a statutory fee of 2% of the claim will be due) to prove the grounds and amount of its claim or it will lose its rights under the writ of execution. If the writ of execution is issued on the basis of a Qualifying Document other than promissory notes or letters of credit, the objection by the debtor and the filing of a court claim does not suspend the enforcement of the creditors' claim.

Filing a Claim, Obtaining a Final Court Decision and Issuance of a Writ of Execution

Where the unsecured creditor is not entitled to obtain a writ of execution under the procedure based on Qualifying Documents, its only option to enforce payment of its receivables is to file a claim and commence a lawsuit against the debtor. In this case, the creditor shall pay a statutory fee of 4% of the claimed amount. Only after a final court decision is enacted is the creditor entitled to obtain a writ of execution and initiate enforcement proceedings by a state or private enforcement agent.

Recognition and Enforcement of Foreign Judgments

Bulgarian Civil Procedure Code consists of provisions for judgments enacted in other countries to be enforced on the territory of Bulgaria.

Enforcement of Judgments of EU Member State Countries

Under the Bulgarian Civil Procedure Code, judgments of courts of EU Member States are enforceable in Bulgaria without any special recognition proceedings.

The Brussels Regulations

Upon adoption of the Recast Brussels Regulation, any judgment issued by a court of an EU Member State is enforceable in the territory of Bulgaria without issuance of a writ of execution. The creditor shall present the Bulgarian bailiff with a certified copy of the judgment, together with a certificate issued by the court of origin evidencing that it is enforceable in the country of origin. Upon commencement of enforcement, the enforcement agent shall present the debtor with the certificate, and with a certified copy of the judgment (in case the debtor has not already been served with it). The debtor has the right to challenge the enforcement before the District Court within its registered address, and the court's judgment on such challenge is subject to a two-instance appeal.

European Order for Uncontested Claims Procedure

This applies to uncontested monetary claims. It is not necessary for the judgment to be final, but it has to be enforceable in its country of origin, and that should be certified by the court of origin. Once such certification is obtained, the European Enforcement Order can be enforced in Bulgaria in accordance with Bulgarian enforcement procedure.

European Order for Payment Procedure

This applies to due, payable, and uncontested monetary receivables, regardless of their amount. Once issued, this order has to be certified as enforceable by the court of origin. If this requirement is fulfilled, the order can be enforced on the territory of Bulgaria. In such case, the creditor is entitled to obtain a writ of execution issued by the respective District Court within the area of the registered address of the debtor, or where the enforcement should take place, and commence enforcement proceedings under Bulgarian law.

European Small Claims Procedure

This applies to monetary receivables of up to €2,000. Court judgments under Regulation 861/2007 are issued under a specific procedure provided under the regulation. Bulgarian authorities recognise such judgments, and the creditor is entitled to obtain a writ of execution in Bulgaria. The writ of execution is issued by the respective District Court within the area of the registered address of the debtor, or where the enforcement should take place, and it is subject only to presenting the District Court with a certified copy of the judgment of the court of origin.

Enforcement of Judgments of Third-Party Countries

Judgments of courts or arbitration awards from third-party countries are enforceable in Bulgaria after they have been recognised as enforceable by the competent Bulgarian court, within specific exequatur proceedings.

Recognition of Insolvency Proceedings Under EU Regulations

As Bulgaria is an EU Member State, the provisions of EU Regulations are directly applicable in Bulgaria. Furthermore, the Bulgarian Law on Commerce provides for supplementary insolvency proceedings to be commenced with respect to the assets of a foreign insolvent debtor, which are located in Bulgaria. This legislation also provides that the receiver appointed by a foreign court shall have the powers envisaged in the state where the bankruptcy proceedings are initiated, provided that they do not contradict public order rules of the Republic of Bulgaria.

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General

In examining the process for the recognition and enforcement of a foreign judgment in Cyprus, regard should be given to the laws of Cyprus, the relevant EU regulations concerning the matter, multilateral treaties to which the Republic of Cyprus is a party, bilateral treaties of which the Republic of Cyprus is one of the parties, as well as the common law principles.

The Process of Having a Foreign Court Decision Recognised and Made Enforceable in Cyprus

(a) Recognition/Registration of a Foreign Judgment Issued in Another EU Member State

There are four main EU regulations which govern the recognition (and enforcement) of judgments issued in another EU Member State, namely:

(i) the Recast Brussels Regulation on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters, which applies to judgments issued by a court of another EU Member State on or after 10 January 2015, and replaced Brussels Regulation, which still applies to judgments or court settlements issued before 10 January 2015;

(ii) the European Order for Uncontested Claims Procedure which applies to uncontested claims (i.e., claims to which the debtor has never objected in compliance with the relevant procedural requirements under the law of the EU Member State of origin) in the course of the court proceedings;

(iii) the European Payment Order Procedure; and

(iv) the European Small Claims Procedure, for claims not exceeding €2.000,00.

Under the current legal framework, a judgment falling under the umbrella of the Recast Brussels Regulation shall normally be recognised by a Cypriot court in the Republic of Cyprus without any special procedure being required, as well as without the need for the issuance of a declaration of enforceability by the Cypriot court (as was the case under the Brussels Regulation), since the whole purpose of the regulation is to abolish the exequatur procedure which existed under the Brussels Regulation, and to allow parties to proceed directly with the enforcement thereof in another state.

To this end, it is essential to furnish the court with the following documents:

(i) A copy of the court judgment which satisfies the conditions necessary to establish its authenticity (i.e., an original or duly certified copy of the judgment in question),

(ii) a certificate issued by the court of origin in the form provided in Annex I of the Recast Brussels Regulation, and

(iii) a translation of the aforementioned documents into Greek.

In terms of practice, the aforementioned documents would be presented before the Registrar of the appropriate District Court by way of a letter notifying him/her of the issuance of the foreign judgment in question, and the procedure for the recognition of the judgment would be almost automatic. The Registrar would then *register* the judgment in question in Cyprus by opening a court file to that effect and assigning a serial number thereto. No application needs, therefore, to be filed before the appropriate court to this end.

It should be noted that, as provided for under Article 45 of the Recast Brussels Regulation, the recognition of a foreign judgment can be refused at the request of any interested party for any of the reasons stated therein, namely:

(i) if recognition is manifestly contrary to the public policy of the member state addressed (i.e., Cyprus in this case); there is no legislative provision which defines the concept of public policy, and the relevant case law on the matter has attempted to describe the said notion as the fundamental values which a society recognises at a specific time period (see, for example, *Attorney General of the Republic of Kenya v. Wirtschaft AG* (1999) 1A CLR 585). A Cypriot court would, therefore, refuse to recognise a foreign judgment in case the judgment in question is deemed to be at variance to an unacceptable degree with the legal order of the Republic of Cyprus, in as much as it would infringe a fundamental principle or would impact on the orderly functioning of the legal, social or commercial life of the Republic of Cyprus. It should be clarified that the public policy principle is rarely invoked before the Cypriot courts in cases involving the recognition and enforcement of foreign judgments, especially of judgments issued by another EU Member State;

(ii) where the judgment was given in default of appearance, if the defendant was not served with the document instituting the proceedings, or an equivalent document in sufficient time, and in such a way as to enable it to arrange for his/her defence;

(iii) the judgment is irreconcilable with another given in a dispute between the same parties in the EU Member State in which recognition is sought (i.e., Cyprus);

(iv) the judgment is irreconcilable with an earlier judgment given in another EU Member State or in a non-EU Member State between the same parties and involving the same cause of action, where the earlier decision fulfils the conditions required for recognition in the state of recognition (i.e., Cyprus); and

(v) the judgment conflicts with Sections 3, 4, or 5 of Chapter II (i.e., jurisdiction in matters relating to insurance, consumer contracts, and employment contracts) and with Section 6 of Chapter II (i.e., the provisions for exclusive jurisdiction, for example).

Under no circumstances will the substance of the judgment be reviewed by a Cypriot court, as provided for by Article 52 of the Recast Brussels Regulation.

In relation to judgments issued in matrimonial cases, there are two EU regulations which govern this area:

- Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes. It replaces the Hague Convention 1978 relating to the law applicable to matrimonial property regimes.
- Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

(b) Recognition/Registration of a Foreign Judgment Issued in a Non-EU Member State

For a judgment issued by a non-EU Member State, the applicable law and procedure pertaining to the recognition and enforcement of such a foreign judgment shall stem from a number of sources, such as:

(i) multilateral treaties, to which Cyprus is a party, such as the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the **Hague Convention**), which has been transposed into national legislation, and which allows for a decision rendered in one of the Contracting States of the Convention to be recognised and enforced in Cyprus in cases where (a) the decision was given by a court considered to have jurisdiction within the meaning of the Convention, (b) the decision is no longer subject to ordinary forms of review in the state of origin, and (c) the decision is enforceable in the state of origin;

(ii) bilateral treaties with other states;

(iii) domestic laws, such as the Foreign Judgments' Law, CAP. 10, for judgments issued by a Commonwealth country, on the basis of the mutuality/reciprocity principle;

(iv) in any of the aforementioned cases, an application will need to be filed before the appropriate District Court seeking the recognition and subsequent enforcement of the issued foreign judgment (on the basis of, inter alia, the Judgments of Foreign Courts (Recognition, Registration, and Enforcement by Convention) Law of 2000, Law No. 121(I)2000; and

(v) common law principles, in cases where no multilateral or bilateral agreement between the state of origin and Cyprus exists and CAP. 10 does not apply, a new civil action, based on the provisions of the foreign judgment in question, will need to be filed in the Republic of Cyprus. Assuming the judgment is final and for a definitive sum, the judgment creditor shall then be able to seek the issuance of summary judgment on the basis that the judgment debtor does not have a defence to the proceedings.

(c) A General Overview of the Enforcement Measures in Cyprus

There are a number of enforcement measures available to a successful claimant/judgment creditor following the issuance of a judgment by a Cypriot court. The same enforcement measures are available with respect to a foreign judgment which has been duly recognised in Cyprus. The main enforcement measures which may be pursued in the Republic of Cyprus by a judgment creditor are the following:

(i) writ of execution for the sale of movable property;

Under this process, which is commenced through the filing of a writ before the relevant court, the debtor's goods are seized by a court bailiff and subsequently sold via a public auction. The proceeds from the sale in question are then allocated towards the repayment of the judgment debt.

(ii) registration of a charging order (a **Memo**) over the immovable property of the debtor company or sale of the debtor's immovable property;

A Memo is a type of legal charge that can be registered at the Land Registry against the real estate assets owned by a company or an individual. It can be registered by the judgment creditor following the issuance of the relevant judgment confirming that the judgment creditor is owed a debt by the judgment debtor/owner of the immovable property. The Memo is registered against all its immovable assets in the total amount owed to the judgment creditor.

It should be noted that the registration of a Memo over a debtor's immovable assets ranks after any secured securities, but fetters the ability of any secured lenders of the judgment debtor to sell the assets in question, following the enforcement of their securities because of the existing charge (which is only removed by the Land Registry following the issuance of a court order to that effect, unless the judgment creditor agrees to its removal).

Additionally, there is also the option of applying for the sale of the debtor's immovable property by public auction, pursuant to Part 5 of the Civil Procedure Law, Cap. 6. The application needs to set out the property's details, such as its registration number, locality, kind of property, as well as the amount sought to be recovered following the sale, a copy of the judgment, the relevant Land Registry Office certificates showing that the property sought to be sold stands registered in the debtor´s name, etc.

(iii) registration of a charging order over the judgment debtor's chattels (e.g., shares);

Pursuant to the provisions of the Charging Orders' Law of 1992 (Law No. 31(I)/1992) and, in particular, Section 3 thereof, a charge over the shares of a company is possible after the issuance of a final judgment against a debtor. More specifically, whenever a debtor is called upon to pay a monetary sum pursuant to a court judgment, then, for the purposes of executing the judgment, a Cypriot court (satisfied that the relevant conditions imposed by the law are met in the circumstances) may issue an order imposing a charge (a **Charging Order**) on any interest which the debtor has on any assets falling within the scope of the law (including shares) for the purposes of securing the payment of the amount owed under the judgment (i.e., the judgment debt). Thereafter, any such charged assets may also be sold, disposed, or liquidated in accordance with a new court order (a **Sale Order**), issued precisely for the purposes of executing the judgment against the debtor.

It should be noted that, before the issuance of a Charging Order, the court shall take into consideration all of the facts of the case, as well as any evidence pertaining to the personal situation and status of assets of the debtor and the possibility of any damage being

suffered by another creditor of the debtor as a result of the issuance of such an order, whereas it may also set certain conditions upon issuing the order concerning the notification of the debtor or any other interested party, as the court deems necessary and just in the circumstances.

As far as the subsequent Sale Order is concerned, prior to issuing such an order, the court shall take into consideration the position of all interested parties (including the Registrar of Companies, the company's directors, etc.) for the purposes of ascertaining the interest of the debtor or any other person(s) on the shares, or any impact that the proposed sale/disposal/liquidation might have on any person(s). For the purposes of assisting the process, the court may also appoint a receiver in relation to the charged assets, who, following the court's approval to that effect, may, among other things, sell the charged assets through a public auction or a private contract, as provided for in Section 7 of the Law No. 31(I)/1992, and distribute a part of the proceeds stemming from such sale to the creditor in satisfaction of the judgment secured thereby.

On the basis of the above, the actual acquisition of any shares belonging to a judgment debtor will not be possible (but only the receipt of proceeds from the sale of any such shares to satisfy the judgment) unless the judgment creditor actually purchases the shares through a participation in the processes prescribed in the law (i.e., at a public auction or through a private agreement), and sets-off all or part of the judgment debt owed thereto through the said sale-purchase.

(iv) order for the repayment of the debt by monthly instalments;

In the context of such a procedure, the debtor will be subject to examination under oath by the judgment creditor and the court in relation to its financial capability to repay the outstanding debt. The debtor must present to the court all its assets and liabilities and, following the relevant examination, the court will decide as to whether it will issue an order against the debtor for the payment of monthly instalments and the amount of such instalments against the judgment debt. Whether the order will be issued, as well as what the relevant amount of each instalment shall be, is at the court's discretion, and all the facts pertaining to the case will be taken into consideration.

(v) garnishee proceedings;

Pursuant to Sections 73-81 of the Civil Procedure Law, CAP. 6, following an application to this end, the court may require a third party which is indebted to the judgment debtor (either because the judgment debtor has a beneficial interest to the movable property/funds of the third party, or because there exists a creditor/debtor relationship between the judgment debtor and the third party, respectively) to pay the relevant debt directly to the judgment creditor as against/in satisfaction of the judgment debt.

(vi) foreclosure of mortgaged property.

Pursuant to the provisions of the applicable law, if credit facilities are obtained, the debtor thereof could grant a mortgage in relation to the said credit facilities as a collateral security for the strict observance of the credit facilities agreement. In the event of a breach of a credit facilities agreement by the borrower, the mortgagee has the option to commence proceedings for the foreclosure of mortgaged property for collection of the outstanding debt.

As Articles 44A-44IAA of the Immovable Property (Transfer and Mortgage) Law 1965 (9/1965) (the **Law**) and its amendment provide:

- Once the borrower defaults on a payment for a period of over 120 days from the date on which the debt became payable under the credit facilities agreement, the lender could serve to the borrower and to any interested party a written notice accompanied by a statement of account and call the borrower to repay the outstanding amount within forty-five days from service of the documents. The notice must also include a warning to the borrower that the lender may proceed with the sale of the mortgaged property if the outstanding amount is not settled.
- If the borrower fails to comply with the notice of payment, the lender may serve on the borrower a second written notice informing the borrower that the mortgaged property will be sold in a public auction. The notice must be served at least thirty days prior to the date and the time of the scheduled public auction.
- The borrower and any interested party may, within forty-five days of receiving the second notice, and in certain specified instances (e.g., the written notice was not duly effected or drafted in the prescribed form, or the notice had not been sent prior to the expiration of the time period set by the creditor for payment of the owed

sum), file an application to the appropriate District Court to set aside the notice.

- If no application to set aside the notice has been filed, the borrower and the lender appoint two valuers, one each, for the purpose of establishing the market value of the mortgaged property. The lender, therefore, must serve on the borrower another written notice regarding his/her intention to appoint a valuer within ten days from service of the said notice. The lender must confirm the identity of the valuer it appointed before the end of the ten-day period so that the borrower can appoint his/her valuer. In the event that the borrower fails to appoint a valuer, the lender may appoint two valuers. The valuers must deliver their reports within thirty days from the appointment of the lender's valuer.

- The first attempt to sell the mortgaged property must be made only through public auction where 80% of the market value is set as the reserved price for the property. The mortgaged property cannot be sold below the reserved price.

- For a period of six months following the completion of the first attempt of a public action, a price is determined which must be no smaller than 80% of the market value of the mortgaged property (regardless of the method of sale) and, after the passing of the three months after the expiration of the six months period mentioned above, another price is determined which must be no smaller than 50% of the market value of the mortgaged property.

- The notice informing the borrower about the public auction of the mortgaged property must:

  (i) be served to the borrower and to any interested party at least forty-five days prior to the date of the scheduled public auction, and

  (ii) be advertised at least once, no less than forty-five days from the date of the scheduled public auction, on the place of the auction, on the website of the Ministry of Interior, on the website of the lender, and in two daily newspapers of national circulation.

- In the event that the first attempt to sell the mortgaged property in a public auction fails, the lender could sell the mortgaged property, either via another public auction or through a direct sale. To this end, the lender serves a written notice to the borrower and to any other interested party at least twenty days prior to the scheduled day of sale, in which the preferred formula of selling must be included. If the lender proceeds with a direct sale, certain requirements provided for in the Law must also be complied with, including advertisement of the property on a website and two daily newspapers of national circulation. Regardless of the course chosen by the lender, the mortgaged property must be sold to the highest bidder.

- If the mortgaged property is burdened with other previous mortgages, the written consent of previous mortgaged lenders is required or, alternatively, a judgment must be issued authorising the public auction or direct sale of the mortgaged property. If the mortgaged property is further charged with subsequent mortgages, the lender has to notify the holders of substantial mortgages at least fifteen days prior to the scheduled day of the public auction or sale.

- Once the property is sold, the lender must send via post, within thirty days, a notice to the borrower on the proposed disposition of the proceeds of the sale and all the costs related to the auction. The notice must also state that the borrower has the right to challenge/object the proposed disposition of the proceeds of the sale within thirty days from the date of the notice. If such an objection is filed within thirty days, then the dispute is resolved by the District Court. In the absence of an objection, the sale becomes final.

- In the event that the lender does not sell the mortgaged property within six months from the conclusion of the first auction, the lender has the option either to purchase the mortgaged property at market value as the final evaluation (to be determined as per point above) or to sell the property.

Other Relevant Measures

(a) Winding Up Proceedings Against the Debtor Company or Bankruptcy Proceedings in Case of Natural Persons

Although strictly speaking, not an enforcement method per se, if the judgment debtor is unable to pay their debt, the judgment creditor may initiate bankruptcy or liquidation (winding up) proceedings against the judgment debtor.

With this measure, the judgment creditor could proceed with a notice and an application for either bankruptcy or winding up against the debtor, depending on whether they are a natural or legal person.

(b) Winding Up Proceedings

In general, the purpose of winding up proceedings under Cypriot law is to enable the liquidator to collect and realise a

company's assets for the settlement of its liabilities by way of distribution of the assets to the creditors. Under Cypriot law, a company may be wound up following a compulsory winding up, a voluntary winding up, or through a court-supervised winding up.

- **Voluntary winding up** does not require any court involvement and may be commenced either by the member of the company or its creditors, depending on whether the company is solvent or not.
- **Compulsory winding up** may be commenced if there are some conditions for which the applicable law provides. Compulsory liquidation is the most formal insolvency process and the relevant proceedings generally require more than two years to complete depending on the number of factors such as, the available assets of the company and the number of creditors. Once all the affairs of the company have been completely wound up, the court, following an application by the liquidator, shall order the dissolution of the company.
- **Court-supervised winding up** constitutes a combination of the voluntary and compulsory winding up process. Specifically, following the approval of a resolution for a voluntary winding up, the court may issue an order for the continuation of this procedure under its supervision. The time frame for the conclusion of these proceedings shall vary from case to case.

Bankruptcy

Bankruptcy is the process whereby a natural person (a debtor) is declared unable to pay debts incurred and/or due and, as such, all his/her available assets are used so as to indemnify all of his/her creditors.

The bankruptcy of a debtor is governed and regulated by the Bankruptcy Law, Cap 5 and by the Bankruptcy Rules, Cap 6. According to the applicable legal framework, any debtor who was:

- ordinarily resident in Cyprus,
- conducting his/her business personally or by means of an agent in Cyprus, and
- a member of a firm and/or partnership which conducts its business in Cyprus

at the time when any act of bankruptcy was committed or suffered by him/her, may be adjudged bankrupt by the Cypriot courts (s.3(2) Bankruptcy Law, Cap 5).

Bankruptcy proceedings commence with the filing of a written bankruptcy petition to the court. The petition may be filed either by a creditor(s) having a provable debt against the debtor or by the debtor him/herself. Whether the petition is accepted or dismissed lies with the absolute discretion of the court. Upon hearing the petition, the court must receive sufficient proof; it must be satisfied that there is a debt owed by the debtor to the creditor, that the petition was served to the debtor, and that the debtor has committed an act that essentially constitutes a justifying act of bankruptcy. Should the court decide to accept it, it will issue a Receiving Order against the property of the debtor, and if the debtor cannot make any arrangement to settle his/her debts, the debtor will be declared bankrupt by the same court.

In such cases, the debtor's property will be vested in the custody of the Official Receiver (a public officer acting on behalf of the court). The Bankruptcy law also provides, under certain conditions, for the automatic rehabilitation of the bankrupt person after a period of three years.

Additionally, under the Bankruptcy law (sections 46 and 47), any settlement of property, with the exception of a settlement made in favour of a purchaser in good faith and for valuable consideration, shall be void against the trustee in bankruptcy if the settlor of the property becomes bankrupt within two years from the date of the settlement. The same principle applies to companies. Under section 301 of the Companies Act (CAP 113), any type of disposition of the property of a company which is made within six months before the commencement of its winding up would be deemed a fraudulent preference of its creditors and be invalidated accordingly.

Another important piece of legislation is the Insolvency Individuals (Personal Plans Repayment and Debt Waiver Order) Law of 2015, which allows for the restructuring of secured and unsecured debts of insolvent individuals, as well as debt relief for individuals with no income or assets.

Examinership

Examinership is a debt restructuring and corporate rescue procedure for insolvent companies or companies that are likely to be insolvent. Its purpose is to give a company facing insolvency a period of protection from its creditors, to facilitate its survival as a going concern, and to save viable businesses and jobs. For an examinership order to be granted, the court must be convinced that the company has a *reasonable prospect of survival*. Whether such a prospect exists is determined by the court on the basis of a petition that is filed before it, which is accompanied by a report of an independent expert.

The policy, in instances of examinership, is that creditors should not be put in a worse position than they would be in the event of liquidation. Examinership orders are issued if the following requirements are met: (a) the company in question must be unable to pay its debts or is likely to be unable to pay its debts; (b) no liquidation order has been issued by a court, nor has a voluntary liquidation resolution been adopted; (c) the company has reasonable prospects of survival of its business as a going concern either in whole or part; and (d) no receiver has been in office for more than thirty days.

Once an application for the appointment of an examiner is filed, the company is placed under the protection of the court for four months (which may be extended under specific circumstances for another two months by the examiner, if appointed). Within this period, no winding up orders can be issued against the company, a receiver cannot be appointed, no execution measures can be taken against the company, and no action can be taken to materialise a mortgage of a company under examinership without the consent of the examiner, if an examiner has been appointed.

Once appointed, the examiner is vested with the rights and powers of an auditor, thus enabling the examiner to formulate proposals for saving the company. The court may also grant the examiner additional powers, including any or all of the directors' powers (management and borrowing) or the liquidator's powers or both. The examiner formulates proposals and presents them to the creditors and shareholders. He/she is primarily responsible for the formulation of an arrangement scheme that will allow the company to continue its operation as a going concern after the protection period has expired. Having formulated his/her proposals, the examiner must convene and preside over such meetings of the members and creditors of the company as he/she thinks proper, and report back to the court on those proposals within sixty days of being appointed.

Fraudulent Transfers

Section 3 of the Fraudulent Transfers Avoidance Law states that every gift, sale, pledge, mortgage, or other transfer or disposal of any movable or immovable property made by any person with intent to hinder or delay creditors or any of them in recovering from him, his or their debts shall be deemed to be fraudulent and invalid as against such creditor or creditors; and the Court has the jurisdiction to set aside such fraudulent transfers.

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Czech Republic

In the Czech Republic, debts are typically secured by: (i) pledges over a security asset, and (ii) security transfers/assignments of a security asset. The most commonly secured assets are dematerialised, immobilised, and certificated shares in joint-stock companies, ownership interests in limited liability companies, enterprise as a going concern, real estate property, tangible moveable assets (including inventory, equipment, and technology), securities (such as bonds), receivables/rights arising from contracts (such as receivables arising from bank accounts, insurance policies, leases, intercompany loans, hedging, commercial contracts, and acquisition documents), patents, and trademarks. In theory, a security transfer/assignment can cover the same categories of assets, however it is usually used only in limited circumstances, most often in relation to receivables arising from commercial contracts or leases.

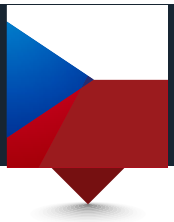
Security over certain assets (mainly, financial instruments and bank accounts) may be structured as financial collateral arrangements (as contemplated in Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as implemented in the Czech Republic in the Czech Financial Collateral Act). There are two techniques as to how to create financial collateral arrangements: a pledge or transfer. Financial collateral arrangements benefit from more robust legislative protection.

Other credit support/enhancement techniques include financial guarantees, (ordinary) guarantees, blank promissory notes, and notarial deeds on direct enforcement.

Below we provide a general overview of enforcement of pledges outside of Czech insolvency proceedings. These procedures may become unavailable in insolvency proceedings where the debtor's assets become subject to administration by the insolvency administrator and where, generally speaking, the secured creditors (although a secured creditor may give instructions to the insolvency administrator in respect of enforcement of its security) have a preferred right of satisfaction from the monetisation of assets to which they had an established security interest prior to the initiation of insolvency proceedings.

Enforcement of Pledge in General

Under the Czech Civil Code, a pledge may be enforced once the secured debt is due but is not paid. The pledge may be enforced either by a method agreed upon between the pledgor and pledgee in writing, by a public auction, or by other enforcement proceedings which are regulated by special acts (primarily, the Czech Civil Procedure Act or the Czech Execution Procedure Act).



The most common ways of enforcing a pledge in the Czech Republic are: (i) a private sale, (ii) a sale in a public auction, or (iii) enforcement proceedings (court enforcement or execution enforcement). As there are doubts if the pledgor and pledgee can agree in the pledge agreement that the pledgee acquires a legal title to the pledged asset (appropriation/foreclosure), the prevailing market practice is not to use this other method of enforcement of pledge. In addition, there may also be some specific rules depending on the type of relevant pledged asset.

With the exception of private sale (and enforcement under the specific rules listed below) all types of enforcement require an enforcement title (exekuční titul): (i) an enforceable decision of a court or an arbitration court, (ii) a notarial deed by which the debtor accepts that if it fails to repay the relevant debt when due, the notarial deed shall constitute an enforcement title, (iii) settlement agreement approved by a court, or (iv) some other type of enforceable decision, which the law allows to serve as an enforcement title (these include a final, conclusive, and binding judgment by a court of an EU Member State as defined in the EU Regulation 1215/2012; or a final, conclusive, and binding arbitral award in the Czech Republic or a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958).

The pledgee must always notify the pledgor in written form of the commencement of enforcement of the pledge. If the pledge is registered in a public register (such as the cadastral register) or in the pledge register, the pledgee must also arrange for the commencement of enforcement to be registered in the relevant register. Once the pledgee has notified the pledgor, the pledgor may not sell or otherwise dispose of the security asset. The relevant security asset cannot be monetised (zpeněžen) by the pledgee earlier than thirty days after the delivery of the above notice to the pledgor or, where applicable, the registration in the public register or the pledge register.

The above requirements do not apply to financial collateral arrangements.

Enforcement of Pledge of Shares and Ownership Interests

Shares in joint-stock companies and ownership interests in limited liability companies established under Czech law can be subject to a pledge. Below, we highlight few specifics of pledges over such assets (as typically reflected in the relevant pledge agreements).

First, the pledgor and the pledgee usually agree in the pledge agreement that when an event of default is continuing, the pledgee is entitled to receive directly from the company all payments or performance obligations relating to or derived from the shares/ownership interest (such as dividends) and, when the secured debt becomes due, to use them to satisfy the secured debts.

Secondly, the pledgor and the pledgee may agree in the pledge agreement that – typically if an event of default is continuing – the pledgor may exercise voting rights associated with shares/ownership interest. Even if nothing is agreed in the pledge agreement, the pledgee can start exercising the voting rights if the attempt to enforce the pledge was not successful.

The initiation of enforcement must also be notified to other shareholders, so they are able to exercise their pre-emptive rights (if applicable).

The pledgor and the pledgee may agree in the pledge agreement that if the pledgee fails to sell the shares/ownership interests in the enforcement procedure, the pledgee acquires the pledged shares/ownership interests automatically. If nothing is agreed to this effect in the pledge agreement, the pledgee can request that such mandatory transfer takes place (on the ordinary commercial terms) if such request is delivered by the pledgee to the pledgor within one month after the unsuccessful attempt has taken place.

Enforcement of Pledge of Receivables

Receivables, in particular receivables from bank accounts, insurance agreements, lease agreements, or trade receivables, are very commonly used as pledged assets.

It is usually agreed in the relevant pledge agreement that the debtor from the relevant receivable makes payments in respect of the pledged receivable to the pledgor, unless an event of default is continuing, in which case the payment is made by the debtor to the pledgee. This is a basic principle which is further commercially modified, depending on the category of receivables and the content of the main finance documents. When the secured debt becomes due and the pledged receivables are not yet due, the pledgee is entitled to have the receivables assigned to it.

Methods of Enforcement of Secured Debts

(a) Private Sale

A private sale is very often provided for in pledge agreements as a method of enforcement of secured debt in the Czech Republic. Under the Czech Civil Code, upon enforcement of a pledge, a security asset may be sold in a private sale, if it is agreed by the pledgor and the pledgee in writing and they set rules for such procedure, including a price calculation mechanism. The pledgee is required to act with professional care with respect to both the pledgor's and the pledgee's interests so the pledged asset can be sold for a price for which a comparable asset would usually be sold in comparable circumstances at the relevant place and at the relevant time.

The benefit of a private sale is that no enforcement title is required, and no administrative bodies are involved, which reduces the costs of the process and saves time.

(b) Sale in a Public Auction

Sale in a public auction is the default way of enforcement in cases where there is no agreement on another way of enforcement. Any sale in a public auction must be based on an (enforceable) enforcement title.

The involuntary public auction is performed by an auctioneer under an agreement entered into between the pledgee who proposed the auction and the auctioneer. The agreement specifies, amongst other things, the lowest acceptable bid. The auction may be carried out electronically. The auctioneer carries out a valuation of the pledged asset. In some cases, such as with real estate, an expert opinion may be required to assist with the valuation. The auctioneer notifies the owner of the pledged asset, the pledgor, the debtor, and creditors secured by the pledge. Following this notice, all actions of the pledgor to alienate or encumber the pledged asset are invalid. Creditors whose claim is secured by the pledge may submit their claims at least fifteen days before the public auction takes place. The auctioneer issues auction orders at least fifteen days before the public auction takes place.

During the auction, the pledged asset is awarded to the highest bidder. If the highest bidder pays the price, the bidder acquires the security asset with an immediate effect from the knock down (příklep). At the transfer of the security asset, the pledges or other security interests over the security asset which was auctioned cease to exist. All debts secured by such pledges, or other security interests, become due to the extent that they are satisfied in the public auction. Any pledges older than the oldest pledge submitted to the auction continue to exist and are effective against the purchaser. The pre-emptive rights to the pledged asset cease to exist but the rights in rem are not affected by the sale in the auction. If the proceeds from the auction are not sufficient to pay all submitted claims, they are satisfied in the order set by law with secured debts having priority. If the minimum bid was not submitted, the auction may be repeated.

(c) Court Enforcement Proceedings

For corporate financings, the court enforcement is not a frequently used enforcement tool for monetary debts.

In a court enforcement, the pledge may be enforced by the: (i) sale of the pledged asset, (ii) adjudication of pledged monetary receivables, or (iii) adjudication of other pledged property rights.

The court orders enforcement of the decision and forbids the pledgor to alienate or encumber the relevant assets included in the inventory. The court estimates the value of the assets (with the assistance of an expert if necessary). Afterwards, the court publishes an auction order which is followed by the auction where the assets are sold. Other creditors may request the satisfaction of their enforceable debts or debts secured by a pledge, or request retention right or security assignment other than the debts for which the enforcement is ordered, only if they have submitted them before the auction begins at the latest. The creditors must specify and prove by relevant documents the amount of their claim.

The auction takes place at least thirty days after the court issues the auction order. The court will accept the highest bid. If the highest bidder pays the price, they acquire the asset with effect from the knock down. If there are more creditors, and they cannot be satisfied in full, the proceeds are distributed as follows: (i) the cost of the enforcement, (ii) the creditor which had retention rights over the asset, and (iii) the rest of the creditors, which are paid according to the order in which they applied for an enforcement order or in which they joined the enforcement proceedings. For the order of secured debtors, the day of creation of the security is decisive. By transfer of the pledged assets, all pledges, retention rights, and other rights encumbering the asset cease to exist. The auction may be conducted electronically.

There are some specific additional rules in the case of court enforcement by sale of real estate. Rights such as leases, usufructuary leases (pacht), and rights in rem which are not registered in the cadastral register and which are not listed in the auction order or submitted to the court, cease to exist after the knock down. If there is a pre-emptive right or option to buy back, they can be performed only in the auction, and cease to exist by the knock down. Within fifteen days from publication of the auction outcome, anyone can offer to buy the real estate for a price at least 25% higher than the highest bid. The court then asks the highest bidder whether they wish to increase the offer price, if not the other bidder will acquire the real estate.

(d) Execution Enforcement Proceedings

Execution enforcement is carried out by a private bailiff. The execution enforcement is mainly governed by a special act, the Czech Execution Enforcement Act.

The enforcement is performed upon request by the pledgee who must designate a bailiff to perform the enforcement. The bailiff will request an authorisation to perform the enforcement from the court.

In the execution enforcement, the pledge may be enforced by sale of pledged movables or real estate. The execution enforcement is substantially similar to the court enforcement outlined above.

(e) Enforcement of Financial Collateral Arrangements

The enforcement of financial collateral arrangements is the most creditor-friendly and is primarily governed by the relevant contract (within the limits set out in the Czech Financial Collateral Act). The enforcement can start following the occurrence of an event of default (it is not required that secured debt is not paid when due). The enforcement methods include the sale of the relevant asset, as well as appropriation (foreclosure).

Enforcement of Unsecured Debts

The unsecured debt may be enforced in court enforcement or execution enforcement proceedings.

The execution enforcement is currently the preferred form, as it is usually more efficient than court enforcement.

The initiation of the enforcement proceeding for unsecured debts is only possible with an enforcement title.

Recognition and Enforcement of Foreign Judgments

Foreign decisions (judgments, court settlements, and enforceable notarial deeds) in property matters are enforceable in the Czech Republic if: (i) the relevant foreign authorities confirmed that they are in legal force, and (ii) they are recognised by Czech courts.

When requesting a court enforcement of a foreign decision in property matters in the Czech Republic, the competent court will, as a preliminary question, assess whether the foreign decision fulfils conditions for recognition, which include: (i) the Czech courts did not have exclusive jurisdiction over the matter, (ii) there is no pending proceeding in the matter before a Czech court which commenced before the proceeding which led to the foreign decision, (iii) there is no enforceable decision or foreign decision of a third country which has been recognised in the Czech Republic, (iv) the participant against which the decision was issued was not denied the possibility to properly participate in the proceedings which led to the foreign decision, (v) the recognition is not against public order, and (vi) if the foreign decision is against a Czech natural or legal person, there is reciprocal recognition of decisions between the countries.

Under the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a decision of a court of an EU Member State can be enforced in other EU Member States, without declaration of enforceability or substantive examination of the decision.

Enforcement of Uncontested Claims

A simplified procedure is available for uncontested claims under the European Order for Uncontested Claims Procedure. If a judgment is certified as a European Enforcement Order in the EU Member State of origin, it shall be recognised and enforced in the other EU Member States (except Denmark) without the need for a declaration of enforceability, and without any possibility of opposing its recognition.

Enforcement on the Basis of the European Order for Payment

A simplified procedure is available for uncontested monetary claims under the European Order for Payment Procedure. At least one of the parties must be domiciled or habitually resident in an EU Member State other than the EU Member State of the court seized. The applicant completes an application for a European Order for Payment using a standard form which is annexed to the regulation. If the requirements are met, the competent court issues an order for payment. If the defendant fails to lodge a statement of opposition within thirty days from the delivery, the court declares the order for payment enforceable. The order for payment is then recognised and enforced in other EU Member States (except Denmark) without the need for a declaration of enforceability, and without any possibility of opposing its recognition.

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England and Wales

Enforcement of Security

English law allows security holders to realise their security, both within and outside formal insolvency processes of the borrower entity, although the enforceability in an insolvency proceeding may require the consent of the insolvency practitioner or the permission of the court. The most common methods of enforcing security under English law are: (i) the appointment of a receiver over a specific asset(s) (frequently real estate) of the borrower company, (ii) the sale of charged real estate as mortgagee in possession, and (iii) the appointment of an administrator over the borrower company.

A new moratorium, which may affect the enforcement of security interests and other claims, was introduced by the Corporate Insolvency and Governance Act 2020 (**CIGA 2020**).

(b) Appointment of Receiver

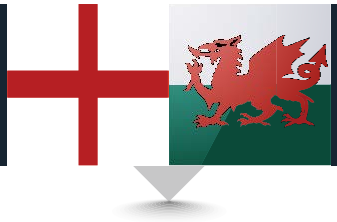
Receivership is a contractual remedy for the enforcement of security, and court approval is not generally required. The relevant security document will detail the circumstances in which the security holder can appoint a receiver, and the extent of the receiver's powers. These powers are usually comprehensive, and typically include the power to take possession and sell the secured assets, manage the business pending a sale, and collect rent or income. A receiver's main function is to take control of the secured assets, to sell the assets, and to apply the proceeds of sale towards discharging the debt owed to the security holder.

There are various types of receiver:

- a fixed charge/non-administrative receiver,
- an administrative receiver,
- a Law of Property Act 1925 receiver, and
- a court appointed receiver (appointed by application to court under the Senior Courts Act 1981).

Of these, the fixed charge/non-administrative receiver is most often used to enforce security in England. If a loan is charged on specific assets, a receiver may be appointed in respect of those specific assets and not over the entire business. A fixed charge receiver is typically appointed under a legal mortgage in relation to particular real estate. A non-administrative receiver must vacate office if required to do so by an administrator, and in cases where an administration is likely to be commenced, a receiver may only be permitted to remain in office where the enforcement of security over the assets concerned is not detrimental to the purpose of the administration.

Where the security package includes charges that together confer a right to appoint a receiver over the whole (or



substantially the whole) of a company's assets, any receiver the chargeholder appoints will be deemed to be an *administrative* receiver with additional statutory powers of management and investigation. However, the appointment of administrative receivers has been phased out and is only available in certain circumstances, including where the relevant floating charge was created before 15 September 2003 or where the charge is part of a large capital markets transaction. As a result, the procedure is used infrequently and has largely been superseded by administration as the preferred method of enforcement.

(b) Mortgagee in Possession

A mortgage is a form of security where one party (the mortgagor) transfers ownership over property (often real estate) as security for the repayment of debt owed to another party (the mortgagee). A mortgagee has a right to take possession of real estate secured in its favour and to sell it. The power of a security holder to go into possession and sell derives from statute and also from the security document. A security document would typically include a clause providing that all of the powers conferred upon a receiver under the security document may be exercised by the security holder directly (though the exercise of such powers are normally contractually deferred until a default).

If a security holder wishes to sell an asset in this manner, it is under a duty to obtain the best price reasonably available at the time of sale. Normally, a security holder would obtain professional advice from an estate agent or valuer as to: (i) the method and timing of sale, (ii) the price to be obtained, and (iii) any steps that should be taken prior to marketing the real estate. In practice, the right of possession is rarely exercised, mainly due to concerns about the liability of mortgagees in possession. Creditors would usually prefer to appoint a receiver or administrator.

(c) Administration

A security holder who has the benefit of a floating charge (or charges) which relates to the whole or substantially the whole of a company's property can appoint a licenced insolvency practitioner as an administrator of that company, provided that at least one of its floating charges is a qualifying floating charge (i.e., the charge empowers the holder to appoint an administrator or administrative receiver, or expressly states that the relevant statutory provisions apply to that charge).

The appointment can be made in court or otherwise out-of-court using a streamlined procedure that involves filing certain forms with the court and serving them on specified parties (including the company and the proposed administrator). The company or the directors of the company may also appoint an administrator but are obliged to give notice to a holder of a qualifying floating charge if they intend to do so (such that the holder may decide to appoint an administrator of its choosing instead of the administrator chosen by the company or the directors).

Once appointed, the administrator takes over management of the company with a view to achieving one of the following statutory purposes:

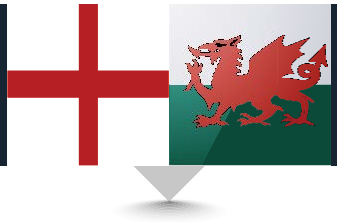
1. rescuing the company as a going concern,
2. achieving a better result for creditors than would likely have been achieved if the company went straight into liquidation, or
3. realising property in order to make a distribution to secured or preferential creditors.

The administrator may only adopt purpose (2) if (1) cannot reasonably be achieved, and purpose (3) only if neither (1) or (2) can reasonably be achieved. Where the administrator is appointed by a chargeholder, the purpose is usually (2) or (3), as purpose (1) cannot generally be achieved without the consent of the chargeholder.

Unlike most receivers, the administrator is an officer of the court with duties to all creditors and not just to the appointing chargeholder. The administrator may sell assets subject to a floating charge, but requires court permission or consent from the chargeholder to deal with fixed charge assets.

In order to achieve the statutory purpose, the administrator may choose to cease trading immediately or continue to trade all or part of the business for some period of time (although any costs he/she incurs in doing so will have priority over all creditors, save for preferential creditors and fixed chargeholders). The administrator has comprehensive statutory powers, including to sell real estate by private treaty (no auction is required).

In an appropriate case, the administrator may sell the business immediately following his/her appointment (a *pre-pack* administration). Pre-packs can result in a quick and relatively smooth transfer of a business, potentially preserving goodwill, retaining human resources, and saving jobs. Crucially, they avoid the need for an administrator to secure funding for the purpose of trading the business prior to a sale. An administrator who enters into a pre-pack is subject to various statutory and professional obligations that seek to make the process transparent and accountable to creditors (for example, ensuring a proper marketing process and valuations have been obtained), along with additional scrutiny where the sale is to a connected party.



During an administration, no person may enforce security against the company, commence or continue litigation, or take certain self-help remedies, without the consent of the administrator or the permission of the court. An administrator may prevent the appointment of a receiver or require a receiver to vacate office. However, in the limited circumstances where an administrative receiver may still be appointed, the appointment of an administrative receiver can block the appointment of an administrator.

The holder of a charge constituting a security financial collateral arrangement (which often includes mortgages or charges over company shares) is not subject to the restriction on enforcement of security, and may enforce its rights during an administration.

(d) Foreclosure

Foreclosure is the process where the mortgagor's rights in a secured asset are extinguished (including the equity of redemption), and the assets become vested in the mortgagee. It is only available to the holder of a legal mortgage, or an equitable mortgage that is capable of being converted to a legal mortgage. For many reasons, including the requirement to obtain an order of the court, this right is rarely exercised as a means of enforcing security, and a creditor will usually rely on exercising its power of sale or appoint a receiver to do so.

(e) Appropriation

Where the security interest is over financial collateral, a streamlined alternative to foreclosure may be available under the Financial Collateral Arrangements (No. 2) Regulations 2003, whereby a collateral taker may, if its documents so provide, exercise a right to appropriate the collateral without the formalities of foreclosure. If a security holder exercises its power of appropriation, it must value the collateral in accordance with the relevant security document and in any event in a commercially reasonable manner. If the value of the appropriated financial collateral exceeds the collateral-provider's financial obligations, the security holder must account for the excess balance; if the obligations exceed the value of the appropriated financial collateral, the balance will remain due.

Moratorium

A new moratorium was introduced by CIGA 2020, which may be obtained by a company without commencing an insolvency proceeding. If obtained, the moratorium restricts creditors from taking certain actions to enforce claims and security interests against the debtor company, including taking steps to enforce a security interest, the appointment of an administrator by the holders of a floating charge, the crystallisation of a floating charge, the commencement of insolvency proceedings, the commencement or continuation of litigation or other legal process, the forfeiture of leases, and the repossession of hire-purchase goods. The directors remain in office and in control of the debtor, but a monitor is appointed to oversee the moratorium. The monitor is chosen by the debtor company, but must be a licenced insolvency practitioner. The company and its directors are subject to certain restrictions during the period of the moratorium (for example, as to the level of credit that may be incurred or payments that may be made without the consent of the monitor).

The moratorium is subject to important exceptions, for example, it is not available to a company that is party to an agreement that forms part of a capital markets arrangement involving a debt of at least £10 million. Most bond issuers and securitisation vehicles could not therefore obtain the moratorium. Creditors of companies who have only raised finance under loan facilities are therefore potentially in a worse position with respect to enforcement than creditors of companies that have issued bonds or notes on the capital markets.

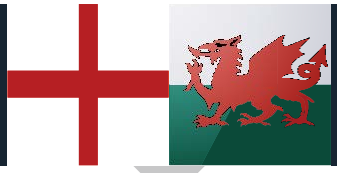
The moratorium lasts for an initial twenty business day period, and may be extended by a further twenty business days without consent of creditors (including secured creditors). In order to extend beyond forty business days, the consent of the pre-moratorium creditors or of the court must be obtained, and in order to extend the period beyond a total of one year, an order of the court must be obtained.

Recognition of Insolvency Proceedings Under the EU Regulation

Further to the UK's exit from the EU on 31 January 2020 and following the end of the transition period (under the UK-EU withdrawal agreement) on 31 December 2020, the bulk of the EU Regulation ceased to apply in the UK. In particular, the automatic mutual recognition of insolvency proceedings between EU Member States and the UK no longer applies (save in certain respects, including in relation to proceedings commenced before the end of the transition period on 31 December 2020, as outlined in further detail below).

Therefore, English insolvency proceedings opened after 31 December 2020 are no longer automatically recognised throughout the EU. English insolvency practitioners dealing with cross-border cases now have to consider recognition of English insolvency proceedings in accordance with the domestic laws of the relevant EU Member State(s) and/or consider the opening of simultaneous local insolvency proceedings.

Insolvency practitioners in EU Member States can no longer rely on the EU Regulation to give automatic recognition (in the UK) of insolvency proceedings commenced in an EU Member



State after 31 December 2020. However, they are instead able to rely on the recognition routes that applied (and continue to apply) to the recognition of insolvency proceedings opened in non-EU Member States prior to Brexit, those routes being well developed. Specifically, EU insolvency proceedings may be recognised in the UK under the Cross-Border Insolvency Regulations 2006 (which enacted the UNCITRAL Model Law on Cross-Border Insolvency in the UK) where they are: (i) *foreign main proceedings* (being foreign proceedings taking place in the state where the debtor has its centre of main interests (COMI)); or (ii) *foreign non-main proceedings* (being foreign proceedings, other than foreign main proceedings, taking place in a state where the debtor has an establishment). Additionally, overseas insolvency processes will continue to be recognised where the proceedings have been commenced in certain specified jurisdictions, following a letter of request from the relevant court under Section 426, Insolvency Act 1986.

Certain aspects of the EU Regulation have been retained in English law following the UK's exit from the European Union, pursuant to the European Union Withdrawal Act 2018 and the Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/146). In particular, English courts retain jurisdiction to open insolvency proceedings in relation to overseas debtors where the debtor has either (a) its COMI in the UK or (b) its COMI in an EU Member State and an establishment in the UK. However, as detailed above, such proceedings will not benefit from automatic recognition in the EU.

The EU Regulation continues to apply (unamended) in the case of:

a) insolvency proceedings that are main proceedings under the EU Regulation and were opened before the end of the transition period;

b) secondary proceeding where main proceedings in an EU Member State were opened in respect of the debtor under the EU Regulation before the end of the transition period; and

c) proceedings falling within article 6 of the EU Regulation (which gives the courts of a member state in which insolvency proceedings have been opened jurisdiction for any action deriving from and closely linked to those proceedings, such as avoidance actions) where main proceedings were commenced before the end of the transition period.

Enforcement of Unsecured Debt

(a) Contractual/Legal *Self-Help* Remedies

Depending on the particular debtor/creditor relationship, an unsecured creditor can also avail itself of certain contractual or legal self-help remedies under English law such as:

- (in the case of trade creditors) claiming retention of title in any asset held by the debtor,
- forfeiting a lease or seizing the debtor's goods in lieu of rent,
- setting-off the debt owed against monies owed by the creditor to the debtor, or
- claiming a lien on the debtor's assets.

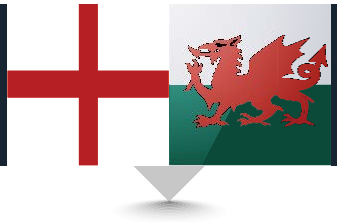
(b) Obtaining Judgment/Execution Proceedings

An unsecured creditor can take court action to recover a debt. Once judgment is obtained, the creditor has the benefit of an order by the court stating that the debtor is liable to pay the creditor. A judgment of itself does not always prompt a debtor to pay, and the creditor might then have to consider various enforcement options. If the judgment is served on the debtor and no payment is received, then the following main enforcement options are available:

- **Seizure and Sale of Goods.** The judgment can be sent to the Sheriff in the High Court or a bailiff in the County Court who has the power to seize the debtor's moveable goods (i.e., chattels) up to the value of the judgment.
- **Charging Order.** If the debtor has real estate, it may be possible to register a charging order on that real estate to secure the value of the judgment debt. A charging order does not have priority over existing security, irrespective of whether the debt existed prior to the secured debt; however, it will have priority over subsequent security.
- **Attachment of Earnings/Third-Party Order.** It may also be possible to seek and obtain an attachment of earnings order or a third-party order (e.g., a garnishee order). A garnishee order is a court order which directs a third party (who owes money to a debtor) to pay those sums directly to the creditor.

Recognition and Enforcement of Foreign Judgments

In England, a variety of common law or statutory rules apply to the enforcement of foreign judgments. Which of those rules apply depends on the origin of the judgment sought to be recognised or enforced and additionally, post Brexit, the question of when the proceedings in which the judgment is given were instituted is critical.



In broad terms, while the UK was a member of the EU, judgments given by a court of another member state were enforceable in the English courts under Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 2001 Brussels Regulation) or Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation). The 2001 Brussels Regulation and Recast Brussels Regulation provided for limited defences to such enforcement, including recognition being manifestly contrary to public policy or irreconcilable with a judgment given in a dispute between the same parties in the member state in which recognition was being sought. The position was similar in relation to judgements of the courts of Iceland, Norway, or Switzerland, as a result of the 2007 Lugano Convention.

The Lugano Convention, 2001 Brussels Regulation and Recast Brussels Regulation have largely ceased to apply in England further to the UK's exit from the EU. However, the European regime continues to govern enforcement in the UK of judgments from courts in EU and EFTA states given in proceedings instituted before the end of the transition period. Specifically:

a) the Recast Brussels Regulation applies to the enforcement in the UK of judgments from EU Member States given in proceedings instituted between 10 January 2015 and 31 December 2020;

b) the 2001 Brussels Regulation applies to the enforcement in the UK of judgments from EU Member States given in proceedings instituted between 1 March 2002 and 10 January 2015; and

c) the Lugano Convention applies to the enforcement in the UK of judgments from three EFTA states (Iceland, Norway, and Switzerland) given in proceedings instituted before 31 December 2020.

In relation to judgements enforced under the European regime, the judgment creditor is entitled to enforce the foreign judgment as if it were an English judgment and utilise the usual English procedures (including writs of control, third party debt orders, and charging orders) in doing so.

In the case of uncontested claims, it may be possible to recognise or enforce a judgment of the courts of an EU Member State pursuant to Council Regulation (EC) No. 805/2004 (the EEO Regulation) which created the European Enforcement Order (**EEO**) procedure. The EEO further simplifies and expedites the process of having a judgment in the member state of origin enforced in another member state. The EEO procedure goes further than the procedure under the Brussels Regulations in that where a judgment has been obtained in a member state and the appropriate EEO certificate (specifying details concerning the judgment itself) has been issued, it can be enforced in the member state of enforcement, without any intermediate examination of the judgment in the member state of enforcement. The EEO Regulation continues to apply to judgments given in legal proceedings instituted before 31 December 2020, provided that the certification as an EEO was applied for before the end of the transition period.

Where the European regime is no longer available (i.e., where the relevant proceedings were instituted after 31 December 2020), the enforcement regime provided for by the Hague Convention may be used to enforce judgments given in other contracting states (which includes all EU Member States). Like the European regime, the grounds for refusing to enforce a judgment under the Hague Convention are relatively limited (including that the enforcing court is not allowed to review the merits of the judgment, inconsistency with another judgement between the same parties, and public policy). The Hague regime, however, does have certain limitations including:

a) that it applies only to judgments given by a court designated as having jurisdiction in an agreement, and such jurisdiction must be exclusive (and as such it may not apply to asymmetric jurisdiction agreements); and

b) that it excludes certain matters from its scope, including judgments related to certain intellectual property matters, rights *in rem* in land and company law matters.

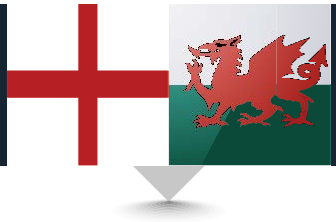
Absent the availability of the European regime, the Hague Convention or another reciprocal regime for the enforcement of judgments, enforcement of foreign judgements would need to be sought under English common law. The English common law regime is subject to certain limitations, including:

(i) that, at common law, a foreign judgment is not directly enforceable but is instead enforced by bringing a fresh action. While the judgment creditor may be able to obtain summary judgment and then apply for the usual enforcement procedures, this inevitably involves more steps (and likely increased time and expense);

(ii) that the foreign court had jurisdiction, according to the laws of England and Wales (including, where applicable, the Regulations);

(iii) that the foreign judgment was not obtained by fraud;

(iv) that the enforcement of the foreign judgment is not contrary to public policy, or natural or constitutional justice as understood in English law;



(v) that the foreign judgment is final and conclusive;

(vi) that the proceedings seeking to enforce the foreign judgment are instituted within six years after the date of the foreign judgment (under certain circumstances the six-year period may not commence to run until a later date);

(vii) that the foreign judgment is for a definite sum of money; and

(viii) that the procedural rules of the court giving the foreign judgment have been observed.

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Finland

1. General

In Finland, the collection of contractual claims is usually based on a debt collection process, which is mainly regulated by the Debt Collection Act (*Laki saatavien perinnästä* 513/1999). If a payment reminder stating the amount owed and due date does not lead to payment of the claim, the creditor can send a debt collection letter to the debtor requiring immediate payment. If the debt continues unpaid, the creditor can initiate legal proceedings.

Debt matters are usually dealt with in the district court where a creditor can apply for a writ of summons requiring the debtor to respond to a claim. If the debtor does not object to the claim, the district court may issue a judgment for the amount ordered to be paid to the debtor.

A debt will usually expire in three years from its due date or the moment the goods are handed over, unless the limitation period is interrupted before then. The limitation period is interrupted when the creditor reminds the debtor of the debt, or when the creditor initiates a foreclosure case, or files a lawsuit to collect the debt. In this case, a new limitation period of the same length begins, which can be interrupted as well. If a judgment or other reason for foreclosure has been issued for the debt, the limitation period is five years. In some cases (for example, if the damage does not reasonably occur) however, the limitation period can run for up to ten years.

Other definitive limitation periods may apply in Finland.

2. Secured Debts

Secured debt is defined in the Finnish Restructuring of Enterprises Act (*Laki yrityksen saneerauksesta* 47/1993) as a debt, where the creditor holds, against third parties, an effective real security right to property that belongs to or is in the possession of the debtor.

According to Chapter 10, Section 2, Subsection 1 of the Commercial code (*Kauppakaari* 3/1734), the pledgee may sell the pledged asset (movable property) and repay the debtor's claim from the sale proceeds when the claim is due for payment. The pledgee must notify the owner of the asset at least one month before the sale. The pledgee may only proceed with the sale if the debt remains unpaid after this one-month period.

Another way for the creditor to realise the security, is to take legal action through a performance claim which, as the name suggests, enforces an obligation to perform. One form of performance claim is a tolerance claim (also known as a hypothetical claim), in which the defendant is required to tolerate or permit something. It is useful for secured debts, as it can be used to oblige the owner of the collateral to tolerate enforcement

measures relating to the realisation of the assets. This procedure is most often to be used with real estate collateral.

Generally, a court order is required to realise and sell collateral, but in some occasions pledged movable property can be sold without a court order, as described above.

3. Unsecured Debts

Recovery of an unsecured debt starts when the debtor fails to fulfil its payment obligations within the agreed time. An unsecured creditor has certain options that it may exercise first which do not require immediate initiation of court proceedings (commonly known as *soft means*).

3.1 Out-of-Court Remedies

Before the creditor initiates legal proceedings to enforce a claim, a payment reminder and debt collection letter must be sent to the debtor; this is called *voluntary collection*. The debt collection letter usually requires immediate payment of the debt and states that if payment is not made, the creditor will initiate legal proceedings. A payment demand is a customary part of the collection procedure, but not a mandatory prerequisite for legal proceedings.

3.2 Legal Proceedings

Legal proceedings begin when the creditor submits an application to the district court for a subpoena which obliges the debtor to respond to the claim. The district court evaluates the grounds presented by the creditor and the validity of the claim. If the debtor does not object to the claim, the district court may issue a judgement for the amount to be paid to the debtor.

The process time may vary depending on the nature of the case. If it is an undisputed debt collection case, the district court will handle it as a summary civil case via a written procedure, which takes approximately three to six months. If the case is more complex, it will be handled as a regular civil case. In cases like these, the dispute is decided impartially by a court after the main hearing where both parties are heard, and evidence has been submitted. The handling time may vary, generally between 12 to 24 months.

3.3 Enforcement of the Judgement

If the district court's judgment is passed in favour of the debtor and the debtor does not comply with the final judgement, the creditor may initiate enforcement proceedings. This happens by filing (or sending via e-mail or post) an enforcement application with/to the electronic enforcement service of the National Enforcement Authority Finland. The application must state the debtor's name, grounds for enforcement, the creditor's claims, and whether the creditor is applying for regular or limited enforcement.

During the enforcement proceedings, the income of the debtor is distrained and its assets seized (up to an amount sufficient to cover the debt). The enforcement ends either with the repayment of the debt or an impediment to enforcement discovered by the enforcement officer (for example, the debtor is bankrupt).

3.4 A Demand for Payment Threatening with Bankruptcy

It is also possible to strengthen the demand for payment by threatening the debtor with bankruptcy. According to the Finnish Bankruptcy Act (*Konkurssilaki* 120/2004), following a demand for payment, a creditor may file a bankruptcy application which must indicate the basis and amount of the claim and that the creditor may petition for the bankruptcy of the debtor, unless the debt is repaid within seven days following receipt of the filing. If the claim remains unpaid, a petition for bankruptcy may be filed at any time within three months.

4. Recognition and Enforcement of Foreign Judgments

Finland does not, as a rule, recognise or enforce civil judgments issued in a foreign jurisdiction if there is no: (i) international treaty binding on Finland, (ii) relevant national law already in place, or (iii) EU legislation pertaining to the enforcement of foreign civil judgements in an EU Member State.

Finland is a party to several international treaties, many of which are bilateral. If the judgment is not recognised, the Finnish court will issue a new judgment; the foreign judgment may hold evidentiary value in the new proceedings.

The Hague Choice of Courts Convention has been adopted in Finland as part of the EU and entered into force on 1 October 2015.

(a) Judgments Given by a Court of an EU Member State

The Recast Brussels Regulation provides for the automatic recognition of a judgment given in another EU Member State, making a judgment directly enforceable without the need for a declaration of enforceability.

If a party wishes to rely on a judgment given in another EU Member State, it must present a copy of the judgment and a certificate of the judgment in the correct form (Article 53 and Annex 1).

The applicant for enforcement must submit a copy of the judgment and the above-mentioned certificate of judgment. The certificate and the judgment (if not served) shall be served on the defendant before the first enforcement measure is taken.

(b) Recognition and Enforcement of Foreign Judgments

According to the Act on International Legal Assistance and Recognition and Enforcement of Judgments in Civil and Commercial Matters (426/2015), unless otherwise agreed or provided by law, an application to declare a judgment issued in a foreign state enforceable shall be submitted to a district court.

(c) A Foreign Arbitration Award

The enforcement of foreign arbitral awards is governed by the so-called New York Convention of 1958. The provisions of the Convention have been incorporated into the Finnish Arbitration Act (*Laki välimiesmenettelystä* 967/1992) (the **Arbitration Act**).

An arbitration award which has been made in a foreign state, which falls under the Arbitration Act, shall be recognised in Finland and shall be enforced upon request. In the first instance, an application for enforcement shall be submitted to the court. The application must be accompanied by the original arbitration agreement or award (as applicable), or certified copies of those. A document in a language other than Finnish or Swedish must be accompanied by a certified translation into either of these languages, unless the court grants an exemption.

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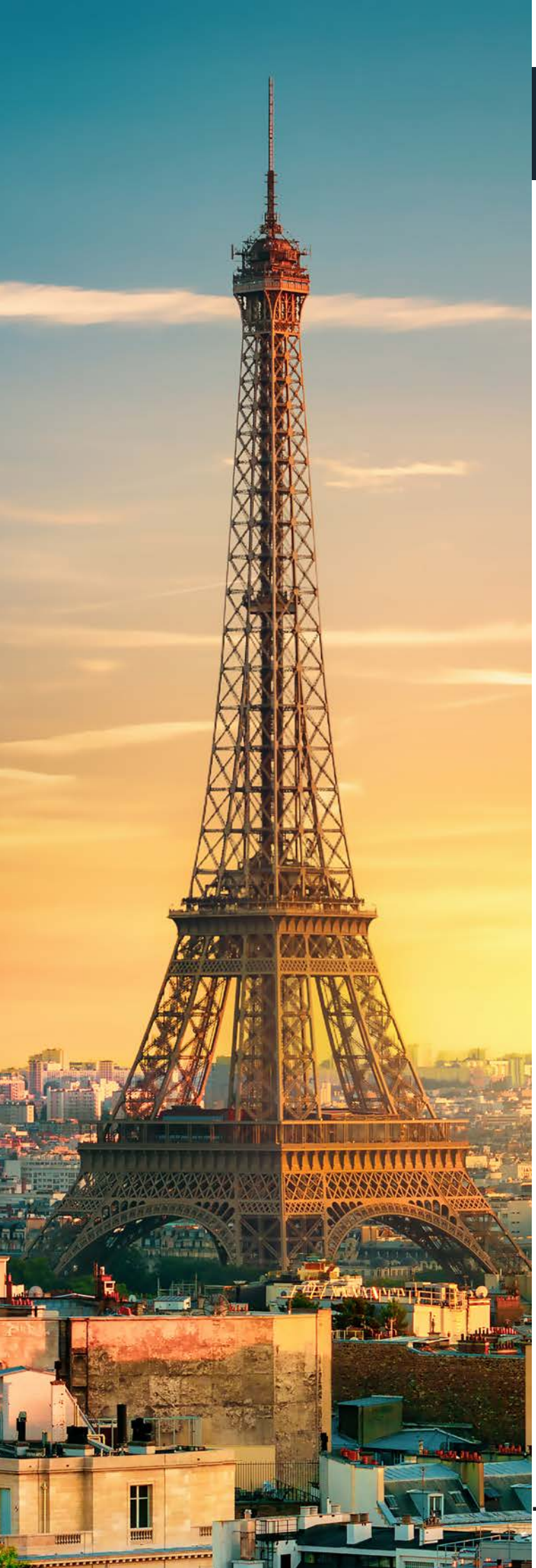

France

Enforcement of Security

French law allows the enforcement of security once a specific claim becomes overdue. However, insolvency proceedings trigger an automatic stay on all pending and future proceedings (including the enforcement of security), subject to some exceptions.

You will find below the enforcement process of French law security in and out of insolvency proceedings.

Classification of Securities

As a preliminary comment, please kindly note that in the event of a default of payment from a debtor, one may enforce its secured debt on the basis of the contract, or through an enforcement proceeding.

The main bilateral securities under French law are pledges, guarantees, and mortgages.

(a) **Pledges**

A pledge consists of pledging an obligation, an intangible/tangible asset or a set of intangible/tangible personal assets, present or future, as collateral to an undertaking. Pledges can be taken over various assets such as shares, receivables, businesses, patents, or even bank accounts.

Before becoming enforceable against third parties, the pledge shall either be registered with the French pledge registry (fichier national des gages sans dépossession), a public registry, or be transferred to the hands of the creditor or a third party.

The pledge is created either: (i) contractually, or (ii) judicially between a creditor and a debtor. Once the debtor who granted the pledge is in default, the creditor may:

- use pledged funds to repay its claim where applicable;
- request the full ownership of the pledged asset(s) through public auction if the pledge is constituted as collateral for a professional debt, or contractual appropriation (*pacte commissoire*), or court foreclosure (*attribution judiciaire*); or
- depending on the pledge agreement provisions, pursue an out-of-court remedy.

Certain pledges grant a creditor with a retention right over the pledged asset, until it is fully repaid by its debtor.

(b) **Guarantee (*Caution*)**

A guarantee is an undertaking granted by a party to another (usually a creditor) to perform a payment obligation in the event a debtor is in default of performing its payment obligations.

If the debtor is in default, the beneficiary of the guarantee may request from the guarantor the payment of the guaranteed amount (subject to applicable legal and contractual provisions).

Once the guarantor has paid the beneficiary, it replaces the beneficiary in its rights against the debtor **(***substitution***).**

(c) **Mortgage (*Hypothèque*)**

A mortgage is a right of ownership over real property, which is used for the performance of an obligation. It may arise from the law, a contract, or a judicial act. To be valid, the contractual mortgage must be established through a notarial deed (acte authentique). Before becoming enforceable against third parties, the mortgage shall be registered at the French Land Registry (service de la publicité foncière), a public registry.

Any real property can be mortgaged, and there is no limitation to the number of mortgages that may be taken over one property. The rank between mortgagees will be determined by the chronological registration of the successive mortgages.

If the debtor who granted the mortgage is in default, the creditor may, after obtaining an enforcement order:

- request full ownership of the asset(s) through contractual appropriation (*pacte commissoire*) or court foreclosure (*attribution judiciaire*) subject to a valuation of the asset(s) from an expert; or
- depending on the provisions of the mortgage agreement, pursue an out-of-court remedy.

- **Enforcement Proceedings (*Voies d'Exécution*)**

(a) **Secured Debt**

In the absence of insolvency proceedings, and once a secured claim is due and payable, the secured creditor shall first send a formal notice (*mise en demeure*) and/or a payment request (*commandement de payer*). If the debtor does not pay within the required timeframe, enforcement proceedings may start.

To that end, the creditor needs to obtain an enforcement order (typically an enforceable French Court decision or an enforceable foreign court decision) evidencing a liquid and due claim. Once obtained, the creditor can try to enforce its claim by seizing the asset(s) belonging to the defaulting debtor. The main types of seizures are the seizure of immovable asset(s) (*saisie-immobilière*) and seizure of claims (*saisie-attribution*).

A creditor may also initiate a preventive seizure (*saisie conservatoire*) when they have evidence that repayment of the claim is at risk (*see below*).

(b) **Unsecured Debt**

Under French law, a creditor may have both contractual and legal remedies available to it, such as:

- **Non-Performance Exception (*exception d'inexécution*):** Pursuant to this rule, a party may refuse to perform an obligation, even though it is due and payable, if the other party fails to perform another obligation under the contract, and if said non-performance is *sufficiently serious*.
- **Termination of the Contract (*résolution du contrat*):** One party may terminate the contract if the breach of contract is substantial. The creditor has the possibility, at its own risk, to terminate the contract by notice. The creditor may also request a judicial termination.
- **Penalty Clause (*clause pénale*):** The contract may provide that the defaulting party shall pay a penalty in the event of the non-performance of its obligations. However, a judge may review the amount of the penalty which has been agreed.
- **Subrogation Right (*droit de subrogation*):** A third-party will pay the debt of the debtor to the creditor, and the rights of the creditor over the claim will be assigned to that third party who will then have the ability to request payment from the debtor. This subrogation right can arise from a contract or from law.
- **Retention Right (*droit de rétention*):** Such a right can be granted to the creditor who holds a claim against the debtor to withhold some goods/some other rights as long as payment has not occurred. The retention right is not a proper security interest, but it is a powerful way of securing a claim, as the creditor can often withhold the goods/rights until it is paid.
- **Preventive Seizure (*saisie conservatoire*)** is a preventive measure requested from a judge over asset) of the debtor to anticipate the granting of an enforcement order (*titre exécutoire*). The creditor can request from a judge an authorization to preventively seize the claim at risk. Essentially, the effect of this measure is to make the property of the seized debtor unavailable, (i.e., so that it cannot be seized or sold).

  If a preventive seizure has not been converted into a definitive seizure before the opening of an insolvency proceeding, such preventive seizure will be void.
- Judicial Securities (sûretés judiciaires) are security interests granted by a judgement through various procedures, or requested from a judge, and are related to assets (e.g., immovable property, businesses, IP rights, shares,

receivables, etc.). The specific procedure to request a judicial security is based on a double mechanism. First, the provisional public registration of such securities and, second, the permanent public registration of the measure, which must be taken when the creditor's rights are established. This mechanism gives a preferential ranking to the creditor, as the date of final registration is deemed to be the date of provisional public registration. The creditor will then have the same rights as the holder of a contractual or statutory security interest.

Enforcement in the Context of an Insolvency Proceeding

The insolvency proceeding triggers a prohibition of payment on all pre-petition claims, and an automatic stay on all pending and future proceedings aiming at obtaining the payment of prepetition claims.

In some cases, secured claims could be enforced even though the debtor is facing an insolvency proceeding.

As a general rule, unsecured claims cannot be enforced, other than through a set-off mechanism (and provided that legal conditions are duly met).

(a) The Automatic Stay Principle

Creditors with pre-petition claims are prohibited from filing for legal action aimed at obtaining the repayment of such claims and pending proceedings are suspended (those will only continue in order to determine the amount of the claim), except for a seller of goodwill. Those rules are of public order.

Conversely, post-petition claims that are useful to the insolvency proceedings shall be paid when falling due. If not, creditors may file for an enforcement proceeding, and will benefit from a preferred rank if unpaid.

Set-off of pre-petition claims is only possible under the following conditions:

- the claims to be set-off must be related (créances connexes) or arise from the same group of contracts,
- the concerned creditor has filed its proof of claims, and
- such set-off has been approved by the bankruptcy judge.

As a result of the automatic stay of payment, creditors will have to file a proof of claim indicating the: (i) amount of their pre-petition claims, (ii) security package, and (iii) if applicable, whether the security has been granted on the debtor's assets to secure a third party's debt, to the creditors' representatives (mandataire judiciaire) to maintain their rights over such claims within the insolvency proceedings. The delay to file a proof of claims, which runs from the publication of the insolvency opening judgment to the BODACC (French legal gazette) within: (i) two months for a French resident, and (ii) four months for a non-French resident.

Creditors who file a proof of claim for their pre-petition claims or for unpaid post-petition claims will be repaid according to their ranks within a safeguard/reorganisation plan, or with the proceeds from a sale plan/assets sale in judicial liquidation.

(b) Effective Security Rights in Insolvency Proceedings

The *Fiducie* (The French Trust)

A fiducie is an agreement where a company or a person (constituant/debtor) transfers the ownership of identified assets, rights, or security interests to a third party (the Trustee). The Trustee will then hold the asset(s) in a bankruptcy remote special-purpose separate estate until the obligations arising from the underlying agreement are performed. The Trustee acts on behalf of one or several beneficiaries (bénéficiaires), which are usually lenders/bondholders.

The *fiducie* remains fully enforceable in the event of insolvency of the debtor, provided that the contractual terms and conditions of enforcement of the *fiducie* are met (most notably the transfer of the disposition right).

The Retention of Title (*Réserve de Propriété*)

A retention of title allows the seller to retain full ownership over a sold asset until full payment by the debtor, even if the asset is in possession of said debtor.

In the event of a debtor insolvency proceeding, the retention of title can be enforced by a creditor, provided that: (i) the asset is in possession of the debtor on the date of the insolvency opening judgment, (ii) the retention of title is valid (i.e., written and existing, at the latest, on the day of delivery of the related assets), and (iii) the creditors have filed a claim of ownership over said asset with the court appointed trustee within three months from the publication of the judgment opening the insolvency proceeding to the BODACC.

Guarantee (Caution)

In the event of an insolvency proceeding against a debtor, the beneficiary may try to enforce the guarantee against the guarantor. However, the following rules will apply:

- the guarantee is always enforceable against the legal person guarantor;
- in a conciliation proceeding, the guarantee could be challenged by the guarantor if a grace period is granted to the debtor; and

- if the guarantor is a physical person, he/she may challenge the enforcement of the guarantee: (i) during the observation period and during the execution of a safeguard or a reorganisation plan (not applicable in judicial liquidation proceedings), or (ii) if the beneficiary fails to file its proof of claims (as the guarantor is substituted in the right of the beneficiary, if there is a failure from the beneficiary to file a proof of claim, the guarantor will lose its rights against the debtor).

The above rule would limit the enforcement of the guarantee against a manager which is a physical person.

Retention Right

Despite the opening of an insolvency proceeding, the bankruptcy judge may authorise the debtor to pay pre-petition claims in order to recover an asset which is subject to a creditor's retention right.

Assignment of Claim (Cession Dailly)

Under French law, the assignment of trade receivables known as Dailly Assignment is a guarantee limited to banks or similar institutions where the assignor (debtor) transfers a claim it holds in its estate (liquid and due or at falling due) on its debtor, the assigned, as security for a claim contracted between him/herself, the assignor, and the assignee (creditor).

This Dailly Assignment is not affected by the opening of an insolvency proceeding, as there is a transfer of ownership of the claim outside of a debtor's estate.

(c) Unsecured Claim

As discussed above, enforcement of an unsecured claim is not possible within an insolvency proceeding, as the opening judgement will trigger an automatic stay on enforcement proceedings, unless it's an authorised set-off (*see above*).

Recognition of Foreign Judgments

(a) Recognition of Foreign Judgments in Non-EU Member States

Foreign judgments falling outside the scope of the Brussels EU Regulations, the Insolvency EU regulations (*see below*) (therefore for all non-EU Member States and EFTA countries) or other relevant European regulations, are not directly enforceable in France.

You would need to request the exequatur of those foreign judgments and arbitral awards.

French case law provides for the following requirements for a French Court to grant an exequatur order:

- the foreign court had proper jurisdiction,
- the foreign judgment has to comply with French international public order, and
- the absence of fraud.

A French tribunal, the Tribunal judiciaire, is competent to examine these three requirements.

Where a bilateral treaty or international treaty is applicable, the exequatur may not be required.

(b) Recognition of Judgements between the EU Member States

Article 36 of the Brussels EU Regulations (Regulation EU 44/2001 and its recast version, Regulation EU 1215/2012), to which France is a party, provides that a judgment given in an EU Member State shall be recognised in the other EU Member States without any special procedure being required.

(c) Recognition of Insolvency Proceedings under the EU Insolvency Regulations

French safeguard, reorganisation, and liquidation proceedings fall within the scope of the Insolvency EU regulations (Regulation EU 1346/2000 and its recast version, Regulation EU 2015/848, Appendix B) which provides, in Article 19 that: "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings."

Article 3 provides for the application of the Center of Main Interest (COMI) principle.

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Germany

Enforcement of Security

German law allows for an enforcement of security by secured creditors outside and within the formal insolvency procedure.

In Germany, security is provided to the creditor by way of land charges, security assignments of receivables, security transfers, share pledges, account pledges, and IP pledges.

Enforcement Outside the Insolvency Procedure

Outside the insolvency procedure, enforcement is subject to different requirements depending on the security.

(a) General Requirements

The creditor may only enforce the secured obligation if the obligation has become due and payable, and the creditor obtained an enforceable instrument (*Vollstreckbarer Titel*). However, the requirement of an enforceable instrument is regularly waived by the security grantor in practice.

With respect to the enforcement of different security rights, the parties will often align its additional prerequisites. The parties agree regularly on an enforcement trigger (e.g., termination). The creditor has to give the security grantor reasonable prior written notice of an intended enforcement; the minimum period that is usually agreed is one week.

(b) Enforcement of a Land Charge

The general requirements for enforcement apply with the exception that the security may only be enforced upon prior receipt of an original enforceable instrument; a waiver is not possible in this case. Creditors usually request the security grantor submit to immediate foreclosure (*Unterwerfung unter die sofortige Zwangsvollstreckung*).

The enforcement of land charges occurs by way of (1) forced administration (*Zwangsverwaltung*), or by way of (2) public sale (*Zwangsversteigerung*) of the charged property. It is in the chargee's discretion to initiate the enforcement by way of forced administration and to request public sale at a later stage, or to request public sale immediately.

(i) forced administration

In this case, the property becomes subject to the administration of a public administrator. The application has to be filed with the local court in whose district the property is situated. In such a filing, the applicant may propose an administrator to the court, which is not bound by the proposal. Accordingly, the right to use and administer the property will be transferred to the appointed administrator.

Rental income deriving from the property is collected by the administrator for the purpose of payment of enforcement

costs and satisfaction of the secured obligations. If the owner of the property operates its own business (such as hotels, inns, amusement parks, rehabilitation clinics, or gas stations) on the property, the administrator may continue to operate this business.

Forced administration is a useful instrument to safeguard the property and the rental income, and to ensure proper management at a stage when the chargee may not yet want to initiate a forced sale, for example, if the chargee wishes to gain time for a restructuring process.

(ii) public sale

The public sale is carried out by the local court in whose district the property is situated. If several properties located in different districts are for sale, the chargee may apply for a public sale of all properties by one of those courts. Prior to the auction, the court appoints a property appraiser for the determination of the fair market value of the property. The appraisal is submitted to the involved parties, and available for inspection or copying at the court.

The date and venue of the auction, as well as information about the property, including the assessed fair market value, is publicly announced by the court. The timing of the procedure depends on the workload of the court. It takes at least half a year, but it can, and typically does, take longer.

The auction proceedings consist of the auction itself (*Bietstunde*), a court decision upon the acceptance of the bid (*Zuschlag*) and a subsequent hearing regarding the distribution of the proceeds for the setup of the distribution plan and its execution (*Verteilungsverfahren*).

(iii) auction

The sale is effected by way of public auction which is accessible to everybody without prior appointment. In the public auction, bidders need to provide security by way of bank confirmed cheque in the amount of 10% of the assessed fair market value of the property.

The lowest bid (*geringstes Gebot*) is set at a level which will cover the costs of the court, and any prior rights which will not be exceeded by the sale. The property is sold to the bidder with the highest bid, unless the court rejects the acceptance of the bid due to legal restrictions. These restrictions may prevent the acceptance of a low bid at the first auction date.

The court has to deny the acceptance of a bid (*ex officio*) if the highest bid (including the value of the remaining charges, if any) is less than 50% of the assessed market value of the property. The remaining charges are the charges which are considered when assessing the amount of the lowest bid, and which would not be covered by the payment (e.g., a prior ranking easement on the property which remains unaffected). This rule aims to protect the owner from dissipation of the property.

Upon request of the chargee, the court refuses the acceptance of the bid if the bid is below 70% of the determined market value. Furthermore, the court denies the acceptance of a bid upon request of a subordinate creditor or debtor whose rights are impaired by the acceptance of the bid, and which undertakes to cover the damage arising by denial of acceptance of the bid.

If the bid was denied once, the limit will not apply in the later auction dates.

(iv) distribution of the proceeds

Subsequent to an acceptance of the highest bid, the court schedules a date regarding the distribution of the proceeds of the auction (*Verteilungstermin*) at which the court will establish the amount of proceeds, the enforcement costs, and put forward the distribution plan (*Teilungsplan*). By this date creditors may notify the court of their entitlement to the distribution proceeds. The distribution of enforcement proceeds is made in the following order:

- firstly, for the satisfaction of enforcement costs, and
- secondly, in payment of any charges in the order in which they rank.

(v) existence of several land charges

If the auction is pursued by a high ranking chargee, any other lower ranking encumbrances will cease to exist, even though the lower ranking creditor may not be satisfied.

If the auction is pursued by a lower ranking chargee, the higher ranking chargee will normally access the enforcement proceedings by way of submission of a filing to the court. Upon the accession of the higher ranking chargee, it takes over and leads the proceedings. After a successful auction, all encumbrances will cease to exist and the proceeds will be distributed according to the rank of the chargees. If the higher ranking chargee does not access the enforcement proceedings, the higher-ranking land charge remains in force and is not covered by the enforcement proceeds.

(c) Enforcement of a Security Assignment of Receivables

The enforcement of a security assignment of receivables is governed by the provisions agreed under the security assignment agreement.

Subsequent to the satisfaction of the general requirements, the creditor enforces the receivables by way of enforcement notice to the third-party debtor and its collection (*Einziehung*). Even if it has received an enforcement notice, the third-party debtor is only obliged to pay the creditor if payment is due. In addition, the debtor of the creditor may not act in a way that compromises the receivable.

(d) Enforcement of a Security Transfer

If the general requirements are met, the creditor may request the transfer of the asset which is subject to the security transfer agreement at its discretion. If the requirement of an enforceable instrument is not waived and the parties did not agree on a right of the creditor to take possession of the object, the bailiff (*Gerichtsvollzieher*) collects the asset and hands it over to the creditor.

(e) Enforcement of a Share Pledge

The creditor needs to fulfil the general requirements of enforcement. If the requirement of an enforceable instrument is not waived, it needs to be obtained and an attachment order (*Pfändungsbeschluss*) needs to be served on the company.

(i) enforcement proceedings

The enforcement of a pledge over shares in a limited liability company (*Gesellschaft mit beschränkter Haftung*) may take place by way of a court-ordered public auction, which is carried out by a bailiff or notary. However, the pledgor may agree to a private sale and transfer of the shares after the secured obligation has become due and payable. The court may not order its collection due to legal constraints.

The pledgee determines the rules of enforcement of the share pledge, including place and time of the auction. These details are announced publicly. The pledgor and impaired third parties have to be notified of the auction by the pledgee. Upon acceptance of a bid, the highest bidder becomes shareholder.

Unless otherwise agreed between the parties, the highest bidder has to pay the purchase price immediately in cash. In case of private sale and transfer, which is subject to the approval of lower ranking pledges (if any), the highest bidder becomes shareholder after the notarisation of the purchase and transfer agreement.

These rules apply to the enforcement of a pledge over shares in a stock company (*Aktiengesellschaft*) as well. In the case of listed shares, the pledgee may effect the sale by private contract, via a commercial broker (*Handelsmakler*) authorised to make such sales, or by any other person authorised to hold a public auction at the current market value. In the case of unlisted shares, the enforcement is only possible via a public auction.

(ii) distribution of proceeds

The enforcement proceeds minus the enforcement costs are paid to the pledgee. If the shares are pledged more than once, the enforcement proceeds are distributed to the pledgees in accordance with their rank of pledge. Lower ranking pledges in the shares expire with the acceptance of the bid or notarisation of the transfer agreement.

(f) Enforcement of an IP Pledge

The enforcement of an IP pledge agreement will be carried out in a similar way to a share pledge if the general requirements are satisfied. It may take place by way of a public auction or by way of private sale and transfer of the IP right. Depending on the right, the court may order its collection and transfer in lieu of payment (**Überweisung** *an Zahlungs Statt*) at the appraised value.

(g) Enforcement of an Account Pledge

Fulfilling the general requirements of an accessory security right, the enforcement of account pledges occurs by way of an enforcement notice to the bank and collection of the funds. The third-party debtor may only make payment to the creditor to the extent that its claim is secured. By receiving the enforcement notice, the bank may only pay the deposits to the creditor. In addition, the bank may not act in a way that compromises the receivable.

(h) Enforcement of Foreign Judgments

Foreign judgments of a court of an EU Member State can be recognised and enforced in Germany as follows:

(i) enforceable title in civil and commercial matters (Recast Brussels Regulation);

A judgment of a court of an EU Member State may be enforced in other EU Member States without substantive examination of the judgment, and without any declaration of enforceability being required in accordance with the Recast Brussels Regulation.

Foreign judgments of courts in the European Union that are enforceable under the domestic law of the respective EU Member State constitute titles under German law, and do not require an order for enforcement (*Vollstreckungsklausel*). Applications for refusal of enforcement are to be lodged with the regional courts in the district of the debtor's place of residence.

(ii) European Order for Uncontested Claims Procedure;

A simplified procedure in civil or commercial matters is available for uncontested claims (as defined in Article 3 of Regulation (EU) No. 805/2004) by way of a European enforcement order, which is to be issued on request by the court of origin. With the original of an issued certificate, as well as a copy of the court decision or settlement, and each German translation thereof (if applicable), the creditor is then able to directly pursue enforcement proceedings in the jurisdiction of the debtor's seat or residence.

(iii) enforcement on the basis of a European Order for Payment Procedure;

The European Order for Payment Procedure aims to simplify cross-border proceedings relating to civil or commercial law claims, and is recognised and enforced in EU Member States (with the exception of Denmark) without the need for an order for enforcement. The European Order for Payment Procedure is available for monetary claims only.

For the application for a European Order for Payment, the creditor files a standard form to the competent court as set out by the Regulation (EU) No. 1896/2006. The local court of Berlin-Wedding is responsible for applicants domiciled in Germany, for example. The application has to include the following information: name and addresses of the parties, the amount of the claim, interest, brief description of the matter in dispute (including basic facts of the case), description of evidence, reasons for competent jurisdiction, and description of cross-border character of the matter. If the debtor does not oppose within a month after the service of the payment order, the Issuing court declares the European Order for Payment enforceable.

(iv) enforcement of minor claims up to €5,000.00 (the European Small Claims Procedure).

For minor claims an additional simplified procedure is available, which supplements the European Order for Payment Procedure.

The European Small Claims Procedure for claims across the EU (except Denmark) in the field of civil and commercial law up to €5,000.00 is initiated by the filing of a standard form (Annex A to the Regulation (EU) No. 861/2007) to the competent court. In Germany, the competent court is regularly the local court as set out in Regulation (EU) No. 1215/2020 (EuGVVO). The European Small Claims Procedure is conducted in written form. A hearing will only take place if the court considers it as necessary or if one of the parties requests it. The court serves the standard form on the defendant who may object within thirty days. After the judgment is rendered it will be recognised and enforced without an order for enforcement.

The advantages of this procedure are primarily low costs and fast proceedings.

Enforcement Within the Insolvency Procedure

The aforementioned procedures do not apply in the case of insolvency procedures. All creditors, whether secured or unsecured, wishing to assert claims against the insolvent debtor, need to participate in insolvency proceedings.

(a) Insolvency Procedure

After a petition has been filed by a debtor or creditor, the insolvency proceedings are controlled by an insolvency court which monitors its due performance. The right to administer the debtor's business affairs and to dispose of its assets passes to an insolvency administrator (*Insolvenzverwalter*), unless the court orders debtor-in-possession proceedings (*Eigenverwaltung*).

German insolvency proceedings are collective proceedings. Creditors may generally no longer pursue their individual claims separately but can, instead, only enforce them in compliance with the restrictions of the German Insolvency Code (*Insolvenzordnung*). Therefore, secured creditors are generally not entitled to enforce any security interest outside the insolvency proceedings. The security interest constitutes a part of the insolvency estate and does not give a person a right for separation (*Aussonderungsrecht*). A person with a right for separation does not participate in the insolvency proceedings. Its asset (i.e., reservation of title) does not constitute part of the insolvency estate. The claim for separation must be enforced in the course of ordinary court proceedings against the insolvency administrator.

However, the secured creditors have certain preferential rights (*Absonderungsrechte*). Depending on the legal nature of the security interest, the entitlement to enforce security with preferential rights is either vested with the secured creditor or the insolvency administrator.

In general, the insolvency administrator has the sole right to realise any assets in his/her or the debtor's possession which are subject to preferential rights, as well as to collect any claims that are subject to security assignment agreements. With regards to land charges and share pledges, the creditor may pursue the enforcement in the same way as outside the insolvency proceedings. If it does not do so, the insolvency administrator has – in the event of a share pledge after prior notice – the right to initiate the enforcement.

(b) Distribution of Enforcement Proceeds

In cases where the enforcement right is vested with the insolvency administrator, the enforcement proceeds, minus certain contributory charges, are disbursed to the creditor holding a security interest in the relevant collateral up to an amount equal to its secured claims. The unencumbered assets of the debtor serve to satisfy the costs of the insolvency proceeding as claims against the estate (*Masseverbindlichkeiten*) first and then the preferred creditors of the insolvency estate (*Massegläubiger*). Typically, liabilities resulting from acts of the insolvency administrator, after commencement of formal insolvency proceedings, constitute liabilities of the insolvency estate. Thereafter, all other claims (insolvency claims (*Insolvenzforderungen*)), in particular claims of unsecured creditors, will be satisfied on a pro rata basis if and to the extent there is value remaining in the insolvency estate (*Insolvenzmasse*).

(c) Mean to Protect the Creditors

The insolvency administrator may void (*anfechten*) transactions, performances, or other acts that are deemed detrimental to the creditors, and which were effected prior to the commencement of formal insolvency proceedings during applicable periods. Generally, if transactions, performances, or other acts are successfully voided by the insolvency administrator, any amounts or other benefits derived from such challenged transaction, performance, or act will have to be returned to the insolvency estate, plus accrued interests.

Proofreeder's Note: In the case of lower-case roman numerals used in a series (romanettes), punctuation was deleted after the header set off by the romanette when it was not used in a sentence. Punctuation was not deleted in the romanette series below because it is in sentence form.

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GREECE

I. Enforcement and Realisation of Securities

Greek law provides for a variety of security rights. In lending transactions, lenders, and especially the financial institutions, prefer the securities *in rem,* which grant priority to them *vis-à-vis* lower ranked secured and unsecured creditors in case of an auction of the debtor's movable and immovable property. Personal guarantees, which are not rights *in rem*, are also very common instruments utilised in lending transactions. It involves third party guarantors (individuals or legal entities) towards whom the lender is entitled to assert its claim if a debtor does not fulfil its financial obligations. Lenders securing their claim with personal guarantees of third parties are not considered to be secured creditors, but they are entitled to initiate enforcement proceedings directly against the guarantors, even before they assert their claim towards the debtors.

The most preferable security package used by lenders in Greece consists of (a) mortgages and pre-notations of mortgages, and (b) pledges (of all types). Both categories are characterised as *special* securities (***ειδικά προνόμια***), i.e., they lead to preferential satisfaction of the secured creditors over lower ranked secured creditors (*generally preferred creditors*, ***γενικώς προνομιούχοι δανειστές***) and unsecured creditors in case of a successful auction. For the purposes of this note, the term *secured creditors* refers to the creditors who enjoy privilege in enforcement and insolvency proceedings because they established mortgages or pre-notations of mortgages or pledges on their debtor's movable or immovable assets.

1. Immovable Assets

1.1 Mortgage (*Υποθήκη*)

Mortgages are established on a debtor's immovable property and/or assets of high quality such as real estate, land plots, aircrafts, and ships. For the enforcement of a mortgage, the creditor must hold a title which arises from a specific legal provision, a final Greek court judgment, a foreign enforceable judgment, an enforceable arbitral award, or a declaration of the owner of the property to be encumbered with the mortgage filed with a Notary Public.

Usually, a debtor's immovable property is firstly encumbered by its lender with a pre-notation of mortgage (enforced by the competent court), before it is converted to a mortgage, as explained below. For the perfection of the relevant procedure, the creditor must register its title with the competent Land Registry or Cadastral Office; the day of the mortgage's registration determines the creditor's priority in case more mortgages are established on the same immovable property.

(a) **Realisation of Mortgage**

As a rule, the mortgage results in the preferential satisfaction of the secured creditors' claims from the auction proceeds *vis-à-vis* generally preferred creditors and unsecured creditors. This principle is reflected by the creditors' ranking on the classification table on the basis of which the distribution of the auction proceeds takes place. The classification of the secured claims depends on whether other creditors had also lodged their claims to be satisfied by the auction proceeds. For example, if secured creditors, generally preferred creditors and unsecured creditors lodged their claims, they would be repaid from 65%, 25%, and 10% of the auction proceeds respectively; where there is a co-existence of secured creditors and unsecured creditors, the former would be satisfied from 90% and the latter from 10% of the proceeds; and where multiple secured creditors lodge their claim and no other creditor exists, they would be satisfied according to the principle of priority, i.e., the earlier security will be satisfied over the later security, etc.

(b) **Pre-notation of Mortgage (***Προσημείωση Υποθήκης***)**

The pre-notation of mortgage can be viewed as a conditional mortgage on the satisfaction of the formal requirements provided by law. For the enforcement of the pre-notation, the creditor must file a petition with the competent County Court which will grant him/her the right to register a mortgage over the immovable assets of the debtor within ninety days after the creditor's claim has been awarded by a final judgment.

(c) **Realisation of Pre-Notation of Mortgage**

When the pre-notation is converted to a mortgage, the latter is deemed to have been registered as from the date of the pre-notation's registration. This secures the priority of the mortgagee over (a) subsequent securities established on the immovable property and (b) the debtor's generally preferred creditors.

Where the creditor's claim has not been awarded until the day of the drafting of the classification table by a final court judgment, then it will be placed in the classification table randomly (***τυχαίως***), i.e., in the place it would have been classified if a mortgage was registered. Nevertheless, the creditor will be satisfied by the auction proceeds only after the fulfilment of the requirements provided by law for the conversion of the pre-notation to a mortgage.

1.2 Movable Assets

(a) **Pledge (*Ενέχυρο*)**

- **Pledge Over Movable Assets (*Ενέχυρο σε κινητά πράγματα*)**

A pledge may be established on movable assets which the debtor has full, bare, or conditional ownership. The pledge is established by a notarial deed or a document having a certain date, and it requires the delivery of the pledged asset to the pledgee or, if otherwise agreed, to a third party. The perfection of the pledge gives the creditor the right to receive any benefits of the asset (e.g., dividends of shares), as well as the priority right of the pledgee in auction proceedings.

- **Pledge Over Rights and Receivables (*Ενέχυρο σε δικαιώματα και απαιτήσεις*)**

A pledge over rights and receivables is valid and enforceable if it is granted in writing, either in the form of a notarial deed or of a private, dated document. For a pledge over receivables, the debtor must also be notified of the pledge.

Where the creditor is a bank operating in Greece, the pledge is regulated under legislative decree 17.07-13.08.1923. This form of pledge allows for enforcement by collection of the pledged receivables independently of whether the secured claim has become due and payable or not, and benefits from protection if the debtor becomes insolvent.

Other forms of securities over movable assets are the chattel mortgage regulated under Art. 1 and 3 of Law 2844/2000, and the floating charge regulated under Art. 16 of the same law. The same formalities apply hereunder, i.e., an agreement must be made between the owner of the movable asset and the creditor in writing with a secure date and describe adequately the secured claim and the charged asset; additionally, for the establishment of these securities, the agreements must be registered with the competent Land Registry or Cadastral Office.

(b) Realisation of Securities Over Movable Assets

The pledge secures the creditor's claim the same way as the mortgage, i.e., they result in preferential satisfaction of the secured creditor from the auction proceeds over generally preferred and unsecured creditors. What was mentioned above as per the realisation of mortgage applies hereunder.

For monetary claims, the creditor is entitled to a sale via auction for the movable property on which the pledge is established by virtue of the competent county court judgment, which will grant him/her the right to proceed thereto.

II. Enforcement of Unsecured Debt

Greek law provides for a variety of options for unsecured creditors to enforce their claims against their debtors.

1. **Issuance of Payment Order (Enforceable Title) Against the Debtor or Potential Third-Party Guarantor (*Διαταγή Πληρωμής*)**

The purpose of payment orders is to effect the direct

and prompt enforcement of monetary claims which are provable by documentary evidence. The creditor must file a petition before the competent court and simultaneously submit sufficient documentary evidence proving his/her claim. A payment order is usually issued on the basis of an acknowledgment of a debt agreement concluded previously between a creditor and debtor regarding the claim. No hearing can take place without prior notice to the debtor. Upon issuance, the payment order is fully enforceable, and the creditor is entitled to commence the enforcement procedure or to continue the enforcement procedure initiated by another creditor, without prejudice to the suspension of enforceability declared after a debtor's petition. In this case, the creditor is entitled to freeze the debtor's assets (e.g., by imposing a conservative attachment on the debtor's bank accounts or establishing a pre-notation of mortgage on its immovable property).

2. Litigation (Enforceable Title) Against the Debtor or Potential Third-Party Guarantor

This procedure is more time-consuming compared to payment orders because the acquisition of a final, non-appealable court judgment, based on which the creditor will be entitled to commence the enforcement or to continue it, may take up to four years after the filing of the complaint with the court. Greek law also allows judgments of Courts of First Instance to be declared provisionally enforceable if particular conditions are met, e.g., in commercial disputes.

3. Interim Measures for the Freezing of Debtor's Assets

An unsecured creditor can file a petition for the issuance of a freezing order to ensure that the debtor won't sell its assets or withdraw money from its bank accounts. After the assets are frozen and once the creditor's claim against the creditor is awarded with a final judgment, the creditor will be able to initiate the enforcement proceeding so that the attachment of the assets or the collection of the amounts becomes possible.

4. Lodging of Claim After Auction Initiated by Another Creditor (*Αναγγελία απαίτησης*)

Even if a creditor's claim has not been awarded by any judgment, the creditor is entitled to lodge its claim upon the successful auction of the debtor's asset, which was initiated by another creditor (by virtue of an enforceable title). In this case, the creditor's claim will be satisfied from 10% of the auction proceeds.

III. Insolvency Proceedings

In October 2020, Greece adopted a new insolvency law that: (i) harmonised local proceedings with EU Directive 1023/2019; (ii) overhauled the out-of-court workout framework; (iii) provided for insolvency proceedings for consumers; and (iv) streamlined the bankruptcy process. The new legislative framework aims to prevent the bankruptcy of individuals and legal entities, and introduces pre-bankruptcy proceedings that are focused on the restructuring of a debtor's debt after taking into consideration the interests of creditors and the debtor. Bankruptcy should be followed by a second chance.

1. Out-of-Court Workout (*Εξωδικαστικός μηχανισμός ρύθμισης οφειλών*)

Both secured and unsecured creditors who are financial institutions, financial servicers, or Social Security Institutions may file an electronic application with a government platform to achieve an out-of-court settlement of debts with the debtor. The application may also be filed by the debtor itself. In this case, the debt settlement proposal must be signed by the majority of financial institutions and servicers and, where secured creditors exist, at least the 40% of them must also co-sign the debt settlement agreement (**DSA**) in order to be perfected.

The DSA may be terminated by any participating creditor if the debtor has not made payments of an aggregate amount equal either to three payment instalments or 3% of the total amount due under the DSA. Termination of the DSA will result in the reinstatement of the debtor's liabilities to the terminating creditor to the pre-settlement debt amount less any amount already paid under the settlement to that date.

2. Rehabilitation Process (*Προπτωχευτική Διαδικασία Εξυγίανσης*)

The rehabilitation process allows for debt restructuring with or without the transfer of a debtor's business. To initiate this process, a debtor must be in the position of a present, threatened, or prospective inability to fulfil its overdue financial obligations in a general manner. The insolvency law introduces two categories of creditors: (i) secured with special privilege, and (ii) all other creditors affected by the rehabilitation agreement. The agreement between creditors and debtor must be ratified by the court and signed by (a) the debtor, (b) more than 50% of all other affected creditors, and (c) more than 50% of secured creditors. Where the debtor is already not keeping up with payments, the rehabilitation agreement may be signed by the creditors only. The ratified agreement is binding for all creditors, provided they are not in a worse position when compared to liquidation and may regulate any of the debtor's assets or liabilities.

3. Bankruptcy Proceedings (*Πτώχευση*)

The application for declaration of bankruptcy may be filed before the competent court by any of the debtor's secured or unsecured creditors; where it is filed by creditors representing at least 30% of the total claims against the debtor, including secured creditors representing at least 20% of the secured creditors, the application may include a request for the sale of a debtor's business as an operational unit or the sale of the business's operational parts. The bankruptcy procedure results in the liquidation of the debtor's assets, by which secured and unsecured creditors are satisfied according to the general rules. Special privileges are provided for secured creditors (e.g., the suspension of individual enforcement actions against the debtor as a result of the submission of the application for declaration of bankruptcy, and the corresponding suspension as a result of the declaration of bankruptcy does not affect secured creditors, who may continue to enforce actions in order to satisfy their secured claims).

IV. Enforcement of a Debt *Cross-Border*

1. Court Judgment

Foreign judgments can be enforced in Greece irrespective of the country where they have been issued, either by virtue of Greek procedural provisions or of international/bilateral conventions and EU legal instruments in relation to judgments emanating from other EU Member States. A prerequisite for the enforcement of the foreign judgment is the recognition of its *res judicata*, which refers to the binding effects of a foreign judgment attributed basically by foreign law. These effects extend to Greece automatically when produced abroad and need not be declared through any special judicial proceeding. The automatic extension is recognised by any Greek court or authority (judicial, administrative, etc.), before which the interested party may bring its claim.

On the contrary, enforceability of a foreign judgment is not always regarded as *ipso jure* extending to Greece; a distinction must be made between judgments issued in EU Member States and those issued in third countries.

(a) *Ipso Jure* Enforceability

According to the Recast Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a judgment given in an EU Member State which is enforceable in that country shall be enforceable in the other EU Member States without any declaration of enforceability being required. Hence, the procedural prerequisites for the enforcement of a Greek judgment apply hereunder as well.

(b) Exequatur Procedure

For judgments issued in countries outside the EU, where there is no international or bilateral convention in force, an exequatur *ex parte* proceeding in Greece is required. A creditor must file a petition before the competent court seeking the declaration of enforceability of the judgment. The request for enforcement is not subject to time limitations. The declaration of enforceability requirements according to Greek law are the following:

- the enforceability of the foreign judgment in the third country of origin that does not violate Greek public order and principles of morality
- the jurisdiction of the third country court that issued the judgment, which is going to be ascertained by the Greek court according to the mirror-image theory, i.e., it must establish that the third country court had jurisdiction assuming Greek law would be applicable
- no violation of the right of defence of the party against which the judgment is requested to be declared enforceable; important in cases of default judgments, where the Greek court must establish that the defaulting party was duly summoned
- no issuance of irreconcilable judgment by a Greek court between the same parties regarding the same issue having the force of *res judicata*

After the declaration of enforceability, the creditor is entitled to commence the enforcement proceedings.

Creditors whose claim has been awarded by a judgment issued by a third country court are also entitled to lodge it after the successful auction of the debtor's asset, in order to be satisfied from 10% of proceeds; this procedure is irrelevant for the declaration of enforceability of the foreign judgment in Greece.

2. European Order for Payment Procedure

A European order for payment which has become enforceable in the EU country of origin is recognised and enforced in Greece, without the need for a declaration of enforceability, and without any possibility of opposing its recognition according to Regulation (EU) 1896/2006.

3. European Order for Uncontested Claims Procedure

A judgment which has been certified as a European Enforcement Order in the EU Member State of origin shall be recognised and enforced in Greece without the need for a declaration of enforceability, and without any possibility of opposing its recognition.

4. European Small Claims Procedure

The judgment issued for claims of up to €5,000, that is based on the standard form (Annex A of the regulation), is recognised and enforceable in Greece without a separate declaration of enforceability being required.

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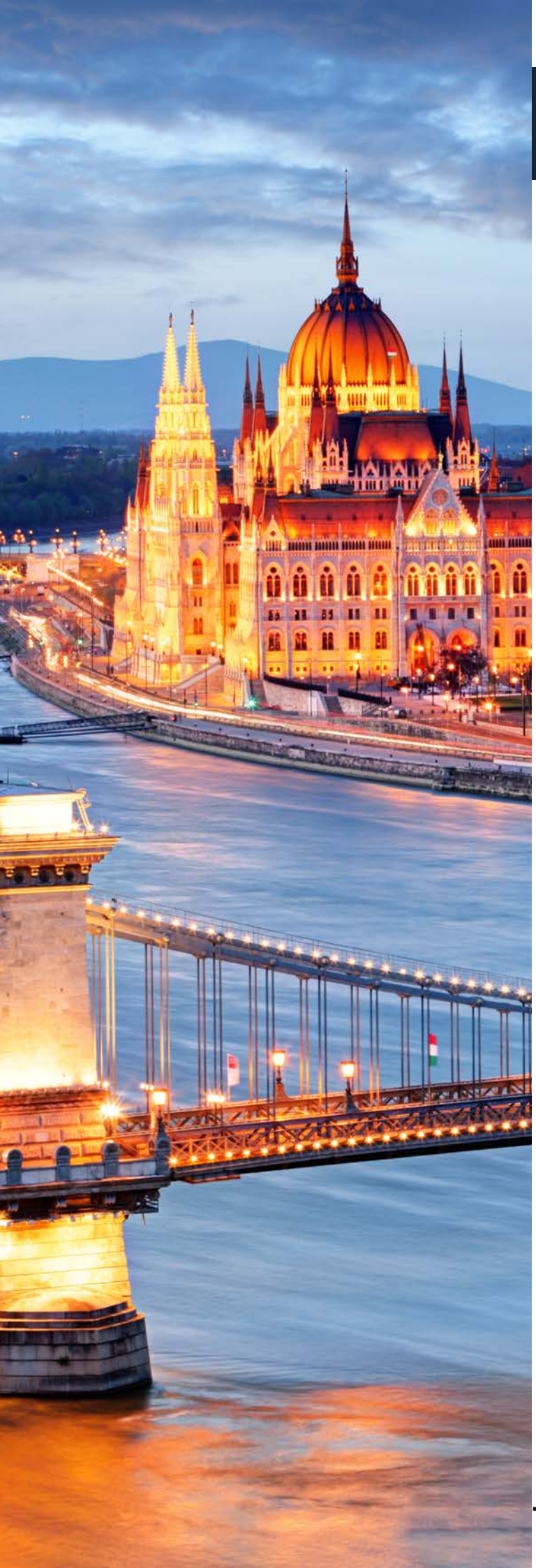

HUNGARY

Under Hungarian law, enforcement of financial claims usually occurs by way of court proceedings, including non-contentious proceedings. Generally, the secured creditors enjoy priority in the category of claims in court enforcement procedures and insolvency proceedings.

Security Interests

The category of in rem and personal security interests are regulated in Act V of 2013 on the Civil Code (the Civil Code), on the basis of which the following types of security interests are available: (i) real estate mortgages, (ii) movables pledges, (iii) account pledges, (iv) receivables pledges, (v) quota/share pledges, (vi) pledges on assets identified by detailed description, (vii) security deposits, (viii) surety, and (ix) guarantees.

Additionally, in terms of claims secured by a real estate mortgage, a mortgage may be established over real estate in favour of a financial institution by way of pledging the property to secure a specific sum, regardless of the secured claim (a Stand-alone Mortgage).

A specific prohibition applies to security agreements with a fiduciary element. Any clause in which a consumer undertakes to transfer ownership, other rights or claims for the purpose of security of a pecuniary claim, or for the right to purchase, shall be null and void.

Enforcement of Security Interests

The provisions of the Civil Code and Act No. LIII of 1994 on judicial enforcement (the Enforcement Act) shall apply to the enforcement of security interests.

Generally, the pledgee's right to satisfaction shall arise in the case of a default when the claim secured by a pledge falls due. Additionally, the right to satisfaction of the holder of the Stand-alone Mortgage shall open, unless otherwise agreed in the security document, if the stand-alone mortgage is cancelled, following the notice period.

The pledgee shall have the option to exercise his/her right to satisfaction, either by way of court enforcement or, against consumers subject to the restrictions laid down in the Civil Code, by way of out-of-court enforcement. However, a pledge on payment account balances may be enforced by way of court enforcement.

Below, we describe the general rules of court enforcement and out-of-court enforcement procedures, but depending on the type of security interests, the specific rules applicable to the enforcement may vary.

(a) Court Enforcement Procedure

Exercising the right to satisfaction by way of court enforcement requires an enforceable document in connection with the claim. Enforcement orders, and enforcement clauses affixed on the document, can be issued by a competent court or the notary public upon application filed by the creditor.

An enforceable document may be issued if the resolution to be enforced: (i) contains an obligation, (ii) is final and binding or its interim execution has been ordered, and (iii) the deadline for performance has expired. If specific conditions are met, the competent court shall issue an enforcement order, and the notary public shall affix an enforcement clause on a notarial deed. The notary public shall affix an enforcement clause on the notarised security agreement if the deadline for performance has expired.

The court bailiff starts enforcement based on the enforceable documents. The court bailiff seizes the security asset by registering the enforcement right in the relevant register, and arranges for the sale process of the asset of the debtor. The court bailiff also requests the relevant financial institution for the seizure of the bank accounts of the debtor. The court bailiff distributes the enforcement proceeds between the secured creditors to satisfy their claims.

(b) Out-of-Court Enforcement Procedure

The right to satisfaction by means other than by court enforcement shall be exercised at the pledgee's discretion: (i) through the sale of the pledged property by the pledgee, (ii) through the acquisition of ownership of the pledged property by the pledgee, or (iii) through the enforcement of a pledged right or claim. The pledgee is entitled to switch to a different mode of enforcement of the right to satisfaction.

The Sale of the Pledged Property by the Pledgee

At least ten days before the sale, the pledgee shall send a prior notice in writing to the relevant persons (e.g., the pledgor and other pledgees, etc.) informing them of his/her intention to sell the pledged property. No prior notice is needed if: (i) the pledged property is perishable, (ii) its value is likely to diminish considerably upon any delay, or (iii) it is a thing or right traded on the stock exchange. Following the effective date of the right to satisfaction, the pledgee shall have the right to take possession of the pledged property for the purpose of sale. Failure to take possession shall have no bearing on carrying out the sale of the pledged property. The pledgee is entitled to transfer the ownership of the pledged property instead and on behalf of the owner of such property. The pledged property may be sold as is, or after commercially justified processing or conversion, by way of a private or public sale. The pledgee may acquire ownership of the pledged property he/she is selling in the case of public sale, or if the pledged property is traded on the stock exchange. After the sale of the pledged property, the pledgee shall prepare a financial statement in writing. Then, the pledgee shall, without delay, distribute the purchase price – plus the proceeds collected, minus the necessary costs – among the pledgees, and pay the remaining amount to the pledgor.

The Acquisition of Ownership of the Pledged Property by the Pledgee

First, any agreement concluded for transferring ownership of the pledged property to the pledgee at the time of opening of the right to satisfaction shall be null and void. Following the effective date of his/her right to satisfaction, the pledgee may offer the pledgor ownership of the pledged property in satisfaction of the secured claim in whole or in part. If the pledgor accepts in writing the pledgee's offer within twenty days from the date of receipt, and the other relevant persons (e.g., the pledgor and other pledgees, etc.) do not object in writing to the pledgee's offer within twenty days from the date of receipt, the pledgee and the pledgor shall enter into a sale and purchase agreement. Upon the transfer of ownership, the claim secured by a pledge shall cease to exist in whole or in part, in accordance with the terms of the offer.

The Enforcement of a Pledged Right or Claim

If the object of a pledge is a claim, the pledgee may give performance instructions to the pledgor and shall be permitted, after the date of maturity of the claim, to enforce the claim in place of the original pledgee against the pledgor. This is also applicable in case the pledge pertains to a right.

Enforcement of Unsecured Claims

In case of enforcement of an unsecured claim, the following options are available:

- Payment Order Procedure: The creditor can file an application for an issue of an order for payment. The order for payment procedure is a simplified non-judicial civil procedure for the collection of pecuniary claims that fall within the competence of a notary public. If the order of payment is issued, the defendant may file a statement of opposition and, in this case, the payment order procedure turns into a court procedure.
- Litigation or Arbitration Procedure: The creditor can bring the case before a court to start a civil procedure or initiate arbitration procedures (where there is an arbitration clause or arbitration agreement). If these procedures prove successful, the creditor initiates an enforcement procedure.

- Liquidation Proceeding: The creditor can initiate a liquidation proceeding against the debtor (if the debtor is a business entity). Liquidation proceedings aim at the dissolution of an insolvent debtor and the distribution of its assets to its creditors.

Liquidation proceedings have an impact on security and enforcement. As soon as liquidation proceedings are commenced, all pending procedures for the enforcement of security interests are stayed, and the creditors can only satisfy their claims within the liquidation proceedings. Unsuccessful enforcement procedures also provide a basis to initiate liquidation proceedings.

Recognition and Enforcement of Foreign Judgments

By virtue of its membership in the EU, the procedure for the enforcement of EU judgments in Hungary is subject to a standardised and simplified procedure, which is governed by Council Regulation 1215/2012 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters. As a general rule, a judgment rendered in a member state of the EU is recognised in any other EU Member State without any additional special procedure.

With respect to judgments of foreign/non-EU Member States, the provisions of Act No. XXVIII of 2017 on private international law (the Private International Law Act) and the Enforcement Act apply.

Under the Enforcement Act, a foreign judgment can be enforced in Hungary on the basis of law, international convention, or reciprocity. This section concerns enforcement procedures on the basis of law. Generally, a foreign judgment must satisfy specific formal requirements in order to be recognised and enforceable in Hungary. The enforcement of a foreign judgment is subject to an enforcement order.

Under the Private International Law Act, a foreign judgment shall be recognised in Hungary, provided that:

- the jurisdiction of the foreign court or authority is legitimate under the rules of Hungarian private international law,
- the decision is considered as final and binding, or has an equivalent effect according to the law of the foreign state in which the decision was rendered, and
- none of the legal grounds for rejection prevail.

Recognition of a foreign judgment shall be rejected on the following grounds:

- the recognition would violate Hungarian public policy,
- the person against whom the decision had been made was not participating in the proceedings, either in person or by a proxy, because the summons, statement of claim, or other document on the basis of which the proceeding was initiated was not served at his/her place of residence or habitual residence properly, or in time sufficient to properly prepare a defence,
- a proceeding based on the same facts and concerning the same right between the same parties has been already brought in Hungarian courts before bringing the foreign procedure,
- a Hungarian court has already rendered a final and binding decision on the merits in a matter based on the same facts and concerning the same right between the same parties, or
- a court of a foreign state, other than the state of the court adopting the judgment, has previously rendered a final and binding decision on the merits in a matter based on the same facts and concerning the same right between the same parties that is found in compliance with the requirements for recognition in Hungary.

Additionally, the recognition of judgments in actions relating to property is subject to reciprocity between Hungary and the state of the court which adopted the judgment. In the absence of reciprocity, a judgment may still be recognised if: (i) the Hungarian courts had no jurisdiction in the matter, or (ii) jurisdiction of the foreign court which adopted the judgment was based on an agreement of the parties that was in compliance with Hungarian law.

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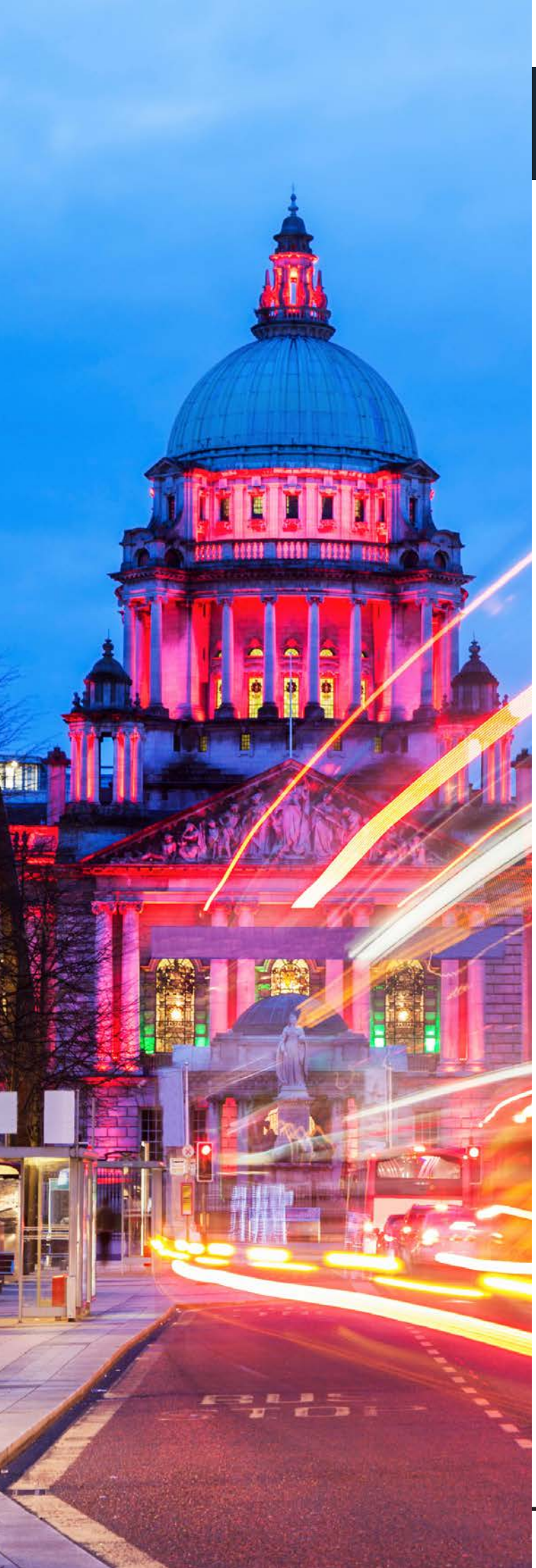

IRELAND

Enforcement of Security

In most instances, it is not necessary under Irish law for a secured creditor to initiate legal proceedings (i.e., go to court) before enforcement, provided it is clear that an event of default has occurred under the terms of the security instrument which entitles the secured creditor to take immediate enforcement action. The most common methods of enforcing security under Irish law are: (i) the appointment of a receiver, and (ii) the power of sale conferred on mortgagees.

Appointment of Receiver

Receivership is a contractual remedy for the enforcement of security, and court approval is usually not required. Receivership allows a chargeholder to appoint a receiver to quickly take control of secured assets in order to realise them for the benefit of the chargeholder.

For the enforcement of all forms of fixed charge, either a receiver is appointed pursuant to the terms of the charge deed, or the chargeholder becomes a mortgagee in possession of the charged asset. Where the receiver is appointed on foot of a floating charge, this charge will crystallise and become affixed to the assets/undertakings over which it was created and previously floated.

The relevant security document will detail the circumstances in which the security holder can appoint a receiver. The powers conferred on a receiver are derived from statute and the requisite security document. A receiver's main function is to take control of the secured assets, to sell such assets, and to apply the proceeds of sale towards discharging the debt owed to the security holder.

Broadly speaking, there are two different types of receiver:

- a fixed charge receiver, and
- a receiver and manager.

If a loan is charged on a specific asset, a fixed charge receiver will be appointed in respect of that specific asset alone. A fixed charge receiver is typically appointed under a legal mortgage in relation to a particular property. The directors of the company will cease to have any role with respect to assets over which a receiver has been appointed.

The security may comprise a fixed and floating charge, and the terms of the security document may provide for the appointment of a receiver manager that may allow the receiver to continue to operate the business (to the exclusion of the directors) during the course of the receivership, with a view to maximising the value of the charged assets. It would be common in such circumstances for the debenture, or other security document, to confer a range of specific powers on the receiver, such as the power to carry on business, to borrow, to sell, and to compromise. It is therefore advisable for a chargeholder to ensure that the security

document provides that a receiver is granted these powers.

In appointing any receiver, it is extremely important to ensure that all formalities for the appointment are strictly complied with, as otherwise the appointment may be held to be invalid. The mortgage debenture usually specifies: (i) the grounds upon which the debenture holder is entitled to appoint a receiver, and (ii) the formalities which the debenture holder must follow in making such an appointment. Typically, the right of the debenture holder to appoint a receiver will arise after the principal money secured becomes payable. Where this ground is relied upon, a formal demand for repayment is usually required to be served on the debtor in the manner prescribed by the debenture. Irish courts have held that sufficient time must be given to the debtor to make repayment on foot of any demand before any enforcement is commenced. The vast majority of cases where an appointment is held to be invalid arise as a result of a defect in the appointment process, whether due to a demand not being validly served on the debtor, the debtor being given insufficient time to pay, or because the deed of appointment is not executed in accordance with the requirements of the relevant security document.

If a receiver is appointed on foot of a fixed charge, he/she must apply the proceeds to the payment of this debt, plus the cost of receivership, and hand any surplus funds back to the company. However, it should be noted that the receiver must consider any prior chargeholders in carrying out his/her duties, as a receiver would have to pay indebtedness owing to a third party holding prior-ranking security, notwithstanding that he/she was appointed by a different creditor of the company. Similarly, if the receiver is appointed on foot of a floating (rather than fixed) charge, statute provides that certain preferential creditors (notably employees and the Revenue Commissioners) must be paid what they are owed first.

In Ireland, pre-pack receiverships (which are very rare) involve the sale of all or part of a business of an insolvent company, which is negotiated before enforcement and completed shortly after the receiver has been appointed. Unlike the position with respect to pre-pack administration under UK law, there is no formal procedure under Irish law for sales by means of a *pre-pack receivership*. A pre-pack receivership option is commercially attractive, as it overcomes the negative publicity associated with an insolvency procedure, and it can be an effective means to preserve the goodwill of the business.

A receiver has an obligation to obtain the best price practicable for the secured assets so a receiver in a pre-pack will require a significant level of comfort as to the market value of the assets which he/she will be asked to sell within hours/days of his/her appointment. Furthermore, there is a risk that the debtor or a third-party creditor may allege that the receiver could have received a better price if the assets had been sold through a marketing process. A prudent receiver will therefore require evidence of market testing and an independent valuation. The extent of any such market testing exercise will be case specific.

Mortgagee in Possession

A legal mortgagee has a right to take possession of a property secured in its favour and to sell it. The power of a security holder to go into possession and sell derives from statute, and also from the security document. A security document would typically include a clause providing that all of the powers conferred upon a receiver under the security document may be exercised by the security holder directly.

As with the duty of a receiver, if a security holder moves to sell an asset in this manner he/she is under a duty to obtain the best price reasonably available at the time of sale. Normally, a security holder would obtain professional advice from an estate agent or valuer as to: (i) the method and timing of sale, (ii) the price to be obtained, and (iii) any steps that should be taken prior to marketing the property.

In entering into possession, the mortgagee will take on liabilities in respect of the property which, depending on the nature of the property, could be significant (e.g., liabilities under environmental and occupier's liability legislation). In practice, due to the risk of incurring such liabilities, most mortgagees seek to avoid taking possession of a property if possible and, instead, appoint a receiver.

Examinership

The main statutory procedure available in Ireland to protect a company from enforcement by its creditors is examinership. Examinership is a court protection procedure available to a company that is insolvent, or likely to be insolvent, and which can demonstrate that, provided that its debts are restructured and/or it can attract new investment, it has an undertaking that is capable of surviving as a going concern. Examinership is an insolvency procedure for the purposes of Regulation (EU) 2015/848 (the **Recast Insolvency Regulation**) and so would automatically be recognised in every EU Member State (except Denmark). The legislation providing for examinership was initially based on Chapter 11, and has many similar features, albeit there are also material differences.

Examinership is available where a company is incorporated under the laws of Ireland, has its centre of main interest in Ireland or another jurisdiction that is not a member of the EU (other than Denmark) and is, or is likely to be, unable to pay its debts. An examiner (invariably an insolvency professional) may be appointed on a petition to the High Court under Section 509 (Power of court to appoint examiner) of the Companies Act 2014 (the **Companies Act**). It should be noted that where the relevant company is treated as a *small company* by virtue of Section 280 of the Companies Act, the

petition may instead be presented to the Circuit Court.

A court will refuse to hear a petition for examinership in relation to a company in respect of which a receiver has been appointed for a period of three continuous days prior to the date of presentation of the petition. A receiver will be removed if a petition for the appointment of an examiner is presented within three days of his/her appointment.

To avail of the court's protection for the company, a petition must be filed and presented to the court by either the company itself, its directors, any shareholder holding more than 10% of the equity, or any creditor. The company will have protection from its creditors (including secured creditors) for a period of up to one hundred days whilst the examiner attempts to seek fresh investment for the company and formulate a scheme of arrangement.

Once the examiner has formulated their proposals, they must convene meetings of each class of members and creditors whose interests would be impaired if the proposals were implemented in order to afford such parties the opportunity to consider the proposals and whether to vote to accept or reject them. The proposals must be confirmed by the court in order to become effective and the court shall not confirm such proposals unless, amongst other things:

- a majority in number of creditors whose interests or claims would be impaired by implementation of the proposals, representing a majority in value of the claims that would be impaired by implementation of the proposals, have voted to accept the proposals; or
- if the above requirement is not satisfied, then a majority of the classes of creditors whose interests would be impaired by the scheme of arrangement have voted to accept them, provided that at least one of those creditor classes is a class of secured creditors or is senior to the class of ordinary unsecured creditors; or
- if the above requirement is not satisfied, at least one class of creditors whose interests or claims would be impaired by the proposals, other than a class which would not receive any payment or keep any interest in a liquidation, has voted to accept them; and
- no dissenting creditor would be worse off if the proposals are confirmed and implemented than such a creditor would be if the normal ranking of liquidation priorities were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the proposals were not confirmed.

Once confirmed by the court, the scheme of arrangement becomes binding on the company and all creditors whose rights are impaired by the scheme of arrangement and who received notice of the meetings convened for the purposes of voting on the proposals.

A scheme of arrangement will usually provide for: (i) the investment of funds from an investor to fund payments to impaired creditors, as well as the costs of the examiner, (ii) the writing down of creditors' claims, and (iii) the transfer of the shareholdings to the investor(s). The court will not approve a scheme of arrangement unless it is satisfied that it is not unfairly prejudicial to any creditor (which is generally taken to mean that a creditor cannot receive less under the proposed scheme than it would have received in a receivership or liquidation). Once the examiner has sought an order from the court confirming the scheme of arrangement, the period of court protection can be extended to allow the court time to consider the proposals and decide whether to confirm them. However, in no circumstances can the period of protection extend for more than twelve months from the date of the presentation of the petition.

The management/board of directors of a company in examinership will remain in place during the period of the moratorium unless the examiner applies to court for an order to transfer those powers to him/her.

The effect of the appointment of an examiner is to suspend the rights of a secured creditor for the protection period, but the appointment does not of itself affect the security or the rights of the secured creditor. However, it should be noted that under the Recast Insolvency Regulation, the moratorium is ineffective in relation to rights *in rem* by way of security in assets situated outside of Ireland.

An examiner of a company may dispose of assets that are subject to security provided that the net proceeds of the disposal of such secured assets (and, where those proceeds are less than such amount as may be determined by the court to be the net amount which would be realised on a sale of the property or goods in the open market by a willing vendor, the sum required to make up the deficiency) must be applied towards discharging the sums secured by that security.

Where an examiner is appointed to a company, the beneficiary of a guarantee in respect of the obligations of that company is prohibited from taking steps to enforce during the period of court protection. However, post-examinership the guarantee will be enforceable provided the guarantor has been offered the right to attend the creditors meeting and vote in the place of the creditor.

Small Companies Administrative Rescue Process (SCARP)

SCARP is a rescue process for insolvent companies that was introduced by The Companies (Rescue Process for Small and Micro Companies) Act 2021 and is available to small and medium sized companies with: (i) no more than fifty employees, (ii) a turnover not exceeding €12,000,000, and (iii) a balance sheet not exceeding €6,000,000. A company is ineligible for SCARP if they are in liquidation, have appointed an examiner in the last five years, or if a receiver has been appointed over its assets or undertaking.

The process is initiated by the way of a resolution of the directors to appoint an insolvency practitioner known as a process advisor (the **Process Advisor**) who manages the rescue process. The Process Advisor must prepare a rescue plan (the **Rescue Plan**) for the company. The Rescue Plan generally involves a write-down of the liabilities of the relevant company.

The SCARP requires a resolution in favour of the Rescue Plan to be approved by 60% of the company's creditors in number, representing a majority in value of at least one class of impaired creditors. A creditor may file an objection in court to the Rescue Plan if it unfairly prejudices its interests, is unfair or inequitable, or was put forward for improper purpose. Where an objection is raised, the Process Advisor must seek court approval of the Rescue Plan. If no objection is filed within twenty-one days, the Rescue Plan becomes binding on all members creditors and directors. The overall timeline for SCARP is seventy days.

Unlike examinership, no automatic court protection is granted to companies entering SCARP. However, the Process Advisor, company, or its directors may apply to court for a stay on proceedings or to restrain further proceedings against the company for a certain period, though such court applications are uncommon in practice.

Enforcing a Personal Guarantee

If there is likely to be a shortfall between the realisations from the secured assets and the debt level, the creditor may also wish to enforce any personal guarantees given with respect to the loan.

In seeking to recover sums under a personal guarantee, unless the personal guarantee is supported by security, the lender must:

- secure a judgment on foot of the terms of the personal guarantee, and
- enforce that judgment against the assets of the guarantor (*see below* for a breakdown of execution proceedings in Ireland).

There are two options available to obtain judgment against the debtor, namely:

- the traditional debt collection procedure in either the Circuit Court (for claims up to €75,000) of the High Court (for claims over €75,000), and
- if the lender is owed a liquidated sum in excess of €1,000,000, the lender may avail of the fast track procedure available in the Commercial Court. The Commercial Court is a division of the High Court that specialises in commercial matters. The court operates a strict case management system to ensure cases are dealt with as expeditiously as possible.

Enforcement of Unsecured Debt

Contractual/Legal *Self-Help* Remedies

Depending on the particular debtor/creditor relationship, an unsecured creditor can also avail of certain contractual or legal self-help remedies under Irish law such as:

- (in the case of trade creditors) the operation of a retention of title clause with respect to any asset held by the debtor that have not been fully paid for and are clearly identifiable,
- forfeiting a lease or seizing the debtor's goods in lieu of rent,
- setting-off the debt owed against monies owed by the creditor to the debtor, or
- claiming a lien on the debtor's assets.

Obtaining Judgment/Execution Proceedings

An unsecured creditor can take court action to recover a debt. Once judgment is obtained, it means that there is an order by the court stating that the debtor is liable to the creditor. A judgment by itself does not always prompt a debtor to pay, and the creditor might then have to consider various enforcement options.

If the judgment is served on the debtor, and no payment is received, then the following main enforcement options are available:

- **Seizure and Sale of Goods:** The judgment can be sent to the sheriff/county registrar who has the power to seize the debtor's moveable goods (such as vehicles, for example) up to the value of the judgment.
- **Registration of Judgment:** This involves the registration of the judgment in the Register of Judgments in the Central Office of the Irish High Court. The Register is available for inspection by any interested party, and entries in the Register are often published in trade journals, such

as the *Stubbs Gazette*. The consequence of this is that until the debt is repaid, the judgment will show up on any judgment search conducted against the debtor (standard, for example, in conveyances of property) and may create negative publicity for the debtor and/or damage its credit rating.

- **Examination of Debtor:** The debtor can be examined as to its means in the District Court and an Instalment Order can be made against it. If the application is successful, the debtor must pay a certain amount each week/month as decided by the court.
- **Judgment Mortgage:** If the debtor has property, it may be possible to register a judgment mortgage on that property. A judgment mortgage involves the registration of a judgment for a debt against the assets of a person against whom the judgment has been received. A judgment mortgage does not have priority over existing security irrespective of whether the debt existed prior to the secured debt, however, it will have priority over subsequent security.
- **Well-Charging Order and Order for Sale:** Following registration of a judgment mortgage, the judgment creditor can initiate the process of realising the property's value by applying for a well-charging order and order for sale. If the sale is ordered, it will occur by way of public auction under the supervision of an independent auctioneer and the court examiner. If the property is sold but the realisations are insufficient to repay any prior charges and leave a surplus, the unsecured lender is unlikely to recover the amount of the judgment debt.
- **Attachment of Earnings/Third-Party Order:** It may also be possible to seek and obtain an attachment of earnings order or a third-party order (e.g., a garnishee order). A garnishee order is a court order which directs a third party (who owes money to a debtor) to pay those sums directly to the creditor. Generally, it is used only in cases where there are no goods to be seized to satisfy the judgment.
- **Receiver by Way of Equitable Execution:** It is also possible to apply to the court to have a receiver appointed over specific assets of a judgment debtor. This is similar to the appointment of a receiver under a security deed. These are designed to allow a judgment debtor to obtain control over specific assets of the judgment debtor in order to satisfy the judgment debt. Again, however, it will not affect any pre-existing security that has been given over the asset.

Recognition of Foreign Judgments

For judgments in civil proceedings (not with respect to insurance, consumer contracts, property, or intellectual property matters) issued in an EU Member State after 10 January 2015, the Recast Brussels Regulation provides that such judgments shall be recognised automatically, and enforceable in Ireland without any special procedure being required (such as a declaration of enforceability).

Pursuant to the Brussels I Regulation, for proceedings issued in an EU Member State before 10 January 2015, and the Lugano Convention for proceedings issued in certain EFTA states (Iceland, Norway, and Switzerland, but not Liechtenstein), a party must apply to the Master of the High Court in order to obtain a declaration of enforceability so that the judgement will be recognised.

Both the Brussels Regulations and the Lugano Convention provide that a judgment shall be recognised (provided that the necessary proofs are in order) without any re-trial or examination of the case subject to the following qualifications:

(i) if such recognition is manifestly contrary to public policy in the EU Member State addressed;

(ii) where the judgment was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings, or with an equivalent document in sufficient time and in such a way as to enable it to arrange for his/her defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for it to do so;

(iii) if the judgment is irreconcilable with a judgment given between the same parties in the EU Member State addressed; and

(iv) if the judgment is irreconcilable with an earlier judgment given in another EU Member State, or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the EU Member State addressed.

In the case of uncontested claims, a judgment of the courts of the countries referred to above would generally be recognised and enforced pursuant to the European Order for Uncontested Claims Procedure. The European Enforcement Order Procedure provides that where the appropriate European Order for Uncontested Claims Procedure certificate (specifying details concerning the judgment itself) has been issued, it can be enforced in the member state of enforcement without any intermediate examination of the judgment in the member state of enforcement. Cross-border enforcement of judgments obtained in defended cases are only enforceable pursuant to the Brussels Regulations.

Common law enforcement principles apply for the recognition and enforcement of judgments where the originating countries are neither EU nor EFTA member states. A party must make an application to the Irish High Court for the relevant judgement to be recognised. Such judgments will generally be enforced by the courts of Ireland if the following general requirements are met:

(i) the foreign judgment was for a definite sum,

(ii) the court where the judgment was rendered had jurisdiction,

(iii) the foreign judgment must be final and conclusive, and the decree must be final and unalterable in the court which pronounces it,

(iv) the judgment was not obtained by fraud,

(v) the procedural rules which apply where the judgment was obtained were followed,

(vi) the judgment was not contrary to public policy (natural and constitutional justice),

(vii) the judgment was not inconsistent with an Irish judgment on the same matter,

(viii) the Irish Court had jurisdiction to enforce the judgment, and

(ix) the application to enforce the judgment was brought within the relevant limitation period.

The amount due and payable by a company under an order of the Irish courts may be expressed in a currency other than euro when issued out of the Central Office of the Irish High Court by reference to the official rate of exchange prevailing on the date of issue of the order. However, in the event of a winding up of a company, amounts claimed against a company in a currency other than euro (the **Foreign Currency**) would, to the extent properly payable in the winding up, be paid either in the Foreign Currency or in the euro equivalent of the Foreign Currency converted at the rate of exchange pertaining on the date of the commencement of the winding up.

The Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises) Regulations 2015 (the SME Regulations)

The SME Regulations apply to credit provided to micro, small, and medium-sized enterprises, which can include natural persons acting within the course of a business, trade, or profession. The SME Regulations apply to an enterprise in Ireland which has:

- fewer than 250 employees,
- an annual turnover not exceeding €50 million, and/or
- an annual balance sheet not exceeding €43 million.

Prior to enforcing security, financial institutions need to be mindful of the SME Regulations, which sets out certain obligations which a regulated entity, such as banks, have to comply with when dealing with a borrower in financial difficulties. The majority of these obligations deal with arrears problems and require regulated lenders to have policies and procedures in place for dealing with SME borrowers in financial difficulties/arrears. Regulated entities should inform a borrower when it is in arrears for over fifteen working days, give it reasonable time to resolve an arrears problem, and assist the borrower in resolving the problem. This could be dealt with by a bank presenting certain options, which have to be accepted within a reasonable period. A regulated entity is under an obligation to ensure that all arrears are dealt with in accordance with its internal policies and procedures on same, and to advise a borrower on the possible impact on other accounts held by that borrower.

DIP Financing

DIP financing arrangements differ depending on the insolvency process with no uniform arrangement applicable equally to all forms of insolvency proceedings. Both liquidators and receivers are entitled to borrow money on the security of the property of the company. Such borrowings are expenses of the liquidation or receivership, and therefore rank ahead of even the fees of the liquidator or receiver. Irish company law currently only allows for partial priority status for DIP finance in an examinership (i.e., monies advanced to the company in examinership which is certified by the examiner ranks behind fixed security but ahead of floating security), and this can make it more difficult to raise the necessary cashflow funding during the period of the moratorium.

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ITALY

In the event that the debtor fails to pay its debts, the bilateral relationship between creditor and debtor becomes a trilateral relationship (creditor, debtor, and judicial authorities). This is due to the fact that the creditor must seek a judicial order/follow a judicial procedure to enforce its rights.

Any action of a creditor to collect its secured or unsecured credit must be filed before the court, which will then issue a title empowering levy execution in favour of the creditor. Even if such title is already in possession of the creditor (for instance cheques, bills of exchange, authenticated accounting entries, or judgments), the judicial system would still be involved to regulate the repayment of the debt to the creditor by means of the sale of the debtor's goods.

An exception to the above principle can be found in so called *personal securities*, such as sureties and comfort letters. In such cases, if the debtor fails to pay, the creditor can require that the third-party guarantor fulfil the debtor's obligations. However, the debtor can stop payment/fulfilment of the obligations by the guarantor by filing a claim to that effect before the court. In this case, the creditor will be required to go through a legal process to enforce its rights.

Out-of-Court Enforcement of Securities

(a) Pledge in Possession

Under Italian law, a pledge provides the secured creditor with the right to take possession of the goods secured in its favour.

The pledge is enforceable with priority against third parties when:

(i) the creditor has maintained the possession of the pledged asset, and

(ii) the pledge has been created by means of a written instrument bearing a date certain at law (*data certa*), giving a detailed description of the secured obligation, as well as of the relevant pledged asset.

Due to the requirement of the transfer of the possession, this security cannot be utilised with reference to plants, machinery, and assets that are utilised by the borrower in its ordinary course of business. Article 2798 of the Italian Civil Code states that the creditor can always bring an action before the court requiring that possession of the goods is awarded to the creditor in payment of its credit, up to the full amount of the debt. The value of the goods shall be confirmed by way of appraisal conducted by independent experts or, alternatively, according to the current market price if such price exists. A similar provision also exists in cases where a credit is the object of the pledge (Article 2804 of the Italian Civil Code).

(b) Mortgage Enforcement

A mortgage is perfected and enforceable against third

parties once it is executed in writing before a notary public, and registered in the Land Registry Office (*Conservatoria dei Registri Immobiliari*) of the place where the property is located.

According to Article 2891 of the Italian Civil Code, within forty days of the notice (previously served), any inscribed creditor or its surety has a right to demand the expropriation of the property by bringing an enforcement proceeding before the president of the competent court, which has jurisdiction according to the Code of Civil Procedure, provided that certain conditions are met and notices are given to interested parties.

(c) Pledge Over Receivables

A pledge over receivables is validly constituted by a written deed bearing a certain date at law (*data certa*), providing for a full description of the pledged receivables. It is enforceable with priority against third parties when:

(i) notice of the pledge has been given to the debtor, or

(ii) the debtor has accepted the pledge by means of a document bearing a certain date at law.

Additionally, in relation to future receivables, a pledge over future receivables will become effective only when the receivables actually come into existence, and it will be enforceable against third parties only if the notice (and the acceptance thereof) is given on or after the date that such future receivables come into existence. An assignment by way of security of receivables can be perfected substantially by repeating the formalities required under Article 1260 and following of the Italian Civil Code.

Out-of-Court Enforcement of Unsecured Debts

Contractual/Legal *Self-Help* Remedies

Depending on the specific debtor/creditor relationship, an unsecured creditor can also avail him/herself of certain contractual or legal self-help remedies under Italian law such as:

- **Right of Subrogation:** when the debtor fails to take the necessary actions to safeguard its assets, the creditor may substitute the debtor in taking such actions. The final aim for the creditor is to safeguard the debtor's assets, against which he/she will enforce its rights.
- **Claw Back:** sometimes a debtor can unlawfully try to avoid the creditor's enforcement by selling/donating (by means of true or simulated agreement) its assets. A creditor can file a claim before a court to have those actions annulled.
- **Attachment:** the creditor may obtain the attachment of the debtor's assets to prevent damages or to have its credits repaid.
- **Penalty Clause:** the parties may contractually agree to the payment of a penalty, which shall apply in case the debtor does not fulfil its obligations. In some cases, such provisions may provide for some assets to be ready to be seized (e.g., a sum kept in an escrow account).
- **Right of Withdrawal:** the parties may agree that a party is entitled to withdraw from an agreement if the other party fails to fulfil its obligations.
- **Right of Retention:** in some circumstances the creditor may have the right to retain the debtor's assets (already in its possession) in order to force the debtor to pay.
- **Setting-Off:** the creditor may have the right to set-off its debt towards the debtor.

In-Court Enforcement of Secured and Unsecured Debt

(a) Obtaining Judgment/Execution Proceedings

Secured and unsecured creditors can launch a court action to recover a debt. Once judgment is obtained, it means that there is an order by the court stating that the debtor is liable to the creditor. A judgment by itself does not always prompt a debtor to pay, and the creditor might then have to consider various enforcement options. In certain specific cases (such as debts acknowledged by the debtor by way of public deed, or by way of agreements with the signature of the parties authenticated by a public notary, or debts acknowledged through promissory notes, etc.), the creditor may start enforcement proceedings without having its right recognised by a court.

If the judgment (or any other equivalent act) is served on the debtor and no payment is received, then the following main enforcement options are available:

- **Seizure and Sale of Goods:** the judgment can be sent to a different public bailiff (*ufficiale giudiziario*) who has the power to seize the debtor's moveable goods (such as vehicles, for example) up to the value of the judgment. Then, the goods (movable or immovable) will be sold by the court through enforcement judicial proceedings.
- **Attachment of Earnings/Third-Party Order:** it may be possible to seek and obtain an Attachment of Earnings Order or a Third-Party Order. The court will issue an order which directs a third party (who owes money to a debtor) to pay the creditor directly any amount due by the third party to the debtor. If the debtor is an individual with personal income such as a pension or salary, the creditor may obtain the attachment of such income up to specific

amounts (usually 20% of the monthly amount of the pension or of the salary).

- **Judicial Mortgage:** According to Article 2818 of the Italian Civil Code, any judgment carrying an order to pay a sum to perform another obligation, or to compensate for damages to be subsequently liquidated, constitutes the basis for inscription of a mortgage on the property of the debtor. The same applies to other judicial provisions to which the law gives such effect. A mortgage can be inscribed on the basis of an award of arbitrators, when such award has been made enforceable (Article 2819 of the Italian Civil Code). A mortgage can likewise be inscribed on the basis of judgments rendered by courts in foreign countries, after such judgments have been declared enforceable by the Italian courts, unless international agreements provide otherwise. A Judgment Mortgage does not have priority over existing security irrespective of whether the debt existed prior to the secured debt, however, it will have priority over any subsequent security.

(b) Protection of Debtors

From 15 July 2022 the new code for business crisis and insolvency (introduced by the Legislative Decree No. 14/2019 and modified by latter laws) replaced the previous 1942 Bankruptcy Code. The new legislation is focused on: (i) introducing safeguard procedures aimed at anticipating a financial crisis and promoting the adoption of pre-insolvency procedures at an early stage; (ii) providing specific benefits for debtors that act promptly to address a financial crisis; (iii) introducing provisions designed to facilitate the restructuring of corporate groups; (iii) re-defining the requirements of debtor-in-possession financing; (iv) amending Chapter 11 type procedures in order to facilitate the restructuring of the business; and (v) introducing new procedural rules, etc.

Temporary protection of the debtor from its creditors, which prevents creditors from taking action against the debtor to recover sums due, is afforded the following procedures:

- **Judicial Liquidation (*liquidazione giudiziale*), (which has replaced the former Bankruptcy Proceedings):** automatic stay of action starts from the date when the judicial liquidation is declared by the court. During the judicial liquidation proceedings, the debtor is deprived of its assets, and the powers to manage and dispose of such assets are delegated to an administrator (*curatore*), which replaced the former bankruptcy administrator (*curatore fallimentare*) appointed by and under the direction and supervision of the court. Where the debtor is a company, upon completion of the judicial liquidation procedure such company will cease to exist.

- **Crisis Recovery Tools Governed by the Italian New Code for Business Crisis and Insolvency (New Code):** the New Code has modified some of the previous existing procedures and introduced many new procedures (some of them are out-of-court while others are judicial procedures) and, just to mention some of them, they are: the Negotiated Crisis Solution (*composizione negoziata della crisi*), the Simplified Business Reorganitazion Agreement (*concordato semplificato*), the Certified Recovery Plans (*accordi in esecuzione di piani attestati di risanamento*)**,** the Debt Restructuring Agreements (*accordo di ristrutturazione dei debiti*)**,** the Restructuring Plan Subject to Homologation (*piano di ristrutturazione soggetto a omologazione*), and the Business Reorganisation Agreement (*concordato preventivo*). In such procedures the debtor may request the court to approve (or confirm) tailored protective measures (usually, stay of actions) which are best suited to the debtor's needs. The court may confirm, amend, or revoke such measures at any time. The duration of the protective measures usually may not exceed twelve months. Generally speaking, they could be considered court-supervised procedures in which the debtor remains in possession and retains management powers of its assets under the supervision of one (or more) independent professional (with different scopes and denomination, depending on the procedure), the purpose of which is to discharge the debtor's debts and avoid the insolvency, and thus, the above said Judicial liquidation.

- **Extraordinary Administration of Large Companies in Crisis (*amministrazione straordinaria per le grandi imprese in crisi*):** automatic stay of actions starts from the date when the insolvency of the debtor is declared by the court. In this case too, the debtor is deprived of its assets and the management of the company is delegated to one (or more) special commissioner (*commissario straordinario*). This kind of proceeding is namely aimed at enabling a large company in financial difficulty to restructure its operations (and particularly its debt) itself in order to continue its activities and pay back its creditors, but usually they end up as long-term liquidation (and not a work-out) procedures.

(c) Special Rules for Banks and Other Financial Institutions

Italian law provides for specific provisions applicable to banks, insurance companies, and other financial institutions.

Such rules are usually set to accelerate the enforcement procedure for credit recovery, such as in the following circumstances:

- **Mortgage granted pursuant to Article 38 of the Consolidated Banking Law (Legislative Decree 385/1993):** In this case, the bank is exceptionally allowed: (i) to start (and continue) individual enforcement on the mortgaged property even if an insolvency proceeding is pending for the debtor; and (ii) to receive almost all of the proceeds obtained from the forced sale of the mortgaged property before the formal distribution by the court.
- **Mortgage granted pursuant to Article 48 of the Consolidated Banking Law:** In this case, the obligation is secured by full ownership of a real estate which is provisionally transferred to the creditor (usually banks). In case of default, the creditor will be exceptionally entitled to directly seize such property by appropriation (eventually, the creditor must refund to the debtor the difference between the due amount and the value of the seized asset).
- **Collateral granted pursuant to Legislative Decree 170/2004 on Financial Collateral Arrangement:** Such collateral includes pledge agreements, credit assignment agreements, and any agreements – including repurchase agreements – under which full ownership of financial collateral (i.e., cash or financial instruments) is transferred to the creditor for the purpose of securing financial obligations, provided that at least one of the relevant parties is a public authority, central bank, insurance company, European financial institution (e.g., ECB, EIB, etc.), or financial institution subject to prudential supervision (e.g., banks, investment firms, fund managers, settlement agents, and clearing houses). Upon the occurrence of an event of default or any similar event agreed upon between the parties, the collateral holder is entitled to enforce the financial collateral by sale or appropriation, with respect to financial instruments, or by set-off, with respect to cash.

Recognition of Foreign Judgments

Under the Italian Law 31 May 1995, No. 218, a party who has obtained judgment in another non-EU Member State may apply to the Italian Court of Appeal of the location where the judgment has to be enforced. The Court of Appeal may grant an exequatur (an order to enforce the judgment) upon providing satisfactory evidence of the foreign judgment without any re-trial or examination of the merits of the case subject to the following qualifications:

(i) the judge who issued the judgment had jurisdiction, according to the laws of Italy;

(ii) the preliminary pleading was served on the respondent pursuant to the law of the state where the process was held, and the defence rights of the defendant were guaranteed;

(iii) the parties' appearance was compliant with the law of the state where the judgment was carried out or the failure to appear was lawfully declared;

(iv) the foreign judgment is final and conclusive;

(v) the foreign judgment is not contrary to any other final judgment pronounced by an Italian judge;

(vi) a judicial process having the same object and between the same parties initiated before the foreign process is not pending before an Italian court; and

(vii) the enforcement of the foreign judgment is not contrary to public policy.

Where the judgment to be enforced has been issued by another EU Member State, then such judgment – pursuant to the Recast Brussels Regulation – is automatically enforced, without the need of an exequatur to be issued by the competent Court of Appeal.

For uncontested claims, a judgment of a court of an EU Member State would generally be recognised and enforced pursuant to the European Order for Uncontested Claims Procedure. The European Order for Uncontested Claims Procedure further simplifies and expedites the process of having a judgment in the member state of origin enforced in another EU Member State. The European Order for Uncontested Claims Procedure goes further than the procedure under the Recast Brussels Regulation in that where a judgment has been obtained in an EU Member State and the appropriate European Order for Uncontested Claims Procedure certificate (specifying details concerning the judgment itself) has been issued, it can be enforced in the member state of enforcement, without any intermediate examination of the judgment in the member state of enforcement.

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LUXEMBOURG

In Luxembourg, there are several procedures that enable a creditor to take action to recover his/her claim (whether secured or unsecured). Some of them only relate to monetary claims and not to affirmative obligations (*obligation de faire*), but they may nevertheless be useful to a creditor who seeks rapid collection proceedings.

Enforcement of Security

(a) Creation and Perfection of Security Interests

The most common security interests in Luxembourg are pledges or transfers of title for security purposes in respect of claims[1] and financial instruments.[2] Luxembourg law is particularly flexible regarding the creation of security interests and their perfection.

(b) Enforcement of Security Interests Outside an Insolvency Scenario

Luxembourg pledges over claims and financial instruments may be enforced even if the secured debt is not due and payable (the enforcement event may be freely defined in the pledge agreements, e.g., change of financial ratios). The collateral taker has several options and may, in particular:

(i) exercise the voting rights so as to change the directors of the company whose shares are pledged,

(ii) appropriate, or have appropriated by any third party, the pledged assets at value agreed upon by the parties,

(iii) sell the pledged assets or have the pledged assets sold in a private transaction at normal commercial conditions (*conditions commerciales normales*), or

1 The concept of claims has a broad meaning and encompasses cash claims (*créances de sommes d'argent*) or receivables (*créances*) whether the debtor is a bank or a straightforward company.

2 Financial instruments means: (i) all securities and other instruments, including shares in companies and other instruments comparable to shares in companies, participation in companies and units in collective investment undertakings, bonds and other forms of debt instruments, certificates of deposit, loan notes, and payment instruments; (ii) securities which give the right to acquire shares, bonds, or other instruments by subscription, purchase, or exchange; (iii) term financial instruments and instruments giving rise to a cash settlement (excluding instruments of payment), including money market instruments; (iv) all other instruments evidencing ownership rights, claim rights, or securities; (v) all other instruments related to financial underlyings, indices, commodities, precious metals, produce, metals or merchandise, other goods or risks; (vi) claims related to the items described in sub-paragraphs (i) to (v) above, or any rights pertaining to these items, whether these financial instruments are in physical form, dematerialised, transferable by book entry or delivery, bearer or registered, endorsable or not, and regardless of their governing.

(iv) sell the pledged assets or have the pledged assets sold in a public auction.

(c) Enforcement of Security Interests in an Insolvency Scenario – the Pledgor Being a Luxembourg Company

The opening of insolvency proceedings (i.e., reorganisation measures and winding up proceedings) against a Luxembourg company (acting as pledgor) in Luxembourg would not affect the enforceability of Luxembourg law or foreign law governed security interests over claims or financial instruments, and the enforcement of such security interests would not be subject to any stay of proceedings in the context of insolvency proceedings.

(d) Enforcement of the Security Interests in an Insolvency Scenario – the Pledgor Being a Company Located in the EU

The opening of insolvency proceedings against a foreign company (acting as pledgor) located in the EU, except for Denmark, would not affect the enforceability of Luxembourg law governed security interests over claims or financial instruments, and the enforcement of such security interest would not be subject to any stay of proceedings in the context of such insolvency proceedings.

Collection Proceedings Under Luxembourg Law

Collection Proceedings (of Unsecured Debts) in a Non-Insolvency Context

(a) Introduction of a Payment Claim Before the Luxembourg Courts Based on Contractual Liability (*responsabilité contractuelle*)

In order to recover its claim, a creditor has the possibility of taking legal action against its debtor on the basis of contractual liability. If the debtor's obligation consists of an obligation to achieve a specific result (*obligation de résultat*), the mere demonstration of the absence of that result makes it possible to hold the debtor liable. On the other hand, if the debtor's obligation consists of a best efforts obligation (*obligation de moyens*), the creditor must demonstrate that the debtor did not take all the necessary steps to obtain a result, or that he committed a wrongdoing in the execution of the contract. If the creditor is successful, the judgment rendered in its favour enables it to initiate several enforcement actions in order to recover its claim.

(b) Summary Proceedings (*référé-provision*)

Summary proceedings may provide the creditor with an interim judgment ordering the debtor to pay a certain sum of money to the creditor. For a specific type of summary proceedings called *référé-provision*, there is no requirement of urgency (as may be the case for other types of summary proceedings), but the summary judge shall not have jurisdiction to rule on the matter where there is a serious objection to the claim. These proceedings are *inter partes* proceedings. The advantage of this procedure is that the creditor has the possibility of obtaining a payment more quickly. However, the summary judge ceases to be competent to render a provisional decision once a court has ruled on the merits of the claim.

(c) Conditional Order for Payment (*ordonnance conditionnelle de paiement*)

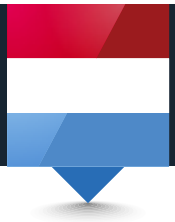
A conditional order for payment is a simplified and thus a faster procedure for the recovery of a claim. If the debtor is a Luxembourg resident, the creditor may bring an action for recovery of its claim not exceeding €15,000 before the Justice of the Peace Court. The advantage of this procedure is that the creditor is not required to summon its debtor before the court, which allows it to save costs (the debtor may nevertheless object to the judge's order, as long as it has not been declared enforceable by the Justice of the Peace). The application is made by an oral or written statement to the clerk. Without contradictory debate, the Justice of the Peace grants the application if it appears to be justified. Otherwise, the Justice of the Peace rejects the application with no scope for appeal.

(d) Order for Payment Issued Upon an *Ex Parte* Application (*provision sur requête*)

If the claim of the creditor is higher than €15,000, and where the debtor is a Luxembourg resident, the President of the District Court may, if the existence of the claim cannot be seriously disputed, grant a payment order to the creditor. The advantage of this procedure is that the creditor is not required to summon the debtor, as the order for payment is issued upon an *ex parte* application. The debtor may nevertheless object to the judge's order as long as it has not been declared enforceable by the District Court.

(e) European Order for Payment

The European Order for Payment Procedure enables a creditor of a monetary claim, who finds itself in a civil or commercial cross-border dispute with its debtor, to obtain a court title against the latter. The procedure is largely similar to the conditional order for payment but, in this case, the defendant is given thirty days to object to the order issued by the competent judge. In the absence of any objection, the court may declare the payment order enforceable on its own initiative. The advantage of this procedure is once again its rapidity.



(f) European Small Claims Procedure

In Luxembourg, the entity competent for claims provided for under Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure is the Justice of the Peace. This procedure may be initiated by a creditor wishing to recover his/her claim provided that the dispute is of a cross-border nature in civil and commercial matters involving a value of less than €5,000. This procedure applies both to disputes relating to an obligation to perform and to the recovery of a sum of money. The decisions rendered in the course of this procedure shall be provisionally enforceable and may be enforced in the other EU Member States, without the need of an exequatur procedure.

(g) Foreclosure (*saisie-exécution*)

Foreclosure enforcement consists of the forced enforcement of a judgment and enables the creditor to be paid out of the sale price of the debtor's attached goods. This procedure is only applicable to fungible movable properties of the debtor who has not paid its debt. The procedure is carried out by a bailiff.

(h) Third-Party Attachment (*saisie-arrêt)*

Saisie-arrêt is a procedure by which a creditor, in the first stage, freezes any sums or assets that a third party owes to the debtor. In the second stage, the creditor may ask the court to be paid out of these sums or the sale of these goods, up to the amount of its claim. In order to be able to carry out this procedure, the creditor must either already hold a title against his/her debtor or obtain an authorisation from the President of the District Court.

(i) Preventive Attachment (*saisie conservatoire*)

A preventive attachment enables a creditor to render certain assets of the debtor unavailable and inalienable. Preventive attachment constitutes a preamble to the enforcement of a judgment: if a court subsequently recognises the validity of the creditor's claim, the creditor can be paid out more easily from the sale of the assets that are the subject of the attachment.

(j) Attachment *Pendente Lite* (*saisie-revendication*)

If the creditor's claim does not consist of a sum of money, but of tangible movable assets that the debtor must return to the creditor, the goods may be attached by the creditor if it is able to obtain an attachment order of the President of the District Court, issued upon an *ex parte* application. This attachment is not, strictly speaking, an enforcement procedure, but a means of regaining possession of property of which the claimant has been wrongfully dispossessed. The attachment must be preceded by a notice to the debtor, at least one day before the attachment, and will be carried out by a Luxembourg bailiff. The attachment will ultimately need to be confirmed/validated by the court.

Collection Proceedings (of Unsecured Debts) in an Insolvency Context

(a) Automatic Divestment of the Bankrupt Person

From the date of the judgment opening the bankruptcy proceedings (*faillite*), the bankrupt debtor is prevented, by operation of law, from managing its assets. Thus, all payments made by or to the bankrupt debtor shall be void.

(b) Suspension of Individual Legal Actions

From the date of the declaratory judgment of bankruptcy, all personal and real actions, as well as any enforcement actions, can only be brought against the bankruptcy receiver. It is the duty of the latter to secure the creditor's common rights. Thus, individual proceedings initiated by creditors (i.e., the use of the above-mentioned proceedings) are suspended. Creditors must act by way of lodging their claims (*declaration de créance*) in the forms provided for by the law.

Recognition of Foreign Judgments

(a) Between EU Member States

According to the Recast Brussels Regulation, a judgment given in an EU Member State shall be recognised in the other member states without any additional special procedure. The automatic recognition is the general principle. On the basis of this principle, the Recast Brussels Regulation provides for limited cases in which a party may bring an action seeking refusal of recognition of the judgment.

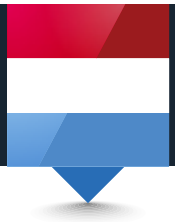
(b) Recognition of Foreign Judgments

Luxembourg applies the principle according to which judgments are considered authentic until proof is given as to the contrary of their content. As a result, foreign judgments are granted a form of *prima facie* recognition, which means that a judgment which does not require any material act of enforcement may produce its effects in Luxembourg. However, if the foreign judgment cannot produce its effects without an act of enforcement, an exequatur procedure must be complied with.

Enforcement of Foreign Judgments

(a) Enforcement of EU Judgments

According to Article 39 of the Recast Brussels Regulation, a judgment given in an EU Member State which is enforceable in that state shall be enforceable in the other EU Member States without any declaration of enforceability being required. Furthermore, an enforceable judgment shall carry with it,



by operation of law, the power to proceed to any protective measures which exist under the law of the state addressed. In fact, the party opposing the enforcement of the judgment must request a refusal of enforcement based on one of the grounds referred to in Article 45 of the Recast Brussels Regulation.

(b) Enforcement of Foreign Judgments

The enforcement in Luxembourg of foreign judgments (issued in countries to which Luxembourg is not bound by any regulation or treaty) is subject to an exequatur procedure. This procedure consists of an actual legal claim to be brought before the civil courts. In order to receive an exequatur decision in Luxembourg, the foreign decision is submitted to the Luxembourg judge's control, who shall verify that the following conditions are met:

- the decision is enforceable in the country in which it was rendered;
- the judge who rendered the foreign decision must have had international jurisdiction according to the Luxembourg rules on the international jurisdiction, for example, the exequatur is not granted if the Luxembourg court considers that it had exclusive jurisdiction in the case. This verification is a matter of public policy;
- the foreign court must have applied the appropriate Luxembourg conflict of law rules;
- the Luxembourg court verifies the respect of the procedural regularity (i.e., it verifies whether the procedural requirements of the law of origin have been complied with and that no fraud has been committed against the defendant); and
- the foreign decision is not in breach with Luxembourg's international public policy.

Recognition of Insolvency Proceedings

(a) Between EU Member States

According to Article 19 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, any judgment opening insolvency proceedings handed down by a court of an EU Member State which has jurisdiction in accordance with the regulation, shall be recognised in all other EU Member States from the very moment that it becomes effective in the original state holding the proceedings. Without further formalities, the judgment opening insolvency proceedings shall have the same effects as granted by its state of origin in all the other EU Member States.

(b) Insolvency Procedures Introduced in a Non-EU Member State

Foreign judgments regarding insolvency procedures introduced in a non-EU Member State are, in principle, recognised in Luxembourg, which recognises the principle of universality of bankruptcies, without the need for a further order for enforcement of the award, subject to the following conditions:

- the judgment must be rendered by a competent court,
- due process must be complied with,
- the foreign court must have applied the appropriate Luxembourg conflict of law rules,
- the foreign judgment must not contravene Luxembourg public policy, and
- the foreign insolvency law which has been applied must have extra-territorial scope.

However, where an act of enforcement of the foreign judgment is necessary, the exequatur procedure becomes compulsory.

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NETHERLANDS

Dutch Security Rights

Under Dutch civil law, security rights are divided into two categories depending on the nature of the asset or goods (according to Article 3:227 of the Dutch Civil Code (*Burgerlijk Wetboek*, DCC):

(i) a right of pledge (*pandrecht*) may be established on non-registered transferable goods (movable assets) (*roerende goederen*), such as shares, machinery, receivables, etc.; and

(ii) a right of mortgage (*hypotheekrecht*) may be established on registered goods (immovable assets) (*onroerende goederen*), such as real estate, registered vessels, and aircraft.

Enforcement of Security

The security generally becomes enforceable in the event of a default in the performance of the secured obligations. In principle, the security rights are *bankruptcy proof* and can be enforced during the security provider's bankruptcy, subject to a court ordered moratorium (a cooling-off period) of two months (which may be extended once for another two months). During the cooling-off period, no creditor, secured and unsecured, may take any enforcement measures, unless the court gives leave to do so.

Under Dutch law there are two ways to enforce a right of pledge: (i) by way of a public auction, or (ii) by way of private sale. A private sale can consist of a sale with approval of the interim relief judge of the District Court (*voorzieningenrechter*), or, in relation to rights of pledge only, pursuant to an agreement between the pledgor and the pledgee, made after the right of pledge has become enforceable.

Although these means of enforcement are available to the beneficiary of a right of pledge over receivables, this is usually enforced by collecting the receivables.

Share Pledge Enforcement

A sale of the business by way of enforcement of a pledge over the shares in the holding company is often used in restructurings. As a general rule, it is possible to go through the foreclosure process within three to four months. A crucial element in this process is the availability of valuation reports, especially if enforcement takes place by way of a court approved private sale. The actual process and timing may be influenced by external elements, as well as defences brought up by a pledgor or third party. If this is the case, the timeline can be longer. A sale of pledged shares through a public auction hardly ever occurs.

(a) Remedies Available to Unsecured Creditors Pre-Trial Attachment

A creditor seeking to preserve the assets of its debtor for the purpose of enforcement may file an application with the court for a pre-trial attachment of such assets. The application has to fulfil certain formal legal requirements in order to obtain leave from the court to attach assets of its debtor, such as a description of the grounds of the claim, an estimate of the amount of the claim, and the assets to be attached. The court will decide to grant leave not on the basis of the full merits of the claim, but on the basis of a summary investigation.

Leave to make the attachment is always granted under the condition that the applicant will start court proceedings in respect of the claim within a period of time specified by the court.

(b) **Executory Attachment**

A creditor can take court action to recover a debt. Once a (favourable) judgment has been obtained from a Dutch court, such judgment can immediately be enforced. Before the enforcement, it is required that a copy of the judgment is served on the debtor by a bailiff.

A judgment does not always prompt the debtor to pay. In such cases, the creditor may consider establishing an executory attachment (*executoriaal beslag*) on assets of the debtor. The enforcement of the judgment takes place via a public sale of the assets, or in case of receivables, collecting the receivables. The revenues of the sale will be used to pay the claim of the creditor. Any surplus will be paid to the debtor or other creditors of the debtor.

If the judgment relates to the delivery of movable goods, a bailiff may seize the goods and deliver them to the creditor. If a transfer of ownership of the goods is subject to specific formalities — such as the requirement for real estate to be transferred by means of a Dutch notarial deed of transfer — the court may determine that the judgment itself should be considered as having the same effect, so that no separate deed is required. Additional rules may apply in the event that, for instance, the debtor is unable to deliver the goods.

In order to establish an executory attachment, the judgment should be sent to a bailiff who then has the power to seize the assigned goods. The bailiff is obliged to compose a report of the specific goods which are seized. The report, including the exact time and date of the execution sale, is offered for signing to the debtor.

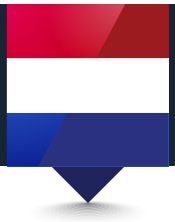
The enforcement of judgment is mainly governed by the rules of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

Proposed Dutch Act on the Extrajudicial Confirmation of Pre-Insolvency Schemes (*Wet Homologatie Onderhands Akkoord*, the Act, or WHOA)

On 1 January 2021, a bill for a Dutch pre-insolvency procedure, entered into force. This bill was inspired by the scheme of arrangement under the UK's Companies Act 2006 and Chapter 11 of Title 11 of the United States Code, (the U.S. Bankruptcy Code). The Act allows a plan offering to prevent a debtor's insolvency. The Act intends to combine a fast and flexible framework for the conclusion of pre-insolvency schemes with a high degree of deal certainty.

Key features of the WHOA are:

- The debtor will retain possession of its property, as well as the authority to dispose of it during the proceedings (i.e., no other administrator or supervisor is involved, besides the court itself). The debtor can continue to conduct its business as normal.
- Initiating WHOA-proceedings can be paired with a court ordered stay of (in aggregate) up to eight months. If granted, the stay will prevent creditors from enforcing their rights, including the right to invoke termination clauses in contracts; attachments may be lifted.
- The debtor can offer a plan on its own motion. Creditors, shareholders, or works council representatives are not allowed to offer a plan themselves, but they can petition the court to appoint a restructuring expert who may offer a plan on their behalf. If a plan is offered by a restructuring expert, consent by the debtor is only required if the debtor qualifies as a small or medium-sized enterprise (an **SME**). If a plan is offered by a restructuring expert, the debtor retains the right to offer a competing plan via the restructuring expert.
- The WHOA provides for two different tracks:
  (i) a *public* track (usually used for complex multiple class restructurings) which can result in an automatic recognition of a plan in each EU Member State by virtue of its inclusion in Annex A of the EU Insolvency Regulation; or
  (ii) a *non-public* track (more suitable for targeted single class restructurings) whereby a plan will not be recognised under the EU Insolvency Regulation.
- As a framework, the WHOA does not prescribe the contents of a plan. Proponents can draft a plan as they deem fit (e.g., with extensions and/or reductions of debt, debt for equity swaps, sale of assets, limited to only a



subset of the capital structure, etc.). The WHOA provides plan proponents with a high degree of flexibility on structuring the process (e.g., timing, electronic voting, etc.).

- Long term contracts can be amended or terminated under the WHOA. Claims for damages in relation to the termination can be restructured under the terms of a plan (except for employment contracts, which are exempted).
- Only creditors or shareholders whose rights are affected by a plan are entitled to vote. A two-thirds majority, in the amount of the claims of all class participants who have cast a vote, is required for class acceptance. Class formation is based on the similarity of new and existing rights of class participants.
- Once all classes have accepted, a plan will bind all participants, regardless of their rank or whether or not they have voted in favour of the plan. If one or more classes oppose a plan, the court may nonetheless confirm the plan. Participants of an opposing class may object to a plan's confirmation by the court if the value realised by the plan is distributed in a way that deviates from statutory or contractual priority and, as such, impairs the opposing class. In such cases, the court may reject a plan, unless it considers that there are reasonable grounds in support of the deviation in distribution according to rank. For SME creditors, the absence of such reasonable grounds is assumed if such creditors receive less than 20% of their claims. This assumption can be rebutted (with robust enough evidence) if the value of the debtor's enterprise is such that an allocation of value of at least 20% of an SME creditor's claim is not feasible. Additionally, if the reorganisation value is distributed in deviation of priority, non-secured creditors of a dissenting class who have voted against the plan may insist on a cash pay-out equal to the value they would have received in a liquidation scenario.
- To promote deal certainty, the court can be petitioned to provide interim relief on procedural issues, as well as substantive issues (e.g., class formation, voting procedures, etc.). A dedicated team of specialised judges deal with WHOA-cases. To ensure a quick turnaround, most decisions cannot be appealed.

Recognition and Enforcement of Foreign Judgments

A monetary judgment rendered by a court of an EU Member State, which is enforceable in that member state, will be recognised and enforced by the Dutch courts without review of its merits. A Dutch court may only refuse to recognise and enforce a judgment by another EU court on the following limited grounds and only upon an application of any interested party to the relevant court:

(i) if the recognition is contrary to public policy (*orde public*);

(ii) where judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings, or with an equivalent document in sufficient time, and in such manner as to enable him/her to arrange for its defence, unless the defendant failed to commence proceedings to challenge the judgment;

(iii) irreconcilability with an earlier judgment given between the same parties in the Netherlands;

(iv) irreconcilability with an earlier judgment given in another EU Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment meets the conditions necessary for its recognition in the Netherlands; or

(v) if the judgment conflicts with certain jurisdiction rules of the Recast Brussels Regulation.

A direct enforcement of any other foreign judgment in the Netherlands can only take place in cases where the Netherlands, and the country where the judgment was rendered, entered into an enforcement treaty or an EU instrument is in place. An important enforcement treaty to which the Netherlands is a party is the Hague Choice of Court Convention 2005 (in relation to exclusive choice of forum clauses only). As of 1 September 2023, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) will enter into force for the Netherlands as well.

In the absence of an applicable treaty or convention providing for the recognition and enforcement of a foreign judgment, such a foreign judgment will not be automatically enforceable in the Netherlands. In order to obtain an enforceable judgment, it will be necessary to re-litigate the matter before a competent Dutch court. According to the current practice (Dutch case law), Dutch courts will, in principle, render a judgment in accordance with a foreign judgment if and to the extent that:

(i) the foreign court rendering the judgment had jurisdiction over the subject matter of the litigation on internationally acceptable grounds;

(ii) the foreign court rendering the judgment has conducted the proceedings in accordance with the general principles of fair trial;

(iii) the foreign judgment is final and definite; and

(iv) the foreign judgment is not in conflict with an existing Dutch judgment or with Dutch public policy (i.e., a fundamental principle of Dutch law). There is no case law which gives guidance as to whether this also applies to default judgments (*verstekvonnissen*).

Other European regulations that are applicable in relation to the enforcement of foreign judgments are: (i) Council Regulation (EC) No. 805/2004, creating a European Enforcement Order for uncontested claims; (ii) Council Regulation (EC) No. 1896/2006, creating a European Order for Payment procedures; and (iii) Council Regulation (EC) No. 861/2007, establishing a European Small Claims Procedure.

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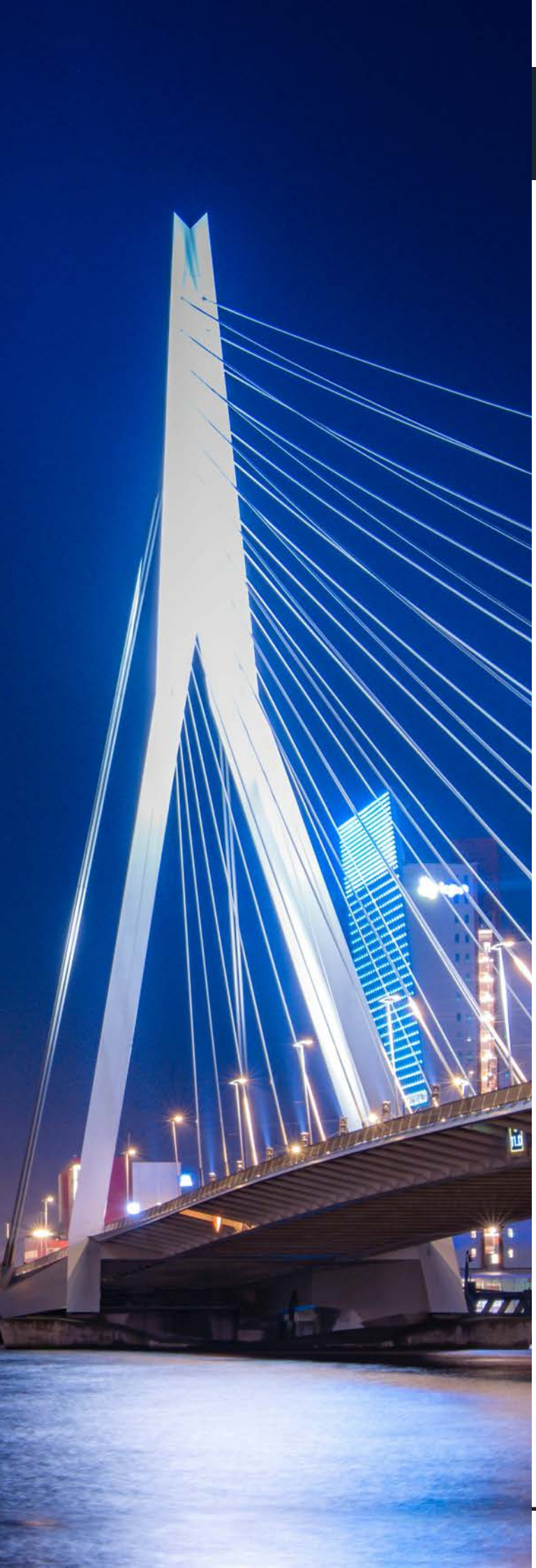

POLAND

Under Polish law, there are different methods available for creditors to enforce their security and satisfy their claims, depending on the type of collateral security.

Claims can be enforced by judicial means pursuant to the Civil Procedure Code dated 17 November 1964 (the Civil Procedure Code) through non-judicial means and through bankruptcy proceedings.

In the case of a registered pledge, financial pledge, or assignment of a claim or right, a creditor's claim can, in some circumstances, be satisfied from the relevant collateral through non-judicial means.

Additionally, pursuant to Polish law, if the debtor executes a notarial deed confirming its consent to the enforcement of its debts (*oświadczenie o dobrowolnym poddaniu się egzekucji*), then the creditor so secured is allowed to commence the enforcement of the debt after obtaining a writ of execution (a rubber stamp that is put on the document by a court stating that the claim may be enforced) from a court without the need for a regular trial. Further, if a creditor transfers a claim after obtaining a writ of execution, a new creditor will be entitled to commence the enforcement against a debtor based on the same writ of execution, provided that the transfer of claim was not conditional and a new creditor has a seat in Poland. Moreover, if a creditor transfers a claim after the commencement of enforcement proceedings, a new creditor will be allowed to step into the shoes of the previous one without obtaining a new writ of execution from the court for its own benefit. In both cases, a claim transfer must be validated with a certified court document, otherwise the bailiff will refuse to commence or continue the enforcement proceedings.

Please find below an overview on enforcement of security by secured creditors outside a bankruptcy procedure. These procedures are not available in the case of bankruptcy proceedings (except for the out-of-court enforcement of a registered pledge by taking over ownership of the encumbered movable property, which is permitted in certain situations) where the debtor's assets become subject to administration by the bankruptcy administrator, and are typically sold by the bankruptcy administrator, in which case the secured creditors' claims enjoy preferred rights of satisfaction.

Likewise, except for the proceedings regarding the approval of an arrangement, in all restructuring proceedings under Polish law a debtor will be granted protection against its creditors who, with certain exceptions, will not be allowed to conduct and commence the enforcement proceedings against a debtor.

Enforcement of Security

Court Enforcement Proceedings

(a) Enforcement of a Mortgage

Mortgages are the most popular type of security interest established on real estate. A mortgage gives a creditor the right to enforce its claims from the real estate with priority over the real estate owners or other creditors, even if title to the property is transferred to another person.

Enforcement proceedings against real property are conducted by a court enforcement officer (a bailiff) whose actions are supervised by the relevant court. In order to commence the enforcement proceedings, the creditor needs to hold an enforcement title. It should be noted that the establishment of a mortgage over the real property gives the creditor priority over other creditors in satisfaction of claims from the proceeds obtained after the sale of the debtor's real property, but does not constitute an enforcement title by itself. Therefore, the creditor must first apply to the court for a writ of enforcement to be affixed to the enforcement title (e.g., a notarial deed confirming the debtor's consent to the enforcement of its debts, or a final and non-appealable judgment).

Following the creditor's application for initiation of enforcement against the real property, the court enforcement officer calls upon the debtor to pay the debt within the specified period of time or, otherwise, it will commence the description and appraisal procedure of the real property in question.

Alongside sending the call for payment to the debtor, the court enforcement officer files, to the relevant land and mortgage register, an application for making an entry in the land and mortgage register regarding the initiation of enforcement proceedings. The property may be sold through a public auction, which cannot be conducted less than two weeks following: (i) the description and valuation of the property, or (ii) the court judgment initiating the enforcement proceedings becomes final and non-appealable. If the debtor has more than one creditor, the sum obtained from the sale of the property will be divided among all creditors, in accordance with the plan prepared by the bailiff or the court. The mortgagee will be satisfied with priority over other creditors (but not before satisfying the costs of enforcement, alimony, and employees' three-month remunerations). Such other creditors will be satisfied in the order stipulated in the Polish Code of Civil Procedure.

(b) Statement on Submission to Enforcement

As stated above, another method of enforcing a security interest is in cases where the debtor has signed a written statement agreeing to submission to enforcement, which constitutes an enforcement title. According to the statement, the debtor submits itself to enforcement and confirms that it is liable to fully repay the specified debt. The statement does not create any collateral over the debtor's assets, although it may provide the creditor with a quick and effective means of debt recovery.

The statement should be executed in the form of a notarial deed, which creates additional costs usually borne by the debtor. In order to initiate the enforcement proceedings, the creditor will only need to ask the relevant court for an execution stamp (a writ of execution) to be placed on the notarial deed. Accordingly, the creditor does not need to go through the process of proving their debt in court in order to enforce the security.

(c) Enforcement of a Civil Law Pledge

A civil law pledge is established by way of a contractual arrangement between the creditor and a debtor (or another third party). Often used as interim security in financial transactions, it generally provides a lower protection of the creditor's rights than a registered pledge, and is enforceable only by way of regular court enforcement proceedings.

Out-of-Court Proceedings

(a) Enforcement of a Registered Pledge

Polish law provides for various enforcement methods with respect to registered pledges. Apart from traditional enforcement through court proceedings, which is usually costly and time consuming, a pledge agreement may provide for other enforcement methods, which are simpler and cheaper than court proceedings. Such other methods allow the creditor to satisfy its claim by taking over the ownership of the pledged assets and/or rights or through a sale of a collateral. The creditor may proceed with these methods of satisfaction if the pledge has been established over:

(i) publicly traded securities,

(ii) commonly traded commodities,

(iii) movables, receivables (claims) and rights, or assets or rights constituting an economic unit, whose value has been defined or where the method of establishing such value has been determined in the pledge agreement, and

(iv) receivables from a bank account.

Sale of the collateral takes place in an out-of-court public auction conducted by a notary public or a bailiff within fourteen days from the day when the pledgee submits a request to sell the pledged assets and/or rights.

If the pledge was established over the assets and rights constituting a business as a going concern, and the pledge agreement allows the pledgee to satisfy the claim from the profits of an enterprise encumbered with the registered pledge, then the business may be managed by the receiver. The creditor may satisfy its claims from the profits of such business. The enterprise may also be leased, and the creditor may satisfy its claims from the rent. While the above remedies are often provided for in the registered pledge documents, we are not aware of any instances of those remedies actually being relied upon in an enforcement.

In any event, the court enforcement procedure may be used under general law, even if it was not envisaged in the pledge agreement. In such cases, the creditor must first obtain the enforcement title and then a writ of execution.

(b) Enforcement of a Financial Pledge

A financial pledge may only be used to secure limited types of claims (mainly bank pecuniary claims), and may be established only on shares, monies, and financial instruments. It is enforced by seizure of the assets on which the pledge was established. Seizure of the assets takes place on the date when the foreclosure notice is served on the debtor.

(c) Enforcement of Security Assignment/Transfer of Ownership

This is a type of collateral that provides for security transfer of ownership of movables or receivables from debtor to creditor. Enforcement mechanisms of this type of security are generally set out in a contract between the parties and may, *inter alia*, consist of the collection of receivables from the account debtors or the sale of movables. While the assignment of receivables continues to play a special role in secured transactions in Poland, transfers of movables are usually a temporary security prior to the registration of registered pledges.

Enforcement of Unsecured Debt

Generally, an unsecured creditor can take court action to recover a debt. Once a court judgment is obtained, the enforcement proceedings are conducted in the manner described above. Nevertheless, Polish law provides other remedies which may be used by unsecured creditors.

(a) Article 527 of Polish Civil Code

Under Article 527 of the Polish Civil Code, if a third party gained a material benefit as a result of a legal transaction by the debtor effected to the detriment of the creditors, each of the creditors may demand that the transaction shall be declared null and void with respect to it, but only if the debtor acted deliberately to the detriment of the creditors, and the third party knew that or could have learned about it with due diligence. Any act performed by the debtor is considered to be detrimental to the creditors if, as a result of that act, the debtor became insolvent or became insolvent to a greater degree than it had been before effecting that act.

The declaration of a transaction as ineffective takes place as a result of an action against a third party who gained a material benefit as a result of that transaction. If the third party disposed of the benefit they obtained, the creditor may directly sue the person for whose benefit the disposal was made if that person had knowledge of the circumstances which justified the declaration of the debtor as ineffective, or if the disposal was gratuitous.

(b) Liquidated Damages

In commercial contracts, the parties may agree to specific provisions referring to liquidated damages. Thus, it may be stipulated in the contract that the redress of the damage resulting from the non-performance, or the improper performance of a non-pecuniary obligation, shall take place by the payment of a specified sum. The debtor cannot, without the creditor's consent, release itself from the obligation to perform the contract by the payment of the liquidated damages. It may also be stipulated that one or both parties may renounce the contract against payment of a specified sum (compensation for loss of contract).

Recognition of Foreign Judgments

Judgments Issued in the EU Member States

Judgments of the courts of the EU Member States (or certain EFTA Countries) will be recognised and enforceable in Poland in accordance with, and subject to, the provisions of (as the case may be):

(i) the Recast Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;

(ii) the European Order for Uncontested Claims Procedure;

(iii) the European Order for Payment Procedure; and

(iv) the European Small Claims Procedure.

Judgments of the courts of the EU Member States (or certain EFTA Countries) in uncontested claims accompanied by a European Enforcement Order constitute enforcement titles in Poland. Similarly, European orders to pay, and court orders issued under the European Small Claims Procedure, may also be enforced in Poland. The relevant procedure is set out in the Regulation (EC) No. 805/2004 creating the European Order for Uncontested Claims Procedure (as amended) and the Polish Code of Civil Procedure.

Judgments Issued Outside the EU Member States

Judgments issued in the UK will be recognised and enforced in Poland through a procedure conducted in accordance with the Hague Convention of 30 June 2005 on Choice of Court Agreements (the **Hague Convention**) and Polish Civil Procedure Code.

To the extent not regulated otherwise by the Recast Brussels Regulation, the Hague Convention, and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters dated as of 2 July 2019 (provided that the latter comes into force),[1] court rulings delivered in civil matters by foreign courts are recognised by virtue of law in Poland. Such a judgment will be enforced following the issuance of a writ of execution (*klauzula wykonalności*), as long as the judgment is enforceable in the country in which it was issued and none of the following circumstances exist:

(i) such judgment is not final in the country where it was issued;

(ii) it was issued in a case which belongs to the exclusive jurisdiction of Polish courts;

(iii) the defendant who has not engaged in dispute as to the substance of the matter has not been served with a letter initiating the proceedings in a due manner, and in a time enabling him/her to defend his/her rights;

(iv) a party was deprived of the possibility to defend him/herself in the course of proceedings;

(v) an action based on the same claim and between the same parties was commenced before the Polish court (or any other competent Polish authority) before being commenced before the foreign court;

(vi) judgment, issued in the case based on the same claim and between the same parties, is contrary to a previous final judgment of the Polish court (or any other competent Polish authority) or a previous final judgment of the foreign court (or any other competent foreign authority), provided that such earlier foreign court judgment (or decision of any other competent foreign authority) fulfils the conditions necessary for its recognition by the Polish court; or

(vii) the judgment is contrary to the basic principles of the laws of Poland.

Foreign court rulings in civil matters may be enforced in Poland when their enforcement is confirmed by a Polish court. In order to do so, a creditor needs to file a motion with the District Court of the debtor's place of residence or registered seat, or if there is no such court, the District Court in whose area enforcement is to be conducted. The court will deliver an order granting an enforcement title to the foreign judgment, if it is enforceable in the country of issuance and if it does not fall into the exceptions stated above. However, the debtor has the right to state its objections against the judgment being enforced against it.

Once the ruling is obtained confirming that the foreign judgment is enforceable in Poland, the enforcement may start after the order becomes final and non-appealable. In the meantime, the creditor may apply for an interim relief. Such interim relief may secure monetary claims and include:

(i) seizure of movable property or salary, claims for funds on a bank account, or other similar claims;

(ii) compulsory mortgage on the debtor's property;

(iii) a prohibition against sale or encumbering of the debtor's property; and/or

(iv) compulsory administration over the debtor's enterprise or agricultural farm.

However, the court may require that a financial deposit is paid by the creditor to the court before such interim relief is granted. The same rules apply to foreign settlements concluded in civil cases.

Court rulings issued in other EU Member States may be enforced in Poland without substantive examination of the judgment in accordance with the Brussels Regulations.

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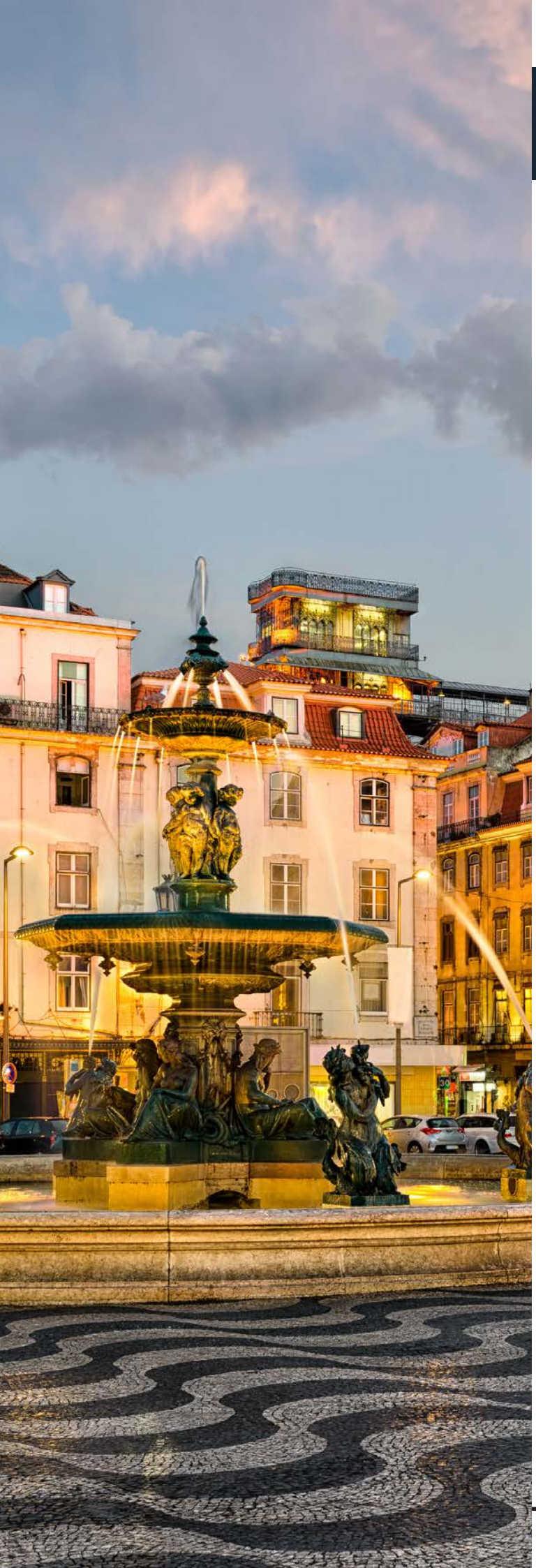
1 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters to enter into force as between the EU (except Denmark) and Ukraine on 1 September 2023.



Portugal

General

Where security has been created in the form of a mortgage, and if the parties do not agree to enforce the mortgage extra-judicially, the enforcement proceedings must be carried out in court.

However, where security has been created in the form of a pledge, the parties may agree that the lender may enforce the pledge without recourse to court enforcement proceedings, by way of an extra-judicial enforcement.

In order to commence an enforcement proceeding (*acção executiva*) in court, the lender must have an enforcement title (*título executivo*) (i.e., the right to go straight to enforcement).

In the event that the lender does not have an enforcement title, the lender will have to first obtain a court decision recognising the claim, and then proceed to enforcement. Pursuant to Portuguese law, a contract signed by an obligor under which payment obligations (in amounts which are, or can be, determined) have been agreed, is only deemed to be an enforcement title if it has been duly authenticated by a notary or any other entity with the power to do so.

In the context of a loan secured by a mortgage or a pledge, a public deed granted by a notary creating the mortgage or the pledge agreement, together with the loan contract signed by an obligor under which payment obligations (in amounts which are, or can be, determined) have been agreed and duly authenticated by a notary or any other entity with the power to do so, will be deemed as executory titles.

Enforcement of Mortgages

(a) Filing of Enforcement Request by the Lender to the Court

The lender requests the enforcement of the mortgage credit and the seizure of the mortgaged asset.

The lender may also request the seizure of other assets (i.e., rent generated by the property and/or bank accounts) of the debtor.

(b) Court Notifies Debtor of the Enforcement Request and Seizure of Assets

The debtor may decide to pay, oppose (twenty days to file opposition), or not oppose and not pay. If the debtor opposes, it can provide a deposit to suspend the enforcement proceedings. The lender is notified of the opposition in order for it to contest.

(c) Seizure of Assets

The enforcement agent seizes the mortgaged asset (by electronic communication directly to the Land Registry office).

If the mortgaged asset is insufficient to pay the debt (i.e., because of low market value, existence of various mortgage creditors, etc.), the enforcement agent can seize other assets of the debtor (the lender may request it to do so initially).

(d) Court Notifies Other Creditors

The court notifies other creditors with mortgages over the same asset, the State, and the Tax Authorities.

Other creditors submit their respective claims within fifteen days.

(e) Court Issues Decision of Ranking of Creditors

The ranking of creditors in enforcement proceedings is as follows:

(i) court expenses involved with the maintenance, liquidation, and enforcement of the mortgaged asset;

(ii) amounts owed to employees that work at the mortgaged property;

(iii) property taxes (Property Purchase Tax (**IMT**) and Immovable Property Tax (**IMI**)) due to the State and Tax Authorities in relation to the mortgaged property; and

(iv) mortgaged credit.

The ranking of creditors in insolvency proceedings differs and is as follows:

(i) debts of the insolvent estate (i.e., court costs, payment to insolvency administrator, expenses with management, and liquidation of insolvency assets), which will be paid firstly with any income of the insolvent estate and, secondly, pro rata with proceeds of sale of all the assets of the insolvent estate (subject in any case to a maximum of 10% of proceeds of secured assets);

(ii) amounts owed to employees that work at the mortgaged property;

(iii) IMT and IMI due to the State and Tax Authorities in relation to the mortgaged property which became due during the period of twelve months prior to commencement of the insolvency proceeding; and

(iv) mortgaged credit.

Other taxes due to the State and Tax Authorities (i.e., income tax or VAT), or contributions due to the Social Security, are ranked below the mortgaged credit.

(f) Sale of Seized Assets

The enforcement agent, under the supervision of the judge, determines the type of sale. This can be a judicial sale, auction sale, or private sale.

(g) Forms of Payment (If Debtor Does Not Pay Voluntarily)

Credit-Bidding: the lender may accept receipt of the mortgaged asset by set-off against its credit (any remaining credit becomes unsecured).

Consignment of Income (*consignação de rendimentos*): if requested by the lender, the court may allocate to the lender income generated by the mortgaged asset (i.e., rental income).

Sale Proceeds: the court awards to the lender the proceeds that are generated by the sale of the mortgaged asset (any remaining credit becomes unsecured).

(h) General Timing

The time frame is approximately eighteen months, assuming there is no opposition by the debtor, no appeal against the court decision, no bankruptcy of the debtor, existence of seizable assets and market conditions for sale of the seized assets; but subject to the complexity of the case and work volume of the relevant court.

(i) Preservation/Conservation of Asset

In the context of enforcement proceedings, the mortgaged asset shall remain the property of and in the administration of the debtor/owner. If actions/omissions of the owner threaten the conservation and preservation of its value, the creditor may potentially file an injunction with the court to impose preservation actions.

In the context of insolvency proceedings, the insolvency administrator (designated by the insolvency court) shall be responsible for administration of the insolvent estate and must ensure the preservation and conservation of the assets of the insolvent estate.

(j) Lease/Rental Agreements

In the case of shopping centres: (i) the shop lease agreements remain in force and effect during enforcement, (ii) the transfer of the mortgaged property to a third party does not lead to termination of the lease agreements, (iii) shop owners do not have special rights in the context of the enforcement proceedings, and (iv) lease agreements typically do not foresee exit/termination upon transfer/change of control of the property.

The lease agreements should, however, be reviewed to ensure there are no unusual clauses.

(k) Moratorium/Standstill

Under Portuguese law there are two types of special recovery proceedings that may establish a standstill period: (i) PER (*Processo Especial de Revitalização*); (ii) RERE (*Regime Extrajudicial de Recuperação de Empresas*); and PEVE (*Processo Extraordinário de Viabilização de Empresas*).

The enforcement proceedings are suspended if the debtor submits itself to a PER or a PEVE. Within the course of a RERE, and unless otherwise agreed between the debtor and its creditors, the enforcement proceedings for payment of claims initiated against the debtor and/or its respective guarantors concerning guaranteed operations are extinguished only if they were initiated by one of the creditors who have adhered to the RERE. Should the debtor be declared insolvent, the enforcement proceedings will also be suspended.

Extra-Judicial Enforcement of the Pledge

In a situation where security has been created in the form of a pledge, the parties may agree that the lender may enforce the pledge over the pledged assets without recourse to a court enforcement proceeding.

If the parties have elected the extra-judicial enforcement of the pledge, the lender may sell the pledged assets through a private sale, provided that:

(i) the pledged assets are sold at their fair market value. In this context, it is advisable that the lender obtain a credible valuation of the pledged assets prior to the sale; and

(ii) the lender may not acquire the pledged assets for itself.

Enforcement of Unsecured Debt

Under Portuguese law, unsecured credits may be enforced, but creditors must have an enforceable title to request an enforcement proceeding.

To be enforceable, documents signed by the debtor must be authenticated by a notary or a duly authorised entity in order to be valid as the basis for enforcement proceedings. *Private documents* signed by the debtor that create or recognise pecuniary obligations are not enforceable titles.

If the document in question does not meet the conditions for it to count as an enforceable title, depending on the document on which the process is based, creditors might be able to present a special debt recovery action, or a declarative action requesting the recognition of their credit.

If the debtor does not: (i) oppose the payment procedure, or (ii) pay within fifteen days, the creditor will have an enforceable title. If the debtor opposes the procedure, the payment procedure will proceed according to declarative action rules.

In the event of the declaration of insolvency of the debtor, unsecured creditors may not enforce their rights outside of the insolvency proceeding.

Enforcement of Foreign Judgments

Any final judgment obtained in a competent jurisdiction in respect of any sums payable would be enforced by the courts of Portugal under the conditions set forth in the Recast Brussels Regulation or, if and when such convention is not applicable, would be enforced by the courts of Portugal without re-examination of the merits of the case provided that:

(i) there are no doubts about the authenticity or substance of the document in which the judgment is given, and the judgment is final and conclusive;

(ii) any conditions imposed by the law of the country in which it was given, which are conditions to its enforcement in the Portuguese courts, have been complied with;

(iii) it was issued by a foreign court, the jurisdiction of which had been used justifiably and does not pertain to matters subject to the exclusive competence of the Portuguese courts;

(iv) the exception of lis pendens or res judicata cannot be raised based on a case before a Portuguese court, unless the action was brought first before the foreign court;

(v) the defendant was duly served for the action in accordance with the law of the country in which the judgment was issued, and that the principles of the right to a fair trial (principio do contraditório) and equal treatment of the parties have been complied with; or

(vi) it does not contravene the principles of Portuguese international public order.

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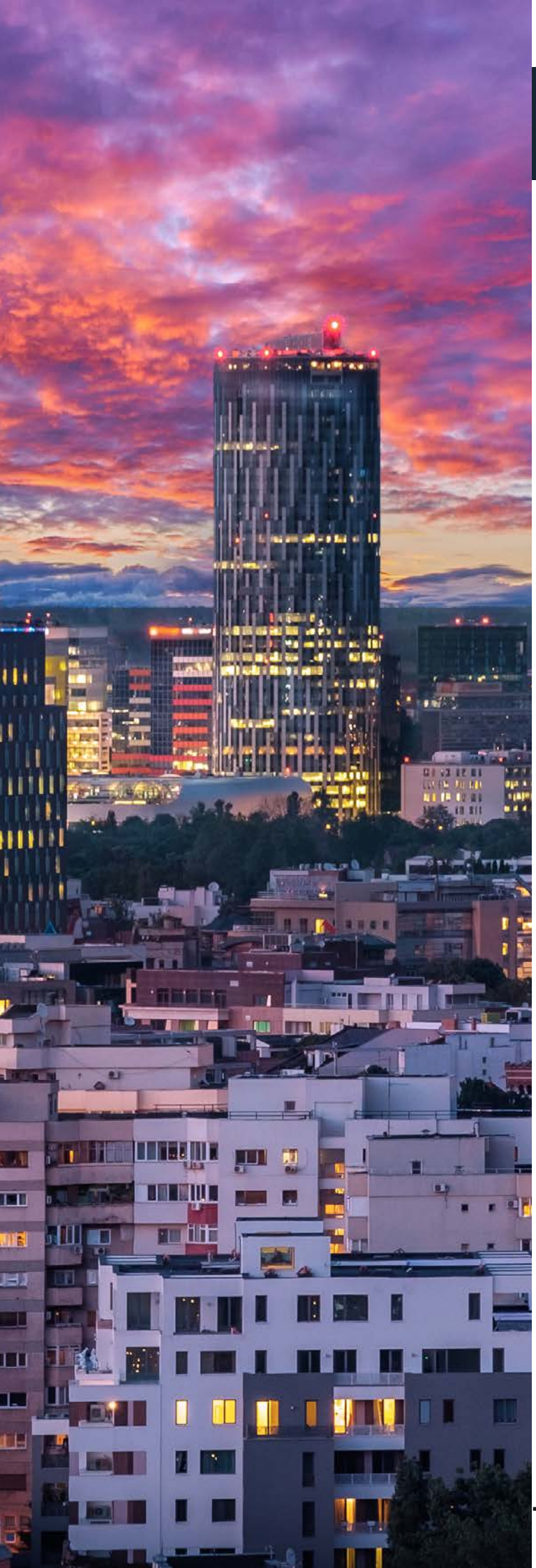

Romainia

The Romanian Civil Code (the **Civil Code**) and the Romanian Civil Procedure Code (the **Civil Procedure Code**) establish stark differences between the enforceability of security based on the type of asset that is secured. The enforcement of security over movable assets (a **Movable Mortgage**) may be initiated, either in accordance with the Civil Code or with the Civil Procedure Code, whereas the enforcement of security over immovable assets (an **Immovable Mortgage**) is governed solely by the Civil Procedure Code.

However, the common ground in both procedures is that in order to be able to commence the enforcement:

- a creditor would need to hold a writ of execution (*titlu executoriu*) such as: (i) a final decision (*hotărâre definitivă*) from a court of law, (ii) a mortgage agreement (*contract de ipotecă*) validly concluded, or (iii) an authentic deed;
- the creditor needs to hold a due and payable, certain, and liquid claim (*creanţă certă, lichidă şi exigibilă*); and
- the statute of limitations (*termen de prescripţie*) with respect to the right sought to be enforced cannot have lapsed.

Upon such requirements being met, enforcement of security in Romania (irrespective of the type of security which is intended to be enforced, i.e., either Movable Mortgages or Immovable Mortgages) is, in principle, a process which involves both out-of-court as well as court proceedings, where the creditor has to resort to the aid of an enforcement officer (also known as a bailiff) supervised by a court of law. The enforcement proceedings can only be initiated upon the creditor submitting the relevant request to such an enforcement officer. Within three days of receiving such request, the enforcement officer has to further request that a competent court of law approve the commencement of the enforcement (*încuviinţarea executării silite*). Such approval is subject to a court procedure which is neither contentious nor public (even the debtor is not invited), where the court simply checks that the document observes the formal requirements to be deemed a writ of execution. The court decision must be rendered within seven days. The decision approving the enforcement is final and can be further censored only through a challenge to the enforcement. The decision rejecting the enforcement can be appealed exclusively by the creditor within fifteen days from the receipt of such decision.

Generally, the enforcement proceedings are, in practice, relatively formal and slow; usually burdened by challenges and procedural delays.

Immovable Mortgages

The enforcement of Immovable Mortgages is regulated by

the Civil Procedure Code. The enforcement procedure is mandatory and cannot be amended by a mutual agreement of parties before the commencement of the enforcement. Any enforcement rules agreed by the parties which are contrary to the rules set out in the Civil Procedure Code are not enforceable.

(a) Approval of the Enforcement

Validly concluded Immovable Mortgage agreements (i.e., those in the form of authentic notarial deeds) are deemed to be writs of execution. The creditor that holds an Immovable Mortgage against a debtor can enforce the mortgage directly, without being required to obtain a prior court decision attesting to the failure of the debtor to fulfil its contractual obligations, or the entitlement of the creditor to commence the enforcement.

After the approval by the court, the bailiff will deliver to the debtor a summons to pay (*somație de plată*). The bailiff will also register the summons with the Land Register where the mortgaged immovable asset is registered.

If the debtor does not pay the outstanding debt within fifteen days from the receipt of the summons, the bailiff may proceed with selling the immovable asset via: (i) an amicable sale; (ii) a direct sale (which entails the private sale to a buyer who offers the price established for the sale) if the parties agree to such direct sale; or (iii) an auction sale.

(b) Methods of Execution

(i) Amicable Sale

The bailiff, having the consent of the creditor, may establish that the debtor will be in charge of the sale of the mortgaged asset. In such case, the debtor must inform the bailiff with respect to the purchase offers which it has received by indicating: (i) the identification details of the potential buyer, and (ii) the timeline within which the potential buyer undertakes to pay the offered price.

Failure to pay by the potential buyer within the agreed timeline entitles the bailiff to proceed with an auction sale.

(ii) Direct Sale

This procedure entails the private sale to a certain buyer who is willing to offer the price established for the sale (the price is determined through the bailiff's evaluation in accordance with the market value of the assets relative to average market prices), and is possible only to the extent that all parties (i.e., both the creditor and the debtor) agree to it.

(iii) Auction Sale

Should the parties not agree on a direct sale or an amicable sale within five days of determining the price of the mortgaged immovable assets (by themselves or by an external authorised valuer), the bailiff will post a notice of sale containing certain required information including, without limitation, the auction starting price. The sale date of the mortgaged assets must be set up between twenty and forty days from the date of posting the sale notice at the address where the auction will take place.

Any person (except for co-owners of the mortgaged immovable asset and persons benefiting from a right of first refusal) wishing to participate in the auction sale must pay an amount (*cauțiune*) equal to 10% of the auction starting price.

The auction sale is held publicly. If there is more than one real estate asset, a separate auction will be held for each of them. The bailiff will offer the mortgaged immovable asset for sale to the person offering the highest price. If no offers are received after three calls, the bailiff will organise another auction sale by no later than thirty days.

The new auction price will be set at 75% of the initial price. If no offer is received for this price, the bailiff will sell the property to the highest bidder, but at a price which is not less than 30% of the starting price for the first auction. The sale may take place even when there is only one bidder offering the adjusted price for this new auction.

If the property is not sold at the second auction, and at the request of the creditor, the bailiff may organise a new auction where the starting price will be set at 50% of the initial starting price. If no offer is received for this price, the bailiff will sell the immovable asset to the highest bidder. The sale may take place even when there is only one bidder offering the adjusted price for this new auction. However, if the creditor intends to buy the immovable asset, it will not be entitled to adjudicate it at a price lower than 75% of the initial auction price.

The person (except in some cases for the creditor, which has the right to set-off its claim) declared the winner of the auction sale must transfer the offered

price to an account indicated by the bailiff within thirty days of the auction sale.

At the request of the bid winner, and with the approval of the creditor (when the winner is not the creditor), the bailiff may permit that the price be paid in instalments.

Movable Mortgages

In practice, the individual movable assets which are the most often mortgaged are: movable tangible assets, bank accounts (and account monies), receivables, insurance rights, shares, intellectual property, and any related proceeds.

A floating charge is also allowed under Romanian law, assuming that the nature and the content of the security is described as accurately as possible. Consequently, the mortgage is usually created based on certain categories of assets (e.g., inventory, machinery, equipment, etc.).

Enforcement of Movable Mortgages can be carried out either in accordance with the provisions of the Civil Code, or the provisions of the Civil Procedure Code (i.e., either out-of-court proceedings or, similar to the experience with the Immovable Mortgage, resorting to the aid of a bailiff and a court of enforcement).

The Civil Code expressly regulates only the enforcement of mortgages over tangible movable assets, certificates of deposit and securities (*titluri reprezentative şi titluri de valoare*), receivables, and bank accounts. Using a *per a contrario* construction, enforcement of Movable Mortgages over other intangible assets (such as shares or intellectual property) is governed by the provisions of the Civil Procedure Code.

(a) Enforcement Under the Civil Code

The enforcement procedures available under the Civil Code are: (i) the sale of the secured asset; (ii) appropriation of the secured asset on account of the creditor's receivable against the debtor (*preluarea în contul creanţei*); and (iii) the takeover of the secured asset for management purposes.

(b) Sale of the Secured Asset

The creditor can sell the mortgaged movable assets either by public auction or by direct sale to a third party by means of one or several agreements, globally or individually, at any time or place. This is done following a request to the court asking for the approval of the enforcement through a sale of the mortgaged asset. The parties may provide the method of sale in the mortgage agreement, assuming that certain requirements are observed, such as the notification of the sale by the creditor and the sale to be conducted in a commercially reasonable manner with regards to the method, time, place, and any other terms and conditions of such sale.

A sale is deemed reasonable if made: (i) in the manner in which similar assets are usually sold on a regulated market, (ii) at a price established on a regulated market and valid at the time of the sale, (iii) in accordance with reasonable commercial practices followed by those who usually sell similar assets, and (iv) in accordance with the rules established in the movable mortgage agreement, whenever a regulated markets/standard commercial practice does not exist with respect to such assets.

The secured creditor may itself acquire the mortgaged asset either through public auction or through a direct sale, though in the latter case only to the extent that assets of the same type are normally sold on a regulated market.

Prior to the scheduled sale, the creditor must observe certain notification/publicity formalities: (i) sending an enforcement notice to certain interested third parties (e.g., the debtor, joint debtors, personal guarantors, the mortgagor, and other secured creditors) regarding the initiation of the enforcement; and (ii) registering an enforcement form with the National Register for Publicity of Security Interests over Movable Property (*Registrul Naţional de Publicitate Mobiliară,* the **National Register**). Both the notice and the registration must be complied with at least fifteen days before the sale date. Failure to observe such formalities may trigger the nullity of the enforcement procedure and render the creditor liable for damages.

The rules regarding the auction sale and the direct sale are the ones regulated by the Civil Procedure Code, as detailed above.

(c) Appropriation of the Secured Asset

As an alternative to the sale of the mortgaged movable assets, the creditor may opt to appropriate such assets on account of its receivable against the debtor. This procedure is available if: (i) the debtor has given its written consent to the appropriation following the occurrence of an event of default in relation to the secured obligations; and (ii) the creditor has notified certain interested parties (e.g., the debtor, joint debtors, personal guarantors, the mortgagor, other secured creditors); and (iii) the creditor has registered an enforcement form with the National Register and none of the above recipients are opposed to the appropriation.

(d) Taking Possession of the Asset for Management Purposes

This means of enforcement is available with respect to a mortgage created over the movable assets pertaining to an enterprise. The procedure is subject to: (i) sending an enforcement notice to certain interested third parties (e.g., the debtor, joint debtors, personal guarantors, the mortgagor, and other secured creditors) regarding the initiation of the enforcement; and (ii) the registration of an enforcement form with the National Register. The creditor, or a person appointed by the creditor or the court, can temporarily take over the management of the respective assets of the enterprise until the secured obligations are discharged.

(e) Enforcement Under the Civil Procedure Code

Any creditor is entitled to perform the enforcement of mortgaged movable assets (of any type) pursuant to the provisions of the Civil Procedure Code.

Those stated above in **(a) Approval of the Enforcement** and **(b) Methods of Execution** under **Immovable Mortgages** are also applicable in this case, with a few particularities:

(i) If within one day of being served with the summons to pay the debtor does not pay the due amounts, the bailiff may proceed with the seizure (*sechestru*) of the mortgaged movable asset. The seizure shall be made public through the National Register and the Trade Registry.

(ii) Moreover, in case of monies, securities, or other receivables of the debtor against third parties, the bailiff will initiate a garnishment procedure (*poprire*) against the debtor. Regarding the funds held with bank accounts, present as well as future monies are subject to this procedure. As a result, the debtor's accounts will be blocked, and the debtor's subsequent debtors may be instructed to pay their debts directly into the accounts of the creditor.

(iii) Under the Civil Procedure Code, the shares in a non-listed company may be sold via an amicable sale or via a public auction, should the direct sale method be unavailable. In the event of the enforcement of shares, the bailiff will also prepare a tender book (*caiet de sarcini*) which shall include the articles of association of the debtor, the type of shares offered for sale and their number, any preferential rights, option rights or security interests created over the shares, the financial statements for the preceding two financial years, and any such other documents necessary for the potential bidders to evaluate the value of the shares. The tender book is circulated to the debtor, creditor, issuing company, and any other shareholder as well, in order to allow them to submit any observations within five days.

(iv) The sale date of the secured assets must be set up between two and four weeks after the lapse of the fifteen-day period of the receipt of the summons to pay.

(v) If the mortgaged movable assets are perishable assets or if the value of the writ of execution is under RON 5,000, the bailiff is entitled to shorten the notice periods, and to forgo any requirements concerning the publication of the notice of sale into a newspaper. Further, the bailiff is entitled to sell such perishable assets at the first auction at the highest price that may be obtained.

Pledges

A creditor may benefit from a pledge (*gaj*) created over tangible movable assets or securities issued in material form (i.e., bearer form), which are under the possession of the creditor. In order to benefit from priority in ranking against other security interests, such as a Movable Mortgage, the pledge must be registered with the National Register, and the creditor must remain in possession of the asset. Enforcement of the pledge is subject to the same rules applicable to the enforcement of movable mortgages.

Personal Guarantees

In principle, a personal guarantee (*fideiusiune*) or a letter of guarantee is not deemed a writ of execution under Romanian law unless the underlying agreement creating the guarantee is concluded as an authentic notarial deed. If the guarantor refuses to make a payment under the personal guarantee, the creditor will need to obtain a court decision against the guarantor in order to be able to enforce the security. The creditor can start enforcement over any assets of the debtor (movable or immovable) existing in the debtor's estate at the time of enforcement. The enforcement will be subject to the rules provided by the Civil Procedure Code regarding enforcement of movable or immovable assets, depending on the assets that are being enforced. If the assets are mortgaged in favour of other creditors, those will be regarded as secured creditors and will be compensated with priority from the enforcement proceeds.

Enforcement of Unsecured Debt Claims

Romanian law does not regulate special proceedings for unsecured debt. As such, after having obtained a writ of execution, those creditors can start the enforcement over any assets of the debtor,

subject to the provisions of the Civil Procedure Code. Because of their unsecured ranking, their debt is unlikely to be satisfied if any secured debt exists and is enforceable.

Impact of Pre-Insolvency and Insolvency Procedures on Debt Recovery

Before the commencement of insolvency proceedings, the relevant debtor may enter into insolvency prevention mechanisms (e.g., (i) collective composition proceedings (*concordat preventive)*, which would determine the suspension of enforcement proceedings, even for creditors which are not part of the collective composition proceedings; or (ii) the restructuring agreement procedure (*procedura acordului de restructurare)*, which is a new iteration of an older procedure that was rarely used and is yet to be broadly tested).

The insolvency proceedings will also lead to a stay of the creditor's enforcement proceedings (with a few limited exceptions) over the debtor's assets, of all interest, penalties, and expenses in relation to unsecured and secured debts, until the approval of a restructuring plan, as well as of the statute of limitation applicable to creditor's enforcement claims and the potential nullity of *fraudulent transactions*.

As an exception, the secured creditor may request that the insolvency judge lift the stay over the enforcement on the charged asset, to proceed to its immediate sale and allow the expedited enforcement of their claims during the insolvency procedure provided that: (i) taxes, stamp duties, and other expenses related to the sale of such assets, including the expenses necessary for the conservation and administration of the assets, as well as for the remuneration of the judicial administrator, the liquidator, and the other experts involved in the proceedings, are paid, and (ii) at least one of the following conditions is met:

- the value of the secured claim (or part of it) is equal to or higher than the value of the secured asset, and: (i) the secured asset is not of vital importance for the success of the proposed reorganisation plan; or (ii) the secured asset is part of a functional unit, and by its separate sale, the value of the remaining assets has not decreased; or
- the secured claim is lacking adequate protection due to the fact that: (i) the secured asset is decreasing in value or there is a serious risk that it may suffer an important loss of value, (ii) the value of a lower-ranking secured claim decreases due to the accrual of the interest and penalties of any kind in favour of a higher ranking secured claim, or (iii) the secured asset is not insured against the risk of being destroyed or damaged.

Recognition and Enforcement of Foreign Judgments

(a) EU Countries

Judgments from an EU Member State's court of law are automatically recognised in the rest of the EU, Romania included. The cross-border recognition and enforcement of said judgements are governed by EU Regulation No. 1215/2012 of the European Parliament and the Council of Europe 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Regulation). The rule enforced by the regulation is that if a judgment is enforceable in the country of origin, it is enforceable in the other EU Member States, without the need for any special procedure. Nevertheless, the regulation does not apply to family law, bankruptcy, inheritance matters, social security, arbitration, and certain other listed matters.

For uncontested claims, a judgment of a court of an EU Member State would be recognised and enforced in Romania according to EU Regulation No. 805 of 2004 of the European Parliament and the European Council creating a European Enforcement Order for uncontested claims. A judgment certified as a European Enforcement Order shall be considered an enforcement title in Romania without intermediate examination of the judgment by a Romanian court of law.

(b) Non-EU Countries

A judgment of a court of a non-EU Member State shall be automatically and fully recognised in Romania, if it concerns the personal status of a citizen of the country where the judgment was issued – or, being issued in a non-EU country, it has first been recognised in the country of citizenship of each party – or, for lack of recognition, it has been issued according to the law deemed applicable by Romanian international private matters rules set in the Civil Code, and it is not opposed to the public policy of Romanian international private law matters, and the right of defence was duly respected. The same reasoning is reiterated in Article 2.567 of the Civil Code, which states that the rights acquired in foreign countries are to be observed in Romania.

Besides the rulings referred to in the paragraph above, other foreign judgments can be recognised and enforced in Romania if they comply with the following provisions:

(i) the judgment is final (non-appealable) according to the law of the state in which it was issued;

(ii) the court issuing the judgment had jurisdiction to adjudicate the matter, without such jurisdiction becoming applicable exclusively based on the presence of the defendant or on some of its assets,

without direct connection with the claim brought in court, located in the respective jurisdiction;

(iii) reciprocity regarding the effects of foreign court judgments exists between Romania and the state of the court which issued the ruling;

(iv) formal validation that the party against whom recognition and enforcement is sought has taken notice of the citation and of the claim filed with the foreign court. If the judgment was issued in the absence of the party against whom enforcement is sought, the judgment must attest that the respective party received in due time the citation for the term when the discussions on the merits of the case were held, as well as the claim filed with the foreign court, and such party was allowed to defend itself and appeal the judgment;

(v) the judgment is enforceable in accordance with the law of the state of the issuing court; and

(vi) the right to seek enforcement of the foreign judgment has not expired under the applicable statute of limitation under Romanian law (currently, three years from the date on which the foreign judgment becomes a writ of execution in the jurisdiction where it was obtained, and five years if it concerns a real estate right).

The enforcement of foreign judgments shall be made at the request of any interested person by the court (*tribunal*) where the judgment is to be executed. The court judgments, through which precautionary or temporary measures were taken, cannot be executed in Romania.

Refusal of recognition of a judgement can be exercised where:

(i) the judgement is manifestly contrary to international private Romanian law or public order;

(ii) the judgement rendered in a matter in which the persons do not freely dispose of their rights was obtained for the sole purpose of avoiding being judged under the law applicable pursuant to the international private Romanian law;

(iii) the trial has already been settled between the same parties through a judgement, even if not concluded in the Romanian courts, or is still subject to trial before the Romanian courts on the date the foreign court is requested to render a judgement;

(iv) the judgement is contrary to a judgement previously rendered abroad and is subject to being recognised in Romania;

(v) the Romanian courts were exclusively competent to render a judgement on that matter;

(vi) the right to defence was breached; or

(vii) the judgement can be further challenged in the state where it was rendered.

Other European regulations applicable in Romania in relation to foreign judgments are: (i) Council Regulation (EC) No. 1896/2006 creating a European Order for Payment procedure; and (ii) Council Regulation (EC) No. 861/2007, establishing a European Small Claims Procedure.

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Scotland

Enforcement of Security

Scots law allows security holders to realise their security both within and outside formal insolvency processes of the borrower entity. The most common methods of enforcing security under Scots law are: (i) sale of a charged property following the *calling up* of a fixed charge heritable security in the form of a standard security, and (ii) the appointment of an administrator or liquidator over the borrower company and all of its assets.

A new moratorium, which may affect the enforcement of security interests and other claims, has been introduced by the Corporate Insolvency and Governance Act 2020 (**CIGA 2020**).

The processes referred to in this Enforcement Guide for Scotland, which are stated as applying to companies, also apply to limited liability partnerships.

There are currently proposals to modernise the law in Scotland in relation to security over moveable property through the Moveable Transactions (Scotland) Bill (the **Bill**). The Bill was passed by the Scottish Parliament on 4 May 2023. It will proceed to receive Royal Assent and it is anticipated that the legislation will take effect in 2024. Once implemented it will, among other things, introduce a new form of fixed security in Scotland known as a *statutory pledge* and the regime for enforcement of that form of security.

Calling Up of Standard Security

Calling up of a standard security is the method of enforcement of a fixed security over heritable property. Broadly speaking, heritable property covers land and buildings. Calling up is a statutory regime set down in the Conveyancing and Feudal Reform (Scotland) Act 1970 (the **1970 Act**) and the Home Owner and Debtor Protection (Scotland) Act 2010 (the **2010 Act**) as applicable.

It is notable that the process of enforcement of a standard security in Scotland is **not** akin to the appointment of a lasting power of attorney (an LPA) or fixed charge receiver under a legal charge in England & Wales, nor is it an insolvency process.

In general terms, subject to any provisions in the security to the contrary, a standard security becomes enforceable when a borrower enters into default. In terms of the 1970 Act, a borrower enters into default where:

(i) a calling up notice has been served in respect of the standard security and has not been complied with,

(ii) there has been a failure to comply with any other requirement arising out of the standard security, or

(iii) where the proprietor of the secured property has become insolvent.

The most common method of enforcing a standard security is by the holder of the standard security issuing a statutory form notice known as a *calling-up notice*.

The calling-up notice is, in effect, a demand for payment, and is the form of enforcement required when the holder seeks to recover the debt, or any part of it, due under a standard security. The procedure for calling up a standard security varies, depending on whether the property is wholly commercial in nature, or is used **to any extent** for residential purposes. For a commercial property, the calling up process can take up to two months. In the case of a property used to any extent for residential purposes, the process is more onerous and requires additional steps to be undertaken, and an order of the court to be obtained. Accordingly, the process can take significantly more than two months to complete.

Once the calling up process has been completed, the holder of the security is entitled to advertise and sell the property (with a requirement to advertise the sale, and to take all reasonable steps to ensure that the price obtained is the best that can reasonably be obtained), and/or enter into possession of the property. The powers of the holder to deal with the secured property do not extend to allowing the holder of the security to deal with the business and/or assets of the borrower within the property. It is merely a right to the heritable interest of the borrower to the extent it is covered by the standard security. It is possible for certain actions taken by the security holder to result in the security holder being deemed to have entered into possession (e.g., by extracting rents, unless those rents are extracted via a valid assignation of rents). Entering into possession carries with it certain additional liabilities and risks. Accordingly, in considering whether to call up a standard security, caution needs to be exercised and the security holder should undertake, in conjunction with its property and legal advisers, an evaluation of the potential risks and liabilities which could arise.

Administration

A chargeholder that has the benefit of a qualifying floating charge (one that either states it is a qualifying floating charge, and/or secures all or substantially all of a company's assets) may appoint an administrator to the company. The appointment can be made in court or out-of-court, with the latter using a streamlined procedure that involves completing forms containing prescribed information, filing them in court, and serving them on specified parties (the company and the proposed administrator). The company or the directors of the company may also appoint an administrator, but are obliged to give notice to a holder of a qualifying floating charge if they intend to do so.

Once appointed, the administrator takes over control of the company, with a view to achieving one of the statutory purposes:

(i) rescuing the company as a going concern,

(ii) achieving a better result for creditors than would likely have been achieved if the company went straight into liquidation, or

(iii) realising property in order to make a distribution to secured or preferential creditors.

The administrator is an officer of the court with duties to all creditors, not just to the chargeholder that appointed the administrator. The administrator may sell assets subject to a floating charge (but has to account for the proceeds of sale to the chargeholder) but requires court permission or consent from the chargeholder to deal with fixed charge assets.

After its appointment, the administrator may choose to continue to trade the business (although any costs the administrator incurs in doing so will have priority over all creditors, save for fixed chargeholders) with a view to create value for creditors or arrange for immediate disposal on appointment (a *pre-pack* administration). A pre-pack is a pre-arranged sale by a company in administration of its business or assets (or both) that completes either immediately upon the appointment of the administrators, or shortly after the administrators are appointed. Pre-packs can result in a quick and relatively smooth transfer of a business, potentially preserving goodwill and jobs. Crucially, they avoid the need for an administrator to secure funding for the purpose of trading the business prior to a sale. An administrator who enters into a pre-pack is subject to various statutory and professional obligations that seek to make the administrator and the process transparent and accountable to creditors.

During the course of administration, there is a moratorium on legal action and any form of enforcement against the company, meaning that security cannot be enforced without the consent of the administrator or permission of the court.

The holder of a charge constituting a security financial collateral arrangement (which often includes mortgages or charges over company shares) is not subject to the restriction on enforcement of security and may enforce its rights during an administration.

Moratorium

In July 2020, a new moratorium process was introduced by CIGA 2020. The moratorium is designed to allow financially distressed companies breathing space from enforcement action by certain types of creditors while they take steps to make their rescue as a going concern viable.

The moratorium restricts creditors from taking certain actions to enforce security and claims against the debtor company, including steps to enforce security, appointment of administrators by the holder of a floating charge, commencement of insolvency proceedings by creditors, crystallisation of a floating charge, the commencement or continuation of litigation or other legal process, irritancy of leases, and the repossession of hire-purchase goods.

During the moratorium the management of a company will remain within the control of its directors. A monitor chosen by the company, who must be a licenced insolvency practitioner, will be appointed to oversee the moratorium. The company and directors are subject to certain restrictions during the period of the moratorium, for example, in relation to the level of creditor that may be incurred or payments that may be made without the consent of the monitor. The moratorium will initially last twenty business days, with the potential to be extended:

(i) for a further twenty business days, without creditor consent;

(ii) for a year in total (including the initial period), with creditor consent; or

(iii) to a date set at the court's discretion.

During a moratorium, although the monitor does not control the company, they will have the ability to terminate the moratorium if they are of the view that the company is no longer able to pay its critical debts when they fall due. The monitor can bring the moratorium to an end by filing a notice with the court.

It is the responsibility of the monitor to file a notice in the following circumstances:

(i) where the monitor believes that the moratorium is no longer likely to result in the rescue of the company as a going concern;

(ii) where the objective of rescuing the company as a going concern has been reached;

(iii) where the monitor cannot carry out their functions because the directors of the company have not provided the monitor with the necessary information;

(iv) where the company is unable to pay moratorium debts that have fallen due or pre-moratorium debts not subject to a payment holiday.

The moratorium provides the company with a payment holiday in relation to certain pre-moratorium debts. Notably, there is no restriction on the ability of financial creditors to accelerate the debt owing to them during the moratorium, and this action would almost invariably cause the monitor to have to terminate the moratorium as the company would not be able to discharge the accelerated debt.

The moratorium is not available to all companies. For example, a company that is party to an agreement that forms part of a capital markets arrangement involving a debt of at least £10 million would not be eligible.

Recognition of Insolvency Proceedings Under the EU Regulation

Since the UK's exit of the EU on 1 January 2021, the recognition of insolvency proceedings between the UK and EU Members States is no longer applicable as the UK is no longer subject to the EU Regulations. The procedures governing these insolvency proceedings depend on the local laws of the EU Member States. Following Brexit, the UNCITRAL Model Law on Cross-Border Insolvency, which already applied to non-EU insolvency proceedings, has provided a framework for the recognition of proceedings started in EU Member States. This framework should assist EU insolvency officeholders in dealing with assets in the UK.

Enforcement of Unsecured Debt

Contractual/Legal *Self-Help* Remedies

Depending on the particular debtor/creditor relationship, an unsecured creditor can also avail itself of certain contractual or legal self-help remedies under Scots law such as:

- (in the case of trade creditors) claiming retention of title in any asset held by the debtor;
- landlord's hypothec in relation to unpaid rent, entitling the landlord to a security right over the assets of the debtor (not third-party assets) to the extent they are within the leased premises on the tenant entering into insolvency procedure;
- setting-off the debt owed against monies owed by the creditor to the debtor; or
- claiming a lien on the debtor's assets.

Obtaining Judgment/Execution Proceedings

A judgment in itself does not always prompt a debtor to pay, and the creditor might then have to consider various enforcement options. An unsecured creditor can take certain other action to recover a debt. In Scotland, this is known as diligence. In simple terms, the creditor can use diligence if the debtor has failed to pay them a sum due. The creditor must have a decree (court order) enforceable in Scotland, or

a *document of debt* (for example a summary warrant, or an extract registered document) before the creditor can exercise diligence. The type of diligence exercised will depend on the nature of the assets of the debtor, and from which the creditor is seeking payment.

The following main enforcement/diligence options are available:

- **Inhibition** – a specific form of diligence in relation to heritable property. Once registered, it covers all property in Scotland owned by the debtor on the date on which the inhibition takes effect. The effect is to prevent a debtor from voluntarily dealing with its heritable property (e.g., by way of sale to the detriment of the inhibiting creditor). Once registered, the inhibition lasts five years until otherwise discharged.
- **Arrestment** – This involves the freezing of an obligation to account to the debtor. It is most commonly used to freeze monies in an account or held by a third party for the benefit of the debtor to prevent the transfer of those monies to the debtor. Once final judgment is obtained, further procedures may be required to release the monies to the creditor, depending on the nature of the obligation.
- **Attachment** – a form of diligence on corporeal moveable property in the hands of the debtor, albeit there are certain categories of property which are excluded. A schedule of property will be prepared and an auction sale will take place, with the proceeds being applied in reduction of the debt due.
- **Earnings Arrestment** – It may also be possible to seek and obtain an arrestment order requiring the employer of a debtor to deduct a sum from the net earnings on every pay-day, and to pay the relevant sum to the creditor.

Recognition and Enforcement of Foreign Judgments

In Scotland, a variety of rules apply to the enforcement of foreign judgments. Which of those rules apply depends on the origin of the judgment sought to be recognised or enforced, and whether any international convention rules apply.

Since the UK's exit of the EU on 1 January 2021, the EU Regulations on the recognition and enforcement of judgments in civil and commercial matters are no longer applicable,[1] as the UK is no longer subject to the Brussels Regulation, the Recast Brussels Regulation, or the Brussels Jurisdiction Convention.

An order for recognition or enforcement of a foreign judgment may be granted on proper proof of the foreign judgment without any re-trial or examination of the merits of the case. However, depending on the circumstances, a Scottish Court may only give such an order subject to a number of qualifications, including the following:

(i) that the foreign court had jurisdiction, according to the laws of Scotland;

(ii) that the foreign judgment was not obtained by fraud;

(iii) that the enforcement of the foreign judgment is not contrary to public policy, or natural or constitutional justice as understood in Scots law;

(iv) that the foreign judgment is final and conclusive;

(v) that the proceedings seeking to enforce the foreign judgment are instituted within any prescribed time limits. For judgements covered by the Administration of Justice Act 1920, proceedings must generally be made within twelve months of the judgement to be enforced (although the court has discretion to extend this time period depending on the circumstances). For judgements covered by the Foreign Judgments (Reciprocal Enforcement) Act 1933, the proceedings must be raised six years after the date of the foreign judgment (under certain circumstances the six-year period may not commence to run until a later date). Where no convention or specific reciprocal rules apply, proceedings may be raised under the process of Decree Conform at common law, in which case any proceedings must be raised timeously under any prescribed period of limitation under the legal system where it was pronounced;

(vi) that the foreign judgment is for a definite sum of money which remains unsatisfied (in full or in part); and

(v) that the procedural rules of the court giving the foreign judgment have been observed.

1 Subject to certain exceptions for enforcement of judgments arising from court actions in EU Member States which were commenced on or before 31 December 2020.

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Slovakia

Enforcement of Security

In the Slovak Republic, debts are typically secured by the following security instruments: (i) a pledge over shares (*akcie* in joint stock companies) or ownership interest (*obchodný podiel* in limited liability companies), moveable assets, securities, receivables (e.g., from bank accounts, insurance agreements, lease agreements, or trade receivables), patents and trademarks, inventories (*floating charge*), enterprise (*podnik,* i.e., business as a going concern), or real property; (ii) security assignment of receivables, assets, or securities; or (iii) other instruments such as guarantees, promissory notes, or directly enforceable notarial deeds.

Of the above list, only the pledge and the security assignment constitute *in rem* security instruments pertaining to the relevant assets of the security provider. Nonetheless, due to structural defects of the security assignment, the pledge is by far the preferred security instrument on secured finance transactions involving a Slovak security package.

Below, we provide an overview of the enforcement of the most common types of security available to a secured creditor outside of insolvency procedure. These procedures are not available in insolvency proceedings where the debtor's assets become subject to administration by the insolvency administrator (trustee), and are typically sold off by the insolvency administrator, in which case secured creditors usually have a preferred right of satisfaction from the sale of the pledged asset.

Enforcement of Pledge

As a general rule, a pledge may be enforced by a private enforcement, i.e., (i) in a manner defined in the contract, (ii) by sale in public auction, or through public enforcement, i.e., through enforcement proceedings (court enforcer).

In addition, there are also specific rules applicable to various types of pledged assets.

Private Enforcement

The pledgee must notify the pledgor at least thirty days in advance of the commencement of enforcement of the pledge. If the debtor and the pledgor are not the same entity, the pledgee must also notify the debtor whose liabilities are secured by the pledge. If the pledge is registered in the Slovak central notarial register of pledges or the Land Registry, the pledgee must also register the commencement of enforcement in the relevant registry. Registration of pledge is a mandatory perfection requirement for all types of pledge, with the exception of pledges over movable assets, in which case a pledge may come into existence by handing over the asset by the pledgor to the pledgee (possessory pledge). If multiple pledges exist in respect of the same collateral, for the purposes of enforcement: (i) the registered pledge takes

priority over any non-registered (possessory) pledge(s), and (ii) priority of a registered pledge against other registered pledges, is determined by the time of its registration in the relevant public registry.

For pledges, Slovak law allows both private (i.e., enforcement without the need to request any judgment or preliminary injunction or approval of court or other public authority) or public (i.e., enforcement through a court-appointed enforcement agent on the basis an enforcement title) enforcement. If the claim is enforced otherwise than by private enforcement, all types of enforcement (e.g., without limitation, enforcement of a guarantee) require an enforcement title: (i) an enforceable decision of a court or an arbitral award, or (ii) a notarial deed containing the acknowledgment of debt and debtor's agreement with its direct enforceability in case of default.

On 1 March 2023 the new Slovak law on screening of foreign investments (the **New FDI Act**) came into force. The New FDI Act is applicable to transactions which closed on or after 1 March 2023. The New FDI Act imposes new obligations to obtain prior approval from Slovak authorities in relation to certain transactions which qualify as foreign investments by non-EU investors in Slovak target entities. The New FDI Act is primarily designed to capture transactions resulting in direct or indirect acquisitions of Slovak target entities by non-EU investors. However, in certain sectors (e.g., military, R&D, media and digital services, essential services, and others), the New FDI Act would also apply to secured finance transactions involving local security over certain material assets of, or shares or participation interest in, Slovak target entities. As such, if the security in question falls within the scope of the New FDI Act, enforcement of such security by way of sale of collateral to a non-EU purchaser would require a prior approval of the Slovak Ministry of Economy.

Enforcement of Pledge of Receivables

When the secured debt becomes due, the pledgee is entitled to the receivable, the interest, and other performance derived from the receivable in the amount of the secured debt.

The pledge is effective *vis-à-vis* third-party debtors upon notification. Either the pledgor or the pledgee may carry out such notification. The difference between the two types of notification is that where it is notified by the pledgor, the pledgor needs not to substantiate the existence of the pledge to the debtor, but if the pledge is notified by the pledgee, the pledgee must prove the existence of the pledge to the debtor.

Enforcement in Manner Defined in the Contract

The pledge agreement may stipulate the way in which the asset will be liquidated. The typical method is private sale. Other available options include a direct sale of the pledge through an agent or private tender.

The pledgee is obliged to act during the sale of the pledge with due care to sell the asset for a price at which the same or a comparable asset is usually sold, under comparable conditions at the time and place of the sale of the pledge.

In general, any agreement concluded prior to the secured debt becoming due, based on which the pledgee shall acquire the ownership of the pledged asset, is void.

Sale in Public Auction

The pledgee may request the pledged asset be sold via a public auction. The public auction is performed by an auctioneer under an agreement entered into between the pledgee and the auctioneer, which specifies (among other things) the lowest bid. The auctioneer values the asset. In some cases, such as with real estate, an expert opinion is required. The auctioneer notifies the owner of the pledge, the pledgor, the debtor, and creditors secured by the pledge. The asset must be sold to the highest bidder. Through sale of the asset by the pledgee, the pledgee's security interest and all junior ranking pledges cease to exist. Senior ranking security interests (if any) continue to exist on the asset and are effective towards the purchaser (unless the senior-ranking creditor(s) decides to take over the enforcement and enforce their senior ranking security first).

Certain restrictions apply to sales of residential houses and apartments where the lowest bid in the first round of an auction cannot be set lower than 90% of the asset value determined by an expert appraisal.

Public Enforcement – Enforcement Proceedings

Under specific circumstances, a pledge may be also enforced in court enforcement proceedings by a court enforcer. In such cases, the liquidation of the asset is carried out by a court-appointed enforcement agent, in line with the general rules on enforcement of judicial and other official awards. However, in this case, the pledge agreement and the underlying instrument creating the secured liability are not sufficient to enforce the security. Instead, the pledgee must present a final enforcement title against the pledgor to allow the pledgee to later petition the court to enforce it through enforcement of the pledgee's security interest. This would typically be a judgment or an arbitral award, depending on the method of dispute resolution agreed in the underlying instrument giving rise to the secured receivables. This method of enforcement can result in practical issues, notably where the pledgor and debtor are different entities. Note, however, that the enforcement title might also be a notarial deed containing

the acknowledgment of debt and debtor's agreement with its direct enforceability in case of default – such notarial deed is a common security instrument which, in combination with a pledge agreement, may serve as a basis for public enforcement of pledge without seeking an enforceable judgment.

Once the pledgee has the final enforcement title to the secured receivable, and the enforcement agent is appointed by the court, the enforcement agent typically liquidates the assets in an auction.

Enforcement of Unsecured Debt

Unsecured debt may be enforced through seeking an enforceable judgment and/or award and subsequent court enforcement, or via insolvency proceedings.

Recognition and Enforcement of Foreign Judgments

Foreign decisions (judgments, court settlements, and enforceable notarial deeds) are enforceable in the Slovak Republic if: (i) the relevant foreign authorities confirm that they are in legal force, and (ii) they are recognised by the Slovak courts.

When requesting a court enforcement of a foreign decision in the Slovak Republic, the competent court will, as a preliminary question, assess whether the foreign decision fulfils conditions for recognitions which include: (i) the Slovak courts did not have exclusive jurisdiction over the matter and the body that issued the decision had jurisdiction under Slovak law; (ii) the decision is final and enforceable in the country in which it was issued; (iii) the decision decides the merit of the issue; (iv) the defendant was not denied due process; (v) the Slovak courts did not issue a decision on the matter and there is no other decision on the matter already recognised in the Slovak Republic; and (vi) the decision is not against Slovak public policy.

Under the Recast Brussels Regulation, a decision of a court of an EU Member State can be enforced in other EU Member States without a declaration of enforceability or substantive examination of the decision.

Enforcement of Uncontested Claims

A simplified procedure is available for uncontested claims under the European Order for Uncontested Claims Procedure. If a judgment is certified as a European Enforcement Order in the EU Member State of origin, it shall be recognised and enforced in other EU Member States without the need for a declaration of enforceability, and without any possibility of opposing its recognition.

Enforcement on the Basis of a European Order for Payment

A simplified procedure is available for uncontested monetary claims under the European Order for Payment Procedure. At least one of the parties must be domiciled or habitually resident in an EU Member State other than the EU Member State of the seizing court. The petitioner files an application for a European Order for Payment using a standard form annexed to Regulation (EC) No. 1896/2006. If the requirements are met, the competent court issues an order for payment. If the defendant fails to lodge a statement of opposition within thirty days of delivery, the court declares the order for payment enforceable. The order for payment is then recognised and enforced in other EU Member States (with the exception of Denmark) without the need for a declaration of enforceability, and without any possibility of opposing its recognition.

Enforcement of Minor Claims up to €2,000

A simplified procedure is available for minor claims in civil and commercial matters where the value of the claim does not exceed €2,000 (the European Small Claims Procedure). At least one of the parties must be domiciled or habitually resident in an EU Member State other than the EU Member State of the acting court. The claimant initiates the procedure by filing a standard form annexed to the regulation with the competent court; unless it is necessary to hold an oral hearing or a party requests such, the procedure is conducted as a written procedure. The court sends the filing together with the standard response form to the defendant within fourteen days and the defendant may reply within thirty days of delivery. The decision becomes enforceable, notwithstanding any possible appeal in another EU Member State without the need for a declaration of enforceability, and without any possibility of opposing its recognition.

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Spain

Enforcement of Security

The two most common types of rights *in rem* which are used in Spain are mortgages and pledges, although other types do exist. The most common security package in lending transactions in Spain is made up of: (i) mortgages over real estate property, and (ii) pledges over shares or units (*acciones o participaciones sociales*), stock goods at warehouses, receivables and credit rights arising from bank accounts, and other relevant agreements (insurance, leases, etc.).

Nonetheless, each security package must be tailored according to the nature of the financing, and the particular circumstances of the creditor, debtor, and its assets. Formalities and costs may vary significantly depending on the security type.

Mortgages

According to Spanish law, there are two main types of mortgages (*hipotecas*): (i) mortgages over real estate property or other immovable assets, and (ii) mortgages over chattels or movable assets.

Although mortgages in lending transactions usually secure monetary obligations, they may also secure fulfilment of non-monetary obligations, such as financial ratios or negative pledge covenants, in which case they will secure the compensation or indemnification claims resulting from the default of such obligations.

Mortgages created on real estate assets are the most typical *in rem* security rights in Spain. They grant an exclusive right for the creditor in order to have its credit satisfied against the value of the collateral assets with preference over any other creditor. Such mortgages do not imply the transfer of the possession of the real estate assets before the potential enforcement of the security, and a mortgage on real estate assets *runs with the land*. In case of insolvency of the debtor, such credit claims will qualify as privileged credits, and will be ranked ahead of ordinary and subordinated claims.

Under current Spanish law, it is possible to create mortgage structures like contingent/conditional mortgages (*hipotecas condicionadas*), floating mortgages (*hipotecas flotantes*), and reverse mortgages (*hipotecas inversas*). Not all these types of mortgages are available for non-credit institutions.

As regards formal requirements, mortgages on real estate must be: (i) granted by the real estate title holder in a public deed granted before a public notary, and (ii) registered at the Land Registry (*Registro de la Propiedad*). The deed of mortgage contains a number of formalities, one of the most important being the maximum mortgage liability, which is the maximum amount for which the property asset is charged. Such amount will be used to calculate the stamp duty, which is triggered

as explained below. Finally, an appraisal or valuation report of the mortgaged asset will also be required and calculated following Order ECO 805-2003 (which differs from RICS principles). This valuation certificate will be annexed to the mortgage deed and it has to be issued within the last six months to be effective and acceptable.

The granting of mortgages involves notary fees and registry fees, and accrues Stamp Duty (*Actos Jurídicos Documentados* AJD) amounting from 0.5% to 2.00% (it varies depending on the location of the asset since each region has its own tax rate) of the maximum mortgage liability, which may result in a significant cost (the rate depends on the specific region in Spain where the property is located). An amendment of the secured obligation or an assignment of the loan will also trigger stamp duty again, except if it is expressly exempted provided certain requirements are met.

A chattel mortgage may be created on certain movable assets such as motor vehicles, planes, machinery, or industrial property. Although these are commonly used in certain deals, chattel mortgages are not as common as real estate mortgages or pledges in lending transactions.

Please note that chattel mortgages must also be granted in a notarial deed and registered at the Movable Assets Registry (*Registro de Bienes Muebles*), and, consequently, stamp duty could be triggered when the security is granted as public deed (*escritura pública*).

Finally, as an alternative or supplemental enforcement mechanism, it can be agreed on the sale of the property asset to the creditor or a third party (*pacto marciano*) provided that the price is at market value as evidenced by appraisal reports, so the sale is not detrimental for the owner. Such mechanism can be reinforced by means of a power of attorney granted by the owner to the creditor to formalise such sale unilaterally.

Pledges

A pledge may be granted to secure any kind of obligation, and it may be created on certain movable assets or credit rights. Again, there are two main types of pledges under Spanish law: (i) possessory pledges, and (ii) non-possessory pledges.

(a) Possessory Pledges (*prendas ordinarias o con desplazamiento*)

Possessory pledges imply the transfer of possession of the asset in favour of the creditor or a third party. In the event of the debtor's default, the creditor may sell the pledged asset to discharge the debtor's liabilities to it in priority to the claims of any other creditors.

Apart from the effective transfer of the possession, the granting of a possessory pledge must be in a public deed (either *escritura pública* or *póliza notarial*) in order to have effects *vis-à-vis* third parties (*erga omnes*). No registration is required, and so the only costs are the notary fees in the event of granting a public deed.

The usual assets granted as security in banking transactions by means of possessory pledges are shares, securities, receivables, and credit rights. In the case of receivables and credit rights, transfer of possession is replaced by a notice served to the relevant obligor communicating the creation of the pledge over such assets.

(b) Non-Possessory Pledges (*prendas sin desplazamiento*)

Furthermore, it is also possible to set up a pledge on movable assets that does not entail the transfer of possession, and thus, permits the debtor to continue using the secured asset in the industrial process. Non-possessory pledges may be created on assets listed in the Law 16/1954 of Chattel Mortgage and Non-Possessory Pledge, which are, amongst others, machinery, stock goods, raw materials, and credit rights.

This non-possessory pledge must be granted in a public deed and registered with the Movable Assets Registry. In certain cases, it is possible to grant this type of pledge in a form of notarial deed (*póliza notarial*) that does not accrue stamp duty tax.

(c) Pledges Over Future Receivables

It should be noted that, in accordance with Spanish Insolvency law,1 in the event that insolvency proceedings are instituted, the credits held against the insolvent company that have been secured by pledges over future credits shall be classified as credits with special privilege, but only if such future credits arise from agreements that have been perfected, or from legal relationships that have been constituted prior to the declaration of insolvency. To benefit from such privileged status, the pledge has to be granted before a notary public so that the execution date is evidenced or, in the case of non-possessory pledge, it has to be registered with the Movable Assets Registry.

It should also be noted that some Spanish Regions (*Comunidades Autónomas*), like Catalonia or Navarra, have established specific regulations for pledges granted in their

1 Royal Legislative Decree 1/2020, of 5 May, approving the Consolidated Text of the Spanish Insolvency Law (*Real Decreto-Legislativo 1/2020, de 5 de mayo, por el que se aprueba el Texto Refundido de la Ley Concursal*), as amended pursuant to the Spanish Law 16/2022, of 5 September, amending the consolidated text of the Spanish Insolvency Law (*Ley 16/2022, de 5 de septiembre, de reforma del texto refundido de la Ley Concursal*).

territory or on assets located therein, which differ from the Spanish statutory law.

An alternative mechanism to the pledge security over credit rights is the assignment, sale or transfer of credit rights under Spanish law by means of *cesión pro solvendo*. As a result, the credit rights (actual or future) are transferred to the creditor as payment of the borrower's debt. The main advantage is that such credit rights belong to the creditor so they will not be part of the debtor's estate in case of insolvency proceedings. The borrower will remain liable until the total outstanding debt has been repaid through the credit rights received by the creditor.

Financial Collateral Arrangements

Financial collateral arrangements are regulated by Royal Decree Law 5/2005, which implemented the EU Directive 2002/47/EC and EU Directive 2009/44/EC of the European Parliament in respect of financial instruments, cash deposited in bank accounts, and credit claims. Pursuant to the Royal Decree Law, the only formality required to create a valid financial guarantee is that it is contained in a written agreement between the parties. Nonetheless, the collateral being provided should be delivered, transferred, held, registered, or otherwise designated so as to be in the possession or under the control of the collateral taker, or of a person acting on the collateral taker's behalf.

A key difference with financial collateral arrangements is that the creditor may dispose of the assets granted as security, but must return to the debtor equivalent assets on the maturity date of the secured obligations. For this to be applicable, the deed must establish: (i) an express agreement to entitle the creditor to dispose of the assets, and (ii) the procedure to do so.

In addition, it should be noted that the beneficiary of such security benefits from a privileged ring-fenced regime in the event of insolvency of the debtor.

Enforcement of Secured Debt

Spanish law provides several proceedings for the enforcement of securities. In particular, the most common proceedings for the foreclosure of a mortgage are the judicial foreclosure procedure and the out-of-court proceedings (i.e., the notarial procedure). The foreclosure of mortgages entails the sale of the mortgaged property though a public auction arranged before the relevant court or notary public. Within the judicial proceedings, the procedural regulation provides that the parties may agree upon a specific procedure to sell the mortgaged property. Moreover, the judge may entrust the sale of the property to a specialised person or entity. Foreclosure is designed to obtain the maximum possible price within reason.

Spanish law grants the secured creditor the possibility of accepting title to the property in satisfaction of the secured amount, but it may be required to acknowledge full satisfaction of the total outstanding amount, or at least of a certain proportion of the debt, in accordance with the procedural regulation on this matter.

The enforcement proceedings for chattel mortgages and non-possessory pledges are similar to the regulation established for the mortgages on real estate, but it is important to take into account the differences between them.

For the enforcement of a pledge of shares/units, judicial and notarial procedures can be followed, although the latter is normally faster and more efficient. For the past years, we have also seen double luxco structures, so there is an additional route of security enforcement out of Spain at the top level.

In any event, the parties can agree on a different procedure for the enforcement of collaterals. For example, the parties may establish a method to enforce the collateral via a financial collateral agreement. This implies that the parties may agree on the set-off or assignment of the asset to discharge the secured obligations.

Finally, it should also be noted that in case of insolvency of the borrower, enforcement of security over assets of the borrower, which are required for the continuation of its business activity, will enjoy a maximum one year moratorium or stay.

Enforcement of Unsecured Debt

Under Spanish law, no special formalities are needed for an unsecured financing agreement to be valid and effective. However, notarisation of the agreement has a procedural advantage for lenders, as it provides direct access to summary (or *executive*) enforcement judicial proceedings.

Judicial executive proceedings (*procedimiento ejecutivo*) are an easy and expeditious way of claiming from the borrower or the guarantor any amount owed under an agreement.

The judicial claim would only need to be accompanied by the following documents:

- the deed by which the agreement was raised to public status before a Spanish notary;
- documents or notarial certificate that justify the amount of due and claimable debt; and
- proof of the notification to the debtor or the guarantors (if applicable).

Furthermore, the debtor has limited grounds on which to challenge the enforcement (i.e., the debt has already been

paid and/or the amount due has been calculated incorrectly). Any other grounds (such as invalidity of the agreement and/or unenforceability of the debt) shall have to be alleged within an ordinary declarative proceeding, which would entail the stay of the enforcement proceedings.

By contrast, in order to enforce an agreement that has not been raised to public status, the lenders have to claim the debt by means of an order-for-payment procedure (*procedimiento monitorio*) related to certain invoices, or a declarative proceeding (*procedimiento declarativo*), which does not affect enforcement of the debt, but leads to a statement of the existence of the right to be repaid. The recovery of the debt by means of enforcement proceedings typically takes from six to nine months. Order-for-payment proceedings are faster (i.e., two to three months), but they can only be initiated if the debt is supported by instruments such as invoices or similar instruments. Declarative proceedings are longer and may take from one to three years. In light of the above, market practice in Spain is for lenders to require the enforcement of the finance documents before a Spanish notary.

Recognition and Enforcement of Foreign Judgments

(a) Recognition

EU Member States: Under the Brussels I Regulation Recast, a judicial judgment rendered in a member state of the European Union shall be recognised in the other member states without any special procedure being required. The 25th final provision of the Spanish Civil Procedure Act provides for measures that complement the application of the regulation.

A judgment will not be recognised if one of the grounds for refusal the recognition provided in Article 45 of the regulation is met.

Non-EU Member States: As regards countries outside the European Union, the foreign judicial judgment must be recognised by the Spanish Court (First Instance Court) prior to its enforcement. However, that recognition will not be necessary in certain cases where a treaty has been entered into via multilateral conventions (Lugano Convention 2007) or bilateral conventions between Spain and the foreign country (i.e., Colombia, Uruguay, Israel, Brazil, Mexico, China, Morocco, Thailand, El Salvador, Tunisia, and Russia).

In the absence of an applicable convention or treaty providing for the recognition and enforcement of a foreign judgment, Spanish courts will recognise a foreign judgment in accordance with Law 29/2015, of 30 July 2015, on international legal cooperation in civil matters.

The new law on international legal cooperation, which will apply in civil and commercial matters, takes a broad and favorable approach to international legal cooperation, even in the absence of reciprocity, although it envisages the possibility of refusal in cases of a repeated lack of cooperation or a legal prohibition on providing it.

The First Instance Court is the competent court to grant the recognition of the foreign judgment.

The foreign final and conclusive judgment will not be recognised in Spain if:

- it is contrary to public policy;
- the decision has been issued with manifest infringement of the rights of defence of any party;
- a foreign judgment has been given on a matter for which the Spanish courts have exclusive jurisdiction;
- the judgment is irreconcilable with a judgment given in Spain;
- the judgment is irreconcilable with a judgment given previously in another member state, and such judgment meets the conditions necessary for its recognition in Spain; and
- there is pending litigation in Spain between the same parties and on the same matter which began before the litigation process abroad.

(b) Enforcement

The First Instance Court is the competent court for enforcing the foreign judgment.

The Spanish Civil Procedure requires all the documents to be submitted before the court be translated into Spanish. It is important to emphasize that since the other party can challenge the translation, even though it is not strictly necessary, a sworn translation will be required. An apostille certificate in accordance with the Hague Convention is required in the majority of cases.

EU Member States: Any enforceable judgment given in a member state of the European Union on or after 10 January 2015, in respect of a matter coming within the scope of the Brussels I Regulation Recast, would be enforceable in Spain, without the need for a declaration of enforceability or exequatur. The 25th final provision of the Spanish Civil Procedure Act provides for measures that complement the application of the regulation.

A judgment will not be enforceable if one of the grounds for refusal the enforcement provided in Article 45 of the Brussels I Regulation Recast is met. In addition, the application of the grounds for refusal the enforcement provided for in the Spanish Civil Procedure Act is also considered.

For the purposes of enforcement in Spain of a judgment given in another member state, the applicant shall provide the First Instance Court of the territorial district where the party against whom enforcement is sought, is domiciled, or where the judgment has to be enforced with: (i) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (ii) the certificate issued pursuant to Article 53 of the regulation, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

Other European regulations applicable to the enforcement of a European judgment are:

- Council Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims;
- Council Regulation (EC) No. 1896/2006 creating a European Order for Payment procedures; and
- Council Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure.

Non-EU Member States: Foreign judgments in civil and commercial matters, which are final and enforceable in their origin country, shall be enforceable in the Kingdom of Spain once exequatur has been obtained in accordance with the provisions of Law 29/2015, of 30 July 2015, on international legal cooperation in civil matters.

The procedure to enforce foreign judgments starts with a request submitted by the applicant. The following documents must be attached:

- the original or certified copy of the foreign judgment, duly authenticated or certified;
- a document certifying that, if the judgment was given in default, the debtor was notified;
- any document evidencing that the judgment is final, conclusive, and enforceable; and
- the relevant translations.

The claim and documents are analysed by the court clerk, who issues a decree notifying the defendant of the claim and allowing them to oppose the declaration of enforceability within thirty days.

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Enforcement of Debts in General (Secured/ Unsecured Debts)

Enforcement of debts is governed by the Swiss Federal Act on Debt Enforcement and Bankruptcy of 11 April 1889 (**DEBA**). The DEBA provides for different types of debt enforcement proceedings depending, among other factors, upon: (i) whether the enforcement relates to a claim which is secured or not, and (ii) whether the debtor is subject to bankruptcy proceedings.

Preliminary Proceedings, Including Attachment Proceedings

The creditor initiates debt enforcement proceedings by filing a debt collection request against the debtor with the appropriate Debt Collection Office (**DCO**). If the debt is secured, the creditor must make reference to the security in the request. No evidence of the creditor's claim is required, nor is there a judicial review at this stage.

Within a matter of weeks following receipt of the debt collection request, the DCO serves a summons for payment to the debtor. The debtor may file an objection to the summons to pay within ten days, or pay the amount claimed within twenty days (longer payment periods apply in case of secured claims). The debtor can object totally or partially to the summons by simple declaration and can do so without any justification. Said objection suspends the debt collection proceedings.

If the debtor fails to both object and pay, the DCO will swiftly move to the applicable next steps in the enforcement proceedings (*see below*).

Where the debtor has objected to the summons to pay, the creditor must seek to have such objection dismissed by the competent court. The creditor may do so in one of the following manners:

- If the creditor already has an enforceable judgment or a notarised deed confirming the claim, it may seek definitive dismissal of the objection by way of summary proceedings.
- If the creditor has a signed or notarised document whereby the debtor undertakes to pay the amount at stake (so-called acknowledgement of debt), it may seek provisional dismissal of the objection in summary proceedings. The provisional dismissal becomes definitive if the debtor does not initiate a lawsuit disputing the claim within twenty days of the court decision.
- If the creditor does not have any of the above, it needs to file a claim on the merits in ordinary proceedings.

The preliminary proceedings are completed once: (i) the debtor fails to object to the summons to pay within the

applicable deadline, or (ii) the creditor has been able to have the debtor's objection definitively dismissed by the competent court.

These preliminary proceedings may be preceded by an attachment of the debtor's assets located in Switzerland. In order to effect such attachment, the creditor must apply to the competent court and demonstrate *ex parte*, on a *prima facie* basis, that: (i) he holds a claim against the debtor; (ii) the debtor has assets located in Switzerland; and (iii) the conditions for an attachment are met under the DEBA. The last condition is given, *inter alia*, where:

(i) the debtor does not reside in Switzerland and the claim has a sufficient nexus to Switzerland, or the creditor holds an acknowledgement of debt by the debtor; and

(ii) the creditor has an enforceable judgement or notarised deed confirming the claim. Foreign judgements or arbitral awards, even if not yet recognised in Switzerland, are sufficient for the purposes of seeking attachment.

Within ten days, the debtor may object to the attachment and apply to the competent court to have it lifted.

If the creditor's application for an attachment has been granted, the creditor must act upon the attachment within ten days, either by pursuing a claim on the merits against the debtor (where the creditor does not yet have a decision confirming the claim), or by initiating the preliminary debt collection proceedings described above.

Enforcement Proceedings

Once the preliminary proceedings are completed, the creditor may initiate the enforcement phase by filing with the DCO a request for continuation of the enforcement proceedings. The creditor may do so within one year from service of the payment summons, it being specified that this deadline is suspended during court proceedings (*see above)*.

The applicable proceedings depend, amongst other things, on whether the enforcement relates to a claim secured by a pledge, and whether the debtor is subject to bankruptcy. The most important forms of enforcement proceedings are the following:

- **Seizure of Assets:** applicable if the debt is unsecured and the debtor is not subject to bankruptcy. The debtor's assets are seized and realised to the extent needed to repay the creditor's claim. The debtor's claims against third parties (e.g., salary or other receivables) may be seized as well; in such instances, the DCO orders the third party to pay directly into the DCO account.
- **Bankruptcy Proceedings:** applicable if the debt is unsecured and the debtor is subject to bankruptcy (this is the case for entities and individuals registered with the commercial register). Bankruptcy proceedings will eventually lead to the liquidation of the debtor's estate, and the proportionate repayment of all creditors through distribution of proceeds.
- **Realisation of the Pledged Assets:** applicable if the debt is secured. The DCO seizes the pledged assets and then sells them as described below. The parties may also agree on private enforcement, in which case the pledgee may have the security realised by way of private enforcement. Unless the debtor has waived it (generally in the security agreement), debt collection by realisation of pledged assets takes precedence over other forms of enforcement proceedings.

Enforcement of Security in Particular

There are three main forms of enforcement with regard to security in Switzerland: (i) private enforcement, (ii) enforcement according to the DEBA, and (iii) enforcement with regard to assets transferred by way of security.

Private Enforcement

Private enforcement of pledged assets by the secured party is permitted if: (i) the security provider has not been declared bankrupt, and (ii) the parties have agreed to private enforcement in advance (typically in the security agreement). Private enforcement is possible with regard to all types of assets, and without going through the DEBA proceedings set out above.

Private enforcement can take place by way of: (i) private sale, (ii) public auction, or (iii) purchase of the relevant assets by the secured party itself, if the value of the pledged asset can be objectively determined (e.g., listed securities). Proceeds in excess of the secured claims must be returned to the pledgors.

Enforcement According to the DEBA

The DEBA provisions on the enforcement of security apply if the parties have not agreed to private enforcement, or in any case where bankruptcy proceedings have been initiated against the security provider.

The security is usually realised by the DCO (or the bankruptcy administration, where applicable) by way of a public auction. A private sale may also take place in certain situations (e.g., in case of assets which have a market price or perishable goods).

Assets Transferred By Way of Security

If the assets have been transferred to the creditor by way of security, enforcement proceedings are not necessary given that the secured party already owns the assets. In such cases, the secured party will typically keep the transferred assets and, in the case of an enforcement event, make a fair valuation of such assets, apply the proceeds to the secured claims, and return any surplus to the security provider. As in the case of a private enforcement, there is no need to go through the preliminary proceedings of the DEBA set out above.

Debt Restructuring Agreements

As an alternative to bankruptcy, the DEBA also provides for the possibility to enter into a court-sanctioned debt restructuring agreement (or composition agreement), which is based upon an agreement entered into between the debtor and its creditors.

Debt restructuring agreement proceedings may be initiated upon request of the debtor, a creditor, or the court itself. Proceedings begin with a temporary stay granted to the debtor by the court, for a maximum duration of four months, in order to allow the debtor to prepare and undertake restructuring measures and to grant him/her a temporary protection against debt enforcement actions. If the situation justifies it, the temporary stay may be extended upon the commissioner's request or, if no commissioner is appointed, upon the debtor's request, for a maximum of four months.

As a rule, courts instruct one or more commissioners to carry out a detailed analysis of the prospects for restructuring or approving a composition.

If, during the temporary stay, sufficient prospects of restructuring or composition appear, the court grants the debtor a final stay of an initial duration of four to six months, which can be extended upon the commissioner's request for up to twelve months, and in particularly complex cases, for up to twenty-four months.

One or more commissioners are appointed by the court in order to prepare a draft agreement, to monitor the debtor's activity, and to inform the court. The effects of the final stay are the same as the effects of the temporary stay. The creditors' consent is not required for the granting of a temporary or final stay.

When the draft agreement is ready, the commissioner convenes an assembly of the creditors. The debtor is required to attend the assembly to provide the necessary information. Each creditor may reject or approve the agreement, which is globally accepted if accepted by either (a) a majority of creditors representing at least two thirds of the outstanding debts, or (b) one quarter of the creditors representing at least three quarters of the outstanding debts. The approved agreement is binding on all creditors whose claims arose before the stay was granted.

The agreement is then subject to the court's approval, which will be granted: (i) if the value of what is granted to the creditors is proportionate to the debtor's resources; (ii) if sufficient security is granted to preferential creditors; and (iii) if, in the event of an ordinary debt restructuring agreement, the shareholders pay a fair contribution to the restructuring of the debtor. Each creditor may request the revocation of an agreement that has been made on bad faith.

There are two types of restructuring agreements: **ordinary debt restructuring agreements** and **debt restructuring agreements with assignment of assets**.

- In the case of an **ordinary debt restructuring agreement**, the debtor and its creditors either agree on a specific payment plan, thereby giving the debtor more time to pay its debts in full, or they agree that the creditors waive part of their claims. The ordinary debt restructuring agreement thus results in a restructuring of the debtor's debts, thereby allowing it to avoid liquidation and continue its business.
- The **debt restructuring agreement with assignment of assets**, on the other hand, usually leads to the liquidation of the debtor's business and its dissolution; the debtor and the creditors agree that the debtor assigns all of its assets to the creditors for realisation by liquidators elected by the creditors and supervised by a creditors' committee. Claims that cannot be satisfied from the proceeds of the realisation of the assigned assets are normally waived. The realisation of the assets by the liquidator is similar to that in bankruptcy proceedings, but with more flexibility.

Recognition of Foreign Judgments

The Lugano Convention

The Lugano Convention applies between Switzerland and (in particular) EU Member States.

The Lugano Convention provides that judgments made in a contracting state (the **Contracting State**) shall be recognised in other Contracting States without any special procedure.

The only exceptions to recognition in Switzerland are if:

- recognition is manifestly contrary to Swiss public policy;
- the foreign judgment was made in absentia (default of appearance), and the defendant was not duly served with the document which instituted the proceedings, or with an equivalent document in sufficient time and in such a way to enable it to arrange for its defence, unless

the defendant failed to challenge the judgment when it was possible for it to do so;

- the foreign judgment is irreconcilable with a judgment rendered in a dispute between the same parties in Switzerland;
- the foreign judgment is irreconcilable with a prior judgment made in another Contracting State, or in a Non-Contracting State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions for recognition in Switzerland; and
- the foreign judgment conflicts with jurisdictional provisions of the Lugano Convention.

Under no circumstances may a foreign judgment be reviewed as to the merits.

The Swiss Federal Statute on Private International Law

Where neither other international treaties nor the Lugano Convention apply (e.g., in the case of bankruptcy and a restructuring agreement), the recognition of a foreign judgment is governed by the Swiss Federal Act on Private International Law of 18 December 1987 (**PILA**).

A foreign judgment will be recognised in Switzerland if the following requirements are met:

- the foreign court had jurisdiction according to the PILA;
- the judgment of such foreign court is final or non-appealable;
- the recognition of the foreign judgment is not manifestly contrary to Swiss public policy;
- the defendant was properly served according to the law of its state of domicile or habitual residence, or the defendant participated unconditionally in the proceedings;
- the foreign proceedings did not breach the principles of a fair trial (as construed in Switzerland) and, in particular, the defendant was granted the right to be heard and the possibility to properly defend its case; and
- no action between the same parties and on the same subject matter has been commenced or decided before by a Swiss court and no judgment between the same parties and on the same subject matter has been rendered before by a foreign court, provided such judgment may be recognised in Switzerland.

Foreign judgements from both Contracting States and Non-Contracting States can provide the basis for an attachment of the debtor's assets in Switzerland (*see above*).

The New York Convention

Switzerland is a party to the New York Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958.

Accordingly, arbitral awards issued by arbitral tribunals seated outside of Switzerland are subject to recognition and enforcement in Switzerland, subject to the conditions provided for by the New York Convention. In particular, recognition and enforcement of the award in Switzerland may only be refused if:

- the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid under the applicable law;
- the debtor was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- the award deals with a dispute outside the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitration proceedings was not in accordance with the arbitration agreement or the applicable law;
- the award is not yet binding or has been set aside or suspended by the competent courts;
- the subject matter of the dispute is not subject to arbitration under Swiss law. Under Swiss law, this notion of arbitrability includes any disputes involving an economic interest and is construed broadly by Swiss courts; and
- the recognition of the award is contrary to Swiss public policy (this is applied narrowly in Swiss case law).

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