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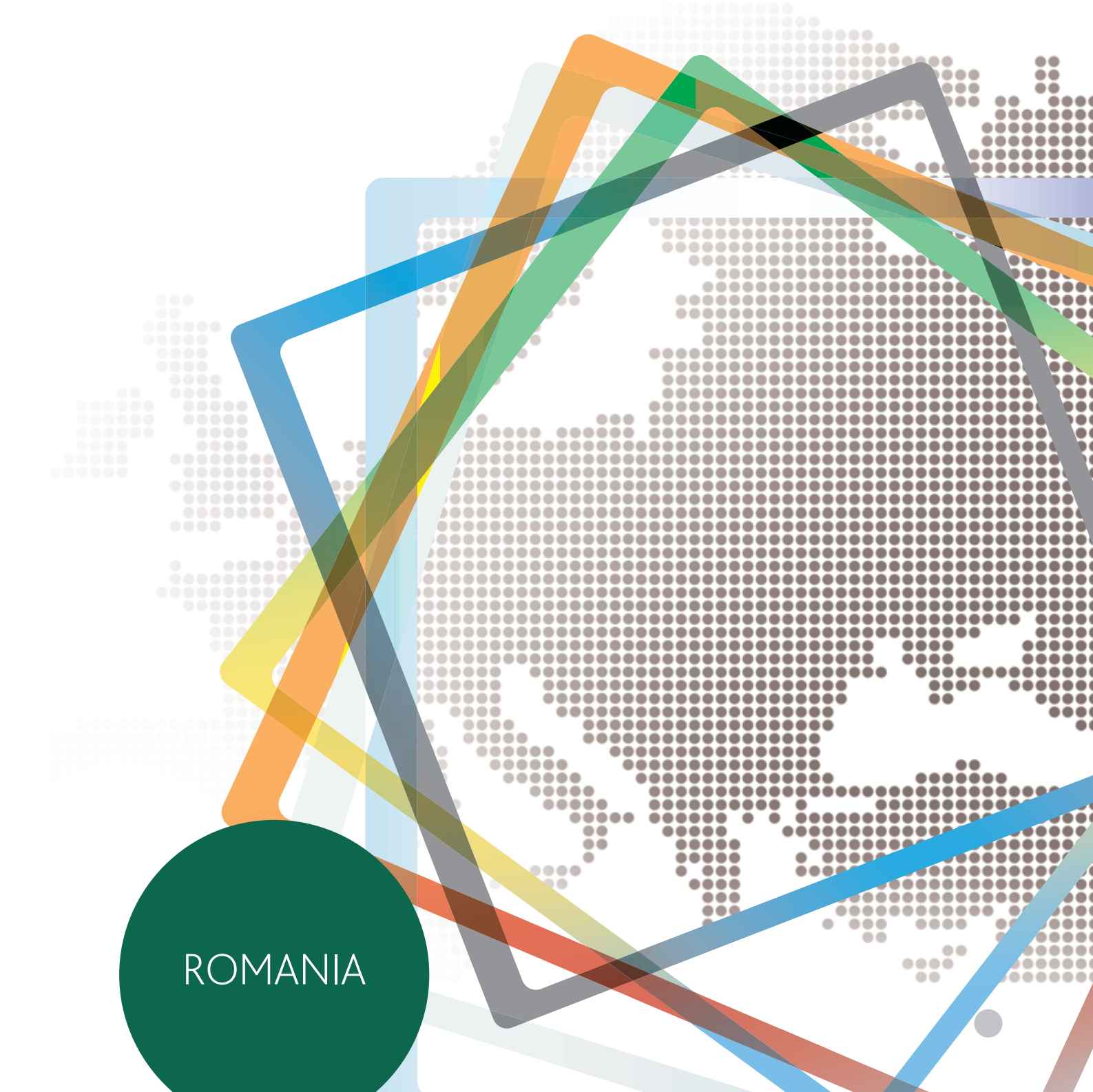
The Southeast Europe Taking & Enforcing Security Handbook 2015



ROMANIA

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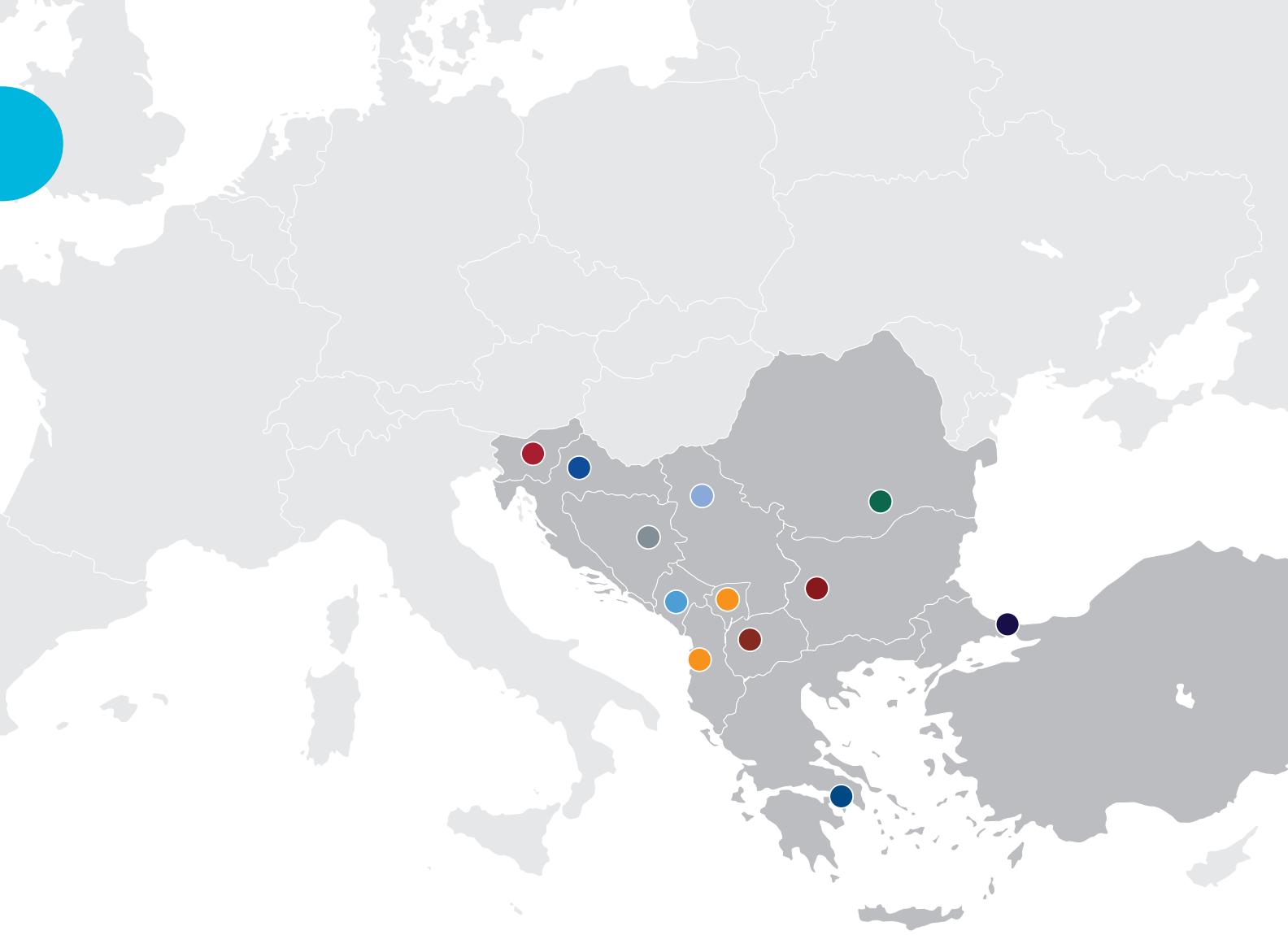

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SEE Legal

PREFACE

Dear Partners and Friends of SEE Legal,

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

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

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

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

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

Sincerely,

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

Borislav Boyanov
Co-Chair of SEE Legal

Disclaimer

GLOSSARY

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

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

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

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

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

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

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

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

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

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

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

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

Nestor Nestor Diculescu Kingston Petersen

ATTORNEYS & COUNSELORS

Legal & Tax

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ROMANIA

1. SECURITY

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

Generally, under Romanian law, security or other guarantees, which are created by a company to support an obligation of a third party, might raise corporate benefit issues to the extent the security grantor does not derive sufficient corporate benefit from entering into the transaction. While the issue is complex and requires the analysis of multiple aspects under Romanian law, it can be summarized as a legal requirement for a company to derive or seek to derive a certain commercial benefit upon entering into a transaction. It follows that, absent of such a commercial benefit, a transaction could be set aside for such reasons. Because Romanian law does not recognize the concept of group interest or benefit, the matter of corporate benefit is particularly relevant in third party security situations, where a company in the relevant group secures the obligations of another.

Generally, it is considered that under Romanian law a company should only perform activities which are directed towards the obtaining of profit. Potentially, third party security may be challenged in a Romanian court on the following grounds:

(a) lack of legal cause (commercial reasoning) underlying the transaction – there is an exposure to this risk, particularly where there is no or very limited direct benefit for the security grantor; and

(b) lack of legal capacity – the granting of security might be considered as not being within the limits of the authorized scope of activity of the company, as set forth by the law and its constitutive documents.

In assessing the existence of the corporate benefit, the following should be considered:

- Romanian legislation and practice lack objective criteria for assessing corporate benefit, leaving this aspect, in case of a challenge, at the discretion of the court; and
- there is no conclusive legal practice under Romanian law to sustain the concept of "group benefit" and, therefore, an assessment of potential benefits of securing debt should be made by reference to a company's own individual position, and not to benefits deriving at group level.

In limited circumstances, a lack of corporate benefit for the company, together with other factors (such as the misuse of the company's assets) may lead to criminal liability of the directors and other persons involved. Finally, it is relevant to note that in an insolvency scenario, Romanian insolvency regulations provide specific (and stricter) rules for the assessment (and potential unwinding) of transactions, as well as specific conditions for liability of parties responsible for the insolvency of the company.

1.2 Financial assistance

The Romanian Companies Law provides that a company may not lend or create security to support the acquisition of its own shares by a third party. Essentially, this means there is a prohibition against Romanian companies creating security for a lender financing the acquisition of their shares. Exceptions under Romanian law include (i) transactions of credit or other financial institutions in the usual course of business and (ii) employee share acquisition schemes. The provisions prohibiting financial assistance are listed in the section of the Romanian Companies Law concerning joint stock companies, raising a debate as to whether these provisions are also applicable to limited liability companies or not. Further, it is noteworthy that Romanian law does not recognize any "white wash" procedures.

1.3 Types of security. Most often used types of security in practice

The most common form of security interest over immovable and movable assets in Romania is the mortgage (ipotecă). Furthermore, the legislation allows creation of various types of security as follows:

[1] *Law No. 287/2009 on the Civil Code is in force as of 1 October 2011 as per Law No. 71/2011 on the application of Law No. 287/2009. The Civil Code was republished in the Official Gazette No. 505/15.07.2011.*

(a) Mortgage

The new Civil Code[2] uses a unified concept of "mortgage" which applies to both immovable and movable assets. This is in contrast with previous legislation which referred to mortgages over real estate[3] and "security interests" over movable assets (garantii reale mobiliare). However, notwithstanding the uniformisation of the terminology, there are still notable differences in terms of creation, publicity requirements (and related costs) as well as the enforcement regime, between mortgages over real estate (notably more formalistic and costly) and mortgages over movable assets. Creation of a mortgage does not require dispossession, unlike the pledge, which is validly created only by taking possession of the respective assets, as detailed below.

(b) Possessory Pledge

Movable assets, including negotiable titles issued in materialized form, may be subject to possessory pledges. This type of security involves the dispossession of the encumbered asset until full repayment of the secured obligations.

(c) Other types of security

Retention of title as security

Romanian law does not generally recognize retention of title for security purposes, which may come into conflict with certain provisions of the Romanian Civil Code which prohibit any arrangements that might allow a lender to automatically acquire ownership over a secured asset as a means of security without undergoing security enforcement procedures.

However, a seller may retain the title over the sold assets to secure certain obligations of a purchaser, such as the payment of the purchase price.

Liens and retention rights

Certain preferential rights of payment of unsecured creditors are legally recognized, such as, for instance, the legal mortgage of the seller of an immovable asset over the respective asset for the payment of the sale price.

Also, we note that, as an element of novelty, the new Civil Code expressly regulates retention rights in favour of the holder of an asset until payment by the owner of the expenses incurred by the holder with the respective asset or compliance with its contractual obligations.

Assignment of receivables as security

Another form of security used is the assignment of receivables for security purposes, although as opposed to movable mortgages over receivables, assignment of receivables for security purposes does not benefit from a clear legal regime.

(d) Financial Collateral

General

The EU Collateral Directive has been implemented in Romanian law by the Government Ordinance No. 9/2004 on financial collateral arrangements.

Generally, securities, credit claims or money credited to an account can be offered as collateral for securing financial obligations which give a right to cash settlement, delivery of financial instruments or both.

Financial collateral arrangements which benefit from the separate legal treatment envisaged by the Collateral Directive are only available to a limited group of entities. In order to be qualified as financial collateral, both the collateral taker and the collateral provider must be either:

(i) a public authority (excluding certain publicly guaranteed undertakings);

(ii) a central bank, including the European Central Bank and other international banking institutions such as the Bank for International Settlements, the International Monetary Fund and the European Investment Bank;

(iii) a financial institution subject to prudential supervision, including credit institutions, investment firms, insurance undertakings, Undertakings for Collective Investment in Transferable Securities (UCITS) or investment management companies; or

(iv) a central counterparty, settlement agent or clearing house, or person, other than a natural person, who acts in the name or on behalf of any one or more persons that includes any bond holders or holders of other forms of securitized debt or the other institutions mentioned above.

[2] *Before the enactment of the new Civil Code, mortgages were regulated by the Civil Code from 1864.*

[3] *Before the enactment of the new Civil Code, security interests were regulated by Title VI of Law No. 99/1999 on certain measures for acceleration of the economic reform.*

Both title transfer and security financial collateral arrangements are recognized, as described below.

Title transfer collateral arrangements

Under this type of collateral arrangements, which includes repurchase agreements, a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations.

Security collateral arrangements

Under security collateral arrangements, a collateral provider provides financial collateral by way of security to or in favour of a collateral taker, and the full or qualified ownership of, or full entitlement to, the financial collateral remains with the collateral provider when the security right is established.

1.4 Creation of security

(a) Mortgage

Immovable mortgage

Mortgages over immovable assets are made under mortgage agreements authenticated by a Romanian public notary. The notary public oversees the signing of the mortgage agreement and ensures communication with the Real Estate Registry, for the purpose of the registration of the mortgage.

This typically means:

(i) requesting excerpts for authentication from the Real Estate Registry, which show the legal status of the real estate to be mortgaged and block the register, not allowing any registrations during the validity of the excerpt;

(ii) verifying the legal title and the fiscal status of the real estate (ensuring that the mortgagor has valid title and that there are no unpaid debts to the tax authorities); and

(iii) overseeing the signing (which includes checking the authorities for signing) and the registration of the mortgage with the Real Estate Registry.

As a novelty element under the new Civil Code, mortgages over immovable assets are now referred as being effectively "created" by way of registration with the Real Estate Registry. This means that entering into the mortgage agreement would no longer be sufficient, as the mortgage would take effect only after registration with the Real Estate Registry.

However, this change under the Civil Code will only take effect after the cadastral works corresponding to the relevant administrative unit in which the real estate is located, are finalized. Until cadastral works are finalized, the registration of the mortgages with the Real Estate Registry will have the same effect as in the past, i.e. to serve notice to third parties and render the mortgage enforceable towards third parties.

Immovable mortgage agreements, like movable mortgage agreements, are not valid unless the amount for which the mortgage was created can be reasonably determined on the basis of the mortgage agreement itself. Furthermore, the agreement must provide the parties, the purpose of the secured obligation and a (sufficient) description of the mortgaged assets.

Movable mortgage

A movable mortgage can be created by concluding a security agreement as a private deed (unlike immovable mortgage agreements, it does not need to be notarised or authenticated). According to the Civil Code, a movable mortgage is perfected once: (a) the secured obligations come into existence; (b) the mortgagor acquires rights over the secured assets; and (c) the conditions for the publicity of the mortgage are fulfilled.

A movable mortgage agreement is valid only if it includes "a sufficiently precise description of the secured assets" and, where the mortgage is created over universality of assets or receivables, if the respective agreement clearly describes the "nature and content" of the respective universality. A description such as "all present and future movable assets of the debtor" is considered to be insufficient.

(i) Bank Accounts

Movable mortgages can be created over bank accounts. In order for the security to be validly created, an exact identification of the bank account (i.e. bank account number) needs to be included in the security agreement (each individual account should be specifically identified in the security agreement).

Perfection of mortgages over bank accounts is achieved by registration of the mortgage with the relevant Movables Pledge Register (the Electronic Archive for Security Interests in Movable Property)and by obtaining control over the mortgaged bank account.

Control over a bank account may be obtained by: (a) the mortgagee being the account bank; (b) the mortgagee, the mortgagor and the account bank agreeing in writing that the account bank will comply with the instructions of the mortgagee regarding disposal of the amounts in the mortgaged bank account; or (c) the mortgagee becoming holder or joint account holder of the mortgaged bank account. A mortgagee which has control over a mortgaged bank account will be preferred by law to a secured party having a mortgage over the same bank account even if the latter registered its claim with the Movables Pledge Register before the controlling mortgagee obtained control over the bank account.

Enforcement of security over bank accounts has the effect of blocking the bank account with regards to outgoing payments, but does not affect incoming cash flow.

(ii) Intellectual Property

Intellectual property can be secured with movable mortgages. In addition to typical movable mortgages registration formalities, security granted over intellectual property rights such as patents, utility models, trademarks, designs must be registered with the State Office for Inventions and Trademarks ("Trademark Office") in order to be enforceable against third parties. Please note that procedures involving registrations or amendments to existing registrations in the registries kept by the Trademark Office may prove lengthy, and terms of about 60 days should reasonably be considered.

(iii) Receivables

Movable mortgages may also be created over receivables. Publicity of mortgages over receivables is achieved by registration of the mortgage with the Movables Pledge Register and, in certain cases, by additional registration formalities (for example, mortgages over rent receivables deriving from lease agreements over real estate need also to be registered with the relevant Real Estate Registry). Likewise, if the mortgaged receivable is secured with an immovable mortgage, registration formalities should be observed with regards to both mortgages, which means that the security over receivables also needs to be registered with the Real Estate Registry.

(iv) Shares

Movable mortgages may also be created over shares of joint stock companies or limited liability companies by entering into a mortgage agreement in the form of a private deed. Generally, the security agreements must be registered with the shareholders' registry kept by the director(s) of the company whose shares are mortgaged, or in the case of listed companies, with the shareholders' registry kept by the Central Depository.

(v) Aircrafts and ships

Mortgages can also be created over aircrafts and ships pursuant to specific validity and perfection requirements in accordance with special legislation governing such assets (they are not governed by the Civil Code). For instance, unlike movable mortgages created under the Civil Code, mortgages over aircrafts are generally concluded by way of a notarised deed. Also, publicity formalities for mortgages over aircrafts and ships include registration with the relevant registers where such assets are registered.

(b) Possessory Pledge

Generally, in order to create a pledge, the relevant creditor (or a person appointed in this respect by the creditor, if the debtor agrees) must take or, as the case, keep possession of the respective asset, for security purposes, with the consent of the debtor. Although not expressly required by law, it is advisable to conclude the pledge by way of a written agreement.

Pledges over negotiable titles can be created by taking over or endorsement of the title, as applicable.

(c) Financial collateral

Financial collateral arrangements are not subject to particular formalities, but in order to be covered by the separate legal treatment envisaged by the Collateral Directive, as implemented in Romanian legislation, certain requirements must be met, including:

(i) the financial collateral needs to be provided to the collateral taker or the person acting on his behalf – meaning that it should be transferred so as to be in possession or under the control of the collateral taker;

(ii) the transfer mentioned above needs to be properly evidenced – meaning that the evidence must allow for the identification of the financial collateral to which it applies (for instance, the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account).

Only certain assets may be offered as financial collateral:

- financial instruments, such as shares in companies, bonds or other forms of debt instruments which are negotiable on the capital market;

- cash, which refers only to money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits; and
- credit claims, which essentially refer to loans granted by credit institutions or other authorized entities in an European Economic Area States.

1.5 Perfection and maintenance of security

(a) Mortgage

Immovable mortgage

In order to be enforceable against third parties, immovable mortgages must be registered with the Real Estate Registry in which the mortgaged property is registered.

A mortgage over an immovable asset will extend over the constructions, improvements and accessories of that asset, even if these are created subsequent to the mortgage agreement.
Furthermore, mortgages over future constructions are generally permitted. Such mortgages can be temporary registered with the relevant Real Estate Registry.

Accordingly, it seems possible to create a mortgage over land, over any future constructions to be built on the relevant plot of land (which will be subject to a provisory registration), and in such case the mortgage will progressively extend over the constructions to be built on the land and any improvements thereof. The Civil Code also refers to mortgages over universality of assets which may include immovable assets. In such cases, in order to be effective, the mortgage over each of the mortgaged immovable property must be registered with the relevant Real Estate Registry.

Movable mortgage

Perfection of a movable mortgage implies fulfilment of the following conditions: (i) the secured obligation must exist; (ii) fulfilment of the conditions for the publicity of the mortgage; and (iii) the mortgagor has acquired rights over the secured assets. As regards opposability requirements, these typically include registration of the security with the Movables Pledge Register, but additional/other requirements may apply, depending on the type of assets that are being secured, as described in Section 1.4 (Creation of security) above. The registration of mortgages with the Movables Pledge Register is valid for five years as of the initial registration and must be renewed before the expiry of this term in order to preserve the ranking of the mortgage.

(b) Possessory Pledge

Publicity formalities may consist in (i) dispossession of the asset, or (ii) registration of the pledge with the Movables Pledge Register.

Perfection of possessory pledges over negotiable titles requires the remittance or, as the case may be, the endorsement of the respective negotiable title. The maintenance of the pledge implies that the pledgee continues to keep possession of the respective asset, or, as applicable, that the endorsement of the negotiable title remains valid. However, the pledge will not be considered released if the creditor: (i) unwillingly losses the possession, by act of a third party, (ii) has temporarily released the asset to the debtor or to a third party, for valuation or repairing purposes, or (iii) provides the asset to a higher ranking creditor or in case of a take over for enforcement purposes.

(c) Financial collateral

Typically, no particular formalities should be required in order to ensure the validity, priority, opposability, enforcement or admission as evidence of the financial collateral agreement, as long as:

(i) the financial collateral has been properly provided and evidenced, as described above; and
(ii) the agreement is evidenced in writing or other equivalent manner which is legally accepted.

1.6 Costs and expenses for creating, perfecting and maintaining security

(a) Mortgage

Immovable mortgage

Notary costs differ according to the value of the secured amount. For values exceeding RON 500,000 (approximately EUR 113,000), the minimum notary fee is of RON 1,285 (approximately EUR 290) plus 0.07 per cent of the secured amount for the amount exceeding RON 500,000. The registration fee with the Real Estate Registry is of 0.1 per cent of the secured amount plus RON 100 (approximately EUR 24) for each mortgaged property.

Movable mortgage

Registration with the Movables Pledge Register requires filling a standard form (sending a copy of the security agreement is not necessary) and is subject to a registration fee of approximately EUR 20 for the initial registration (irrespective of the value of the secured claim) and of approximately EUR 15 for each amendment/extension of the initial registration with the Movables Pledge Register.

(b) Other – possessory pledge; financial collateral

Registration of possessory pledges and financial collateral arrangements with the Movables Pledge Register is subject to similar fees as mentioned above.

1.7 Recognition of security governed by foreign law

Choice of law and choice of forum clauses in security agreements will be upheld under Romanian law as long as they are valid under EU private international law legislation (Rome I and Brussels I Regulations, as regards contractual obligations). However, with regards to the security itself, as a general rule, Romanian law applies the lex rei sitae principle. This means that if assets are located in Romania at the time the security is granted, the creation, perfection and effectiveness of the security will be assessed under Romanian law irrespective of any choice of law clauses in the security documents.

Certain exceptions to this principle apply with regards to movable assets. The lex loci debitori principle will apply to: (a) movable assets destined to be utilized in several states, (b) intangible assets, and (c) certain negotiable titles (see exceptions below). This means that securities over such assets will be assessed according to the law where the debtor is situated at the time the security is granted. Other exceptions may apply as well:

(a) the legal regime of assets that are being transported from one jurisdiction to another will be governed by the laws of the jurisdiction where the goods departed from, unless the parties agree otherwise;
(b) securities over shares or bonds are assessed according to the law where the issuer has its registered headquarters, or, for state bonds, the law of the issuing state;
(c) securities over financial instruments that are tradable on a regulated market are assessed according to the law of the state where the regulated market is registered; and
(d) securities over mineral resources, oil, gas or certain related receivables are assessed according to the law of the state where they are exploited.

Although there are generally no restrictions with regards to choice of forum clauses in security documents, exclusive jurisdiction rules apply with regards to immovable property. That is why Romanian courts will have jurisdiction over proceedings related to mortgages over immovable property situated in Romania. It is common that whenever a security interest is granted with respect to assets located in Romania, parties agree that security documents will be governed by Romanian law and accept to submit disputes to Romanian courts.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

Judicial enforcement of mortgages is generally regulated by the new Civil Procedure Code[4] entered into force in 2013 ("**CPC**") and also by certain provisions in the new Civil Code entered into force in 2011. The procedure can also be followed by unsecured creditors that have a certain, liquid and due receivable against the debtor.

(b) Enforcement grounds

As a precondition for initiating enforcement proceedings against a debtor, a creditor needs to have a valid writ of execution. Under Romanian law, mortgage agreements which are validly created are generally regarded as writs of execution. If, however, the mortgage is accessory to a foreign law governed agreement, a Romanian court of law may take the view that such mortgage may not be enforced unless the agreement generating the secured obligations is a writ of enforcement or a court decision or writ of enforcement is obtained as a prerequisite for approving the enforcement of the mortgage agreement.

According to a very recent amendment of the Civil Procedure Code by Law No. 138/2014, effective as of 19 October 2014, as a precondition for starting enforcement proceedings, mortgage agreement must be vested with executory formula (investite cu formula executorie) by the court and the initiation of the enforcement proceedings must be approved by the enforcement officer (executor judecatoresc) (incuviintarea executarii silite)[5].

(c) Procedure

Enforcement of mortgages is subject to mandatory provisions of Romanian law, which, as mentioned above, generally include, as a prerequisite for starting the enforcement procedure, the vesting

[4] *Law No. 134/2010 on the Civil Procedure Code, republished in the Official Gazette No. 545/03.08.2012*

[5] *Prior to this amendment, mortgage agreements, as writs of execution, did not need to be vested with executory formula and the competence for approving the initiation of enforcement proceedings belonged to the court of law.*

of the mortgage agreement with executory formula by the court, the approval of the initiation of the enforcement proceedings by the enforcement officer and strict procedural requirements. Enforcement of immovable mortgages is governed by the Civil Procedure Code, whereas rules governing enforcement of mortgages over movable assets are included in the Romanian Civil Code and the Romanian Civil Procedure Code.

As both the Romanian Civil Code and the Romanian Civil Procedure Code are relatively new legislation (entered into force in 2011 and 2013, respectively), it is not clear how certain provisions on enforcement measures set forth in each of them should be interpreted and applied in correlation with each other, which may create procedural difficulties in enforcing the mortgage. Furthermore, the Romanian Civil Code and the Romanian Civil Procedure Code have generated a limited amount of practice and case law and Romanian courts and practitioners have yet to express their views in connection with most of the ambiguous provisions set forth under this legislation. As a consequence, there is a degree of uncertainty affecting the correct interpretation and application of the provisions of the Romanian Civil Code and the Romanian Civil Procedure Code.

(d) Enforcement of mortgage over immovable assets

Enforcement of immovable mortgages is performed in accordance with the provisions of the Romanian Civil Procedure Code. The process is driven by a court enforcement officer under court supervision. Generally, the enforcement of immovable assets can be achieved either through: (i) amicable sale (performed by the debtor himself); (ii) direct sale (performed by the enforcement officer); or (iii) public auction sale.

Public auction procedure

Once the debtor is informed about the approval of the enforcement, the enforcement officer may appoint, if he deems necessary, a receiver (administrator sechestru) in charge with managing the income and the relevant costs and expenses of the asset and the debtor/ mortgagor will no longer be entitled to manage the immovable property. If the debtor is appointed as receiver, the enforcement officer will hand over the immovable to the debtor or, in case of refusal, will draft a delivery receipt minutes which will be deemed as delivery receipt.

After the evaluation of the assets and fulfilment of the publicity formalities regarding the sale, the sale will be organised by the enforcement officer in subsequent steps, starting with a first session in which the assets will be offered for sale at the valuation price.

In case the asset is not sold during the first session, the public auction is postponed for another session, to be held no later than 30 days. The starting price for the second session will be reduced to 75 per cent of the valuation price. If there are at least two bidders and the starting price is not offered, the asset will be sold at the highest bid, but in no case for a price lower than 30 per cent of the valuation price.

Furthermore, if the asset is not sold in the second session, the enforcement officer may organize a third session upon the creditor's request. The starting price will be reduced to 50 per cent of the valuation price. In case there are at least two bidders, the asset may be sold at the highest offered price. Further, the asset can also be sold if there is at least one bidder willing to buy for the starting price for this session.

The creditor may participate in the public auction, but he may not adjudicate the asset for less than 75 per cent of the valuated price.

Enforcement proceeding against the general proceeds derived from immovable assets.

This procedure represents an alternative procedure to the enforcement of the immovable assets and cannot be used in case the enforcement proceedings have already been initiated against the relevant immovable property.

The object of such procedure may be represented by all present and future proceeds derived from the immovable assets.Following the approval of the enforcement, at the creditor's request, the enforcement officer may appoint a receiver for the management of the proceeds derived from the immovable assets. The receiver can be either the creditor, the debtor or a third party.

Generally, the main procedural steps to be followed in such procedure are:

- a request submitted to the enforcement officer;
- preliminary enforcement measures as described above (vesting of the mortgage with executory formula by the court and approval of the enforcement by the enforcement officer);
- appointment of the receiver by the enforcement officer;
- publication of the enforcement action; and
- handover of the immovable asset by the enforcement officer to the receiver.

(e) Enforcement of mortgages over movable assets

Enforcement of movable mortgages under the Civil Procedure Code

In accordance with the Civil Procedure Code, after the vesting of the mortgage agreement with executory formula, the approval of the enforcement procedure by the enforcement officer and the summoning of the debtor, the enforcement officer may seize the relevant assets of the debtor in case it fails to pay the amount provided in the relevant summons for payment.

As a general rule, in case the debtor does not pay the amount due within one day as of the communication of the enforcement officer's summons, the enforcement officer will seize the debtor's assets. In case there is a real threat that the debtor intends to dispose of the goods, upon the request of the creditor or of the enforcement officer, the court may order the seizure of the debtor's assets together with the communication of the summons for payment to the debtor. The enforcement of movable assets can be achieved through: (i) amiable sale (performed by the debtor himself); (ii) direct sale (performed by the enforcement officer); or (iii) public auction sale (which is the most common means of enforcement).

The auction sale is organised by the enforcement officer, after the evaluation of the assets by the enforcement officer (either in accordance with the average market prices, or, more frequently in practice, through an evaluation expert appointed by the enforcement officer) and fulfilment of the publicity formalities for the sale. The enforcement officer will be entitled to perform the auction procedure if the debtor does not pay its debt within 15 days as of the date the assets were seized (or immediately after the seizure, if the goods are subject to destruction or are perishable). According to the Civil Procedural Code, the sale by public auction will take around two to four weeks.

The sale is run in subsequent steps, starting with (i) a first session, in which the assets will be offered to be sold at the value shown in the valuation, and may be reduced to 75 per cent of the valuation, which may be followed by (ii) a second session, in which the assets may be sold at 50 per cent of the valuation or even less, if there is no offer for 50 per cent.

The creditor may not adjudicate the assets for a price lower than 75 per cent of the evaluation price. However, if the asset is not sold in the last auction session, a creditor may take over the asset in exchange for debt for the price established for the final auction session (which is usually 50 per cent of the evaluation price.)

The amount obtained from the sale of such assets will be distributed in accordance with the waterfall of payments detailed in Section (f) (Ranking of claims) below.

Enforcement of movable mortgages under the Civil Code

The enforcement procedures set forth in the Civil Code entitle the creditor, in case the debtor fails to comply with its obligations, to:

(i) take over the assets by its own means (see Section 2.2 (Private foreclosure) below) or with the help of an enforcement officer; (ii) sell the mortgaged asset; (iii) take over the mortgaged assets in exchange for the mortgaged debt; or (iv) take over the mortgaged assets for the purpose of administration, until full repayment of the mortgaged debt.

(i) Sale of the mortgaged asset

According to the provisions of the new Civil Code, as recently amended by Law No. 138/2014, effective as of 19 October 2014, the sale of the mortgaged assets can be performed on the basis of the mortgage agreement invested with executory formula by the court of law. According to the Civil Procedure Code, the sale of the mortgaged assets under the Civil Code is subject to approval by the court, without the intervention of the enforcement officer. The sale can be achieved either through public sale or a direct negotiation, if certain conditions are met (such as observing the reasonable commercial rules).

In the security agreement the parties may include in advance provisions concerning the method of sale of the mortgaged assets. Before the sale, the mortgagee must: (i) send a notice to relevant persons (including the debtor, mortgagor, guarantors, co-debtors, all mortgagees having registered mortgages over the asset or other secured creditors whose security has become opposable to third parties by other means and all other persons which have raised any claim regarding the asset, if known); and (ii) register the application with the Movables Pledge Register.

(ii) Taking over the mortgaged asset in exchange for debt or for purpose of administration

These particular enforcement methods are a novelty under the new Romanian Civil Code, subject to very strict conditions provided by law, and given the relative novelty of these procedures, they have not been, to our knowledge, tested in practice.

Specific features of these enforcement procedures under the Civil Code include:

- The takeover of the mortgaged assets in exchange for the mortgaged debt is subject to the debtor's written consent which must be issued subsequent to the initiation of enforcement. The takeover of the relevant asset by the creditor extinguishes the secured obligation and the creditor can no longer exercise any personal action or pursue an enforcement action against the debtor, even if the value of the asset taken over does not cover entirely the secured obligation.
- The takeover of the mortgaged assets for the purpose of administration essentially consists in taking over the management of the movable assets of the mortgagor and applying the proceeds obtained in order to gradually discharge the secured obligations. However, given the novelty of this procedure and the fact that it has not yet been tested in practice, there is a degree of uncertainty affecting the interpretation and application of its provisions (for example, it is rather unclear how the procedure would apply to shares or other intangible assets).

Enforcement of mortgages over certain types of assets

(i) Receivables

Under the Romanian Civil Code, a mortgage over receivables generally confers the secured creditor, when the conditions to initiate enforcement are met, with the right to take over the debt title, request and obtain payment of the receivable, or sell the debt and collect the relevant price, all within the limits of the secured amount.

As a side remark, we note that, according to the provisions of the new Civil Code, mortgages over receivables entitle the mortgagee to request direct payment of the mortgaged receivables, on their maturity, from the debtor of the mortgaged receivables, even if the secured obligations are not due and payable (the amounts thus paid will be deducted from the secured obligations).

(ii) Bank accounts

Enforcement of mortgages over bank accounts over which the secured creditor has obtained control (see Section 1.4 above for the formalities for obtaining control over accounts) may be achieved by requesting the account bank to release the account balance in favour of the secured creditor.

If the account bank is the secured creditor, enforcement may be achieved by setting off the account balance against the secured debt. Enforcement of mortgages over accounts may be difficult in practice when the secured creditor is not the account bank and the mortgagee does not obtain control over the respective account in accordance with the Civil Code.

(iii) Shares

Enforcement of mortgages over shares in limited liability companies (parti sociale) is subject to a set of limitations, generally as a result of lack of specific provisions, or effective practice (including lack of practice in relation to some of the more recently added provisions in the Romanian Civil Procedure Code). Typically, the general principles and enforcement rules will govern the enforcement process to the extent they can be applicable to shares, given their particular nature as non tangible assets subject to a special legal framework set by the Company Law.

Other limitations may also arise as a result of Romanian corporate legal requirements in connection with transfers of shares in limited liability companies, which may impact the enforcement over shares process, particularly if the mortgage does not cover 100% of the shares issued by the relevant company at the time of enforcement.

The sale of shares during the enforcement proceedings can only be achieved through amicable sale or public auction. A direct sale by the enforcement officer is not included among the list of options available when enforcing shares.

Although there are no express legal provisions in relation to the valuation of social parts during the enforcement process, in practice, it appears to be more common that enforcement officers appoint evaluators for the purpose of determining the price of the shares. In addition to the formalities typically applicable to enforcement proceedings over movable assets, the enforcement officer carrying out enforcement over shares is required to prepare a tender book, comprising information on the company whose shares are being enforced.

The tender book will be communicated to the creditor, the debtor, the company, and its shareholders, which are entitled to raise objections. The enforcement officer will issue a ruling with regard to any objection, and continue accordingly, organizing the sale through the auction procedure.

(f) Ranking of claims

The Romanian Civil Procedure Code sets forth a mandatory order for the repayment of creditors in enforcement proceedings. According to the waterfall of payments set forth by the Civil Procedure Code, the amounts obtained from enforcement will be distributed to the creditors in the following order:

(i) receivables representing costs related to court proceedings, preemptive measures, enforcement costs, other costs for maintenance of the assets of the debtor, as well as costs and expenses incurred for the common good of the creditors;
(ii) claims secured by mortgages, pledges or other priority rights;
(iii) wages or other similar claims;
(iv) budgetary receivables;
(v) receivables deriving from state loans;
(vi) claims for damages caused to public property by unlawful acts;
(vii) receivables from banking loans, rents, etc.
(viii) claims from fines owed to state or local budgets; and
(ix) other receivables.

Generally, claims of the same rank shall be satisfied proportionately, unless the law provides otherwise (e.g. priority of mortgages according to the date of registration).

Priority given to perfected mortgages

Perfected movable mortgages have priority over movable mortgages which are not perfected. For example, a mortgage which has been registered first, but the other conditions for its perfection have not been met, will rank below a mortgage which was registered later, but which meets the other conditions for perfection.

Conflict between mortgages over bodies of assets and mortgages over individual assets

Generally, priority is given to whichever mortgage is either perfected or registered first, as applicable.

Conflict between movable and immovable mortgages

If the same assets are secured both with a movable and an immovable mortgage, and the two are registered in the same day, priority will be given to the immovable mortgage.

(g) Costs

Fees payable to enforcement officers vary depending on the nature of the enforcement act. For example, according to Law No. 188/2000 regarding enforcement officers, the maximum fee that may be charged by enforcement officers in case of enforcement of monetary receivables of over RON 100,000 (approximately EUR 22,000) is of RON 6,300 (approximately EUR 1,400) plus a percentage up to 1 per cent of the value of the receivable subject to enforcement exceeding RON 100,000 (approximately EUR 22,000).

Additional costs are also likely to arise such as court fees or payments for legal consultants, property appraiser, etc. which depend on the particularities of the case.

2.2 Private foreclosure

Under Romanian law, a form of private foreclosure is regulated only with respect to mortgages over tangible movable assets - please see in this respect Section 2.5 below (Recourse of a secured creditor to self-help remedies). However, the private enforcement procedure regulated by the Civil Code is based on rules which have only been recently enacted[6] and, to our knowledge, haven't been consistently tested in practice.

Foreclosure of Financial Collateral

Generally, unless the parties agree otherwise, enforcement of financial collateral can be initiated upon the occurrence of an event of default and is not conditioned by the obligation to deliver a prior enforcement notice or to obtain a court approval. Close out netting clauses included in financial collateral arrangements are legally recognized and may be enforceable even after the opening of reorganization or liquidation proceedings or other measures against the collateral provider such as initiation of attachment procedures.

This, however, does not apply to credit claims provided as collateral. The new Romanian Law No. 85/2014 regarding insolvency and prevention of insolvency proceedings (the "**Insolvency Law**") includes special provisions with regard to certain qualified financial contracts (such as agreements on transactions with derivatives, repo/reverse repo agreements, buyback/sellback agreements or certain securities loan agreements), whereby transfers or other obligations under such agreements or under bilateral netting agreements (including guarantee arrangements under master

[6] *A similar private enforcement procedure has been regulated in Romania before the enactment of the Civil Code, under Title VI of Law No. 99/1999 on certain measures for acceleration of the economic reform, but such was not frequently used in practice. However, the private enforcement procedure regulated by Law No. 99/1999 is still applicable to the security interests created according to its provisions.*

netting agreements) are valid and enforceable against an insolvent guarantor of a counterparty and may be recognized as a basis for registering claims in insolvency proceedings.

The new Insolvency Law also includes provisions whereby the judicial administrator/liquidator or the relevant court of law may not (save where there is evidence of fraudulent intent) request the cancellation of operations with derivative financial instruments, including the execution of a netting agreement based on a qualified financial contract.

2.3 Bankruptcy and debt-restructuring proceedings

General

Under Romanian law, insolvency proceedings can currently be initiated only against companies and merchants. A new law governing insolvency proceedings of natural persons has been recently enacted and published in the Official Gazette[7] but has not yet entered into force (it is scheduled to apply as of 26 December 2015). As a rule, the opening of insolvency proceedings suspends any individual judicial and extrajudicial measures of enforcement taken against the debtor's assets, which will be dealt with collectively within the insolvency procedure (with certain exceptions, as detailed in Section 2.4 below).

Also, as a rule, the opening of the insolvency procedure freezes any accrual of interest, default interest, penalty or any other amount whatsoever, save for certain limited exceptions.

Are recognised in insolvency only the claims of creditors that have been filled within the applicable term for admission of receivables and further verified and registered by the judicial administrator in the table of claims. If a creditor fails to register its receivable in the table of claims, it loses the right to participate in the insolvency procedure and further, to claim the debts against the debtor, even after the closing of the insolvency procedure (save for certain exceptions expressly regulated by law, such as employees' claims which are registered ex officio by the judicial administrator in the table of claims). The claims of secured creditors will be registered as secured claims in the final table of claims up to the amount of the market value of their security (evaluated in insolvency). If the value of the debt is higher than the value of the secured asset, the secured creditor will be registered in the table of claims for the balance as an unsecured creditor. However, if the asset is sold at a price which is higher than the valuation, the difference between the actual price paid and the valuation is distributed to the secured creditor. Any perfection formalities, including registration of security interests or mortgages with the relevant publicity registers performed after the initiation of the insolvency proceedings, are not opposable against registered creditors.

Challenges affecting secured claims. Claw back.

Certain transactions concluded by the insolvent debtor within the applicable claw back periods may be set aside in insolvency. Claw back periods range between 6 months (e.g., for transactions concluded at an undervalue, creation of a preference right, including by way of security, for a claim which otherwise would have been unsecured or early repayments of debts if the original due date was a date after the commencement of the insolvency proceedings) to 2 years prior to the opening of insolvency proceedings (e.g., for fraudulent transactions concluded with the intention of all parties to defraud creditors' rights, or transactions concluded by the debtor with its shareholders holding a participation of at least 20 per cent of its share capital or its directors).

Reorganisation plan

At the end of the observation period (which should not exceed twelve months), the debtor will either have a reorganisation plan approved by the creditors and confirmed by the court or will enter into bankruptcy whereby the debtor's business will cease and all its assets will be liquidated. Where a reorganisation plan is approved, the creditors may recover an amount of their claims against the debtor as set forth in the reorganisation plan or may suffer rescheduling of debts, amendments and/or haircuts, as the case may be.

Liquidation of assets in bankruptcy and priority of claims

In case of liquidation of the debtor's assets in bankruptcy, the secured creditors will have priority in respect of the proceeds derived from the sale of the collateral as long as the security was properly registered prior to the opening of the insolvency procedure.

There are two separate payment waterfalls: (i) for secured creditors, and (ii) for unsecured creditors.

(i) The funds obtained from the sale of the collateral will be distributed with priority to the secured creditors in the following priority order:

[7] *Law 151/2015 regarding insolvency proceedings of natural persons, published in the Official Gazette no. 464 dated 26 June 2015*

1. Costs for asset liquidation (including maintenance and conservation costs and fees to utility providers after initiation of the insolvency proceedings and professional fees of any receiver/liquidator or independent experts hired during insolvency procedure);
2. Receivables of secured creditors incurred after the initiation of the insolvency procedure, including the principal, interests and ancillary rights; and
3. Receivables of other secured creditors, including the principal, interests, penalties and other costs and expenses.

Furthermore, a secured creditor is entitled to participate at any distribution performed prior to the sale of its collateral asset. Such amounts will be deducted from the price obtained from the subsequent sale of the collateral asset, if this is necessary in order to prevent the secured creditor from receiving more than it would have if the secured assets had been sold prior to such distributions.
(ii) The last creditors to be paid are the unsecured creditors, which will be satisfied after the full satisfaction of creditors from a superior category in the following priority order:

1. costs of the insolvency procedure, including expenses incurred during the procedure to preserve the debtor's estate, for the continuation of the debtor's activity and the consideration payable to the liquidator and other experts appointed during the proceedings;
2. claims resulting from financing granted to the debtor within the observation period, in accordance with the Insolvency Law;
3. employees' claims;
4. claims resulting from the continuation of the debtor's activity after the commencement of the insolvency procedure and damages for the termination of contracts in accordance with the provisions of the Insolvency Law, as well as claims of third parties acting in good faith that have returned the assets or their value after a claw back claim in accordance with the Insolvency Law;
5. budgetary claims;
6. claims representing amounts owed to third parties, based on alimony obligations, or any obligations of regular payment intended to insure basic means of survival (to the extent applicable);
7. claims resulting from: (i) bank loans (including ancillary expenses and interest); (ii) the supply of products, services or works; and (iii) rents;
8. other unsecured debts; and
9. subordinated claims, in the following order: (i) receivables of third parties acting in bad faith which have returned the assets or their value after a claw back claim in accordance with the Insolvency Law; (ii) shareholder loans, in the case where the shareholder owns at least 10 per cent of the debtor's share capital or has at least 10 per cent of the share capital or voting rights in the debtor's general meetings of shareholders; and (iii) receivables deriving from gratuitous acts.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

(a) Judicial enforcement v. bankruptcy proceedings

As mentioned above, the opening of insolvency proceedings suspends, as a rule, any individual measures of enforcement taken by creditors against the debtor's assets. As an exception from this rule, the suspension will not apply in certain limited cases provided by law, of which of relevance may be:

(i) claims filed against the joint debtors and/or third party guarantors; or
(ii) judicial claims aimed at determining the existence and amount of claims against the debtor, which are incurred after the initiation of the insolvency proceedings. The creditors of such claims may make, during the observation or reorganisation period, a payment request which will be verified by the judicial administrator.
(iii) Also, the insolvency judge can lift the suspension for the benefit of the secured creditors upon their request, only with respect to the secured assets and only subject to the fulfilment of certain requirements:

- the value of the collateral is covered by the value of the secured receivable and the asset does not have essential significance for the success of judicial reorganization plan or, if the asset is part of a functional ensemble, the separate enforcement of the security over the asset does not diminish the value of remaining assets from debtor's ownership; or
- when the secured receivable is not protected enough by the collateral as a result of one of the following reasons:

(i) the value of the collateral was reduced or there is a real danger that it would suffer a considerable reduction;
(ii) the value of the secured receivable of a mortgagee having a subsequent rank was reduced as a consequence of accrual of interest, increases or penalties of any kind to a secured receivable with prior rank;
(iii) the asset is not insured against the risk of damage or destruction.

In the second case, the insolvency judge can reject the request to lift the suspension if the judicial administrator or the debtor proposes, as an alternative, the adoption of certain measures to protect the secured receivable, such as making regular payments in favour of the creditor to cover the reduction of the collateral's value or to reduce the amount of the debt below the reduction rate of the collateral's value.

(iv) Also, as an exception to the suspension of enforcement actions, the amounts held in accounts that are subject to mortgages, as well as amounts subject to cash collateral, may be released by the judicial administrator/liquidator to the secured creditors upon demand. However, in order to ensure the necessary resources for the continuance of the debtor's current activity during the observation period, the judicial administrator may use the respective funds, with the approval of the secured creditor or, if the secured creditor refuses to give its consent, by granting the secured creditor an adequate protection as provided by the Insolvency Law.

(b) Private foreclosure v. bankruptcy procedure

As a rule, following the opening of the insolvency procedure, all private enforcement measures against the assets of the debtor are suspended by law. As an exception, the new Civil Code provides in case a creditor has taken over an asset for the purpose of administration as detailed in Section 2.1 (e) of Chapter 2 (Enforcement of security) above, the administration does not cease upon commencement of the bankruptcy proceedings of the debtor. However, the law does not provide any further guidance on how the two procedures would be correlated and interact and, to our knowledge, such provisions have not yet been tested in practice.

2.5 Recourse of a secured creditor to self-help remedies

According to the new Civil Code, a creditor may be able to self-enforce a mortgage over tangible movable assets, after sending a notification in this respect through an enforcement officer.
However, the creditor is not entitled to use coercion if the debtor opposes to the taking over the relevant asset.

3. ROLE OF SECURITY TRUSTEE

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

It is also possible to create a trust (fiducie) under the rules of the new Civil Code. However, the regime can be regarded as somewhat inflexible because of registration formalities or formal requirements (including notarisation requirements).

Moreover, Romanian law now recognizes trust relationships created under a different legal regime than the Romanian one. This allows foreign lenders to pick a familiar structure when enforcing security over assets placed in Romania (for instance, to appoint a UK law security trustee). Romanian law allows lenders to appoint a third party as agent and enable him to act on their behalf in what concerns the management of security over movable assets. However, such is not expressly regulated with respect to security over immovable assets.

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

An agent appointed by the mortgagee generally has the same rights and obligations as the mortgagee. The agent is entitled to perfect the movable mortgage, and maintain or modify the registration of the respective mortgage. Furthermore, the agent is liable towards the beneficiaries of the movable mortgage for its acts performed in relation to the movable mortgage.

Considering the above, the relevant regulations do not provide any special or derogatory provisions with regards to enforcement by a trustee or agent, considering that such have the same rights and obligation as per the beneficiaries of the mortgages.

3.3 Precedents

As mentioned above, the general rules on trust (fiducie) and the role of the agent in case of movable mortgages have been very recently enacted in Romania. Having said that, it is difficult to assess an eventual outcome of enforcement of a security by a trustee/security agent.

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