WOLF THEISS

THE WOLF THEISS GUIDE TO:

Restructuring Loans and Enforcement of Security in Central, Eastern & Southeastern Europe

2020 Edition

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Restructuring Loans and Enforcement of Security

This 2020 Wolf Theiss Guide to Restructuring Loans and Enforcement of Security is intended as a practical guide to the general principles and features of the basic legislation and procedures in countries included in the publication.

While every effort has been made to ensure that the content is accurate when finalised, it should be used only as a general reference guide and should not be relied upon as definitive for planning or making definitive legal decisions. In these rapidly changing legal markets, the laws and regulations are frequently revised, either by amended legislation or by administrative interpretation.

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FOREWORD

Economies move in a cyclical pattern: expansion is followed by contraction, periods of boom end when economic indicators fall. Leverage incurred at a time of rapid growth may be excessively burdensome for debtors in a time of bust, with companies experiencing financial difficulties or facing insolvency.

However, financial distress also creates opportunities for restructuring, turnaround, and investment in distressed companies and assets. There is a wide range of possibilities provided by the law or crystallised in private restructuring techniques to save or reorganise viable businesses, or to commence insolvent liquidation if the distribution of assets among qualifying creditors is the only option. As complexities arise even in domestic restructurings, choosing the optimal restructuring technique in a cross-border context can prove a challenging task for stakeholders.

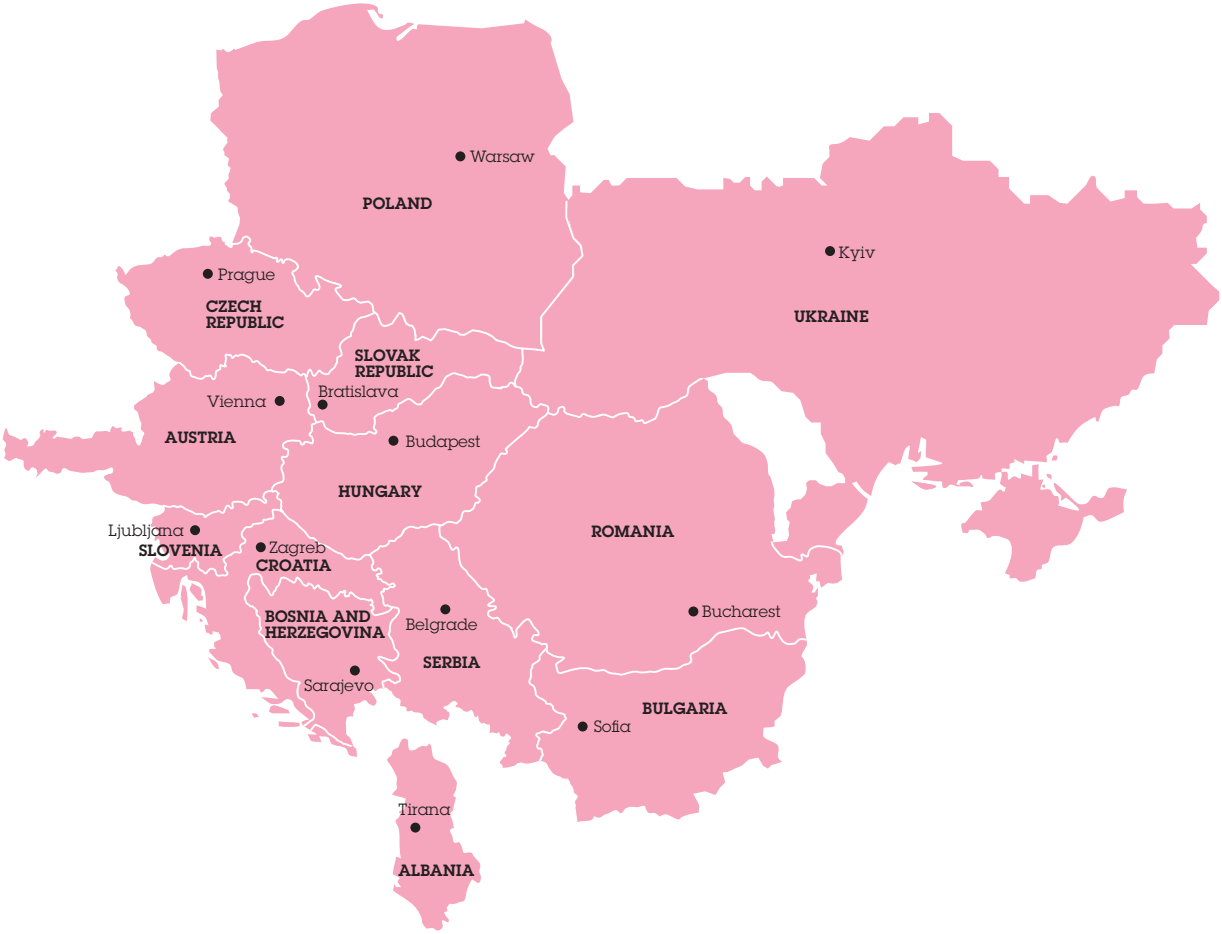
Our updated guide provides a comprehensive summary of the restructuring and insolvency regulations of 13 jurisdictions in CEE/SEE and offers the reader practical insight into the available options for the restructuring or winding up of businesses. The structure of the individual country chapters allows an easy comparison between the national rules applicable in the given situation of the debtor and the impact of relevant legislation that has been issued on an EU level.

Wolf Theiss is able to draw on the expertise of experienced practitioners from the entire CEE/SEE region and beyond. Cross-disciplinary resources, consisting of finance, corporate, employment and litigation experts, allow us not only to advise our clients on the right solutions in this complex area of law, but also to develop state of the art innovative solutions in cases where no precedent exists.

We are pleased to offer this 2020 Wolf Theiss Guide to Restructuring Loans and Enforcement of Security to our clients and interested readers. My special thanks go to all contributors. Our experts named in the country chapters remain available for any additional enquiries.

Marcell Németh ▪ October 2020

Partner, Wolf Theiss, Vienna



WOLF THEISS REGION

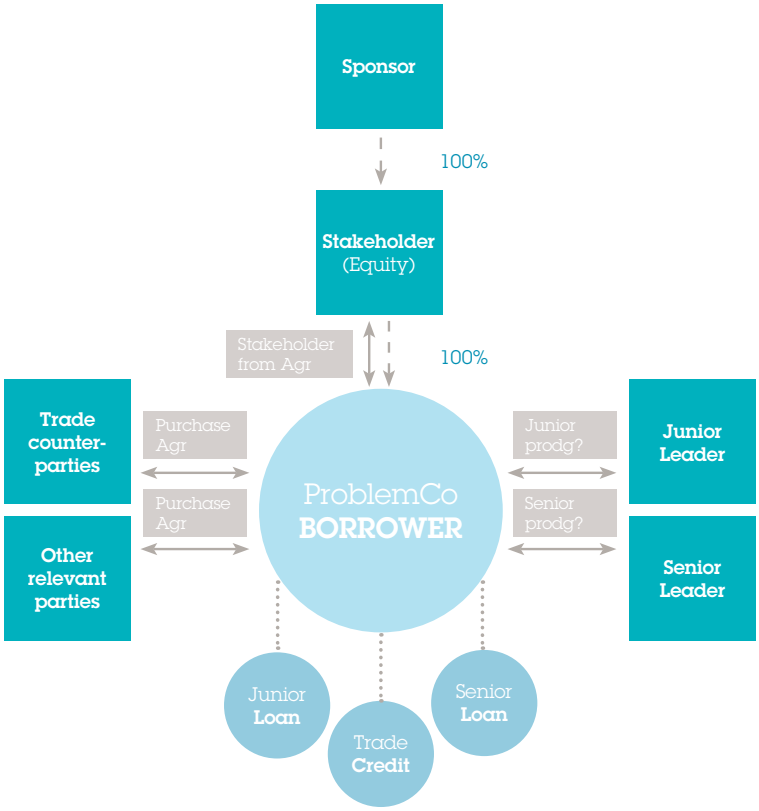
EUROPE

INTRODUCTION

The introductory chapter to the updated WOLF THEISS Guide to Restructuring Loans and Enforcement of Security 2020 intends to give the reader a general overview and highlight the key stages of a consensual restructuring process. While private restructuring is very much on the ascendancy and creditor driven arrangements have been given ample attention throughout introduction, the main themes of court driven rehabilitation and liquidation proceedings are also covered. In what follows, we summarise the major issues and outline potential decision points which, in our view, stakeholders in a financially distressed company will be facing before a final determination can be made concerning the viability of a work-out or the need for the enforcement of security which may trigger the insolvent liquidation of the debtor.

This introduction is not jurisdiction specific (for specific points relevant for our 13 jurisdictions, please see the country chapters within this guide) and is no substitute for legal advice, which in each case must be sought in case of looming insolvency.[1]

The stakeholders in a typical restructuring situation involving a relatively highly leveraged borrower include:



1 When summarising these key points, we have assumed that the stakeholders are all commercial entities and assets involved are not subject to any special legal regime relating to consumers or residential or matrimonial property. We have also assumed that facilities agreements and other finance documents are drafted according to market standard templates adopted for cross-border lending activities for international banks. Whilst bond financings may include similar provisions and many of the points made in this guide are relevant for bond documents, the incentives of bondholders and bond trustees to engage in, and their motivations to turn around a company by way of restructuring tend to be quite different to those of commercial lenders and their corporate borrowers.

1. CONSENSUAL RESTRUCTURING

Companies facing financial difficulties may need to significantly restructure their operation, debt, equity and ownership structure in order to restore the commercial viability of the business. The combination of all of these relevant corporate and commercial actions is called restructuring (or sometimes workout or turnaround)[2]. Restructuring is usually private, fully contractual and implemented by the amending and restating of the existing finance documents of the debtor. However, there are statutory reorganisation processes available where the resulting contractual scheme is enforceable by virtue of legislation (in that case, however, courts or other competent authorities may be involved in order to sanction the agreed scheme or deal with challenges).

The stakeholders in a typical restructuring situation involving a relatively highly leveraged borrower include:

1.1 Early warning signs

1.1.1 Commercial

Business is cyclical and is exposed to changes in the markets and macro-economic processes.

Cause of financial difficulties can result from:

- a flawed business case;
- a general downturn in the economy;
- problems in the company's business sector;
- too much leverage on the balance sheet;
- poor management; or
- very often a combination of the above factors.

Usually one can distinguish three stages of decline of financial performance before complete failure of a business:

- underperformance;
- financial distress;
- financial crisis.

Whether a business can be rescued and the company could be turned around in any of the above phases depends on a wide variety of factors, including but not limited to the sheer willingness of creditors to embark on what may end up being a full restructuring, or the lack of sufficient unity and support shown by the various types or classes of creditors or other stakeholders. However, it is of key importance that the signs of decline are detected early on so that if there is a willingness to restructure, the necessary steps can be made in a timely fashion. Well drafted credit documentation will greatly help lenders to identify those signs.

1.1.2 Legal

In legal terms, each jurisdiction has its own definition (or test) for insolvency, but overall, the main definition that seems to have emerged across jurisdictions is the concept of "inability to pay the debt" and therefore susceptibility to be wound up by the court. Generally, a company is assumed to be unable to pay its debt when:

2 In this guide we use the term "restructuring" to describe an essentially consensual and out-of-court process aimed at reorganising the debt structure of a company or group.

- it fails to pay or satisfy the debt based on statutory demand within the time period defined by law;
- an enforcement process conducted by a creditor was unsuccessful;
- even if solvent at any given point in time, on balance of probabilities, its cash flow will not be sufficient in the near future to meet its obligations (cash flow insolvency), unless proven to the contrary;
- its liabilities exceed its assets (balance sheet insolvency); or
- or a combination of the above.

Applicable laws may require that directors file for insolvency when any of the above is triggered.

1.2 The loan documentation

Lenders typically do not have statutory protections in respect to their investment in a solvent company, but the finance documents will invariably contain representations and warranties, covenants and events of default which provide a certain level of control for the lenders over how the debtor's business is conducted, and are designed to preserve the conditions prevailing in the borrower's business when the loan was made to it. Accordingly, if well drafted, breach of certain representations and covenants should provide early warning to lenders regarding the deterioration of the borrower's financial or other performance, and thereby secure for the lenders an early opportunity to enter into restructuring discussions with the borrower or any other relevant stakeholder.

1.3 Early action

Well drafted credit agreements will allow lenders early on to:

- spot and act upon problems signalled by breaches;
- "have a seat at the table" when it comes to discussing restructuring options;
- through the threat of acceleration, leverage on the breach and propose terms for remedy and turn-around, if possible;
- recover their loans through repayment or refinancing, whilst the borrower is technically and legally solvent.

On the other hand, belated action, even if payment is made by the borrower, may be vulnerable to creditor preference, claw-back and similar avoidance rules on insolvency. Further down the line, when default is wide-spread and affects several credit agreements, the race between creditors begins, and in the absence of an inter-creditor arrangement in place and unless an orderly restructuring is agreed, priorities will be decided upon by applicable legal rules, chiefly on a secured and non-secured basis.

1.4 Misrepresentation

Common representations which, if breached may signal problems early:

- no material adverse change since the most recent financial statements delivered;
- no default under the financing documents or other project agreements;
- no incorrect or misleading information provided (accounts, reports or information memoranda).

These representations are usually repeated during the lifetime of the loan and breach occurs when they are deemed repeated periodically (typically on interest payment dates). Misrepresentation operates as a draw-stop and unless remedied or waived, will usually trigger an event of default.

1.5 Breach of covenant

As opposed to warranties which are deemed to be repeated from time to time, covenants are undertakings which must be complied with by the borrower on a continued basis, and if well negotiated and drafted, any actual or potential covenant breach should be indicative of the difficulties the borrower is experiencing, well before an actual payment default. Of particular relevance in this context are:

- notification of default;
- financial covenants.

Financial covenants are useful tools to measure financial performance, but because they are tested on specific dates (quarterly, semi-annually or annually) based on historic financial information, the compliance certificate delivered on any particular testing date may not catch the deterioration since the most recent accounts have been drawn and financial covenants generally designed to signal steady decline rather than a sudden and material drops in the borrower financial strength. Unexpected dramatic events may be caught by the material adverse change (**MAC**) clause if adopted as a standalone event of default, but the usefulness of the MAC clause greatly depends on the actual drafting of the MAC definition and the facts of the case. Usually, courts require an objective demonstration of the occurrence of a MAC and generally, the invocation of the MAC is expected to be supported by information that is derived from the borrower's financial statements. Nonetheless, directors of well managed borrowers know well in advance the actual testing date if a financial covenant is likely to be breached on that next testing date and therefore a potential default might be outstanding, which in turn should be notified to the lenders under the information covenants.

1.6 Default

The occurrence of an event of default allows the lenders to demand immediate repayment of the loan or place a term loan on demand.

Typical events of default include:

- payment default;
- misrepresentation;
- breach of financial covenant;
- breach of other undertaking;
- cross-default or cross-acceleration;
- criteria of applicable insolvency test met;
- opening of insolvency proceedings;
- attachment by other creditor(s);
- auditor's qualification;
- MAC; and
- other events of default, on a deal specific basis.

Whilst the occurrence of an actual event of default can hardly be considered as an "early warning sign", credit agreements usually make a distinction between default and event of default. Drafting to this effect customarily states that default is "any event or circumstance which would, on the giving of notice, expiry of any grace period, making of any determination under the facility documents or satisfaction of any other condition (or any combination thereof), become an event of default".

Therefore, since the absence of any default is warranted on the submission of a utilisation request, the occurrence of a default should result in the banks' right to refuse to lend when the potential for an event of default subsists, and generally, the borrower is required to let the banks know of such default under the notification clause.

However, representations, warranties, covenants and defaults customarily contain qualifications and other limitations that need to be analysed before the clause can be triggered, including:

- grace/remedy periods and deadlines for such actions;
- monetary thresholds;
- "best of knowledge" qualifiers;
- materiality and MAC qualifiers;
- legal reservations;
- requirements as to act reasonably or in good faith;
- discretion might need to be exercised rationally and not in an arbitrary fashion etc.;
- similar restrictions under local law.

In summary, the likely effects of a default include:

- no further utilisations;
- notification obligation triggered;
- distribution lock-up;
- cross-default clause potentially triggered (and adverse action by other creditors);
- if unremedied by the borrower, waiver or permanent amendment requested.

In turn, an actual event of default will most likely result in:

- acceleration of the loan, including:
  - cancelling of commitments;
  - declaring the loan immediately due and payable;
  - declaring the loan payable on demand;
  - instructing the security agent to enforce the transaction security.
- cross-acceleration triggered (and domino accelerations in other financings);
- usual trigger for a free transfer of the loan (without borrower consent or other limitations);
- additional capital charges, reserve requirements, reporting of bad loan;

- unilateral action by the borrower's directors (insolvency filing, bankruptcy protection);
- trade credit evaporates, customers may suspend payments;
- other reputational issues, including downgrades in credit ratings.

Other relevant issues to consider on acceleration, arising under local law requirements if any:

- requirement to act in good faith when accelerating and duty to cooperate;
- mandatory notice periods;
- mandatory cure periods before security can be enforced;
- judicial control over commencing enforcement of security over certain assets;
- currency controls when accelerating foreign currency loans;
- restrictions on automatic termination or cancellations;
- restrictions on termination or cancellation on actual or deemed insolvency;
- payment of stamp duties or court fees before enforcement can begin; and
- statutory payment moratoria (also in the context of the recent COVID-19 pandemic).

Whilst the lender is not obliged to do any of the above under the credit agreement and may in theory opt to do nothing when it learns about the default, the risk this lender will be running is that the borrower might argue that inaction implied a waiver and therefore the lender is prevented to invoke that default further down the line. This argument may or may not succeed but it is best to avoid a dispute and prudent lenders will, nevertheless, act in one of the following ways when a default has occurred:

- waive the default;
- issue a reservation of rights letter (if it needs more time to decide);
- accelerate and enforce the security (in the last resort).

1.7 Borrower action

As noted above, it will be prudent of borrowers to notify the lenders about potential breaches early on and consider the options available with the most significant group of lenders (or other funders, such as bondholders or their trustee).

Borrowers typically will:

- seek, if possible, to remedy the default at their own initiative within the framework of the agreed provisions of the credit agreement, or request temporary or permanent waivers;
- if permitted as a remedial action:
  - might provide new or additional security (subject to negative pledge clauses in other financings and hardening periods under insolvency codes);
  - inject additional money (equity or subordinated debt) in the business ("equity cure");

  - reduce leverage by partial prepayment;
  - dispose of assets (including subsidiaries or business lines) against cash (subject to any restrictions in the covenants and subject to the release of any relevant security);
  - procure the buy-back of debt (subject to the standard restrictions in the credit agreement);

- propose credible cash flow projections and business models that will convince lenders of the temporary nature of the problem; failing which
- initiate a wider balance sheet restructuring process with the creditors; failing which
- file with the competent court for insolvency proceedings if the situation is hopeless or the law requires such filing (pertinent duties of directors and other officers to be analysed in each case).

1.8 Creditor options

Assuming that the default was not remedied or waived, in which case the default is deemed to continue, the lenders may:

- exit by transferring the loan;
- negotiate a restructuring plan and related documentation; or
- accelerate the loan and enforce the security (triggering most likely an insolvent liquidation of the borrower).

1.9 Exit

Defaulted loans are usually capable of being transferred to any class of potential transferees (including "vulture" funds who loan to own strategies). Nonetheless, lenders may wish to check their credit agreements against any technical requirements relating to loan transfers, and applicable laws (the laws governing the loan agreement, or the laws applicable to the lender as seller and the new lender as buyer) may contain restrictions in respect to:

- method of transfer (novation, assignment or sub-participation);
- consents (borrower and regulator);
- automatic transfer of security;
- confidentiality undertakings by lenders and bank secrecy laws that may be applicable in any relevant jurisdiction and data protection;
- stamp duties and taxes;
- potential licensing requirements for the buyer.

1.10 Enforcement of security

As noted above, enforcement of security is usually the last resort for a lender after all other available options have been exhausted, including agreeing to waivers, permanent amendments or restructuring. The relevant security document (failing which, applicable law) will specify how and when the security can be enforced. It is prudent for lenders to commission a review of the security before enforcement is started in order to make sure that the security is valid and all conditions for enforceability on the agreed priority are still met (registration or its renewal, stamp duties, court fees etc.). For a detailed overview of the relevant issues in respect to each Wolf Theiss jurisdiction please see the country sections of this guide.

1.11 Security interest – types

Personal security interests:

- guarantee and suretyship;
- bank guarantees and obligations coterminous with the underlying debt.

Comfort letters and similar documents encompassing a promise to maintain ownership of shares, financial standing of a subsidiary or provision of necessary funding for a business or project do not typically amount to guarantees, but the parties' intent and proper construction of the document may alter this position.

In rem security interests:

- mortgage, charge, pledge;
- assignment.

1.12 Security interest – accessory nature

Accessory security interests are typically pledges and mortgages.

An accessory security interest means that:

- such security interest depends on the valid existence of the secured claims; thus, it is terminated by operation of law upon payment of all secured claims;
- unless otherwise agreed the secured party must be the holder of the secured claims.

Civil law jurisdictions typically do not recognize trust arrangements whereby security can be granted in favour of the security agent as trustee for the Finance Parties. Usually, parallel debt or "joint and several creditorship" structures are used instead.

If security is held by third parties or when secured debt is transferred to them, lenders are advised to check whether they are secured creditors for any purpose including regulatory requirements and capital relief provisions.

1.13 Security interest – perfection

Both a title instrument and an act of perfection (often, a notice or another act of publicity) are required for the valid establishment of a security interest with the required priority.

Title instrument:

- pledge/hypothecation/assignment agreement;
- the title instrument determines the content of the security.

Act of perfection:

- registration for mortgages or certain company charges;
- actual delivery of the movables (physical assets) to secured party;
- notifications to debtors of assigned claims.

In many jurisdictions, notarization is recommended as a form to ensure or preserve priority on enforcement, or when lenders want to use the private enforcement route (please see below).

1.14 Court enforcement

Court administered enforcement proceedings:

- requires enforceable title instrument (i.e. final court judgement or arbitral award);
- sale of collateral through court leads to public auction;
- purchaser acquires collateral free of any encumbrances;
- enforcement proceeds are distributed to secured creditor to satisfy secured claims.

1.15 Private enforcement

Private sale:

- typically, sale of collateral through public auction;
- requires that the mortgagee/pledgee/assignee is able to affect a transfer of the collateral to a potential purchaser.

Certain legal limitations may apply:

- foreclosure (e.g. acquisition of the title to the secured asset on enforcement may be illegal in many jurisdictions);
- private sale may not be permissible with regard to certain assets (e.g. real estate);
- minimum price as agreed in the security documents may need to be observed.

Insolvency proceedings will stay most enforcement proceedings and the relevant assets subject to security or the relevant proceeds will be distributed according to the general rules.

1.16 EU dimension – the financial collateral directive

The financial collateral directive[3] has created a harmonised EU legal framework for the receipt and enforcement of financial collateral.

A key instrument designed to facilitate trade in the single market and improve the efficiency of secured transactions, the directive:

- has scrapped many requirements as to form, including registration of the financial collateral;
- allows immediate private enforcement of the collateral outside insolvency proceedings;
- requires recognition of title transfer and close-out netting arrangements; and
- clarifies certain conflict of laws questions in that the law applicable to most issues relevant to financial collateral is the law of the country where the account is maintained on which the relevant securities are held.

3 DIRECTIVE 2002/47/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 June 2002 on financial collateral arrangements

1.17 The restructuring option

If the borrower's business plan is viable and there is certain flexibility in restructuring the debt service (for example, an extension), restructuring may be an attractive option for lenders because:

- it often minimizes loss (as opposed to insolvency which crystallizes the loss); and
- recoveries tend to be higher on consensual restructuring than on formal insolvency (going concern vs gone concern).

However, a successful restructuring is predicated upon:

- the support of the company, its directors and the creditors;
- the position of shareholders in the process, especially if equity holders and junior creditors are out-of-money but may have the ability to block the restructuring effort;
- inherent value being available in the company or the business;
- a viable restructuring plan (which is acceptable to all creditor classes);
- a workable business plan and cash-flow models and projections;
- more often than not, new money being injected in the business (fresh liquidity or long-term funding); and
- positive macro-economic trends and broader policy issues (for example, in strategic or otherwise sensitive industries).

Please note that consensual restructuring could be combined with statutory reorganization proceedings if available in the jurisdiction, which may further assist the consensual process through mandatory stays, legal protection (or even super-priority) of new money paid to the debtor or cramming down non-consenting creditors. Please review the country chapters of this guide to see if such processes are available in a particular jurisdiction.

Especially in a cross-border restructuring context, the following legal matters should be given further consideration when developing a consensual restructuring strategy:

- availability and enforceability of inter-creditor agreements;
- availability and enforceability of subordination agreements (for example, senior creditors can prove junior debt and can vote instead of the junior debt);
- hardening periods for new security (also in the context of new money provided to the business);
- vulnerability of transactions agreed in the restructuring plan;
- claw-back in respect of payments made to creditors;
- financial assistance and capital maintenance requirements;
- robustness of transaction security and reliable and efficient insolvency regime with reasonably speedy liquidation of assets, ensuring the realization of at least the expected break-up value of the business at acceptable transaction costs.

1.18 Steps in a typical restructuring

- Appointment of Coordination Committee:
  - formed by one or more lenders and bondholders, or their respective groups in larger financings;
  - acts as an interface between the creditors and the debtors (including in terms of sharing information);
  - sounding board of interests;
  - leads the process in negotiating the standstill and the terms of the restructuring and addresses intercreditor issues (Standstill Agreement, Restructuring Agreement and Intercreditor Agreement); and
  - appoints external advisors.
- Coordination Committee defines agreed action plan but does not make commercial decisions.
- Lenders will need to decide how much power to give to the Coordination Committee and they must agree on procedure in the appointment letter.
- Appointment letters are relatively standard and straightforward documents but indemnities, liability exclusions and cost protection for committee members are negotiated on a deal specific basis.
- Appointment of external advisors:
  - Lawyers:
    - structuring and implementing restructuring plan and drafting of the standstill, restructuring and override agreements as relevant;
    - legal due diligence;
    - assistance in contingency planning (insolvency);
  - Accountants and auditors:
    - investigations and forensic issues (if necessary)
    - check financials;
    - provide information to review Restructuring Plan that proves business case for recovery;
    - make valuations.
- Agree on Standstill Agreement – definition, principles and content
  - A Standstill Agreement is a temporary arrangement entered into between the company and its creditors (typically does not cover trade creditors). It gives Stakeholders time to gather information and evaluate their respective position.
  - Standstill Agreement is only realistic if each creditor believes that it is better off with a consensual restructuring.
  - Standstill Agreement is only necessary if no statutory stay or moratorium applies (in case the private restructuring effort is combined with a statutory process).

– Typically, the following principles apply to the Standstill Agreement:
  - it prevents individual creditors from taking enforcement action for a period of time allowing for a consensual restructuring to be completed;
  - no improvement of relative creditor position (freezing the exposure) after day-one (so called day-one position);
  - parties to Standstill Agreement share all relevant information.
– Regulates how creditors divide and distribute new cash that may come into the company from:
  - new equity;
  - asset disposals;
  - enforcement proceeds.
– Defines Standstill Period (relatively short, can be extended).
  - Decisions requiring Majority Lenders consent:
    - □ declaring an Event of Default and enforcement action;
    - □ accepting new or releasing existing security interest;
    - □ amending agreements;
    - □ exercising set-off rights;
    - □ filing for insolvency;
    - □ charging default interest.
– Borrowers undertakings:
  - prohibited actions;
  - cancel undrawn facilities; close out hedging arrangements;
  - information undertakings.
– Lenders undertakings:
  - do not demand repayment or enforce during Standstill Period;
  - do not seek to better their respective relative position.
– Termination events:
  - filing for insolvency;
  - attachment of material assets;
  - breach of Borrowers undertakings;
  - (Super-)Majority Lenders vote.

– Required liquidity: New Money

  - new facility limited in amount and repayable on demand;

  - by each Lender pro rata or by specific Lender(s) for preferred position (super-priority).

– Confidentiality undertaking by each party,

  - (Back-ended) standstill/restructuring fee payable by Borrower.

– Surviving terms after Standstill Period ends.

– Schedules:

  - agreed list of existing Facilities and Lenders exposure;

  - agreed list of existing Security Interests.

- Restructuring Agreements are permanent amendments to finance documents on restructuring and typically include:

  – an extension of maturity or partial write-off the debt;

  – interest capitalization, PIK interest;

  – adjustment of margin and other elements of pricing (commitment fees etc.), equity kickers or warrants;

  – payment of restructuring fee and a success fee;

  – tightening of security structure;

  – further restrictions on disposals, dividend payments etc., (the so called short-leash covenants);

  – resetting financial covenants and reviewing the definition of the accounting group;

  – increased disclosure obligations;

  – implementation of agreed restructuring plan (disposals of non-core assets, acquisitions, corporate actions etc.), proceeds typically used to repay the debt;

  – general reorganization of the business (creation of new SPV which acquires assets and lefts losses in the old vehicle);

  – injection of new equity or subordinated debt;

  – debt-equity swaps/exchange offers (so that lenders and bondholders can take an upside if the company survives); and

  – issuance of the pertinent shares or loan notes, or other instruments (warrants etc.).

- Restructuring Agreements may technically take the form of Override Agreements which create consistency across several facility agreements and implement all the permanent changes and other issues agreed on restructuring consistently across the existing facilities agreements (override).

  – The position needs to be checked in respect to ancillary lenders/facilities and hedging. Inter-creditor agreements typically contain additional rules regarding voting and priorities and sharing of security.

2. NON-CONSENSUAL RESTRUCTURING – STATUTORY COMPROMISES

Statutory compromises are a form of corporate rehabilitation whereby an insolvent company may be able to reach a compromise with its creditors within a statutory, usually court driven framework. Note the array of names used for this type of procedure – bankruptcy, moratorium, composition, compromise, arrangement, voluntary arrangement, scheme (of arrangement) etc. The key factor and common denominator of these processes is that a reorganization (rehabilitation) of the business is intended (other than winding-up and final liquidation) and the law provides a framework for the work-out (which will not be a private and contractual exercise, although the combination of the two is very common and should be possible in all advanced jurisdictions). We tend to use the term "statutory compromise" in this guide, but other concepts are equally acceptable and are in frequent use by practitioners and courts alike.

Purpose of statutory compromises is:

- to resolve the debtor's (imminent) insolvency as a going concern;
- to (partially) satisfy the debtor's creditors.

Statutory compromises are only desirable in case:

- there is a realistic business case for recovery;
- the creditors will not be worse off compared to a bankruptcy solution.

In comparison to fully private arrangements, advantages (from a debtor's perspective) of a statutory compromise may include:

- relative ease of entry (although this is very much jurisdiction specific) – the level of proof required for the long-term viability of the company may be very low;
- directors may be very much incentivized to file on grounds of concerns regarding wrongful trading;
- the process tends to provide for an immediate moratorium for 60 to 90 days or more;
- enforcement and requests for winding up are stayed;
- albeit judicial control will be there, the administrator may have the power to terminate contracts that are seen disadvantageous from the debtor's perspective and he or she may be able to secure rescue financing;
- courts may have an easier access to assets abroad, which are part of the estate and are required for the compromise (but otherwise would be up for grab for creditors who are not bound by the scheme).

Typically, only the debtor may file a petition for statutory compromises.

As noted above, the effects of the statutory compromise are:

- a stay on enforcement and a moratorium on the payment of the debt is ordered by the court;
- debtor stays in charge of assets, subject to judicial control;
- the debtor or the administrator, bankruptcy trustee etc. proposes a scheme to the creditors court-approved scheme to achieve Cram-Down;
- all creditors are bound, but secured creditors are not affected unless they consent.

Certain majority of the creditors may agree to a restructuring plan which ensures repayment of a specific quota of outstanding debt; thus, it can help to deal with hold-out lenders or subordinated lenders who are out of the money. Lenders must watch out for potential super-priority creditors in such a situation – tax authorities, for example.

2.1 EU dimension – the restructuring directive

In contrast with the US Chapter 11 regulation, there is no single European bankruptcy code that would provide substantive rules applicable to cross-border restructurings of companies that have assets or operations in more than one member state of the EU.

Therefore, lenders and investors still face a multiplicity of bankruptcy regimes in cross-border restructurings and reorganizations. Fully consistent implementation of restructuring plans may not be possible across all relevant jurisdictions due to differences in national laws. This means that similar to the COMI (centre of main interest) being a key factor in the law applicable to the primary insolvency proceedings, the location of the debtor and its operations, and the whereabouts of its assets still have a very significant impact on what can be achieved within the proposed scheme for reorganising the debtor's business in the various member states involved, and the relevant national laws tend to differ widely in respect of the rights and remedies creditors have in voting, adopting and implementing such a scheme.

As noted below, the Insolvency Regulation concerns chiefly applicable law, jurisdiction and other procedural issues when it comes to cross-border insolvency procedures. Although preventive restructuring regimes (if any) of the member states might be caught by the regulation in procedural terms (that is it may be a primary or secondary proceeding for the purposes of the regulation), the purpose of this regulation is not to eliminate the substantive differences between the applicable national codes and, therefore, presents no solution to the problem of heterogenous restructuring regimes across the EU.

It is against this background that a new directive[4] was adopted in 2019 (the EU Restructuring Directive), which requires member states to harmonise their laws so as to ensure that the pre-insolvency regime incorporated in the directive becomes national law by July 2021 as a set of minimum standards aimed at facilitating out-of-court restructuring without the need to access the courts or other elements of the judicial system. Technically, directives are instruments that are not directly enforceable in the member states and, therefore, national law must be passed (or amended)oto give effect to the contents of a directive in the EU.

Inspired in many ways by US Chapter 11 and other internationally accepted restructuring tools such as the English law scheme of arrangement, the stated aim of the EU Restructuring Directive is to make sure that debtors whose business is viable have access to binding restructuring proceedings in order to restructure their operations and save jobs instead of undergoing insolvent liquidation.

The key provisions of the EU Restructuring Directive are set out below

- **Debtor-in-possession (DIP)** – the directive requires that member states implement legislation which ensures that debtors accessing the preventive restructuring regime remain, wholly or at least partially, in possession of their assets in order for them to continue their business activities. Whilst under the US Chapter 11 regulation DIP debtors may continue running their business, although in the best interests of the creditors and subject to court approval in respect to activities and transactions that fall outside the ordinary course of business, the directive is not specific on these issues but as a safeguard against abusive exercise of the DIP status, member states may require the mandatory appointment of an insolvency officer to oversee the activities of the DIP. However, the judicial oversight of the DIP activities will be mandatory if the proposed restructuring plan will require the sanction of the court (in the case of a cross-class cram-down, for example).

4 DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

- **General stay of enforcement** – under national law that will implement the Preventive Restructuring Directive, individual enforcement actions against the debtors will have to be stayed during the negotiation of the proposed restructuring plan. The maximum length of such a stay will be about 120 days, and members states are given a relatively wide range of discretion to decide whether the stay covers all enforcement actions, or certain types of creditors or claims only. Furthermore, through a combination of legislative and judicial discretions member states are allowed to extend the stay up to on) year, except when as a result of an obvious attempt at forum shopping under the Insolvency Regulation, the COMI of the debtor was moved to the member state where the application is sought within a period of about 90 days prior to the filing being made, in which case the maximum of the stay that may be given to the debtor is 120 days. Finally, member states will have the authority not to grant or revoke the stay if it is unlikely to contribute to the overarching goal of the directive or where creditors would be unfairly prejudiced, including if they could become insolvent as a result of postponing the recovery of their claims.

- **Safe harbour** - unless the debtor is clearly insolvent, the stay overrides any duty to file for insolvency by the debtor under national law. Directors must have due regard to the interests of creditors, shareholders and other stakeholders when running the business of the debtor in case of looming insolvency, but have under the terms of the directive no positive duty to file for insolvency and in fact, the directive requires that they take steps to avoid insolvency.

- **Automatic termination ("ipso facto") clauses** – conscious about business continuity, the EU Restructuring Directive seeks to ensure that national law prohibits the early termination (automatic or otherwise), acceleration or amendment (to the detriment of the debtor) of contracts that are essential for the debtor's business solely due to non-payment by the debtor during the negotiation of the restructuring plan or by virtue of the stay being applied. It should be noted that these provisions will be without prejudice netting (including close-out netting) transactions if otherwise available and enforceable under national law.

- **Voting majorities** – the key document which contains the terms of the reorganisation of the debtor's business is the restructuring plan which is essentially an offer by the debtor to change the capital structure of the company which if accepted by the required majority of creditors, becomes a binding restructuring agreement subject to the sanction by the court if required. Generally, a restructuring agreement may be agreed by the majority in the amount of the claims or interests of the creditors in each creditor class (national law may require 75 % but not more) and national law may also require that consent of the majority in the number of the creditors in each class is obtained. Equity holders, deeply subordinated creditors and parties related to the debtor (where a conflict of interest may arise) may be excluded from the voting by national law.

- **Class formation** – according to "sufficient commonality of interest based on verifiable criteria", creditors will be allocated into separate classes. Secured and unsecured creditors are as a default position to be treated as a separate class. The appropriateness of the formation of each class is subject to judicial scrutiny in each case when the restructuring agreement must be sanctioned by the court.

- **Sanctioning by the court** – although national law may define other instances where this is required, the directive provides that as a minimum harmonisation rule, a restructuring agreement which affects the interests of dissenting creditors or which foresees rescue financing, will not be binding on all affected parties unless approved by the court. Essentially, the court should not sanction an agreement if the procedural requirements (including those relating to notification of creditors or class formation were not observed) or there is a rescue financing involved but the terms are unfair on the existing creditors and finally, if the plan fails to ensure that no affected party is worse off by implementation of the plan than it would be on insolvency of the debtor (the so called "best interests of creditors" test).

- **Cross-class cram-down** – dissenting creditors can be "crammed down" and so bound by the plan that was adopted despite their disagreement if (and in the absence of higher number of consenting classes required by national law):

- the plan meets those criteria pursuant to which the court is able to sanction the plan (see above);

- the majority of the creditor classes has approved the plan and at least one consenting class is a class of secured creditors; or failing this, at least one of the voting classes (other than equity) or (if so provided by national law) an impaired or "out-of-money" class has approved the plan;

- dissenting creditors are not worse off than creditors in the same class or rank and are treated more favourably than the junior classes (the "absolute priority" test); and

- no creditor class receives more than the full amount of its claims.

- **Position of equity** – since the equity class will most likely be out of money and would receive no value on the insolvent liquidation of the debtor, the working assumption of the directive (subject to national law providing to the contrary) is that preventive restructuring is a creditor driven process where equity holders have no vote when it comes to approving the restructuring plan. Accordingly, the main concern of the legislator is to ensure that shareholders are not able to unreasonably block the restructuring effort as between the creditors and the debtor. Equity holders can form a class but will either not vote or can be easily crammed down (see above).

- **Statutory valuation of the debtor's business** – as it will be recalled, preventive restructuring under the directive is intended to be a private effort to reorganise the debtor, and therefore statutory valuation will be required only in exceptional cases. These instances are in fact limited to challenges in respect of the restructuring plan on grounds of an alleged failure to meet the best interest of creditors test or the conditions under which the cross-class cram-down was carried out. The directive requires that member states ensure that proper expertise is available for the competent authorities when dealing with these challenges.

- **Anti-avoidance protections** - under national law, transaction made by or with the debtor during the period running up to insolvency may be vulnerable and set aside by the court, and provision of new funding to an insolvent business may attract civil, administrative or even criminal liability. Subject to a few overriding principles such as absence of fraud or bad faith, the directive seeks to provide protection for such transactions:

  - rescue financing: financings required to preserve value ("interim financing") or to implement a restructuring plan sanctioned by the court ("new financing") may be accorded super-priority on the debtor's insolvency and should not generally be set aside and the lenders should not be subjected to liability on account of such funding; and

  - other transactions **(including asset sales)**: transactions that are "reasonable and immediately necessary" to negotiate or implement the restructuring plan should not be declared void or be set aside on the ensuing insolvency of the debtor, unless, in each case, national law provides otherwise including when the funding was provided at a time when the debtor was beyond doubt unable to pay its debts.

- **Key exemptions** – because these are regulated institutions with specialist insolvency and resolution regimes, the framework laid down in the directive will not apply to banks, brokers, insurance companies, exchanges, depositaries and certain other regulated financial institutions. Generally, the directive should not affect payment finality, financial collaterals and transactions with central counterparties and repositories that remain enforceable in accordance with the relevant national law.

Lastly, it is important to note that the EU Restructuring Directive provides additional flexibility for debtors envisaging a preventive restructuring by allowing member states to derogate from corporate law requirements[5] such as mandatory winding up on substantial loss of capital or technical rules relating to the increase or decrease in the

5 DIRECTIVE (EU) 2017/1132 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 relating to certain aspects of company law

registered capital if and to the extent such derogations are necessary to implement the preventive restructuring framework in national law.

2.2 Cross-border aspects – the 1997 UNCITRAL Model Law on Cross-Border Insolvency

The main aim of the Model Law is:

- the facilitation of the recognition of foreign insolvency proceedings, and
- the coordination of proceedings between the relevant courts and other authorities.

The preamble to the Model Law sets forth the following key objectives in the context of cross-border insolvency proceedings:

- judicial co-operation;
- greater legal certainty for trade and investment;
- fair and efficient administration of cross-border insolvencies;
- maximisation of the value of the debtor's assets; and
- helping to rescue financially troubled businesses.

The Model Law has no binding force as an international treaty andrfor it to have any effect, it must be adopted in national law in the relevant jurisdiction. Whilst key players of the global economy (US, Canada, UK, Australia and Japan, for example) have adopted the Model Law, at the time of writing, only five jurisdictions in the CEE/SEE (Montenegro, Poland, Serbia, Slovenia and Romania) have adopted the Model Law in their jurisprudence. This means that these countries, irrespective of being a member in the EU or not, may have effective tools at hand when it comes to the recognition, coordination and handling of insolvency proceedings aiming at the rescue or liquidation of businesses connected to the other relevant jurisdictions.

Further aspects of the recognition and coordination of international insolvency are a complex area; may be based on bilateral and sometimes antiquated treaties and principles of judicial cooperation and comity and therefore requires specific analysis in all the relevant cases.

For further jurisdiction specific details of statutory compromises, please see the country chapters of this guide. As noted above, the EU Restructuring Directive will need to be implemented by member states by July 2021.

3. WINDING UP PROCEEDINGS (LIQUIDATION)

Winding-up or liquidation results in the dissolution of the debtor and its assets are distributed amongst creditors based on their hierarchy and relative priorities as set out in the relevant insolvency laws.

Liquidation proceedings aim at:

- resolving the debtor's insolvency by realizing its assets;
- collectively satisfying the creditors on a pro rata basis.

In contrast to a statutory compromise, the effects of liquidation are:

- a stay on enforcement and a collective realization of the debtor's assets;
  - a court-appointed bankruptcy practitioner is in charge of the debtor's assets;
  - the insolvent company is wound up;
  - all creditors are bound, but secured creditors have preferential rights to their collateral;

Usually, either the debtor itself or its creditors may file a petition for bankruptcy.

Petition for the initiation of liquidation which is not filed in a timely manner may result in criminal and/or civil liability of:

- directors;
- shadow directors, i.e. persons in accordance with whose directions the managing directors are accustomed to act.

Rescue loans may be qualified as equity-replacing shareholder loans in liquidation and therefore will be subordinated to other creditors.

The bankruptcy practitioner may challenge preferential transactions and repayments made in hardening period prior to insolvency.

For further jurisdiction specific details of statutory compromises, please see the country chapters of this guide.

3.1 EU dimension – the Insolvency Regulation

Where debtors have operations ("establishments") or assets in several countries in the EU, insolvency and insolvency procedures affecting those entities clearly have a cross-border effect. Jurisdictional and conflict of law issues relating to those insolvency procedures have been covered on the EU level since at least 2000 by way of a regulation[6] which has been recast in 2015 (**Insolvency Regulation 2015**)[7] and applies to insolvencies commencing after June 2017.

The main effect of the Insolvency Regulation 2015 is that in the context of a cross-border insolvency, the courts of the member state where the debtor's centre of main interest (**COMI**) is situated will have the right to open the so-called main (or primary) insolvency proceedings in respect of the debtor and its assets that may be scattered through a number of member states of the EU. Accordingly, primary proceedings will not be capable of being opened in any jurisdiction other than that of the COMI, although secondary or territorial proceedings may still be opened if the conditions set out in the regulation are met.

In case of companies, the COMI is, in the absence of proof to the contrary, presumed to be the place where the common debtors registered office is located.

The overriding principle of the Insolvency Regulation 2015 is that by analogy to ordinary court judgements issued by an EU court, an EU court's decisions ordering the insolvency of the debtor rendered in the jurisdiction of the COMI should be recognised in any other member state of the EU, which essentially means that the law of the main proceedings will:

6 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

7 REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on insolvency proceedings (recast)

- have the same effect in other relevant jurisdictions where assets are located (for example, a stay on enforcements),
- govern procedural issues in any other relevant jurisdiction, including the scope of assets forming the insolvent estate or transactions that may be avoided by the insolvency officer or the court; and
- not be capable of being challenged as the law governing the main proceedings and proceedings that may opened in any other relevant jurisdiction may be secondary or territorial proceedings only.

Specifically, COMI determines amongst other things:

- the conditions for the opening of the proceedings as well as their conduct, their closure;
- the powers of the insolvency officer;
- the effects of proceedings on individual creditors, contracts and claims;
- rules relating to the avoidance, voidability, or unenforceability of legal acts;
- steps in respect of acts detrimental to all creditors (challenge).

Because of the key importance of COMI, the Recast Insolvency Regulation seeks to reduce the possibility for parties to engage in "forum shopping" in relation to the COMI of the debtor; the registered seat will thus be considered as the COMI of the relevant corporate debtor only if this seat was not moved to the given jurisdiction during a period of three months immediately preceding the request for the opening of the insolvency proceedings.

As noted above, secondary or territorial proceedings may be opened in respect of the same debtor in a jurisdiction other than that of the COMI only if the debtor has carried out business in a permanent fashion involving personnel and assets in that other country during the period of three months prior to the opening of the main proceedings and any such proceedings are limited in their scope to the assets of the debtor in that jurisdiction. Technically, secondary proceedings are opened after the main proceedings have been opened. Territorial proceedings are those secondary proceedings that are exceptionally opened prior to the commencement of the main proceedings in case the legal conditions for opening the main proceedings have not been met in the COMI jurisdiction (but have been triggered in another country where the debtor has an establishment) or creditors or public authorities specifically request the opening of those proceedings.

Secondary proceedings effectively limit the powers of the insolvency officer appointed in the main proceedings and may restrict the ability of that officer to remove assets from the jurisdiction where the secondary proceedings were opened, unless the office holder provides an undertaking to the creditors who would otherwise be able to request the opening of the secondary proceedings, which provides the necessary reassurance to those creditors as to the treatment of the assets located in that jurisdiction. The relationship between the various classes of proceedings is a complex matter and legal advice must be sought when these issues are encountered.

The introduction was written by Marcell Németh.

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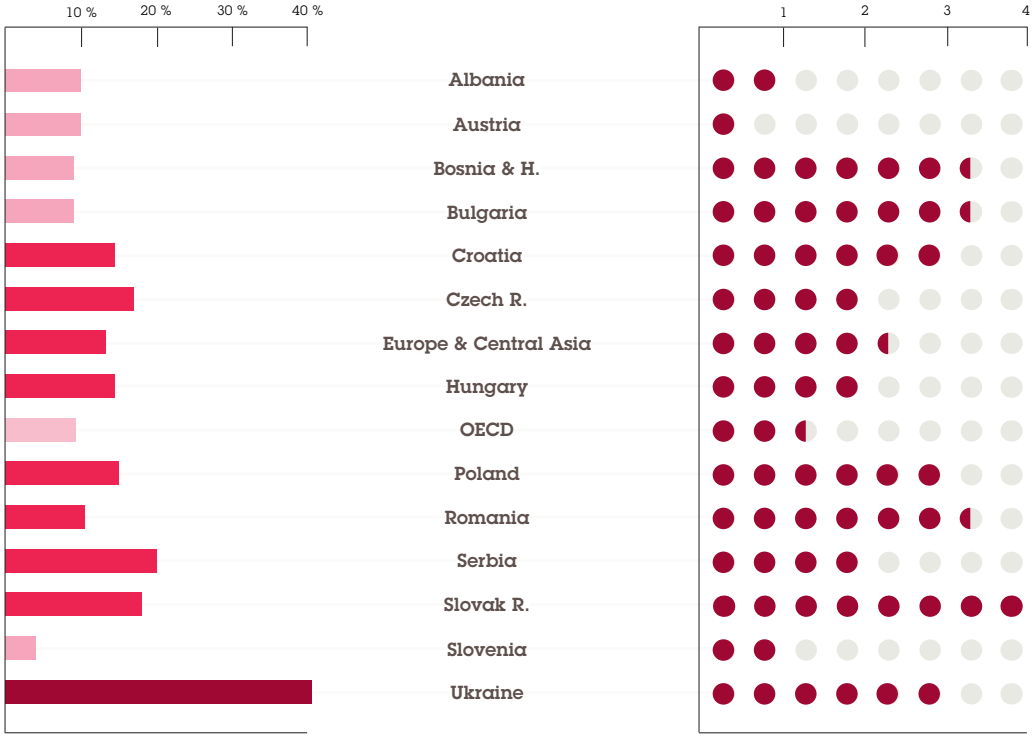
RESOLVING INSOLVENCY
INDICATORS*

RECOVERY RATE – cents on one dollar recovered by secured creditors

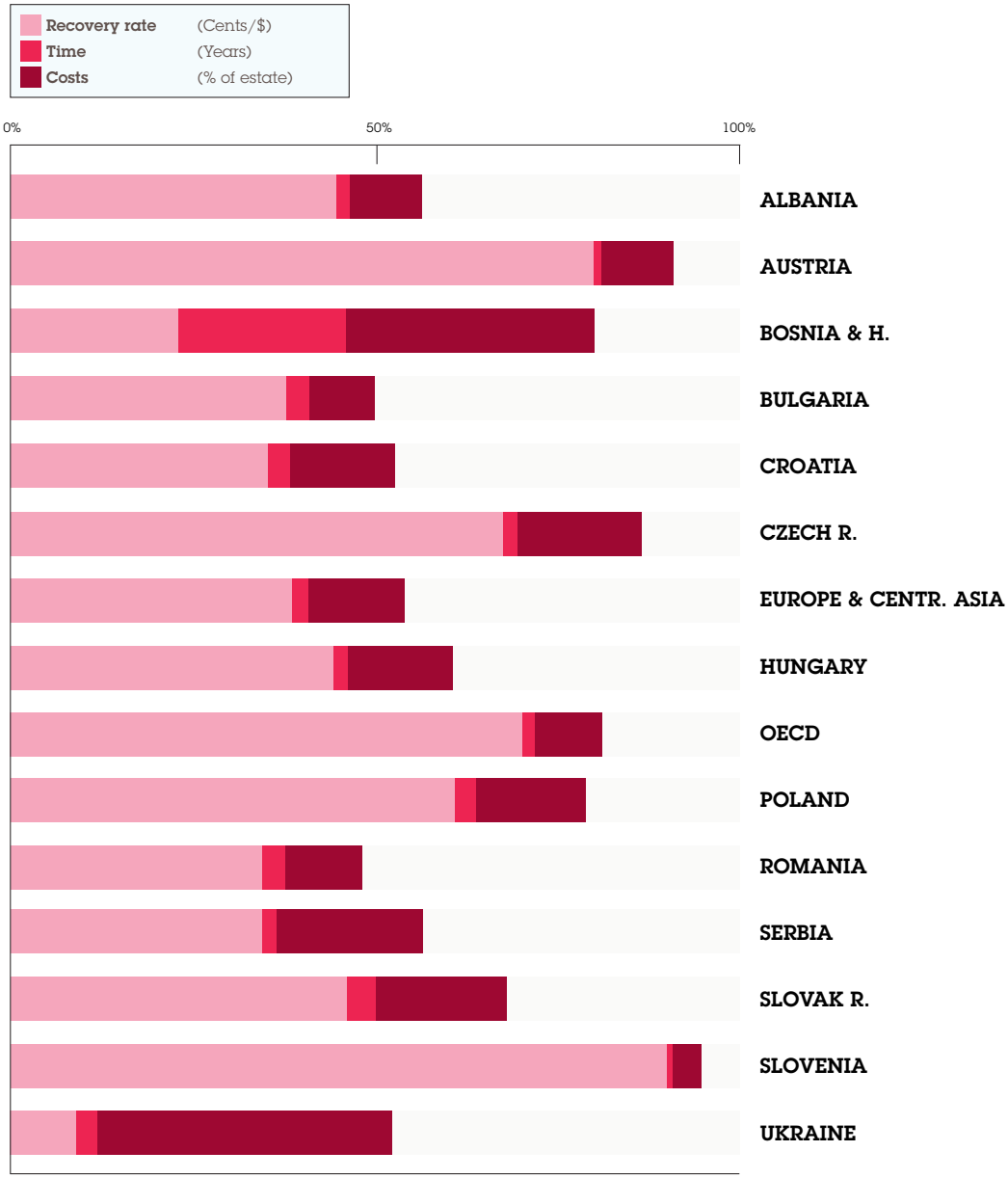
COST OF INSOLVENCY PROCEEDINGS – costs as percentage of the value of debtor's assets

TIME OF INSOLVENCY PROCEEDINGS – time starting from the company's default until the payment of some or all of the money owed to the bank



RESOLVING INSOLVENCY
INDICATORS COMBINED –

Country information about key indicators illustrating the efficiency of insolvency proceedings in our 13 jurisdictions



* **Source:** The World Bank, Doing Business

WOLF THEISS

ALBANIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In general, a negative pledge undertaking is legally valid and binding.

1.2 Restrictions on accelerating a loan

In general, Albanian law does not restrict the ability of parties to a facility agreement to agree on any event of default.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment regarding monetary claims only has relative effect if concluded between two business entities, i.e. such contractual prohibition is effective only between the parties to the facility agreement. Any assignment by a lender to a third party is valid unless it is proved that the third party was aware of this prohibition.

1.4 Common methods for loan transfers

Rights of an existing lender under a loan agreement, such as the right to receive interest and the right to repayment, can be assigned to a new lender. Notice of the assignment is given to the borrower to make an assignment enforceable.

Where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption of obligations by the assignee. This makes it possible to transfer all existing lender's rights and obligations under a loan agreement to a new lender by way of assignment and assumption. It requires the consent of all parties to the loan agreement.

1.5 Effectiveness of a contractual subordination

The effectiveness of contractual subordination is neither explicitly regulated nor addressed in Albanian case law. Contractual subordination is generally permitted, and such subordination should be effective between the contracting parties.

There are also good legal arguments that such contractual subordination is also binding upon an insolvency receiver in case the subordination does not put other creditors at a disadvantage.

1.6 Subordination by operation of law

The Albanian insolvency law provides that claims subordinated by operation of law are satisfied only after all other insolvency creditors' claims are satisfied. The following count as subordinated claims:

- claims for the interest accruing on the claims of the insolvency creditors from the time of the opening of the insolvency proceeding;
- claims for costs incurred by insolvency creditors due to their participation in the proceeding;
- civil, administrative or criminal penalties payable by the debtor; and
- claims based on a gratuitous promise of the debtor.

1.7 Validity of a forfeiture agreement

An agreement for the forfeiture of the security interest (i.e. the secured creditor may keep the collateral in lieu of the secured liability) is not valid if entered when the security interest is established. However, the parties may agree afterwards (i.e. when payment is due or after this) that the fulfilment of the obligations of the debtor will be made by handing the collateral to the creditor.

1.8 Super-priority loans in bankruptcy

The insolvency court may decide that the receiver may enter into new loan agreements on behalf of the debtor and the court may decide to grant super-priority to the new lenders.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

There is no need for the security to be retaken if a varying interest rate is provided for in the agreement at the time the security is granted but an increase in the rate may trigger the need to amend the security agreements. In case of change of the tenor of the loan the security must be retaken only if the security is granted for a determined period, which that does not cover the new tenor of the loan.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, a title instrument and an act of perfection (i.e. an act of publicity) are required.

Title instruments include:

- movables securing charge agreement, account securing charge agreement, receivables securing charge agreement, securing charge over shares agreement and mortgage agreement; and
- surety agreement.

Pledges under the Civil Code are also possible, but not widely used in practice. In practice the non-possessory form of security, a so-called “securing charge”, is preferred.

In case of a surety the act of perfection is the signing of the surety agreement. In case of *in rem* rights, a separate act of perfection is required.

2.2 Ranking of charges/mortgages

The ranking of a securing charge depends upon when the filing for the registration was made.

The ranking of a real estate mortgage depends on the exact time when the application for registration of the mortgage was duly submitted to the Land Register (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

In general, Albanian law does not restrict the ability of the creditors to agree on any change of the ranking of consensual security.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge/securing charge	Physical delivery of the movables to the pledgee or instruction to possess to a third-party holding movables for the pledge/registration with the Securing Charge Register
BANK ACCOUNT	Securing charge	Registration with Securing Charge Register
RECEIVABLES	Securing charge	Registration with Securing Charge Register
SHARES	Securing	Registration with Securing Charge Register
REAL ESTATE	Mortgage	Registered with the Land Register (*Zyra e Regjsitrimit te pasurive te paluajtshme*)

2.5 Availability of floating charge

Albanian law recognizes the concept of floating charges over all existing and future assets of a company.

2.6 Trust and parallel debt issues

There is no structure comparable with a common law trust in Albania. Consensus in the legal community is that a common law trust does not create the ownership regarding the secured claims that is required to create a valid and enforceable accessory security interest.

The above issue is typically solved through a so called “parallel debt structure” whereby the parties to the facility agreement agree that the security agent shall be the joint and several creditor of each and every obligation of the borrower towards each finance party (other than the security agent).

The above concept has not been tested in Albanian courts.

2.7 Availability of private sale and its main conditions

Albanian law does not allow private sale (subject to the exceptions below). The sale of the collateral in an enforcement proceeding shall be made by the bailiff in a public sale.

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	No	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes
ACCOUNT PLEDGE	Yes	N/A
RECEIVABLES PLEDGE	Yes	Yes, if contractually agreed
SHARE PLEDGE	Yes	Yes, if contractually agreed
REAL ESTATE MORTGAGE	Yes	No

2.8 Security and loan transfers

Accessory security is usually made available to a new lender automatically when the secured obligations are assigned or assigned and transferred by way of assumption of contract.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

Two kinds of insolvency proceedings exist:

- Bankruptcy proceedings (*Procedura e falimentimit me likuidim*), which generally aim to satisfy the creditors' claims by liquidating the assets of the debtor and distributing the proceeds; and
- Judicial reorganization proceedings (*Plani i riogranizimit*), the ultimate aim of which is to preserve and continue the debtor's business on the basis of a reorganization plan.

3.2 Applicable insolvency test and directors' duty to file

Two separate insolvency tests (each triggers insolvency) for a company are typically applied:

- Balance sheet test: a company's due and payable obligations exceed the value of the company's assets (over-indebtedness);
- Cash flow test: a company is not able to perform more than one monetary obligation (inability to pay).

Each member of the company's administrative body is obliged to notify the competent court of the company's insolvency within a 21-day period after becoming insolvent and to apply for the opening of bankruptcy proceedings. A member of the company's administrative body risks criminal liability in case of non-compliance.

In addition, the members or the shareholders of the debtor are obliged to notify the competent court of their company's insolvency within three months from the day they obtained knowledge of such insolvency. A member or shareholder risks personal liability and administrative fines in case of non-compliance.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Bankruptcy proceedings are initiated by the competent court upon an application either by the debtor or by one or more of its creditors. In addition, the tax authorities may file a petition for the opening of bankruptcy proceedings if a corporate taxpayer's balance sheet shows losses for a period of three consecutive years. Any application filed by a member of the debtor's administrative body needs to be accompanied by the list of assets and income, and a list of the creditors.

The court must decide within 30 days of filing. The decision of the court to initiate bankruptcy proceedings is entered into the Registry of Immovable Property and is delivered to the debtor and to all of its known creditors and debtors. Upon the opening of bankruptcy proceedings, the company's administrative body loses its control over the debtor's assets.

The court appoints a receiver (*administartori i falimentimit*) who assumes control over the debtor's assets. The decision on the limitation of the administrative body's powers and the appointment of the receiver is published. The receiver examines the debtor's assets. The list of the debtor's assets and the list of creditors must be filed with the District Court. The Commercial Section of the Court supervises the receiver. The receiver must obtain the creditors' approval for the implementation of actions of particular importance for the bankruptcy proceedings.

The assets of the insolvent debtor are confiscated and liquidated (i.e., sold in public auction) by a bailiff. The liquidation proceeds are distributed to the company's creditors in accordance with the priority principles set out in the Bankruptcy Act.

The Bankruptcy Act sets out the following priority of payments:

- costs of the bankruptcy proceedings;
- costs for the maintenance and administration of the assets in bankruptcy and related taxes;
- secured creditors;
- unsecured creditors;
- subordinated creditors.

3.3.2 Reorganisation plan

A reorganisation plan (*Plan Riorganizimi*) may be proposed by the debtor or by the receiver at any time before the final creditors' meeting. The creditors' meeting may also assign to the receiver the task of preparing a reorganisation plan.

The reorganisation plan consists of two parts. The first part details the measures that have been taken since the beginning of implementation of the bankruptcy proceedings. The second part describes the procedures to be carried out and the rights of the parties involved in such procedures. This part should contain the period for the payment of the claims.

If not otherwise provided in the reorganisation plan, the debtor will be released from its debts upon approval of the reorganisation plan. The plan sets forth the costs and the expected incomes during the period of repayment of the creditors. The plan may also provide that the debtor may continue its business activities by regaining control over the company. The receiver supervises the implementation of the reorganisation plan. The Court resolves on the termination of the period of supervision.

The reorganisation plan requires approval by the creditors. The District Court has the right to approve or reject the reorganisation plan. After the decision of the Court on the plan has become final, the court resolves on the termination of the bankruptcy proceedings.

The reorganisation plan must include a period during which the implementation of the reorganisation plan is to be supervised. During this period of supervision, the debtor may obtain new loans subject to prior approval by the receiver and certain other restrictions. Any new lender will take priority over the existing creditors if the reorganisation plan provides for such priority.

3.4 Timing and costs of insolvency proceedings

The duration of bankruptcy proceedings will depend on several factors (e.g. the extent of the assets and liabilities of the debtor, the number of creditors, whether the receiver challenges any transactions of the debtor in court, etc.). Although there is no general rule, in our experience bankruptcy proceedings may last between 12 months to nine years in more complex cases.

In practice, not many bankruptcy proceedings have been carried out by the Albanian courts. However, the statistics show an increase in the number of such proceedings recently.

3.5 Challenge of preferential transactions and suspect periods

The receiver has the right to challenge preferential legal acts or transactions, most importantly, if:

- a debtor has intentionally put certain creditors at a disadvantage compared to its other creditors, and such other creditors knew of this intention (suspect period of 10 years);
- a creditor related to the debtor knew of the insolvency of the debtor when entering the transaction (suspect period of two years).

In addition, certain transactions may be challenged by the receiver: (i) if they are carried out during the month preceding the opening of the insolvency proceedings or after the petition for the insolvency proceeding is filed; (ii) if they are carried out three months before the submission of the petition for opening the bankruptcy proceedings provided that the debtor was insolvent and that the creditor was aware of that fact, and/or; (iii) if the transaction is carried out after the date of submission of the petition for the opening of the insolvency proceeding provided that the creditor was aware of the opening of the insolvency proceedings or that the petition was filed for the opening of the insolvency proceedings.

3.6 Impact of insolvency proceedings on security and enforcement

In case of insolvency proceedings, the enforcement of the security shall be subject to the insolvency law provisions. The receiver is given control over any immovable property and/or any movable property in the possession of the debtor at the date the insolvency the proceeding is opened.

This control extends to temporary use of the property while the receiver is running the business of the insolvent debtor, and to ultimate disposition of it. However, the receiver shall not exercise the right to dispose of goods subject to particular disposal (i.e. the collateral) if the value of the goods is lower or equal to the value of the amount owed to the creditor and the amount of expenses necessary for its execution.

Thus, in case the insolvency administrator decides not to dispose of these assets, or in case the court upon the request of the secured creditor decides to remove the limitations provided by the insolvency law as mentioned above, the secured creditor may enforce the security pursuant to the applicable legal requirements that are applicable outside of insolvency proceedings.

3.7 Secured creditors in bankruptcy proceedings

A validly established *in rem* security interest gives the secured creditor a preferential claim regarding the respective collateral. The secured creditor will have the preferential right to be satisfied from the proceeds of the sale of the collateral before any other creditors in accordance with the preference order set out in the Bankruptcy Act.

3.8 Survival of powers of attorney

The survival of the powers of attorney is not explicitly addressed in the Albanian legislation on bankruptcy. However, certain considerations can be made regarding the powers of representation during such proceedings. The law states that, in case the bankruptcy proceeding is initiated upon request of the debtor itself, then the debtor, (therefore also its legal representatives) shall have rights limited to the ordinary management of the activity under the supervision of the liquidator, which shall previously authorize all the actions of the debtor. All the other actions regarding the debtors' activity may be only performed by the liquidator. In case the bankruptcy proceedings are opened upon request of the creditor/s, then the debtor (therefore its representatives) shall have no right to any actions regarding the debtor's activity, and all the management shall pass under the exclusive disposal of the liquidator. We assume that also the powers of attorney and proxies issued by the debtor shall be subject to the above regime affecting the freedom of the debtor to dispose of the actions regarding its activity. The liquidator has the right to terminate any power of attorney or proxy previously issued by the debtor. With regard to the instruction contracts entered by the debtor, the law clearly provides for their automatic termination upon opening of the bankruptcy proceedings.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

A secured creditor may have to pursue judicial enforcement regarding its collateral in accordance with the provisions of the Civil Procedure Code, which requires completion of the following steps:

- the lending bank has to issue a bank statement and file such statement together with the facility agreement with the competent court and request the rendering of an enforcement order (*urdher ekzekutimi*);
- the enforcement order is submitted to a bailiff (court employed or private);
- the bailiff will take possession of the collateral and submit it to the secured party; and finally,
- the secured party must sell the collateral and is entitled to satisfy its claims out of the enforcement proceeds.

4.2 Timing and costs of enforcement proceedings

In our experience the enforcement procedure takes between three and 36 months (starting with the filing of the enforcement application and ending with the distribution of the monies realised to the secured creditor). This duration also depends on the court's caseload and any defensive pleadings pursued by the debtor.

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AUSTRIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In general, a negative pledge or other covenant, undertaking or agreement not to grant any security is legally valid and binding, save for real estate assets. Such negative pledge undertakings may be invalid under section 1371 of the Austrian General Civil Code.

The violation of a negative pledge may give rise to damage claims. However, it is not effective vis-à-vis third parties.

1.2 Restrictions on accelerating a loan

In general, Austrian law does not restrict the ability of parties to a facility agreement to agree on any event of default, but loan agreements concluded for a definite period of time may only be accelerated on the objectively justified grounds (*sachlich gerechtfertigte Gründe*). However, contractual stipulations providing for the right to withdraw from or cancel an agreement or for an automatic termination in the event of opening of an insolvency proceeding (*Insolvenzverfahren*) against an Austrian entity are not enforceable, if this was the only reason for withdrawing, cancellation or termination of an agreement, with the exception of specific financial transactions.

1.3 Effectiveness of a non-assignment clause

Non-assignment clauses between business entities are only valid if agreed upon individually and if these are not grossly discriminatory (*gröblich benachteiligend*). A violation of a contractual assignment prohibition which fulfills these criteria may give rise to damage claims, however, the assignment made in violation of such prohibition remains valid.

1.4 Common methods for loan transfers

Under Austrian law, the two most common ways for acquiring a participation in the position of a lender vis-à-vis a borrower under a credit facility agreement are: (i) an assignment of receivables (*Abtretung or Zession*); and (ii) a sub-participation (*Unterbeteiligung*).

- Assignment of Receivables: An assignment is a transfer of loan receivables from a lender (the assignor) to a third party (the assignee), who becomes the new lender. The obligations of the debtor (i.e. the borrower) remain unchanged. In contrast to the transfer of contract (which requires the involvement and consent of the borrower), an assignment of receivables can be concluded between the assignor and the assignee. In principle, no consent of a debtor is required, unless specific assignment restrictions have been agreed in the underlying credit facilities agreement. However, as long as the borrower is not notified of the assignment, the borrower may settle the claim with debt discharging effect by paying to the assignor.

- Sub-Participation: In contrast to a contract transfer and an assignment of receivables, a sub-participation (Unterbeteiligung) does not lead to a change in the creditor structure originally agreed in the credit facilities agreement (i.e. the sub-participant neither becomes party to the credit facilities agreement, nor creditor vis-à-vis the borrower). The lender merely grants the sub-participant the right to participate commercially (in full or in part) in the right of the original lender to receive principal and interest payments from the borrower. Sub-participations are typically entered into on the sub-participant's own account and at its own risk. The sub-participant – who is not in a contractual relationship whatsoever with the borrower – is not granted any direct claims or rights vis-à-vis the borrower.

1.5 Effectiveness of a contractual subordination

A contractual subordination is effective in Austria.

1.6 Subordination by operation of law

The Austrian Act on Equity Replacements (*Eigenkapitalersatzgesetz* or *EKEG*) stipulates that a loan granted by a shareholder or a security granted by a shareholder to secure a debt of a company which is in a financial crisis is deemed to be equity replacing. Austrian insolvency law provides that equity replacing shareholder loans are subordinated to other indebtedness in the context of insolvency by operation of law.

A company is in a financial crisis if:

- a company is insolvent (*zahlungsunfähig*), within the meaning of section 66 of the Austrian Insolvency Act (*Insolvenzordnung*);
- a company is over-indebted (*überschuldet*), within the meaning of section 67 of the Austrian Insolvency Act; or
- the quota of own funds (*Eigenmittelquote*) according to section 23 of the Business Reorganization Act (*Unternehmensreorganisationsgesetz*) of a company is less than 8 %, and its fictitious duration of debt redemption (*fiktive Schuldentilgungsdauer*) according to section 24 of the Business Reorganization Act is more than 15 years.

A shareholder is defined to be:

- a shareholder with controlling participation;
- a shareholder with a participation of at least 25 %; or
- any person not holding a participation in the company but having a controlling influence (*beherrschenden Einfluss*) with regard to the company.[1]

1.7 Validity of a forfeiture agreement

Austrian law generally prohibits forfeiture of the security collateral. The secured creditor may not keep the collateral in lieu of the secured liability.

An agreement regarding forfeiture of financial collateral is legally valid and binding only if specifically agreed upon in accordance with the Austrian Act on Financial Collateral (*Finanzsicherheiten-Gesetz*).

Forfeiture agreement with respect to other kinds of security interests (concluded prior to secured obligations becoming due and payable) is null and void.

1.8 Super-priority loans in bankruptcy

During the course of insolvency proceedings, the insolvency administrator can enter into agreements, for example loan agreements or agreements for supply of goods and utilities. In general, claims, including claims of creditors, which arise during the insolvency proceedings, must be satisfied with priority over those already existing before the insolvency proceedings (and not secured).

Other than this general rule, Austrian law does not recognize the concept of super-priority loans in bankruptcy.

1 Following the respective explanatory notes, a controlling influence of a person not being a shareholder exists if such person has factual material influence on important decisions of the management of the company and exercises such influence as if it were a shareholder having the majority of the votes. Information and control rights typically agreed to in loan agreements do not create such “shareholder” position (this is explicitly provided in section 5 para 1 no 3 of the Act on Equity Replacements).

1.9 Varying interest rate and tenor of the loan – must security be retaken?

Varying interest rate and tenor of the loan do not require the security interest to be retaken. However, it is market practice in Austria that the security provider confirms security in such cases.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, title and modus (i.e. perfection / an act of publicity) are required.

Title instruments include:

- account pledge agreements, receivables pledge/assignment agreements, movable assets pledge agreement, IP rights pledge agreements, share pledge agreements, mortgage agreements; and
- surety agreements and guarantee agreements.

Acts of Publicity:

To establish an *in rem* right a separate act of perfection is required.

For guarantees and sureties, no separate act of perfection is required.

2.2 Ranking of pledges/mortgages

The rank of a pledge depends on when the act of perfection is made.

The rank of a mortgage depends on the exact time when the filing for registration of the mortgage is submitted to a land register (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

It is generally possible to change the ranking of consensual security interests by mutual agreement between the secured creditors. Consent of the security provider is not required.

In cases where a mortgage was terminated (e.g. by repayment of the secured amount) but registration in the land register is still in place, it is possible to maintain the registration and use the registered mortgage as a security for other obligations. By this way, the newly established security will acquire the ranking of the original mortgage.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge	Handover of the pledged assets to the pledgee; if handover is factually impossible (*faktisch nicht möglich*) or commercially not viable (*wirtschaftlich untunlich*), a third party (other than the pledgee or pledgor) may be instructed (*Besitzanweisung*) to hold the pledged assets on behalf of the pledgee as agent (*Pfandhalter*) and the pledged assets are marked as pledged (by affixing a plaque)
ACCOUNT	Pledge	Notification of the account holding bank
RECEIVABLES	Pledge/ Assignment	Third party notification or setting a book annotation in the account books and the open items list (*OP-Liste*)
SHARES	Pledge	Notification of the company
SHARES (LISTED) HELD IN A CUSTODY ACCOUNT	Pledge	Instructing the custodian (*Besitzanweisung*) to hold the pledged assets on behalf of the pledgee
REAL ESTATE	Mortgage	Registration with the Land Register (*Grundbuch*)

2.5 Availability of floating charge

Austrian law does not recognize the concept of floating charges over all existing and future assets of a company.

2.6 Trust and parallel debt issues

Austrian law does not recognise a trust arrangement whereby security can be granted in favour of a security agent as trustee for the finance parties, without such security agent being a creditor in its own right of all secured obligations. A pledge/mortgage under Austrian law is an accessory right (*akzessorisches Recht*), meaning that the pledge cannot be separated from the secured obligation, which in particular entails that it can only be held and enforced by the creditor of such secured obligation.

This is typically resolved by a joint and several creditorship or parallel debt structures. Under Austrian law, parties can validly establish a joint and several creditorship (*Gesamtgläubigerschaft*). For this purpose the security agent is established as the joint and several creditor (*Solidargläubiger*) (together with the relevant finance party) of each and every obligation of any obligor towards each of the finance parties, and accordingly, the security agent has its own independent right to demand performance by the relevant obligor of those obligations. In international syndicated lending transactions where the facility agreement or the intercreditor agreement is governed by foreign (i.e. not Austrian) law, parallel debt structures are established, whereby each debtor undertakes to pay to the security agent amounts equal to all present and future amounts owed by them to a secured party under any secured debt document, and whereby the security agent has its own independent right to demand payment of such obligations.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	No	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes, if contractually agreed
ACCOUNT PLEDGE	Yes	Yes, if contractually agreed[2]
RECEIVABLES PLEDGE	Yes	Yes, if contractually agreed
SHARE PLEDGE	Yes	Yes, if contractually agreed
REAL ESTATE MORTGAGE	Yes	Yes, if contractually agreed

2.8 Security and loan transfers

Accessory security will normally be transferred to the new creditor upon the assignment of the claim and it is advisable to notify the debtor subsequently about the transfer.

It should be noted that any replacement of the pledgee/assignee may result in the legal requirement to repeat certain acts of publicity in order to ensure that the security interests are properly perfected in accordance with Austrian law.

Non-accessory security, such as guarantees, are not automatically transferred to the new creditor and would typically need to be re-issued or confirmed.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

In general, the Austrian Insolvency Act (*Insolvenzordnung*) distinguishes between:

- bankruptcy proceedings;
- restructuring proceedings, in which an administrator is appointed by court; and
- restructuring proceedings, in which the debtor retains the right to self-administration.

While bankruptcy proceedings usually lead to a realisation or winding-up of the debtor's estate and the distribution of the proceeds of its assets among its creditors, the aim of restructuring proceedings is to enable the debtor to continue its business and to be discharged from its debts.

3.2 Applicable insolvency test and directors' duty to file

Insolvency of the debtor in the meaning of the Insolvency Act is given in case of:

- over-indebtedness – the value of the company's assets (based on liquidation values) is less than the amount of its liabilities, and the company does not have a positive going-concern prognosis (*Fortbestandsprognose*); or
- illiquidity – means that the company is unable to pay its debts when due. A temporary delay of payments (*Zahlungsstockung*) does not amount to insolvency.

An application for commencing insolvency proceedings can be filed by the legal representatives of the debtor or one of its creditors. The debtor's obligation is triggered by the company becoming insolvent. The managing directors must file an application without culpable delay, but in any case, not later than 60 days after insolvency occurred.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Bankruptcy proceedings are initiated by the competent court upon an application either by the debtor or by one or more of its creditors, if the debtor is over-indebted or illiquid and the debtor has sufficient assets to cover the initial costs of the proceedings (*kostendeckendes Vermögen*). The court appoints an insolvency administrator (*Masseverwalter*) to administer the assets of the debtor and publishes the decision of the opening of the bankruptcy proceedings.

Unsecured creditors' claims must be filed as insolvency claims (*Insolvenzforderungen*) in order to take part in the insolvency proceedings. In this context, obligations of the debtor that are not due at the time of commencement of the insolvency proceedings are deemed accelerated and due for the purpose of the proceedings. Secured creditors only take part as insolvency creditors to the extent their claims exceed the value of the secured assets.

Unsecured creditors whose claims have been recognized in principle receive the same *pro rata* quota of their insolvency claim. As a class, they are subordinate to: (i) administrative expenses, consisting, generally, of the costs of the proceedings (including the remuneration and reimbursement awarded to the creditors' committee and the special creditors' associations), the fees of the administrator, and all expenses concerning the maintenance and administration of the insolvency estate post-petition; and (ii) the rights of secured creditors to the extent the respective claims are secured by assets subject to security interests.

Once the realization of the debtor's assets has commenced and the administrative expenses (*Masseforderungen*) and any other claims enjoying priority status have been satisfied or properly secured, the receiver can, in principle, start with interim distributions to the unsecured creditors (provided that there sufficient assets in the insolvency estate). However, the insolvency administrator has to ensure that there are always sufficient funds at hand to pay off the administrative expenses as they fall due.

After all of the proceeds from the liquidation of the debtor's estate have been distributed, the bankruptcy proceedings will be terminated by a court order.

In the course of bankruptcy proceedings, the debtor may propose a restructuring scheme.

3.3.2 Reorganisation plan (Restructuring proceedings)

There are two types of restructuring proceedings:

- restructuring proceedings without self-administration: the debtor needs to include in its application a restructuring scheme proposal, offering a minimum payment of 20 % of the debts within a maximum period of two years to unsecured creditors; and

- restructuring proceedings with self-administration: the debtor needs to include in its application a restructuring scheme proposal, offering a minimum payment of 30 % of the debts within a maximum period of two years to unsecured creditors.

Upon receipt of an application for restructuring proceedings and after having examined certain formal requirements, the court will formally open restructuring proceedings and appoint an insolvency administrator[2].

2 In restructuring proceedings with self-administration, the insolvency administrator only supervises the debtor.

The unsecured creditors decide (at a special hearing) whether to accept this restructuring scheme proposal by both a simple majority of the creditors attending the hearing as well as a simple majority based on the value of their claims. Following the creditors' acceptance, the insolvency court confirms the restructuring scheme in case no grounds for denial exist. Once the debtor has fulfilled the restructuring scheme, it is discharged from its further debts. Rights of secured creditors remain in principle unaffected.

Restructuring proceedings are, however, converted into bankruptcy proceedings, if *inter alia* the debtor withdraws the restructuring scheme proposal, or the restructuring scheme is not accepted by the creditors, or the insolvency court denies confirmation of the restructuring scheme.

3.4 Timing and costs of insolvency proceedings

The duration of insolvency proceedings depends on the complexity of the proceedings. In case of a restructuring scheme or a restructuring scheme proposal, the proceedings might be finalized within a few months. Complex bankruptcy proceedings involving time consuming litigation can take up to ten years.

The court fees for filing an insolvency claim currently amount to EUR 23.

3.5 Challenge of preferential transactions and suspect periods

In the event of insolvency proceedings, the insolvency administrator can contest legal actions and transactions which have taken place within certain suspect periods before the opening of insolvency proceedings, and which relate to the assets of the insolvent debtor, provided that those acts have reduced the funds of the bankrupt estate and/or the satisfaction of other creditors.

The Insolvency Act sets forth various circumstances for contestation:

- pursuant to section 28 no 2 of the Insolvency Act (contestation due to the intent to cause disadvantage to creditors), legal acts may be contested: (i) if they have caused disadvantage to the creditors of the insolvent debtor; (ii) if the debtor's intention to cause disadvantage must have been known to the counterpart; and (iii) if the legal acts have been carried out during a two years period prior to the opening of the insolvency proceedings. If the counterpart had knowledge of this intention, the time limit between the opening of insolvency proceedings and the contested legal act is extended to up to ten years (section 28 no 1 of the Insolvency Act);

- according to section 28 no 4 of the Insolvency Act (contestation due to fraudulent conveyance), the right of avoidance applies to certain contracts (including purchase and exchange contracts) discriminating creditors and entered into by the debtor within one year preceding the formal opening of insolvency proceedings with the intention of e.g. selling the goods to an unusual and unjustified low price if the counter-party to the contract had knowledge of this intention or should have had knowledge of this intention when acting with due diligence. Not only the transaction in itself can constitute fraudulent conveyance, but also a clear disproportion between the transaction and the assets of the debtor;

- section 30 of the Insolvency Act (contestation due to preferential treatment) allows the contestation of legal acts which were carried out by the insolvent debtor after the occurrence of insolvency or after an application for insolvency or during 60 days prior, if (i) the creditor has obtained a security or satisfaction which he was not entitled to receive in this way or at this time, or (ii) if the security or satisfaction has been given to a creditor with the intention to favour this creditor over the other creditors. The intention must be known to the favoured creditor or should have been known by him had he acted with due care. A contestation pursuant to section 30 of the Insolvency Act is not possible if the legal acts were carried out more than one year before the opening of the insolvency proceedings;

- pursuant to section 31 of the Insolvency Act (contestation due to knowledge of insolvency of the debtor), legal acts or transactions of the debtor which lead to a satisfaction or securitisation of a creditor can be contested, if the acts or transactions were undertaken within six months prior to the opening of

insolvency proceedings, provided that the debtor was already insolvent (illiquid or over-indebted) at the point of time such acts were undertaken or concluded;

- legal acts of the insolvent debtor are contestable if at the moment they were undertaken the insolvency was known to the other party or must have been known if due care had been applied;

- legal transactions which are directly or indirectly disadvantageous to the creditors are contestable, provided that the counterparty of the debtor is aware of the insolvency or the insolvency is unknown to him because of negligence. An indirect disadvantage for the insolvency estate must be objectively foreseeable. Such disadvantage is in particular deemed to be objectively foreseeable in case a restructuring concept (*Sanierungskonzept*) is obviously unsuitable;

- the right of avoidance can also apply to transactions free of charge which took place within two years before the opening of the insolvency proceedings (section 29 no 1 of the Insolvency Act).

3.6 Impact of insolvency proceedings on security and enforcement

Secured creditors are barred from exercising their rights for a maximum period of six months after the opening of insolvency proceedings if the exercise of such rights would endanger the carrying on of the insolvent's business by the receiver and provided the bar does not constitute severe personal or economic damage to a particular secured creditor.

3.7 Secured creditors in insolvency proceedings

Secured creditors are creditors holding:

- claims for segregation of property that are rights of creditors to certain assets in the possession of the debtor in which such creditors have property interests recognized by Austrian law (including assets that are subject to retention of title claims); such rights are in principle not affected by any insolvency proceedings and the creditors can demand the return of such assets; or

- preferential claims that are security interests (e.g. pledges, mortgages) of the creditor in respect of certain of the debtor's assets. The secured creditor is entitled to have its claims satisfied out of the proceeds of the respective assets according to the rank of priority of the respective security. The creditor's claim will only be regarded as an insolvency claim as far as it is not satisfied out of the secured assets.

3.8 Survival of powers of attorney

Any power of attorney issued or appointment as agent granted by a company will cease to be valid upon the opening of an insolvency proceeding over its assets.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

For initiating enforcement proceedings, the enforcing party requires an enforceable title for which a request for enforcement needs to be filed with the competent district court determining the requested enforcement measure. The choice of the requested enforcement measure depends on the assets of the obliged party (e.g. bank accounts, shares, real estate, etc.).

The further enforcement proceedings depend on whether the title needs to be declared enforceable in Austria, in accordance with the exequatur proceedings of 403 et seqq EO.

- Decisions rendered by an Austrian court

  – A final and binding decision of an Austrian court is an enforceable title. Separate proceedings for the declaration of enforceability are not required. However, a precondition for the enforcement is the confirmation on the enforceability of the decision (*Vollstreckbarkeitsbestätigung*), which is issued by the title court.

- Decisions rendered by a Court in another EU member state

  – EU Regulation No 1215/2012 (Recast Regulation)[3] provides for the facilitated recognition and enforcement of judgements in other member states of the European Union. If the subject matter falls within the scope of the Recast Regulation, a final and binding decision rendered by a court in an EU members state is enforceable in any other EU member state without further proceedings concerning recognition and enforceability.

- Decisions rendered by a Court in Switzerland, Norway or Iceland

  – The Lugano Convention (OJ 2007 L 339/3)[4] applies to matters of recognition and enforcement of decisions rendered by a court in Switzerland, Norway or Iceland.

  – The most significant difference as opposed to the Recast Regulation is the system of exequatur that exists under the Lugano Convention. The system of exequatur corresponds to the procedure of declaration of enforceability.

- Decisions rendered by a court in another foreign country

  – In general, the enforcement of decisions rendered by a foreign court (other than a court located in a EU members state, Switzerland, Norway or Island) requires a separate request for the declaration of enforceability pursuant to the exequatur proceedings of section 403 et seqq EO.

  – Foreign judgements are to be declared enforceable in Austria if (i) the decision is enforceable in the state of origin and (ii) reciprocity is given (i.e. there must be an international treaty regarding the mutual recognition and enforcement of decisions).

- Arbitral awards

  – A final, conclusive and binding arbitral award issued in accordance with and by a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is to be declared enforceable pursuant to section 403 et seqq EO.

In practice, the request for declaration of enforceability is submitted jointly with the request for enforcement including the specific enforcement measure. Subsequently, the competent court decides on all requests simultaneously.

Further Enforcement Proceedings

The competent district court (*Bezirksgericht*) examines the admissibility of the request for enforcement and subsequently issues a decision on the approval of the enforcement (*Exekutionsbewilligung*). In a second stage (*Vollzugsverfahren*), the decision will be enforced.

3 Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

4 Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

The following enforcement measures can be requested under Austrian law:

- Enforcement in immovable assets (*Liegenschaftsexekution*): seizure by registration of mortgage / administration in land register; administration of real estate or sale via public auction.

- Enforcement in moveable assets (*Fahrnisexekution*): court bailiff seizes the assets; private sale or public auction of seized assets.

- Enforcement in receivables (*Forderungsexekution*): Creditor can list up to twelve banks as potential debtors; court orders the banks to inform the court whether the creditor has any bank accounts; receivables are seized by court order; receivables are transferred to creditor for satisfaction.

- Enforcement in other assets (*Exekution auf sonstige Vermögenswerte*): Seizure and subsequent sale of e.g. company shares or intellectual property rights by private sale or public auction of seized assets.

4.1.1 Civil proceedings

To initiate civil proceedings in Austria, the claimant has to file a claim with the competent court (e.g. the Commercial Court of Vienna) including the conclusive argumentation and the most important facts of the case. The claim has to include a specific request for relief (*Urteilsbegehren*).

4.1.2 Interim measures

To ensure that, at the end of the civil proceedings, the relief sought for is still possible, provisional measures in the form of preliminary injunctions (*einstweilige Verfügungen*) can be used. The party applying for such an injunction bears the burden of proof (prima facie) that there are reasons to assume that the aim of the civil proceedings is put in jeopardy and that without the injunction the debtor would prevent or make significantly more difficult the collection of the claim by alienating his property, concealing it or disposing of it in some other way. In general, injunctions cannot be issued if they would lead to irreversible results or if the enforcement would already be permissible.

Inter alia, preliminary injunctions can be used to secure:

- pecuniary claims – provided that there is the risk that the opponent tries to thwart the collection of a monetary claim, property of the opponent can be taken into custody of the court, the opponent can be ordered not to sell or to pledge his property or a third person can be ordered neither to pay nor to dispose of claims the opponent has against this third party;

- rights and legal relationships – in this case, not the enforceability of a claim, but the present legal situation is to be secured provided that the party seeking such injunction would suffer irreparable damages without such injunction.

  – The European Account Preservation Order (EAPO) provides for a procedural device to enable a creditor to freeze some or all funds within any bank account held by a debtor located within the EU. The purpose of this procedure is to prevent the subsequent enforcement of the claim from being jeopardised by a transfer or withdrawal of funds held by or on behalf of the debtor in a bank account in a Member State. The creditor may apply for a European account preservation order at any stage of the proceedings, both before the creditor initiates proceedings against the debtor, during such proceedings and after the creditor has obtained a title against the debtor (Art 5 EAPO).

4.2 Timing and costs of enforcement proceedings

ENFORCEMENT	COMMENT	COSTS[6]	TIMELINE
REQUEST FOR DECLARATION OF ENFORCEABILITY[7] (*VOLLSTRECKBARERKLÄRUNG*)	Applied for together with request for enforcement		Issued together with the decision on enforcement
APPLICATION FOR ENFORCEMENT IN IMMOVABLE ASSETS	Seizure by registration of mortgage / administration in land register	Costs relating to enforcement covered by proceeds Legal fees depending on the enforcement measure and the specifics of the case	Approx. 6 to 12 months
APPLICATION FOR ENFORCEMENT IN MOVEABLE ASSETS	Court bailiff seizes the assets Subsequent auction	Yes	Yes, if contractually agreed
APPLICATION FOR ENFORCEMENT IN RECEIVABLES		Yes	Yes, if contractually agreed[2]
APPLICATION FOR ENFORCEMENT IN OTHER ASSETS		Yes	Yes, if contractually agreed

6 Court filing fees depending in general on the amount in dispute.

7 Only applicable in case exequatur proceedings are required.

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BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina ("BiH") is a country consisting of two separate entities, the Federation of Bosnia and Herzegovina ("FBiH") and Republika Srpska ("RS"), and one special autonomous district under direct sovereignty of the state, the Brčko District. In each of these parts essentially different legal regimes are applicable; nevertheless, certain matters are regulated by State laws applicable in all parts of the country. Also, in many cases the relevant laws of the entities and Brčko District are to a large extent harmonised and provide for almost identical legal frameworks. Unless otherwise set out below, our comments apply in both FBiH and RS, while Brčko District is not included.

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In general, a negative pledge undertaking or any other similar undertaking or agreement, which restricts the pledgor's right to grant security over the pledged property in favour of a third party is null and void in BiH. However, such undertakings in a foreign law governed loan agreement may be valid between the contractual parties (if valid under the relevant governing law) but would not be effective or enforceable towards third parties acting in good faith.

1.2 Restrictions on accelerating a loan

In general, parties are free to agree on any event of default, but the loan may not be accelerated due to non-fulfilment of an insignificant part of the obligation.

Enforcement of claims may be temporary restricted during bankruptcy proceedings (including preliminary proceedings) and receiverships.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment of monetary receivables is legally valid and binding between the contracting parties, but would not be effective towards third parties acting in good faith.

1.4 Common methods for loan transfers

Two methods for transfer of loans are available in BiH: (i) assignment of claims; and (ii) transfer of agreements.

1.4.1 Assignment of claims

An assignment of claims includes transfer of the main receivables together with ancillary rights (such as security interest). Consent of the debtor is not a statutory requirement but notification of the assignment to the debtor is necessary for the assignment to be valid vis-à-vis the debtor. Typically, NPLs where the underlying loan has been duly accelerated are transferred by way of assignment of claims.

1.4.2 Transfer of agreements

A transfer of agreements includes transfer of the entire contractual position, i.e. all claims, receivables, rights, interests, obligations and undertakings under the agreement. Consent of the debtor is required. Typically, performing loans are transferred by way of transfer of agreements.

1.5 Effectiveness of contractual subordination

Effectiveness of contractual subordination is not explicitly regulated in BiH. Generally, claims which have been contractually subordinated by an agreement between the creditor and the debtor will be settled among the last.

1.6 Subordination by operation of law

In RS, a company may not make payment to its shareholders if such payment would affect its ability to settle debts as they fall due.

In FBiH, profit distributed to shareholders may have to be returned to the company if, after such payment, the company is unable to settle its debts vis-à-vis third parties.

Equity replacing shareholder loans are subordinated to other indebtedness in the context of bankruptcy proceedings by operation of law.

Unsecured loans granted by affiliates of a company in RS (excluding affiliates that are financial institutions) are also subordinated in the context of bankruptcy.

The laws regulating bankruptcy proceedings and the laws regulating payment operations provide for a mandatory order of payments if the company is in bankruptcy proceedings or illiquid.

1.7 Validity of a forfeiture agreement

Forfeiture agreements (i.e. agreements permitting the creditor to keep the property subject to the security in lieu of the secured liabilities) are null and void in BiH.

1.8 Super-priority loans in bankruptcy

In general, the concept of super-priority loans is not recognised in bankruptcy proceedings. However, loans granted for the purpose of carrying out the business operations of the debtor during bankruptcy proceedings are considered to be costs of the bankruptcy estate which have priority in settlement.

1.9 Varying interest rate and tenure of the loan – must security be retaken?

If the parties agreed on a floating interest rate, there is no need to retake security from time to time; interest rates only have to be determinable at the moment when the security is taken.

Subsequent changes (in particular increases) of the interest rate or the loan tenure should also be reflected in the relevant security documents and public registries where the security is registered.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid *in rem* security by way of a contractual arrangement, a title instrument and appropriate perfection steps (i.e. acts of publicity) are required. Establishment of a valid personal security requires execution of an appropriate title instrument.

Title instruments for *in rem* security include pledge agreements (for movable property, shares, bank accounts, receivables and rights) and mortgage agreements (for immovable property).

Title instruments for personal security include suretyship and guarantee agreements. Certain other instruments are also commonly used as security in practice, in particular bills of exchange (*mjenice*).

Acts of publicity with respect to *in rem* security include:

- registration of pledges in the BiH Pledge Registry (*Registar zaloga Bosne i Hercegovine*) with respect to movable property, shares in limited liability companies, bank accounts, receivables and rights or, if possible and appropriate, transfer of possession over the pledged property;
- registration with the FBiH Securities Register/RS Securities Register with respect to shares in joint stock companies and other securities; and
- registration in the competent land registers (*zemljišno-knjižni ured*) with respect to immovable property.

Certain other steps, such as notification to debtors, account holding banks, commercial registries, etc. may also be needed.

2.2 Ranking of pledges/mortgages

The ranking of pledges registered in the BiH Pledge Registry is determined by the time of the execution of the online registration. The ranking of mortgages and the ranking of pledges over shares in joint stock companies and other securities depends on the order of submission of applications to the competent land register i.e. securities register.

2.3 Can ranking of consensual security be changed by agreement of the creditors?

In general, yes, however, such changes would need to be affected in the relevant registries in order to become effective. Furthermore, in certain cases the consent of the debtor may also be required.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge	Registration with the BiH Pledge Registry or transfer of possession
BANK ACCOUNT	Pledge	Registration with the BiH Pledge Registry and notification to the account holding bank
RECEIVABLES/RIGHTS	Pledge or security assignment	Registration with the BiH Pledge Registry and notification to the underlying debtor
SHARES IN LIMITED LIABILITY COMPANIES	Pledge	Registration with the BiH Pledge Registry, recording of the pledge in the book of shares (*knjiga udjela*) of the company whose shares are being pledged and, if possible, registration with the competent commercial register
SHARES IN JOINT STOCK COMPANIES AND OTHER SECURITIES	Pledge	Registration with the competent securities register
REAL ESTATE	Mortgage	Registration with the competent land register

2.5 Availability of floating charge

In general, no floating charge is available; the general rule is that a security has to be specified (or at least definable) at the moment of its creation. However, there is one statutory exception in relation to certain movable property, defined as "general movable property" (*opšta pokretna imovina*) (i.e. the property which does not have a serial number attached to it in line with the law), which has effects similar to the floating charge concept.

2.6 Trust and parallel debt issues

In BiH there is no comparable structure to the common law trust.

The issue is typically solved through a so-called "parallel debt structure". Under this structure, the creditors agree that a security agent shall be the joint and several creditor (*solidarni povjerilac*) of each and every obligation of the borrower towards each creditor (other than the security agent). However, the respective concept has not yet been tested in court.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
PLEDGE OVER MOVABLES	Yes	In general no; however, under certain conditions, a pledgee may sell the security independently in a public auction (*javna prodaja*) or through a direct sale (*neposredna pogodba*).
PLEDGE OVER BANK ACCOUNT	Yes	Possible, provided that the relevant preconditions are met (direct payment by the bank).
PLEDGE OVER RECEIVABLES/RIGHTS	Yes	Possible, provided that the relevant preconditions are met (direct payment by the debtor). With respect to non-monetary rights, the same rules as for movables apply *mutatis mutandis*.
PLEDGE OVER SHARES IN LIMITED LIABILITY COMPANIES	Yes	In general no; however, under certain conditions, a pledgee may sell the security independently in a public auction or through a direct sale.
PLEDGE OVER SHARES IN JOINT STOCK COMPANIES AND OTHER SECURITIES	Yes	Possible, provided that the relevant preconditions are met, which inter alia includes that the pledge agreement is executed as a notarial deed and the parties agreed to this (sale on stock exchange).
MORTGAGE OVER REAL ESTATE	Yes	No
BANK GUARANTEES	No	Possible, provided that the relevant preconditions are met (direct payment by the bank).
SURETYSHIPS	Yes	No
BILLS OF EXCHANGE	No	Yes

2.8 Security and loan transfers

When a loan is transferred, all accessory security is generally transferred to the transferee by operation of law. The transfer should also be registered with the relevant registries. In order to affect the transfer, separate security transfer documents and a valid registration clause (*clausula intabulandi*) may be required, in particular with respect to mortgages.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

There is only one type of insolvency proceeding available in BiH: bankruptcy proceedings (*stečajni postupak*).

The aim of bankruptcy proceedings is the collective satisfaction of all creditors through liquidation of the bankruptcy debtor's property and distribution of the sale proceeds. An alternative to liquidation and dissolution is the reorganisation (*reorganizacija*) of the debtor. This can be carried out in the course of bankruptcy proceedings as a separate phase and aims at re-defining the legal and economic position of the bankruptcy debtor and its relationships with creditors in order to maintain the business on a "going concern basis".

Additionally, the RS law provides for restructuring proceedings (*postupak restrukturiranja*), which regulate the legal (and financial) status of the debtor and its relationship with creditors and enable the debtor to continue with its business operations. Restructuring proceedings can be initiated due to a threatening illiquidity or if the client is not settling its obligations as they fall due for a period of up to 60 days.

FBiH law does not explicitly provide for restructuring proceedings; however, similar effects can be achieved through the reorganisation of the debtor.

3.2 Applicable insolvency test and directors' duty to file

Illiquidity (*platežna nesposobnost*) is the primary reason for opening bankruptcy proceedings against a debtor in BiH. Illiquidity of a debtor is presumed:

- in FBiH in the event that the debtor fails to fulfil its obligations as they fall due for an uninterrupted period of 30 days;
- in RS in the event that the debtor fails to fulfil its obligations as they fall due for an uninterrupted period of 60 days or if the debtor's bank accounts have been blocked for an uninterrupted period of 60 days. The ability of the debtor to fulfil some of its obligations but not all of them is per se not sufficient evidence against the debtor's inability to pay.

The second reason for opening of bankruptcy proceedings is threatened illiquidity (*prijeteca platežna nesposobnost*) of the debtor. Threatened insolvency exists if it can be anticipated that the debtor will not be able to fulfil its obligations as they fall due, in FBiH for an unspecified period, and in RS for a period of 12 months. However, only the debtor can initiate bankruptcy proceedings on the grounds of threatened insolvency.

The debtor is generally required to submit a bankruptcy petition without delay, but in any case, within 30 days in FBiH and sixty 60 days in RS, from the date of realising that the illiquidity has occurred. Otherwise the management faces monetary fines and potentially also civil and criminal liability.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

A bankruptcy petition can be filed by:

- the debtor;
- one or more of its creditors; or
- the liquidator (*likvidator*) in the course of (ordinary) liquidation proceedings.

The opening of bankruptcy proceedings becomes effective as of the publication of the decision of the court in the relevant official gazette. As of this date:

- the court appoints a bankruptcy administrator (*stečajni upravnik*), who assumes control over the bankruptcy debtor and its assets;
- any existing court, arbitration and similar proceedings relating to the bankruptcy estate are stayed;
- the opening of bankruptcy proceedings is noted in all relevant public registries (competent commercial registry, land registry, etc.).

The creditors have 30 days following the publication of the decision on opening of the bankruptcy proceedings in the relevant official gazette to register their respective claims.

All unsecured creditors who hold a valid and undisputed claim against the bankruptcy debtor and who have duly registered their claims in the course of the bankruptcy proceedings are divided into three payment classes:

- Preferential creditors, which include: (i) claims incurred in the course of the preliminary bankruptcy proceeding; and (ii) employee claims, but only up to a certain amount;
- General creditors, which include all creditors which have a valid claim against the debtor; and
- Subordinated creditors, which include: (i) interest accrued after opening of bankruptcy proceedings; (ii) expenses incurred by a creditor due to its participation in the proceedings; (iii) administrative and criminal fines and related damage claims; (iv) claims related to gratuitous favours of the debtor; (v) equity replacing loans. In RS, claims of affiliates also fall in this category.

The creditors of the lower payment class may have their claims paid only after the creditors of the preceding rank have had their claims paid in full. The creditors of the same payment priority have their claims paid on a pro rata basis.

Reorganisation is initiated by submission of a petition for reorganisation by the bankruptcy debtor or bankruptcy administrator at the latest until closure of the final hearing (*ročište za glavnu diobu*). The creditors vote on the reorganisation plan; whereby a majority in each creditor class is required and the sum of the claims of those who voted for the plan is greater than those who voted against.

3.3.2 Restructuring proceedings

In RS restructuring proceedings can be initiated against a debtor due to its threatened illiquidity. A petition for initiation of restructuring proceedings, together with a draft plan of the financial and operational restructuring, can be submitted to the court by the debtor or by a creditor with the consent of the debtor.

By the decision on opening of restructuring proceedings the court will also:

- appoint a trustee (*povjerenik*);
- schedule an examination hearing (*ispitno ročište*);
- invite creditors to notify their claims within 30 days from the publication of the decision in the RS Official Gazette.

If the restructuring plan is subsequently adopted, the claims of the creditors who accepted the plan will be reduced in accordance with the plan, while claims of the creditors who voted against the plan may be reduced by up to 10 % of their claims.

During the restructuring proceedings, litigation and enforcement proceedings against the debtor are suspended.

3.4 Timing and costs of insolvency proceedings

The duration of bankruptcy proceedings depends on several different factors including the backlog of cases pending in court. Although there is no general rule, in our experience more complex bankruptcy proceedings may take several years.

In relation to restructuring proceedings, under RS law the proceedings should be completed within five (5) months from the date of the decision on opening of the restructuring proceedings; this period can be extended by the court for an additional ninety (90) days.

3.5 Challenge of preferential transactions and suspect periods

As a general rule, a transaction can be contested if:

- it has been carried out within six months before filing of the bankruptcy petition and the bankruptcy debtor was insolvent at the time, provided that the bankruptcy creditor knew or should have known about the illiquidity of the debtor; or

- it has been carried out after the bankruptcy petition have been filed and the bankruptcy creditor knew or should have known about the illiquidity of the debtor and/or the bankruptcy petition.

A transaction providing preference or security for a creditor's claim can also be avoided if:

- it has been carried out within one month prior to the filing of the bankruptcy petition or after the petition has been filed; or

- it has been carried out up to three months prior to the filing of the bankruptcy petition if at that time the debtor was already insolvent.

Furthermore, a transaction entered into by the bankruptcy debtor which provided for no or insufficient compensation for the bankruptcy debtor can also be avoided if it has been carried out within five years prior to the filing of the bankruptcy petition.

A transaction undertaken by the bankruptcy debtor within five years before or after the filing of a bankruptcy petition or with the intent to harm one or more of its creditors may be avoided if the other contractual party was at the time aware of such intent.

Avoidance proceedings are generally initiated by the bankruptcy administrator on behalf of the bankruptcy debtor, however, a creditor may also do so. The claim for avoidance is filed against the party which benefited from the transaction.

3.6 Impact of insolvency proceedings on security and enforcement

As of the opening of bankruptcy proceedings:

- all enforcement proceedings pending at the time are stopped;

- creditors can no longer initiate enforcement proceedings; and

- creditors can no longer request security instruments in relation to the bankruptcy estate.

Enforcement proceedings relating to the debts of the bankruptcy estate (*dugovi stečajne mase*) are prohibited for a period of six months following the opening of the bankruptcy proceedings, except in the following cases:

- bilateral agreements (*dvostranoobavezujući ugovori*), which the bankruptcy administrator elected to perform;
- permanent agreements (*trajni ugovori*), which the bankruptcy administrator did not cancel within appropriate deadlines; and/or
- labour agreements or other long-term agreements in relation to which the bankruptcy administrator requested fulfilment of the other party's obligations in favour of the bankruptcy estate.

Secured creditors who have validly established *in rem* security interest can generally demand separate settlement of their respective claims out of the proceeds realised through the sale of the collateral but cannot realise their right to demand sale of the collateral in the course of the preliminary bankruptcy proceedings until the end of the examination hearing.

During the restructuring proceedings, litigation and enforcement proceedings against the debtor are suspended.

3.7 Secured creditors in insolvency proceedings

Secured creditors (*razlučni povjerioci*), which have validly established *in rem* security interest (e.g. mortgage or pledge) can demand separate settlement of their respective claims out of the proceeds realised through the sale of the collateral. If the claims of a secured creditor cannot be fully satisfied out of the collateral, the remaining claim will be treated as an unsecured claim in bankruptcy proceedings.

3.8 Survival of powers of attorney

Upon opening of the bankruptcy proceedings any appointment as a procura holder (*prokurist*) legal representative (*punomoćnik*) or as an agent (*zastupnik*) granted by the debtor will automatically cease to be valid.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

Enforcement proceedings can be initiated based on:

- enforceable deeds (*izvršne isprave*), which include: (i) final and binding court decisions and court settlements; (ii) final and binding decisions of administrative bodies; (iii) notarial deeds (in relation to monetary claims); (iv) other deeds defined by law, in particular pledge registrations issued by the BiH Pledge Registry;
- authentic deeds (*vjerodostojne isprave*), which include: (i) bills of exchange; (ii) promissory notes; (iii) cheques; and (iv) utility services' invoices or excerpts from bookkeeping records in relation to the utility services.

Enforcement proceedings for monetary claims involve the following main steps:

- seizure of property;
- appraisal of property;
- sale of property through court proceedings or private sale (if allowed); and
- settlement.

4.2 Timing and costs of enforcement proceedings

The duration of judicial enforcement proceedings varies greatly, depending on the court involved, its caseload, defensive tactics pursued by the debtor and similar. In our experience, it generally takes between six months and two years (starting with filing the application for enforcement and ending with the distribution of the funds).

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BULGARIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

Even though there is no special regulation regarding negative pledges, they are used in practice. In our opinion, negative pledge undertakings are legal and binding between parties to a loan agreement. However, such clause is not effective vis-à-vis third parties. It may lead to litigation for breach of contract between the contracting parties but does not affect the subsequently established pledge. The Special Pledges Act requires prior in rank creditors' explicit consent for the registration of subsequent pledges over the pledged assets.

1.2 Restrictions on accelerating a loan

In general, Bulgarian law does not restrict the ability of the parties to a facility agreement to agree on any event of default.

In case of a bank facility, the bank must grant a defaulting borrower a reasonable period of time before the acceleration becomes effective.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment is legally valid and binding between the contracting parties. Violation of such clause may give rise to damage claims. It is not effective vis-à-vis third parties and any assignment by a lender to a third party is valid. There is limited case-law which adopts the view that the non-assignment clause is related to assignor's knowledge and good faith and could lead to damage claims.

An assignment becomes effective vis-à-vis third parties as well as the debtor only upon notification of the debtor.

1.4 Common methods for loan transfers

In Bulgaria, the most common method used in practice to transfer rights related to a loan agreement is the assignment of claims. Following the assignment, the new lender ("assignee") acquires the receivables including all privileges, security interests and other rights of the previous lender ("assignor"). Notice to the borrower is not required in terms of validity of the assignment of claims agreement between the parties. Nevertheless, if the borrower is not notified of the change of creditor, the former may perform its obligation towards the previous lender and the assignment will not be effective vis-à-vis third parties and the debtor.

Novation is another common way for replacing the creditor under a loan agreement. This method requires the express consent of the borrower for the change of creditor. Change of the creditor has to be registered with the relevant register as additional filing to the initially registered security interests.

1.5 Effectiveness of a contractual subordination

The effectiveness of contractual subordination is neither explicitly regulated nor addressed in Bulgarian case law.

A contractual subordination agreed in a standard inter-creditor agreement is effective between senior lenders and junior lenders. However, such agreement would not be binding upon a bankruptcy receiver.

1.6 Subordination by operation of law

Shareholders' loans are subordinated upon the opening of insolvency proceedings by operation of law.

1.7 Validity of a forfeiture agreement

An agreement for the forfeiture of the security interest (i.e. the secured creditor may keep the collateral in lieu of the secured liability) reached before enforcement commences is not legally valid or binding, except with regard to financial collateral contracts.

Financial collateral contracts include financial contracts between central banks (domestic and European), banks, diverse financial institutions, insurance companies, leasing companies, investment intermediaries and market operators, as well as UCITS, AIFMs and other companies.

1.8 Super-priority loans in bankruptcy

Bulgarian law does not provide for prioritised loans within bankruptcy proceedings beyond the ordinary creditors' ranking. Certain types of security interest, however, may be exercised notwithstanding the opening of the insolvency or require severability of the secured assets from the insolvency pool.

Claims secured under the Financial Collateral Contracts Act, including netting clauses, may be qualified as super-priority receivables, as the start of insolvency proceedings or any other proceedings leading to the liquidation of the borrower's assets does not prevent the secured creditor exercising its rights under such netting agreement.

Bulgarian mandatory insolvency rules prevail over contractual netting arrangements, with a few exceptions as set out below. Close out netting arrangements included in a financial collateral contract are not affected by the limitations of Bulgarian mandatory insolvency rules. For banks in insolvency, the netting arrangement is not affected by Bulgarian insolvency rules, if it is valid and enforceable under the foreign law governing the netting arrangement. For insurance companies in insolvency, the creditors may set off if the law governing the debtor's claim allows the set-off.

The enforcement of a pledge given under the Special Pledges Act which commenced before the beginning of the insolvency proceedings is also not affected by these proceedings. In this regard, the insolvency administrator bears obligation to provide the secured party with possession over the pledged assets which are frequently movables and/or other goods or funds. Thus, such security would allow secured lenders to enforce it despite the opening of insolvency. However, according to a limited case law, the court is entitled to suspend such private enforcement proceedings if the insolvency creditors' interests are threatened to be affected by such private enforcement.

According to the Commerce Act, private enforcement over pledge shall be suspended upon commencement of stabilization proceedings.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

According to Bulgarian law, all security interests are given to cover contractual claims up to a certain amount. Thus, variation of the interest rate may lead to an excess of the amount for which the respective security is established. In this case, the excessive amounts shall not be covered by the security and the existing security shall be amended to cover the excessive amount. Due to the specifics upon perfection for mortgages, an amendment in this regard requires retaking of the security while for financial collaterals and special pledges such variations do not affect security ranking and registration of the changes is sufficient.

Variations of the tenor of the loan do not require retaking of the security interest. Registration of such amendments is not mandatory but may be required if the tenor is reduced and the secured creditor wishes to enforce.

Without prejudice to the above, it shall be noted that all mortgages are valid for a maximum of a ten-year term. On the other hand, special pledges are valid for a maximum of five years. In order to preserve the priority created by the initial registration, the security shall be renewed with the respective registry before expiry of the relevant period.

2. SECURITY INTERESTS

2.1 How to establish a security interest

Establishment of security interest such as mortgages and special pledges requires title agreement and acts of perfection (i.e. publicity).

Title instruments include:

- movables pledge agreement, accounts receivable pledge agreement, receivables pledge agreement, shares pledge agreement, securities pledge agreement, going concern pledge agreement, floating pool pledge agreement, financial collateral agreement and mortgage agreement; and
- surety (personal guarantee agreement).

Depending on the security interest, the act of perfection may be one or more of: (i) the registration of the security with the respective registry; (ii) notifying the debtor; (iii) the transfer of the respective collateral to the secured party; or (iv) notarisation of the agreement.

In case of surety (personal security interests), the act of perfection falls together with the signing and entry into force of the respective title instrument.

2.2 Ranking of pledges/mortgages

The rank of a pledge depends upon the time when the respective act of perfection has been made.

The rank of a real estate mortgage depends on the exact time when the application for registration of the mortgage is submitted to the registry agency (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

The ranking of creditors within the enforcement procedure is subject to mandatory legal provisions which may not be changed under an inter-creditor agreement. The ranking is defined by the registration date of each security interest. A consensual change of the creditors' ranking will give effect only between the parties to the agreement and will not be opposable to third parties.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge	Physical delivery of the movables to the pledgee or instruction to possess to a third-party holding movables for the pledgor or registration with the Central Pledges Registry
BANK ACCOUNT	Title transfer (applicable for financial collateral arrangements) or pledge	Registration with the central pledges registry or compliance with the requirements under the Financial Collateral Contracts Act;
RECEIVABLES	Title transfer (applicable for financial collateral arrangements) or pledge	Notification to debtor and/or registration with the Central Pledges Registry
SHARES/QUOTAS	Pledge	(i) in case of materialized shares (*налични акции*) – endorsement, hand-over and registration with the Shareholder Registry, and the Central Pledge Registry; (ii) in case of quotas (*дружествени дялове*) – registration with the Commercial Register and the Central Pledge Registry
BOOK-ENTRY FORM SECURITIES	Title transfer (applicable for financial collateral arrangements) or pledge	Registration with the central depository
REAL ESTATE	Mortgage	Notary deed registered with the registry agency
GOING CONCERN OR FLOATING POOL	Pledge	Registration with the Commercial Registry, the Central Pledges Registry and subsequent registration with the respective registries in accordance with the type of the asset class – Land Registry, Patent Office, etc.

2.5 Availability of floating charge

Bulgarian law recognises a floating charge in the form of:

- a registered going concern pledge over the going concern of a company (enterprise pledge). Pledge may extend over specific assets if specified in the pledge agreement;
- a registered pledge over a floating pool of: (i) assets; (ii) receivables; (iii) movables; and/or (iv) book entry securities owned by a company.

2.6 Trust and parallel debt issues

Bulgarian law requires that the secured party must be the holder of secured claims. Bulgarian law, as a general rule, does not recognise a security trustee structure. As an exception, a structure similar to security trusteeship is provided by Bulgarian law in the following two cases:

- bondholders of a bond-issue shall appoint a security trustee; and
- the Financial Collateral Contracts Act (effective as of 25 August 2006) mentions the provision of financial security to a party acting for the account of several secured creditors, so that with regard to financial collateral agreements effectiveness of the security trustee structure seems probable. This has not yet been tested in court.

The above issue is typically solved through a so-called “parallel debt structure” whereby the parties to the facility agreement agree that the security agent shall be the joint and several creditor of each and every obligation of the borrower towards each finance party (other than the security agent).

The above concept has as yet not been tested in Bulgarian courts.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	Yes/No – depending on terms	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes
ACCOUNT PLEDGE	Yes	Yes
RECEIVABLES PLEDGE	Yes	Yes
SHARE PLEDGE	Yes	Yes/No for quotas in limited liability companies
REAL ESTATE MORTGAGE	Yes	No

2.8 Security and loan transfers

In the event of assignment of claims all securities and privileges of the assignor are acquired by the assignee. The latter shall undertake all necessary steps to register in all applicable registries the change of creditors for the registered securities. It shall be taken into consideration that assignment of receivables that are secured by mortgage need to be performed in writing with notarised signatures. In this case the registration with the Land Registry is a condition precedent for the enforceability of the assignment.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

Insolvency proceedings may be opened against an insolvent or over-indebted company.

Insolvency proceedings are initiated with an application for opening of insolvency proceedings. The single-entry procedure may have two different outcomes:

- Composition (*Оздравяване на предприятието*), formal or informal depending on the existence of a restructuring plan approved by the court or an out-of-court settlement with all creditors;
- Insolvency (*Обявяване в несъстоятелност*) of the company which leads to the liquidation of the company's assets and subsequent termination of the company.

3.2 Applicable insolvency test and directors' duty to file

The alternative tests to asses a company's solvency position are:

- Balance sheet test: a company's payment obligations exceed the value of the company's assets (over-indebtedness);
- Cash flow test: a company is not able to perform a monetary obligation that has become due (illiquidity).

The court shall reject the application for opening of insolvency proceedings if the debtor's difficulties are of temporary nature.

Directors of a company are obliged to file with the competent court for the opening of insolvency proceedings within a 30-day period after the company becomes insolvent. A director risks criminal and civil liability in case of non-compliance. In case they don't comply with this requirement directors are exposed to criminal and civil liability.

3.3 Describe insolvency proceedings

3.3.1 Insolvency proceedings

The insolvency proceedings are initiated by the competent court upon application by:

- the debtor;
- one or more of its creditors;
- an assigned liquidator; or
- the National Revenue Agency.

The opening of insolvency proceedings becomes effective as of the day of the competent court's ruling on the opening.

In its decision the competent court: (i) appoints an insolvency administrator (*синдик*); (ii) determines the date as of which the debtor has become insolvent or overindebted; (iii) imposes a general injunction over the assets of the debtor; and (iv) determines the date for the first meeting of creditors.

The insolvency administrator supervises and approves the acts of the management of the company, in case their control over the business is retained.

The competent court is entitled to declare that the insolvency administrator assumes control of the insolvent company's business in case the management of the company endangers the interest of its creditors.

Typically, the debtor's assets are liquidated, i.e. sold in a public auction procedure to the highest bidder. Liquidation proceeds are distributed to the company's creditors pursuant to the statutory order of priorities.

The Commercial Act lays out the following priority of payments:

- claims secured by a pledge or mortgage or by restraint registered under the Special Pledges Act;
- claims secured by a lien;
- insolvency costs;
- claims arising out of employment contracts before the effectiveness of the opening of insolvency proceedings;
- obligations (allowance) owed by the debtor to third parties by operation of law;
- public claims of the state and the municipalities such as taxes, customs duties, social security contributions, which have arisen before the effectiveness of the opening of insolvency proceedings;
- claims which have occurred after the effectiveness of the opening of insolvency proceedings;
- all other unsecured claims that have arisen before the effectiveness of the opening of insolvency proceedings;
- unsecured claims for interest payment which have become due and payable after the effectiveness of the opening of insolvency proceedings;
- claims arising out of a credit extended to the debtor by a partner or a shareholder;

- claims arising out of gratuitous transaction; and finally
- claims arising from the costs incurred by creditors in connection with their participation in the insolvency proceedings, with the exception of costs for opening of the proceedings.

If liquidation proceeds are not sufficient to satisfy all creditors within a certain class, available proceeds are distributed on a pro rata basis.

The commencement of insolvency proceedings against a pledgor does not affect the enforcement of a registered pledge upon the pledged assets if the enforcement started before the opening of insolvency proceedings and if the collateral is identifiable within the debtor's estate.

The commencement of insolvency proceedings against a debtor does not affect the enforcement proceedings of public debts if the enforcement started before the opening of the insolvency proceedings.

3.3.2 Reorganisation plan

Under the Commercial Act the approval of a restructuring plan is the core of the formal composition proceedings.

A restructuring plan can be proposed not later than one month following the date of publication in the commercial register of the court's ruling approving the list of claims.

A restructuring plan can be proposed by:

- the debtor;
- the insolvency administrator;
- the creditors holding at least 1/3 of the secured claims;
- the creditors holding at least 1/3 of the unsecured claims;
- the shareholders holding at least 1/3 of the capital of the debtor; or
- 20 % of the total number of the debtor's employees.

The restructuring plan may provide for deferment or rescheduling of payments, reduction of debts, debt-to-equity swap, or reorganisation of the enterprise. The restructuring plan may envisage the sale of the enterprise or a separable part thereof.

The restructuring plan must be accepted by a majority of each of five classes of creditors (secured creditors, unsecured creditors, employees, public creditors, and creditors ranking after the unsecured) and, in total, by creditors representing more than 50 % in value of all accepted claims.

The court must approve the restructuring plan. If the restructuring plan is approved by the court, the insolvency proceedings are terminated.

If the debtor does not perform its obligations under the restructuring plan the insolvency proceedings may be reopened. No further composition is permissible within the reopened insolvency proceedings.

3.3.3 Stabilization proceedings

In 2016, the Commerce Act was amended to introduce new stabilization proceedings for merchants at immediate insolvency risk. The provisions became effective as of 1 July 2017. The new proceedings aim to prevent

bankruptcy by allowing merchants at such risk to reach an agreement with their creditors on the repayment of obligations and, as a result, to continue their business activities.

The stabilization request shall include, inter alia, a detailed list of the merchant's obligations towards its creditors, an overview of the circumstances due to which the merchant is at immediate risk of insolvency, the reasons for proposing a stabilization plan and a suggestion for the manner, terms and conditions for repayment. The stabilization plan can envisage partial write-off of obligations or deferred payment to creditors. Partial write-off is allowed, if at least 50 % of the amount due will be paid. Payments can be deferred for up to three years upon completion of the stabilization proceedings.

If the court finds that the merchant is at insolvency risk, the court opens the stabilization proceedings, appoints a trustee (*доверено лице*) and schedules a court hearing for the review and adoption of the stabilization plan. The court order for opening of stabilization proceedings and the list of the merchant›s creditors are announced in the Commercial Register. At this point the court may impose restrains or other preserving measures over the merchant›s assets.

3.3.3.1 Consequences of opening of the stabilization proceedings

After the opening of the stabilization proceedings, it is inadmissible to initiate enforcement proceedings against the trader and to proceed with enforcement under the Special Pledges Act. In case of an approved stabilization plan, such suspension is replaced by the effect of the ruling for approval of the stabilization plan. When the stabilization proceedings are terminated without a stabilization plan being approved, the suspended enforcement cases and the actions taken for satisfaction under the Special Pledges Act shall be resumed immediately.

After the suspension, the bailiff or the public enforcement agent (for public obligations – tax, etc.) may not perform new enforcement actions, but may perform actions to secure the claim. The suspension of the enforcement cases and the enforcement under the Special Pledges Act shall have effect until the termination of the stabilization proceedings.

Limitation periods shall not run from the opening of the stabilization proceedings until its termination. The suspended limitation periods continue to run from the termination of the stabilization proceedings, except in the cases when the proceedings end with an approved stabilization plan. Interest is charged for the period of suspension.

3.4 Timing and costs of insolvency proceedings

The duration of insolvency proceedings will depend on several different factors (e.g. the volume of the assets and liabilities of the debtor, the number of creditors, whether a restructuring plan is approved, whether the insolvency administrator challenges any transactions of the debtor in court, etc.). Although there is no general rule, in our experience more complex insolvency proceedings may take up to 36 months.

3.5 Challenge of preferential transactions and suspect periods

There are three groups of deals that may be challenged in front of the district court at the place of incorporation of the insolvent company according to the Amended Commercial Act (2013):

3.5.1 Void actions

The following transactions are completely null with consideration to the creditors admitted in the insolvency proceedings, if performed after the decision for opening of insolvency proceedings: (i) performance of obligation which has occurred prior to the opening of the proceedings; (ii) establishment of pledge or mortgage over an asset which is subject to the insolvency proceedings; (iii) any transaction with assets part of the insolvency pool.

Compared with the other groups of acts subject to avoidance, void actions do not aim to have a retroactive effect. Rather they are directed at legal acts executed after the opening of the insolvency proceedings, but do not comply with the procedures and exemptions set out in the law.

3.5.2 Preference actions

The following deals may be declared null with consideration to the creditors admitted in the insolvency proceedings: (i) payment of an obligation, where maturity has not fallen on the payment date, if paid within one year prior to the filing of the application for opening of insolvency proceedings; (ii) establishment of a pledge or mortgage as security for receivables, which have occurred within one year prior to the filing of the application for the opening of the insolvency proceedings; (iii) payment of an obligation which has become due, if paid within six months before the filing of the application for opening of the insolvency proceedings; and (iv) set-off which are subject to avoidance.

If the creditor was aware of the debtor's insolvency at the time of accepting the payment or the security the relevant periods are doubled. These categories of challengeable deals are subject to some exceptions, defined in the legislation and in the case law. Such exceptions are also defined by legal doctrine as preferential actions because they set forth the beneficial and preferential treatment of certain creditors by the debtor.

3.5.3 Actions subject to avoidance

The difference between void transactions and actions subject to avoidance is that in the case of the latter, for the purposes of setting aside a transaction, the claimant must establish that the negative consequences have occurred, or that the pre-requisites defined by the law are met.

Actions subject to avoidance include gratuitous transactions, transactions where the consideration given by the debt is considerably more valuable than the consideration received, granting security for the liabilities of a third party and transactions with affiliates which harm the creditors' interests.

There are no presumptions to be applied by the petitioner. Avoidance claims can also be differentiated from preference actions as the latter protect the relationships between the creditors and the anti-preference satisfaction, while avoidance claims are directed against acts which endanger the estate and their aim is to ease proving the endangering. These actions are further characterised by the longer periods they cover. Actions subject to avoidance may have been performed within two to three years prior to opening of insolvency proceedings. This is due to their undoubtedly harmful nature resulting in, or contributing to, the insolvent state of the company.

3.6 Impact of insolvency proceedings on security and enforcement

Generally, in insolvency proceedings claims secured by first ranking mortgage or pledge rank first.

The validity of such security is subject to the following restrictions:

- a mortgage or a pledge, established by the debtor for a previously unsecured obligation and made in the one-year period prior to the filing of a petition for initiation of insolvency proceedings, may be annulled with respect to the other creditors. However, such annulment cannot be made if the mortgage and/or the pledge has been established simultaneously with the secured transaction; or the security has been established to substitute other security, which is not subject to annulment; or the security has been established to secure a loan, granted for acquiring the assets, which are subject to the security;

- a security established after the court's decision for the opening of insolvency proceedings, shall be considered void with respect to the rest of the insolvency creditors;

- a security for the obligations of a third party established within one year before filing of the petition for opening the insolvency proceedings and after the date when the debtor has become insolvent or over-indebted may be challenged by the rest of the insolvency creditors;

- in certain cases, the one-year period is doubled;

- if foreclosure proceedings are initiated;
- in general, opening of insolvency proceedings suspends private enforcement over assets part of the insolvency pool;
- opening of insolvency proceedings does not suspend enforcement under a registered pledge, which commenced prior to the opening.

3.7 Secured creditors in insolvency proceedings

Secured creditors do not enforce their security during the insolvency proceedings and their ranking in the waterfall of claims is not affected. During the insolvency proceedings, the insolvency administrator liquidates the assets of the insolvent company by way of a public sale in accordance with the procedure agreed by the creditors. The secured creditors' claims are then satisfied by the proceeds of the sale of the assets secured in their favour. If the proceeds collected from the public sale of the collateral are insufficient to satisfy the claims of the secured creditors, the secured creditors participate along the unsecured creditors in the distribution of the proceeds from the rest of the liquidated estate on a proportionality basis.

3.8 Survival of powers of attorney

Any appointed legal representative powers granted by a company will cease to be valid upon the opening of insolvency proceedings over its assets.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

A secured creditor may have to pursue judicial enforcement over the security interest established in its favour.

Under the Code of Civil Procedure, the following steps are envisaged:

- obtaining a title for enforcement;
- filing of a motion for enforcement with the competent court;
- obtaining writ of execution and payment order by the court;
- commencement of enforcement through a state/private enforcement agent;
- liquidation of debtor's assets through public auction for real estate properties and movables or freezing order of the bank accounts, bonds, shares or movables and subsequent sale or collection; and finally,
- the liquidation proceeds are distributed among creditors in accordance with the priority of their claims.

A title for enforcement may be:

- a final, conclusive and binding decision, ruling, settlement or order of a Bulgarian court or other intermediate judgment that is immediately enforceable;
- a final, conclusive and binding judgment by a court of an EU Member State as defined in Council Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;

- a final, conclusive and binding arbitral award in Bulgaria or a member state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;

- a judgment, act or memoranda on court settlement of foreign courts which have been admitted to enforcement in Bulgaria.

4.2 Timing and costs of enforcement proceedings

The enforcement procedure takes about six months to two years (starting with the filing of the enforcement application and ending with the distribution of s the liquidation proceeds to creditors). This duration depends on the court's caseload and potential objections pursued by the debtor.

4.3 Validity of a foreclosure agreement

The foreclosure agreement (whereas the lender and the borrower agree that the former shall have the right to dispose of the secured asset upon occurrence of event of default) is null according to Bulgarian law, except with respect to collateral under the Financial Collateral Contracts Act. The recognised enforcement methods for security interests (except for the ones under the Financial Collateral Contracts Act) are either auctions (according to the Special Pledges Act) or enforcement proceedings (Code of Civil Procedure). Similar to foreclosure, effect may be achieved through agreement for transfer of ownership in exchange for the debt which represents settlement in the event of non-performance of debt. Such exchange has to be performed in the necessary form (notary deed for mortgages, notarised signatures for certain special pledges, etc.).

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CROATIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In agreements governed by Croatian law, a negative pledge undertaking as a contractual undertaking (as opposed to an *in rem* right) is expected to be upheld in Croatian courts, although the courts' position has not been fully elucidated in that respect.

A negative pledge undertaking in a foreign law governed agreement may not be enforceable in Croatia by way of a specific performance, as it might be considered against Croatian public policy (*ordre public*). However, in case of breach of a negative pledge undertaking in a foreign law governed facility, the lender may exercise the available remedies, including declaring default and accelerating the loan.

1.2 Restrictions on accelerating a loan

In general, Croatian law does not restrict parties to a facility agreement from agreeing on any event of default.

A facility agreement may not be accelerated due to the non-fulfilment of an insignificant part of the contractual obligations.

1.3 Effectiveness of a non-assignment clause

A prohibition on assignment of monetary claims is effective in respect of third parties and any assignment by a lender to a third party in violation thereto is invalid.

1.4 Common methods for loan transfers

The most common method for transfer of loans is through an assignment of claims and transfer of contractual position.

Assignment of claims provides for assignment of claims, together with ancillary rights. No consent of the debtor is required, but a consent requirement can be contractually agreed. Typically transferred by assignment of claim are:

- NPLs, where the underlying loan has already been accelerated and/or the loan agreement terminated; and
- loan receivables from bilateral retail loans where the loan agreement does not include an advance consent for, or does not allow the transfer.

Transfer of contractual position means the transfer of all rights, claims and obligations. The consent of the other contractual party/parties is required but may also be granted in advance (e.g. in the original loan documentation). Typically transferred by transfer of contractual position are:

- performing loan receivables; and
- loan receivables deriving from syndicated facilities and/or restructured under MRAs.

Under certain circumstances sub-participation arrangements may be chosen as a transfer alternative. While these are not unknown in Croatia, the transferring bank remains involved in the NPLs going forward which may not be desirable.

1.5 Effectiveness of a contractual subordination

Contractual subordination is not regulated and may not be binding to insolvency officers.

1.6 Subordination by operation of law

1.6.1 Concept of equity-replacing shareholder loans

Shareholder loans are subordinated to other indebtedness in the context of insolvency if:

- the debtor was already in financial distress; and
- a diligent business person would in such a situation infuse equity instead of granting a loan.

This does not apply to:

- shareholders who do not manage the company's business and whose shares represent no more than one tenth (1/10) of the company's share capital; or
- lenders who acquire equity positions by way of a capital increase for the purpose of overcoming a situation of distress with respect to: (i) loans granted beforehand; and (ii) new loans, up to the amount of the paid in share capital.

1.7 Validity of a forfeiture agreement

An agreement for the forfeiture of the security interest (i.e. a secured creditor may keep the collateral *in lieu* of the secured liability) is not valid.

1.8 Super-priority loans in bankruptcy

Super-priority of loans in bankruptcy (*stečajni postupak*) may be recognized only with respect to loans taken in the course of pre-bankruptcy proceedings (*predstečajni postupak*) as new temporary indebtedness for the purpose of securing continuation of the business during the pre-bankruptcy period. Such new indebtedness is subject to approval of the creditors holding more than two thirds of claims acknowledged in the pre-bankruptcy proceeding. If such new indebtedness is taken, but the debtor eventually ends up in bankruptcy proceedings, the creditors of this new indebtedness shall be repaid before all other bankruptcy creditors (other than first higher payment rank claims, i.e. claims of employees and ex-employees incurred until the opening of the bankruptcy proceedings, claims of the state budget, institutes and funds in respect to salary related payments and severance and work injury damages payments).

1.9 Varying interest rate and tenor of the loan – must security be retaken?

The varying tenor of the loan does not affect the accompanying security. However, any changes made to the tenor of the loan must be registered with the relevant registries (e.g. Land Registry, Court Registry, and Registry of Notarial Security Instruments over Movables and Rights).

The interest rate of the loan must be determined or at least determinable when executing the original security. If the interest rate subsequently changes, the security will have to be retaken.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, a title instrument and an act of perfection (i.e. an act of publicity) is required.

Title instruments include:

- mortgage agreement, movables pledge agreement or movables transfer agreement or movables floating charge agreement, share pledge agreement, rights/receivables pledge agreement or rights/receivables transfer/assignment agreement;
- debenture (or prompt collection order) (*zadužnica*); and
- guarantee agreement and surety agreement.

For debentures, guarantees and sureties, the act of perfection is determined by the signing of the respective title instrument.

In case of *in rem* rights, a separate act of perfection is required (i.e. registration with the relevant registry).

2.2 Ranking of pledges/mortgages

The rank of a pledge depends on when the respective title instrument was submitted for registration (act of perfection) with the relevant registry.

2.3 Can ranking of consensual security be changed by agreement of the creditors?

The ranking can be changed by agreement of the creditors and must be registered with the relevant registry.

Consent has to be given by the owner of the pledged object (e.g. real estate), the lender, and by all lenders in favour of which the security instruments that will be subordinated are established.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge or transfer	Registration with the registry of notarial security instruments over movables and rights maintained by the Financial Agency ("FINA Registry")
BANK ACCOUNT	Pledge or assignment for security purposes	Registration with the FINA Registry
RIGHTS/RECEIVABLES	Pledge or assignment for security purposes	Registration with the FINA Registry
SHARES	Pledge or transfer	Registration with the FINA Registry / Central Depository and Clearing Company, and (best practice) annotation in the book of shares
REAL ESTATE	Mortgage or transfer	Registration with the Land Registry

2.5 Availability of floating charge

Croatian law recognises a floating charge over all (or a certain group) of physical movable assets (e.g. goods on stock) located in a certain individually defined location (e.g. storage).

The goods may be changed during the duration of the floating charge. However, the value of the goods should not fall below the contractually determined value at any time, unless agreed otherwise.

2.6 Trust and parallel debt issues

There is no comparable structure to a common law trust in Croatia. A common law trust does not create the required ownership over secured claims that is necessary to create a valid and enforceable security interest.

This is typically solved through a "parallel debt structure" whereby the parties to an English law facility agreement agree that the security agent shall be the joint and several creditor of each and every obligation of the borrower towards each finance party (other than the security agent).

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	Yes (unless bank guarantee)	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE/TRANSFER	Yes	Yes
MOVABLES FLOATING CHARGE	Yes	Yes
RIGHTS/RECEIVABLES PLEDGE/ ASSIGNMENT (INCLUDING ACCOUNTS)	Yes	Yes
SHARE PLEDGE	Yes	Yes
REAL ESTATE	Yes	Yes

2.8 Security and loan transfers

When a loan is transferred by way of assignment, the security is transferred to the new lender. The transfer of security must be registered with the relevant registry. In case of a transfer of the contract, security may need to be retaken.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

The Insolvency Act provides for the following two insolvency proceedings:

- Bankruptcy proceedings (*stečajni postupak*), which generally lead to the liquidation of the insolvent entity; and
- Reorganisation proceedings, which aim to preserve the debtor's business as a going concern.

If the assets of the insolvent entity are less than HRK 2 million (approximately EUR 263,200) less complex bankruptcy procedure applies.

If a company is likely to become unable to perform its monetary obligations as they fall due (*prijeteća nesposobnost za plaćanje*), the company may commence pre-bankruptcy proceedings. Pre-bankruptcy proceedings (*predstečajni postupak*) primarily aim at determining the financial status of a company and its relations towards its lenders, with the purpose of preserving the business of the company.

3.2 Applicable insolvency test and directors' duty to file

Two separate insolvency tests (each of these triggers insolvency) are typically applied:

- Balance sheet test: a company's due and payable obligations exceed the value of the company's assets (over-indebtedness, *prezaduženost*) plus a negative business forecast, unless a shareholder of the company who is a natural person has joint and several liability for the obligations of the company and bankruptcy proceedings have not been commenced over the shareholder;

- Cash flow test: a company is unable to perform its monetary obligations as they fall due (inability to pay, *nesposobnost za plaćanje*).

The management board must file a petition for the opening of bankruptcy proceedings no later than 21 days after the company becomes insolvent. Directors are personally liable to creditors for damages in case of noncompliance.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Bankruptcy proceedings are initiated by the competent court upon an application by:

- a debtor;

- one or more creditors; or

- a third party (i.e. financial agency).

Upon receiving the application, the competent court usually initiates preliminary proceedings to determine if the conditions for opening bankruptcy proceedings exist.

The opening of the bankruptcy proceedings becomes effective as of the day the ruling is publicised by the competent court. If the assets of the insolvent entity are insufficient, the court will render a decision on the opening and immediate closing of the bankruptcy proceedings.

The competent court appoints a bankruptcy receiver (*stečajni upravitelj*), who assumes control of the business of the debtor and its assets.

Creditors of the debtor register their claims with the bankruptcy receiver. The competent court examines each claim individually and renders a decision determining the accepted and challenged claims, their value and payment order.

The Insolvency Act lists the following order of payment:

- costs of the bankruptcy proceedings;

- claims of: (i) employees and ex-employees of the debtor incurred until the opening of the bankruptcy proceedings; (ii) state budget, institutions and funds for salary related payments; and (iii) severance and work injury damages payments;

- all other claims towards the debtor which do not belong to a lower payment rank; and

- other claims of creditors of the bankruptcy estate, i.e. interest rates accrued in relation to the claims of the creditors since the opening of the bankruptcy proceedings, penalties relating to criminal deeds or torts of the debtor, expenses of the creditors in relation to the bankruptcy proceedings, equity-replacing shareholders loans and claims in relation to which a lower order of payment rank has been agreed upon.

3.3.2 Reorganisation proceedings

During the bankruptcy proceedings, the debtor or the receiver may apply for the initiation of reorganisation proceedings by submitting a reorganisation plan to the court, in order to preserve the debtor's business as a going concern.

The reorganisation plan requires acceptance by the majority of creditors within each class of creditors and the value of the claims of the creditors who accept the reorganisation plan must be at least double the value of the claims of the creditors who refused the reorganisation plan.

The opening of reorganisation proceedings becomes effective once the court's decision confirming the reorganisation plan (*rješenje o potvrdi plana*) becomes final and binding.

Once the reorganisation plan has been approved by the competent court and the receiver has paid out the creditors of the bankruptcy estate, the bankruptcy proceedings are terminated, and the debtor generally regains control over its assets.

However, if so ruled by the court, the receiver, the creditors' committee and the bankruptcy court supervise the implementation of the reorganisation plan.

Reorganisation proceedings may affect the position of the secured creditors, as the reorganisation plan may envisage a modification of their rights to separate satisfaction. Secured creditors are entitled to vote for or against acceptance of a reorganisation plan and if the majority approves it the rights of the non-consenting secured creditors may be adversely affected by the plan.

3.4 Timing and costs of insolvency proceedings

The duration of the bankruptcy proceedings will depend on several different factors. Although there is no general rule, in our experience more complex bankruptcy proceedings may take up to five years.

3.5 Challenge of preferential transactions and suspect periods

Preferential transactions undertaken prior to the bankruptcy proceedings may be challenged by the bankruptcy receiver and the bankruptcy creditors on the following grounds:

- paying a creditor (or providing security for the payment) in line with previously agreed terms, if the debtor was insolvent at the time of the transaction and the creditor knew (or should have known) of it (suspect period of three months before the petition for the bankruptcy proceedings);

- paying a creditor (or providing security for the payment) not in line with previously agreed terms (suspect period of one month before the petition for the bankruptcy proceedings), with the suspect period being extended to the second and third month before the petition for the bankruptcy proceedings if the debtor was insolvent at the time of the transaction and the creditor knew (or should have known) of it, or if the creditor knew at the time of the transaction that it would be damaging to the bankruptcy creditors;

- transactions that put the bankruptcy creditors at a disadvantage, if the debtor was insolvent at the time of the transaction and the other party knew of it (suspect period of three months before the petition for the bankruptcy proceedings);

- transactions between the debtor and persons closely connected to the debtor that put the bankruptcy creditors at a disadvantage (suspect period of two years before the petition for the bankruptcy proceedings);

- transactions with the intent of damaging creditors, if the other party knew of it at the time of the transaction (suspect period of 10 years before the petition for the bankruptcy proceedings);

- transaction without compensation (suspect period of four years before the petition for the bankruptcy proceedings); or

- shareholder loans replacing capital contributions (suspect period of one year, or, if security is provided, five years, before the petition for the bankruptcy proceedings).

3.6 Impact of insolvency proceedings on security and enforcement

All enforcement proceedings for unsecured debt which were pending before the start of the pre-insolvency settlement proceedings will be stayed and new enforcement orders will not be enforced.

3.7 Secured creditors in insolvency proceedings

A valid *in rem* security interest gives the secured creditor a preferential claim over the respective collateral.

Creditors with security interests (*razlučni vjerovnici*) are creditors who have a security (mortgage or pledge) or an equivalent right (e.g. the right of retention) over particular assets of a debtor. These creditors have a right of separate satisfaction with respect to the collateral established in their favour.

The right of separate satisfaction is enforced outside of bankruptcy proceedings within a regular enforcement procedure. A secured creditor may also choose to waive its right of separate satisfaction and participate in the bankruptcy proceedings as an unsecured creditor. The precondition for secured creditors to participate in the bankruptcy proceedings as unsecured creditors is: (i) separate satisfaction is insufficient for the creditor's claim to be fully satisfied; or (ii) the security is given to the creditor for securing a claim the creditor has directly towards the debtor itself (i.e. the security interest was not given for securing a third party claim).

Creditors with exemption rights (*izlučni vjerovnici*) are creditors who can prove, on the basis of their proprietary or personal right, that an asset should not be part of the estate of the debtor (e.g. owners of machinery leased to the debtor or vendors holding title retention rights). The exemption right is enforced outside of the insolvency proceedings.

3.8 Survival of powers of attorney

Any powers of attorney will automatically cease to be valid upon the opening of bankruptcy proceedings.

This may affect a secured creditor's ability to affect a transfer of the collateral to a potential purchaser in a private enforcement.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

Security instruments are generally in the form of a directly enforceable instrument (*ovršna isprava*), i.e. a security agreement in the form of a Croatian notarial deed. Depending on the type of security interest granted these can be enforced either out-of-court or by way of court driven procedures.

Assignments or transfers (*prijenos*) established by a directly enforceable instrument may be enforced out-of-court. Prior to enforcement, the creditor must obtain an enforcement confirmation (*potvrda o ovršnosti*) from a Croatian notary public, i.e. a ruling on non-payment by the borrower. The out-of-court enforcement is affected via a Croatian notary public, by means of a public auction (*javna dražba*) or direct sale (*neposredna pogodba*).

Mortgages and pledges established by a directly enforceable instrument are enforced in court. The creditor secured by a security agreement in the form of a Croatian notarial deed will have to:

- obtain an enforcement confirmation from a Croatian notary public;
- file an enforcement request (*prijedlog za ovrhu*) with the competent Croatian court;
- obtain a court decision on the enforcement (*rješenje o ovrsi*);
- effect enforcement by: (i) public auction, in case of real estate; (ii) public auction or court driven direct sale, in case of movables; (iii) auction or court driven direct sale, in case of immaterial stocks and shares; (iv) stock exchange public auction or another legally permitted manner, in case of securities registered with the Central Depository and Clearing Company Inc.; (v) public auction or court driven direct sale, in case of material rights (e.g. IP rights, usufructs);
- the proceeds are distributed to the secured creditor(s) to settle secured claims.

4.2 Timing and costs of enforcement proceedings

The duration of judicial enforcement proceedings varies greatly, depending on the court involved, its caseload, defensive tactics pursued by the debtor and similar issues. In our experience, it generally takes between nine months and two years (starting with filing the application for enforcement and ending with the distribution of the monies realised to the secured creditor).

This chapter was written by Vedrana Iveković and Lucia Močibob.

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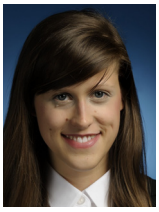

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CZECH REPUBLIC

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

A negative pledge (*zákaz zřízení zástavního práva*) undertaking is legally valid and binding between the parties, unless it was established as a right *in rem*. A negative pledge is created on the basis of a written underlying agreement on establishing the negative pledge. The negative pledge should be established for a reasonable and limited period of time in such interest of a party which deserves a legal protection. Negative pledge may have effects also vis-à-vis third parties if it is registered in the relevant register.

1.2 Restrictions on accelerating a loan

In general, Czech law does not restrict the ability of the parties to a facility agreement to agree on any event of default and on accelerating a loan following the occurrence of such an event of default which is continuing. General legal principles applicable to exercise of rights would apply.

1.3 Effectiveness of a non-assignment clause

The general rule is that receivables which can be alienated (*zcizit*) can be assigned, unless the agreement between debtor and the creditor precludes it. The prevailing view is that a non-assignment clause is effective vis-à-vis third parties and assignment by an assignor to a third party in breach of such prohibition would be invalid.

1.4 Common methods for loan transfers

Loan transfer may be achieved by way of an assignment of a loan agreement as a whole (i.e. including rights as well as obligations) or by an assignment of receivables.

Sub-participation (both funded, as well as risk) is also common in the Czech banking market.

1.5 Effectiveness of a contractual subordination

A contractual "turnover" subordination agreed in a standard subordination or inter-creditor agreement is effective in an insolvency situation. However, such agreement (or some parts of it) may not be binding to the insolvency administrator.

1.6 Subordination by operation of law

Within the insolvency proceedings, receivables of shareholders arising from their participation in the insolvent company will always be satisfied as the last category of claims. Some claims (such as interest and default interest which became payable after the decision on insolvency has been made by the insolvency court) are excluded from the satisfaction in the insolvency proceedings.

Otherwise, the concept of subordination by operation of law (including shareholders' loans) does not exist under Czech law.

1.7 Validity of a forfeiture agreement

An agreement for the forfeiture of a pledged asset is permissible only under the conditions stipulated in Czech law, which sets out that it is not permissible for the pledgor and creditor to agree before maturity of the secured debt that the creditor will keep the pledged asset for any or pre-determined price. However, it should be permissible to agree that a pledgee can keep the pledged asset for a market price determined at the time of enforcement. Forfeiture is not frequently agreed as an enforcement method in the Czech Republic (except for financial collateral arrangements).

Forfeiture agreement cannot be agreed upon by a consumer or an entity that is a small or medium-sized entrepreneur.

1.8 Super-priority loans in bankruptcy

During the course of the insolvency proceedings, in order to maintain or restore the continued operation of an insolvent company, the insolvency administrator can enter, on ordinary terms, into loan (and similar) agreements, agreements for supply of energy and raw materials as well as agreements securing the fulfilment of these agreements. Existing secured creditors have a priority right to enter into such agreements. Claims of creditors from these agreements shall be satisfied as preferred (post-insolvency) claims.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

In general, it is possible to agree on an amendment to an existing facility agreement and the related security does not have to be retaken. Under Czech law, a security agreement typically contains: (i) the maximum amount of secured debts; (ii) the time period in which they may arise; and (iii) categories of the secured debt. The security must be retaken if the maximum amount or the maximum time period would be exceeded by such variation or if a new category of debt was to be secured.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish an *in rem* security interest, a title instrument and an act of perfection are required.

Title instruments include:

- movables pledge agreement, bank account pledge agreement, agreement on pledge/security assignment of receivables (such as trade receivables, leases, insurance and intercompany loans), share pledge agreement, ownership interest pledge agreement;
- enterprise pledge agreement and mortgage agreement.

2.2 Ranking of pledges/mortgages

The general rule is that if multiple security interests encumber one asset, then ranking is as follows: (i) creditors secured by security as a right in rem registered in public registers or Pledge Register; (ii) creditors secured by security as a right in rem not registered in such registers; and finally (iii) creditors secured by security which does not constitute a right *in rem*.

Such general rule is modified for the purposes of insolvency and enforcement proceedings as follows:

- the ranking of a pledge depends on when the pledge comes into existence;
- the ranking of a mortgage depends on the exact time when the filing for registration of the mortgage is submitted to a competent Real Estate Register (subject to actual registration).

Finally, liens (*zadržovací právo*) over movables rank ahead of pledges.

2.3 Can ranking of consensual security be changed by agreement of the creditors?

It is generally possible to change the ranking of consensual pledge/mortgage by a mutual written agreement between the relevant pledgees/mortgagees. If such pledge/mortgage must be registered, the agreement will be effective vis-à-vis third parties when it is registered in the relevant register. Consent of the security provider is not required.

In cases where a pledge/mortgage was released (e.g. as a result of discharge of the secured debt) but the pledge/mortgage is continuing to be registered in the relevant public register, it is possible to register "released pledge/mortgage" in the relevant register and to maintain the registration and use the registered pledge/mortgage as a security for other debts. By this way, the newly secured debts will benefit from the ranking of the original pledge/mortgage.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
TANGIBLE MOVABLES	Pledge	Physical delivery of the movables to a pledgee or third party; Labelling of the pledged movables; Registration of the pledge in the Pledge Register (*rejstřík zástav*)
BANK ACCOUNT RECEIVABLES	Pledge	Third-party notification to an account bank (effectiveness vis-à-vis the account bank); Registration in the Pledge Register
RECEIVABLES (SUCH AS INSURANCE, INTERCOMPANY LOANS AND TRADE RECEIVABLES)	Pledge or security assignment	Third-party notification to debtor (effectiveness vis-à-vis the relevant debtor); Registration in the Pledge Register (problematic in respect to registration of a pledge over trade receivables)
SHARES (CERTIFICATES)	Pledge	Pledge endorsement, third-party notification to issuer and handing over of share certificates to pledgee or third party
SHARES (REGISTERED SHARES)	Pledge	Registration in the owner's account with the Central Securities Depository (*Centrální depozitář cenných papírů*)
OWNERSHIP INTEREST	Pledge	Third-party notification to company and registration in the Commercial Register (*obchodní rejstřík*)
ENTERPRISE	Pledge	Registration in the Pledge Register
SET OF ASSETS	Pledge	Registration in the Pledge Register
REAL ESTATE	Mortgage	Registration in the Real Estate Register (*katastr nemovitostí*) or, where applicable, the Pledge Register

2.5 Availability of floating charge

The floating charge concept as used in common law jurisdictions is not recognised under Czech law.

However, effects similar to a floating charge may be achieved under Czech law by establishing a pledge over an enterprise or part of an enterprise. A pledge over an enterprise is created by an agreement in the form of a notarial deed and is perfected by the registration in the Pledge Register.

2.6 Trust and parallel debt issues

Although there is a hybrid Czech law concept of trust (*svěřenský fond*), the common law concept of trusts, especially in connection with distinction between legal and beneficial ownership, is not recognised in the Czech Republic.

The above issue is typically solved through a "joint and several creditorship" or parallel debt structure, whereby the parties to a facility or inter-creditor agreement agree that the security agent shall be a joint and several creditor (or a creditor in respect of debt which is parallel to) of each and every obligation of the borrower towards each finance party (other than the security agent) and accordingly has its own independent right to demand performance of the borrower's obligations.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	PRIVATE SALE
BANK GUARANTEE	N/A
OTHER GUARANTEES	N/A
MOVABLES PLEDGE	Yes
ACCOUNT PLEDGE	Yes
RECEIVABLES PLEDGE	Yes
RECEIVABLES ASSIGNMENT	Yes
SHARE PLEDGE	Yes
OWNERSHIP INTEREST PLEDGE	Yes
ENTERPRISE PLEDGE	Yes
SET OF ASSETS	Yes
REAL ESTATE	Yes

A pledged asset may be sold in a private sale, if it is agreed by the pledgor and the pledgee in writing and they set out the rules for such private sale procedure including the price calculation mechanism. The pledgee must act with processional care with respect to both the pledgor's and the pledgee's interests, so the pledged asset can be sold for price for which a comparable asset could usually be sold in comparable circumstances at the relevant place and at the relevant time.

2.8 Security and loan transfers

Pledges/mortgages are transferred by operation of law together with the loan they secure. However, if a pledgee/mortgagee is changed (this would be the case if security agent is replaced), it would be necessary to retake the security unless replaced security agent assigns the relevant secured debts to successor security agent.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

The Czech insolvency law regime comprises one main type of insolvency proceedings (*insolvenční řízení*), within which the insolvency of the debtor can be resolved through:

- Bankruptcy proceedings (*konkurz*), which generally leads to the liquidation of the assets forming the insolvency estate;
- Reorganisation proceedings (*reorganizace*), which primarily aims at preserving the debtor's business as a going concern; or
- Debt relief proceedings (*oddlužení*), which is applicable to individuals and to non-business legal entities only; therefore, not covered here.

3.2 Applicable insolvency test and directors' duty to file

The following insolvency tests for a company are generally applied:

- Balance sheet test: a debtor (i) has several creditors; and (ii) the sum of its obligations exceeds the value of its assets (over-indebtedness). When determining the value of the debtor's assets, further management of such assets and further operation of an enterprise is also taken into account.
- Cash flow test: a debtor (i) has several creditors; (ii) has overdue monetary obligations outstanding for more than 30 days; and (iii) is not able to fulfil these obligations.

A debtor is deemed to be unable to fulfil its monetary obligations if it: (i) has stopped paying a substantial portion of its payment obligations; (ii) has defaulted under its payment obligations for more than three months after their due date; (iii) is not able to satisfy its due and payable debts in the course of enforcement proceedings; or (iv) it failed to comply with its obligation to submit a list of assets, liabilities, employees, etc., imposed upon it by the insolvency court.

A debtor is deemed to be able to fulfil its monetary obligations if a difference (or expected difference) between the amount of due monetary obligations and the amount of available funds is (or is expected to be) less than one tenth of the amount of due monetary obligations, as set out in an applicable liquidity statement or liquidity development outlook.

A debtor may also file an insolvency petition on the grounds of "impending insolvency". This occurs when, in the light of all circumstances, it may be reasonably expected that the debtor will not be able to fulfil the substantial part of its monetary obligations in a timely manner.

A statutory body of a company is obliged to file an insolvency petition without undue delay once it learns or having exercised due care should have learnt that the company is insolvent. Non-compliance with this duty may result in civil, and possibly also in criminal liability of members of the statutory body.

3.3 Describe insolvency proceedings

3.3.1 Insolvency proceedings

The insolvency proceedings are initiated upon delivery of an insolvency petition which can be filed either by a debtor itself or by one or more of its creditors.

A commencement of the insolvency proceedings and any other document issued in the course of the proceedings are published in the Insolvency Register, which is publicly available online on *https://isir.justice.cz/isir/common/ index.do/*.

If the debtor's insolvency is proven, the insolvency court will decide on its insolvency, appoint an insolvency administrator and invite the creditors to register their receivables within two months.

The insolvency administrator (*insolvenční správce*) will be appointed by the insolvency court from a list maintained by the Ministry of Justice of the Czech Republic.

The insolvency court usually decides within three months following the decision on insolvency about the method of resolution of insolvency (i.e. bankruptcy, reorganization or debt relief). When determining the method of resolution, the court is generally bound by the resolution of the creditors' meeting.

3.3.2 Reorganization proceedings

During the course of the insolvency proceedings, a debtor or any creditor who registered its claim in the insolvency proceedings may apply for reorganization in order to preserve the debtor's business as a going concern.

The reorganization is generally available only to debtors which are entrepreneurs and which either: (i) have a minimum annual net turnover of CZK 50 million (approximately EUR 1.87 million) during the accounting period which precedes the year in which the insolvency petition was filed; or (ii) employ at least 50 employees. The debtor may avoid these requirements if (simultaneously with filling the insolvency petition or before the insolvency court decides on the debtor's insolvency) it submits a reorganization plan approved by at least half of the secured creditors and at least half of the unsecured creditors (in both cases calculated on the basis of the amount of claims).

The reorganization is carried out by way of a reorganization plan – this is approved by the creditors with the possible intervention of the insolvency court. The debtor has the priority right to prepare a reorganization plan even if the petition for approval of the reorganization was filed by a registered creditor. The reorganization plan is approved by the creditors divided into classes based on an essentially identical legal status and economic interests (each secured creditor always forms a separate class). The reorganization plan must be approved by the insolvency court, which may however approve it even if not all classes of creditors approved it.

As from the effectiveness of the reorganization plan, the rights of all creditors (referred to in the reorganization plan) against the debtor shall cease to exist (even if they had not registered their claims in the insolvency proceedings) and shall be replaced by new rights specified in the reorganization plan. Third parties' rights to property belonging to the insolvency estate shall cease to exist and such rights shall arise to the persons referred to in the reorganization plan.

When the reorganization plan becomes effective, all pending restrictions on the disposal of the estate applicable to the debtor cease to exist save for those set out in the reorganization plan. However, the creditors' committee may reserve its right that the debtor may undertake legal acts of material significance solely with the preliminary consent of the creditors' committee. If the reorganization plan stipulates legal acts which the debtor may only perform subject to obtaining the consent of the insolvency administrator, these acts would be invalid if performed without such consent.

The restructuring proceedings can be concluded either by a decision of the insolvency court acknowledging the fulfilment of the reorganization plan or by transformation into the bankruptcy proceedings.

3.4 Timing and costs of insolvency proceedings

The duration of insolvency proceedings will depend on several factors (e.g. the amount of the debtor's estate and number of creditors). The average duration of insolvency proceedings is two years, although more complex insolvency proceedings may take up to five years.

3.5 Challenge of preferential transactions and suspect periods

An insolvency administrator has the right to challenge the effectiveness of preferential transactions by filing an action (*odpůrčí žaloba*), if the debtor reduced the possibility of the creditors› satisfaction or favoured some creditors to the detriment of others, for example, by:

- undervalue transactions;
- preferences; or
- fraudulent transfers.

An undervalue and preference transaction may be challenged only if it was entered into within one year prior to the opening of the insolvency proceedings (or within three years in case such transaction was entered by the debtor with persons related to the debtor or persons forming a group with the debtor).

A fraudulent transfer act may be challenged only if it was entered into within five years prior to the opening of the insolvency proceedings.

The insolvency administrator can file the relevant action within one year of the effectiveness of the decision on insolvency.

3.6 Impact of insolvency proceedings on security and enforcement

As of the opening of insolvency proceedings:

- claims and other rights cannot be independently enforced; and
- the right to satisfaction from the collateral concerning property owned by the debtor or property belonging to the insolvency estate may be exercised and newly acquired only under conditions stipulated by the Insolvency Act.

3.7 Secured creditors in insolvency proceedings

The security will be enforced by the insolvency administrator based on the secured party's instructions.

The collateral will form a part of the insolvency estate, but the secured creditor will have the preferential right to be satisfied from the proceeds of the sale (minus expenses of liquidation to a maximum of 5 % of the proceeds of the liquidation, expenses of administration to a maximum of 4 % of the proceeds of the liquidation and remuneration of the insolvency administrator) of the collateral.

The insolvency proceedings have no impact on security provided as a financial collateral arrangement.

3.8 Survival of powers of attorney

In general, any unilateral legal act related to the insolvency state including any orders, instructions, authorizations and powers of attorney (including prokura) will automatically cease to exist upon the declaration of bankruptcy (*prohlášení konkursu*) by the insolvency court.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

Under Czech law, any creditor may choose between the following types of enforcement:

- court enforcement (*výkon rozhodnutí*), which is governed by the Civil Procedure Code (*občanský soudní řád*); or
- enforcement by a private bailiff (*exekuce*), which is mainly governed by the Execution Procedure Act (*exekuční řád*).

In practice, most creditors prefer the (generally more efficient) enforcement by a private bailiff.

A creditor can initiate the enforcement proceedings only if it has an "enforcement title" (*exekuční titul*), which could be a:

- enforceable decision of a court;
- notarial deed by which the debtor consents that if he fails to perform the relevant debt when due, the notarial deed shall constitute an enforcement title;
- settlement agreement approved by a court; or
- other type of an enforceable decision, which the law allows to serve as an enforcement title (these include 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).

4.2 Timing and costs of enforcement proceedings

In our experience, the enforcement by a private bailiff takes about six months to two years; the court enforcement generally takes longer. The costs of both private and court enforcement proceedings are borne by the debtor.

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HUNGARY

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In general, a negative pledge undertaking is valid, but may be ineffective in respect to disposals of third parties acting in good faith.

In the case of real estate, the negative pledge undertaking may be registered in the Land Registry as a restriction of sale or encumbrance which constitutes notice to third parties. Therefore no one, if acting in good faith, may acquire good title to the property.

1.2 Restrictions on accelerating a loan

In general, Hungarian law does not restrict parties to a facility agreement from agreeing on any event of default, but the loan cannot be accelerated upon the commencement of bankruptcy proceedings based on a payment default.

1.3 Effectiveness of a non-assignment clause

A prohibition on assignment of monetary claims is not effective in respect to third parties. This does not affect the assignor's liability for a breach of the non-assignment clause.

1.4 Common methods for loan transfers

METHOD FOR LOAN TRANSFERS	ASSIGNMENT	TRANSFER OF CONTRACT
SCOPE OF TRANSFER (RIGHTS AND OBLIGATIONS)	Rights and claims only	Rights, claims and obligations
SET-OFF (AVAILABILITY FOR ORIGINAL CONTRACT DEBTOR)	No	No
SECURITY (AUTOMATIC TRANSFER AVAILABLE)	No	Yes
CONSENT (BY THE ORIGINAL CONTRACT DEBTOR)	No (notification is recommended)	Yes (may be given in advance in the loan agreement)

1.5 Effectiveness of contractual subordination

Contractual subordination is not regulated and may not be binding to insolvency officers.

1.6 Subordination by operation of law

Shareholder loans are subordinated to other indebtedness in the context of insolvency by operation of law.

1.7 Validity of a forfeiture agreement

As a general rule, an agreement for the forfeiture of security interest (i.e. the secured creditor may keep the collateral in lieu of the secured liability) is not legally valid and therefore not binding.

Nevertheless, a secured creditor may, after its rights for satisfaction have become available, make a written offer to the security provider that it wishes to keep the security asset in lieu of the secured claim.

In addition to the security provider, the secured creditor shall also notify the following persons of its intention to acquire the security asset:

- the direct debtor (*személyes kötelezett*) (if the debtor of the secured creditor is not the same person as the security provider) and the persons which guaranteed the direct debtor's performance;
- the beneficiaries of other security interests over the same security asset;
- all persons having any right registered with respect to the security asset; and
- any other persons who sent a written notice to the secured creditor, claiming that they also have security over the security asset (together with proper evidence of the existence of such security interest).

1.8 Super-priority loans in bankruptcy

If the super-priority nature of a loan is only contractually agreed between the parties, it will not be acknowledged by the liquidator. By virtue of law, in a liquidation procedure secured loans have priority over unsecured loans. With respect to secured loans (if those are secured by the same security asset) the ranking of the security interest is relevant for the priority of such secured loans.

If the super-priority loan is secured by the same security asset and at the same rank as another secured loan, the claims of the creditor of such super-priority loan and the creditor of the other secured loan will be satisfied pro rata from the proceeds of the liquidation procedure.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

Varying interest rate and tenor of the loan do not require the security interest to be retaken.

However, if the security provider is different from the borrower and the tenor of the loan is extended by the parties, it is market practice in Hungary that the security provider acknowledges and confirms in writing that the security provided by it will keep securing the loan with such an extended tenor.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, a title instrument and an act of perfection (i.e. an act of publicity) are required.

Title instruments include:

- movables pledge agreement, account pledge agreement, receivables pledge agreement, quota/share pledge agreement, pledge on assets identified by detailed description ("floating charge") and mortgage agreement; and
- guarantee agreement and surety agreement.

Depending on the security interest, the act of perfection may be one or more of: (i) the registration of the security with the respective registry; (ii) notifying the debtor; (iii) the transfer of the respective collateral to the secured party; or (iv) notarisation of the agreement.

In case of a guarantee or surety (personal security interests), the act of perfection is the signing of the security agreement.

2.2 Ranking of pledges/mortgages

The rank of a real estate mortgage, pledge on movables, account pledge, receivables pledge, pledge on assets identified by detailed description and a quota/share pledge is determined by the time of registration. The applications are considered in the order of their submission.

2.3 Can ranking of consensual security be changed by agreement of the creditors?

The ranking can only be modified with the consent of all interested parties. The new ranking must be registered with the relevant registry.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge/securing charge	Registration with the Collateral Registry (*Hitelbiztosítéki nyilvántartás*) or, in case of certain movable assets such as aircrafts and ships, with the separate special registry
BANK ACCOUNT	Securing charge	Registration with the Collateral Registry
RECEIVABLES	Securing charge	Registration with the Collateral Registry
QUOTA/SHARE	Securing charge	Registration with the Companies Registry (*Cégbíróság*)
ASSETS IDENTIFIED BY DETAILED DESCRIPTION	Mortgage	Registration with the Collateral Registry
REAL ESTATE	Mortgage	Registration with the Land Registry (*Földhivatal*)

2.5 Availability of floating charge

Hungarian law recognises a floating charge in the form of a pledge over assets identified by detailed description. The pledge extends also to future assets, without any amendment of the underlying security document.

2.6 Trust and parallel debt issues

The creditors may appoint one of themselves or a third party to be their collateral agent (*zálogjogosulti bizományos*). It is not necessary for the creditors to be a party to the security agreements.

The collateral agent must be registered in the relevant registries as security holder. Following registration, it is only the collateral agent who is entitled to enforce the security on behalf of the other creditors.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes
ACCOUNT PLEDGE	Yes	No
RECEIVABLES PLEDGE	Yes	Yes (not used in practice)
QUOTA/SHARE PLEDGE	Yes	Yes
PLEDGE ON ASSETS IDENTIFIED BY DETAILED DESCRIPTION	Yes	Yes
REAL ESTATE MORTGAGE	Yes	Yes

2.8 Security and loan transfers

Upon transfer of loans, i.e. secured claims (which transfer may be made by way of (i) assignment (*engedményezés*) or (ii) transfer of contract (*szerződésátruházás*), those security interests, which secure the transferred loans and have an accessory nature (this includes the asset pledges and charges, as well as the suretyship (*kezesség*) are transferred to the new lender by virtue of law. Depending on the type of security, the transferor shall hand over to the transferee the security asset or, if the security is registered, provide the transferee with the appropriate documentation for registering the relevant security for the benefit of the new lender.

Security interests – apart from independent pledges – may only be transferred together with the transfer of the secured claims.

Independent pledges may be assigned or transferred to other financial institutions in whole or in part without transferring the underlying claims. The party whom the independent pledge has been assigned replaces the assignor in the relevant security agreements.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

There are two types of insolvency proceedings applicable for business entities:

- Bankruptcy proceedings (*Csődeljárás*), which aim at achieving a composition between the financially troubled business entity and its creditors by granting a temporary relief (payment moratorium) for its financial obligations and enable a reorganisation;

- Liquidation proceedings (*Felszámolási eljárás*), which aim at the dissolution of the insolvent business entity and the distribution of its assets among its creditors.

If the debtor and its creditors fail to agree on composition or if the composition agreement fails to comply with the law, the bankruptcy proceedings are terminated, and the court will commence liquidation proceedings.

3.2 Applicable insolvency test and directors' duty to file

In case a company is threatened by insolvency, upon the director's proposal, the shareholder is obliged to adopt a resolution which must be implemented within three months with a view to rectifying the company's solvency by providing new capital.

There is no obligation for the directors of a company to file for bankruptcy proceedings or liquidation proceedings. However, in case a company becomes insolvent, the directors, if this is in the best interest of the creditors, must file an application for bankruptcy proceedings or liquidation proceedings in order to avoid personal liability afterwards.

In Hungary, none of the concerned parties are obliged to initiate bankruptcy proceedings or liquidation proceedings. Nevertheless, the court commences liquidation proceedings ex officio: (i) following unsuccessful bankruptcy proceedings; or (ii) upon request of the commercial or criminal courts.

Liquidation proceedings may only be initiated if the court determines that the debtor is insolvent. The debtor may only be qualified as insolvent, if:

- the debtor fails to settle or contest its previously uncontested and acknowledged contractual debts within 20 days of the due date, and failed to satisfy such debt upon receipt of the creditor's written payment notice;

- the debtor fails to settle its debt within the deadline specified in a final court decision or order for payment;
- the enforcement procedure against the debtor was unsuccessful;
- the debtor failed to fulfil its payment obligation as stipulated in the composition agreement concluded in bankruptcy or liquidation proceedings;
- the court has declared the previous bankruptcy proceedings terminated; or
- the debtor's liabilities in proceedings initiated by the debtor or by the receiver exceed the debtor's assets, or the debtor was unable and presumably will not be able to settle its debts on the date when they are due, and in proceedings opened by the receiver the members (shareholders) of the debtor fail to provide a statement of commitment in relation to providing funds necessary to cover such debts when due.

3.3 Describe insolvency proceedings

3.3.1 Liquidation proceedings

Liquidation proceedings are initiated:

- by the competent court upon application by:
  - the debtor;
  - one or more of its creditors; or
  - the receiver;
- by the court:
  - following unsuccessful bankruptcy proceedings; or
  - upon request of the commercial or criminal courts.

If the liquidation proceedings are requested by a creditor, the creditor must prove that the debtor is insolvent and specify the reasons for the debtor's alleged insolvency.

The opening of liquidation proceedings becomes effective as of the date it is published in the Company Gazette (*Cégközlöny*), a publicly available online platform. As of this date:

- companies subject to liquidation proceedings are identified by the use of the affix "under liquidation" (*Felszámolás alatt or f.a.*) after the company name;
- the court appoints a liquidator (*Felszámoló biztos*) who becomes the sole representative of the debtor company and is responsible for conducting the entire liquidation proceedings;
- the directors cease to have management power over the debtor company;
- all assets of the debtor fall within the scope of liquidation assets; and
- any claim against the debtor may only be satisfied in the framework of the liquidation proceedings.

Typically, the debtor's assets are sold to the highest bidder via auction sales or public tenders. Both forms of sale process take place electronically. Case law has developed the position that liquidators cannot be held liable if assets are sold below their market price.

Creditors' claims are ranked in the following order of priority:

- cost of liquidation (e.g. salaries of employees, costs of sales etc.);
- claims secured by pledges identified by detailed descriptions and established before the commencement date of liquidation proceedings;
- alimony claims, life annuity payment claims and compensation benefits to private individuals;
- other claims of private individuals not originating from economic activities (e.g. damages, warranty claims, etc.);
- taxes and other public dues as well as public utility charges;
- other claims (e.g. any unsecured claims);
- default interest and late charges, as well as surcharges, penalties and similar debts;
- claims held by the shareholder or any member of the management.

However, claims which are secured will enjoy priority in satisfaction irrespective of the order above.

3.3.2 Bankruptcy proceedings

The representatives of the financially troubled business entity, upon approval of its main statutory body, may request the commencement of bankruptcy proceedings from the competent court.

As of the commencement of bankruptcy proceedings:

- the debtor is granted a temporary relief (payment moratorium) for 120 days or 240 days (if agreed by the creditors). Companies must be identified by the use of the affix "cs.a." after the company name;
- the debtor must inform its creditors of the bankruptcy proceedings and ask them to register their claims. Creditors must register their claims and pay the registration fee within 30 days;
- an administrator (*Vagyonfelügyelő*) is appointed by the court to supervise and control the business and the management of the debtor during the payment moratorium.

The payment moratorium may enable the debtor to prepare a reorganisation proposal (a so-called "rescue plan") for its creditors. Bankruptcy proceedings are successful if the required majority of creditors support the reorganisation proposal and the court approves this. In this case the debtor can resume its ordinary course of business. In all other cases, the court orders liquidation proceedings.

3.4 Timing and costs of insolvency proceedings

In bankruptcy the debtor is granted a temporary relief (payment moratorium) of 120 days from the commencement date. With the creditors' consent this can be extended up to 240 days, but in no event can bankruptcy last longer than 365 days.

Liquidation proceedings must be completed within two years, but in certain cases they may take longer due to any failure to sell the debtor's assets. The duration of liquidation procedures varies significantly depending on the complexity of the case.

3.4.1 Liquidation proceedings

Creditors must file their claims within 40 days from the commencement date and at the same time pay a registration fee which is 1 % of the claim, but a minimum of HUF 5,000 (approximately EUR 20) and a maximum of HUF 200,000 (approximately EUR 600) per claim registration in the liquidation proceedings.

The sale must be commenced by the liquidator within 100 days from the commencement date.

In general, the stamp duty payable on the commencement of liquidation proceedings is HUF 80,000 (approximately EUR 300).

3.4.2 Bankruptcy proceedings

The creditors must register their claims and pay the registration fee within 30 days from the commencement date. Furthermore, the creditors must pay a registration fee which is 1 % of the claim, but a minimum of HUF 5,000 (approximately EUR 20) and a maximum of HUF 100,000 (approximately EUR 300) per claim registration in the bankruptcy proceedings.

In general, the stamp duty on the commencement of bankruptcy proceedings shall be HUF 50,000 (approximately EUR 200).

3.5 Challenge of preferential transactions and suspect periods

The liquidator or a creditor may challenge transactions by the debtor:

- that took place within five years before the submission of the insolvency petition in the case of fraudulent transfers;
- that took place within three years before the submission of the insolvency petition in the case of transactions at undervalue;
- that took place within 90 days before the submission of the insolvency petition in the case of unlawful creditor preference (the transaction results in an unlawful preference of certain creditors over other creditors, including an amendment of a contract to the benefit of a creditor or provision of a collateral to a previously unsecured creditor);
- that took place within three years before the submission of the insolvency petition in the case of other types of unlawful creditor preference (the performance of a contract results in an unlawful preference or the provision of those services is outside the ordinary business of the debtor).

The claim must be filed with the competent court within 120 days from the relevant person taking notice of such transaction but in no event later than one year after the commencement of liquidation proceedings.

3.6 Impact of insolvency proceedings on security and enforcement

As soon as liquidation proceedings are commenced:

- all claims against the debtor become due irrespective of the terms of the underlying agreements;
- all pending procedures for the enforcement of security interests are stayed and the creditors can only satisfy their claims within the liquidation proceedings (and amounts held by the court bailiff in the stayed enforcement proceedings will become part of the bankrupt estate).

Unsuccessful enforcement proceedings provide a basis to initiate liquidation proceedings.

A secured creditor must file its claim and pay the registration fee within 40 days from the commencement date. Once the assets of the debtor are sold by the liquidator, the proceeds generated by the sale must be distributed without undue delay to the secured creditors (costs of sale may be deducted by the liquidator).

Unsecured creditors only receive satisfaction at the end of the liquidation proceedings subject to the availability of funds.

In the case of a "floating charge" (assets registered in the Collateral Register have been identified by detailed description so as to cover all assets of the debtor as shown in the Collateral Register), the liquidator must apply 50 % of the proceeds from the sale of the relevant assets identified (minus costs of sale) to satisfy the secured claim.

A creditor having a security deposit (*óvadék*) may enforce its claims from the deposited security within three months from the commencement of liquidation proceedings. Upon expiry of such a period the claim can be satisfied from the security deposit by way of distribution by the liquidator only.

3.7 Secured creditors in insolvency proceedings

Secured creditors' claims have priority over unsecured creditors' claims and, as a general rule, the proceeds of the sale of a pledged asset shall be paid to the pledgee/collateral (security) agent, deducting the cost of liquidation, which are as follows:

- documented costs and expenses relating to works performed in order to restore the encumbered asset form its status endangering life and other assets;
- costs and expenses relating to the lawsuits concerning the clawback of the encumbered asset, costs and expenses relating to the maintenance, safeguarding and sale of the encumbered asset;
- taxes and stamp duties to be paid in connection with the encumbered asset, which become due after the date of commencement of the liquidation procedure;
- in case of pledge of receivables, costs and expenses relating to the collection of receivables;
- maximum 1 % of the net purchase price (in case of pledge of receivables, the proceeds of collecting the receivables) as costs in connection with the arrangement, placement and safeguarding of the debtor's documents; and
- 7.5 % of the net purchase price (in case of pledge of receivables, the proceeds of collecting the receivables).

Pursuant to the Hungarian Civil Code, if the same asset is pledged in favour of more than one creditor, such secured creditors' claims must be satisfied in the order of the date: (i) of establishing their pledge over such asset; and (ii) if such pledge shall be registered, when the pledge is registered with the relevant registry.

Creditors, when filing their claims in an insolvency procedure, shall pay a registration fee of a certain percentage rate of their claims, but not exceeding HUF 200,000 (approx. EUR 600).

3.8 Survival of powers of attorney

The liquidator has the right to terminate any agreements of the debtor with immediate effect (concluded prior to the commencement of the liquidation) including powers of attorney given to security agents.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

The court bailiff will start enforcement based on:

- a court decision, issued in the course of litigation proceedings, on the maturity and enforceability of the debt;
- an enforcement order issued by a notary based on notarised loan agreements or security documents (if these meet the requirements of the law).

Enforcement proceedings involve the following steps:

- a secured creditor files an application for an enforceable document either to the competent court or to the notary;
- the competent court or the notary issues the enforcement order and sends it to the court bailiff competent at the registered seat of the security provider;
- the secured creditor, who requested the enforcement proceedings, pays the costs of the enforcement in advance to the court bailiff;
- the court bailiff seizes the security asset by registering the enforcement right in the relevant register or requests the relevant financial institution for the seizure of the bank accounts of the debtor; and finally,
- the court bailiff distributes the enforcement proceeds between the secured creditors to satisfy their claim.

4.2 Timing and costs of enforcement proceedings

In general, the timing and costs depend on the subject of the enforcement proceedings. The secured creditor who requested the enforcement proceedings is entitled to decide whether all types of assets (movables, real estate, bank accounts, receivables, etc.) or only specified assets of the debtor are enforced.

With regard to court enforcement proceedings, in our experience the enforcement procedure takes between several months and one year (starting with the filing of the enforcement application and ending with the distribution of the enforcement proceeds to the secured creditor).

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POLAND

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

Validity and effects of the negative pledge clause, i.e. a clause under which a debtor undertakes not to create security over its assets, depends on certain factors.

The clause is valid if stipulated in unsecured debt documentation. A lender can request a court to invalidate subsequent security of another creditor within a year from the date of the agreement creating such subsequent security. The lender would have to prove that the other creditor knew of the negative pledge restriction.

The clause is valid and effective among the parties as well as against third parties if stipulated in the registered pledge agreement. As a matter of principle, any subsequent security contradicting the negative pledge covenant will be null and void.

The clause is invalid if stipulated with respect to the assets being subject to mortgage, ordinary pledge, or financial pledge. In those cases, security provider's undertaking towards the creditor not to dispose of or encumber an asset before expiration of the mortgage, ordinary pledge or financial pledge is not allowed under Polish law.

1.2 Restrictions on accelerating a loan

Polish insolvency and restructuring laws do not permit a modification or termination of a legal relationship that is triggered by a filing for insolvency/restructuring or declaration of insolvency/opening of restructuring. Hence, acceleration events based on such *ipso facto* clauses are disallowed. However, except for as provided above, Polish law does not restrict the ability of parties to a facility agreement in agreeing on any event of default.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment of monetary claims is effective against third parties and any assignment by a creditor to a third party in violation thereof is invalid. A non-assignment clause related to the receivables confirmed in writing, shall be made in writing, in order to be effective towards the assignee. This does not apply if the assignee was aware of a non-assignment clause at the date of the assignment.

1.4 Common methods for loan transfers

In general, the most common method for the transfer of loans is an outright assignment of loan claims.

An assignment of claims means an assignment of claims, together with ancillary rights. No consent of the debtor is required unless the lender and borrower agreed otherwise in the loan documentation. The debtor should be notified of the assignment.

In certain transactions, parties to an assignment agreement also attempt to affect a debt assumption in order to achieve a transfer of entire contractual position. An assignment coupled with a debt assumption means the transfer of all rights, claims and obligations. The consent of the debtor is here required but may also be granted in advance (e.g. in the original loan documentation). It is noteworthy that a blank consent to debt assumption in a loan agreement can be challenged. Consumer protection laws also affect such clauses. In addition, certain obligations of banks under bank loans may not be assumed by non-bank entities.

Subrogation is a less common method of transfer as it might require consent of the borrower. The subrogee, who pays off the creditor acquires the receivable up to the amount of the payment made to the original creditor.

Security interests of accessory nature (e.g. mortgages or pledges) are transferred to the assignee together with the secured receivable, unless the parties decide otherwise. It should be noted that transfer of a receivable secured by a mortgage is effective upon registration of the transfer with the land and mortgage register. Under certain circumstances sub-participation arrangements may be chosen as an alternative to a transfer or as a

temporary solution for transfer of mortgage receivables (until registration of the full transfer with the land and mortgage register).

Parties to an intended sale of receivables shall investigate the underlying documentation to establish a list of steps necessary to perfect the full transfer.

1.5 Effectiveness of a contractual subordination

Contractual subordination is permitted by Polish law and the general rule of freedom of contract shall apply. The parties may agree contractually that certain claims are subordinated to claims of the senior creditors for a limited period or that such claims rank *pari passu* with the creditor's senior claims. Contractual subordination is not binding on enforcement officers or administrators.

1.6 Subordination by operation of law

In case shareholders' loans (i.e. loans granted by a direct shareholder or the direct shareholder of the first direct shareholder) are granted within five years prior to the declaration of bankruptcy, claims for repayment of such loans are satisfied in the fourth category of bankruptcy waterfall after any other claims. However, there are exceptions to the above rule, including where the lenders being partners or shareholders represent less than 10 % of votes at the general meeting of shareholders, unless they are members of a company's governing bodies or actually manage its affairs.

In cases where shareholders' loans are secured by mortgages or pledges, they can be considered as preferential claims to the bankruptcy estate and being satisfied with first priority from the secured assets.

1.7 Validity of a forfeiture agreement

As a rule, it should be noted that an agreement for the forfeiture of a security interest (i.e. an agreement providing that a secured creditor may keep the collateral in lieu of the secured liability) is not valid.

Forfeiture as a method of out-of-court enforcement is allowed with respect to registered pledge agreements. If the pledge agreement provides so, the secured creditor will be allowed to seize the secured asset (i.e. movables, rights and/or shares in companies) upon occurrence of an agreed enforcement event. However, forfeiture will not be possible if the asset has been seized by a bailiff acting upon instructions of another creditor.

Moreover, it should be noted that an agreement on the transfer of ownership right for security purposes is allowed. Transfer of ownership right for collateral purposes may concern both immovables and movables, but also other objects. Transfer of ownership to the creditor, with respect to the movables, might occur under a conditional agreement, which provides for re-transfer of the ownership right, in the case of repayment of the secured claim. With respect to the immovables, transfer of ownership shall be made under unconditional agreement together with separate obligation of the creditor to re-transfer ownership right to the debtor when the claims are satisfied. Transfer of ownership right for collateral purposes allows creditor to organize a private sale of the assets, without court enforcement proceedings. The proceeds received by the creditor in the process of sale shall be applied on account of the secured claim.

It is also noteworthy that the parties may conclude security assignment agreements, in order to secure the assignee's claims by the assignor's receivables, particularly claims for payment, arising from the relevant agreements, such as intercompany loans, insurance agreements, bank guarantees and other material contracts, which are subject to assignment of rights. As a result of the assignment, the assignee becomes the new creditor against debtors of the assigned claims. The parties may agree that upon the occurrence of an event of default or an enforcement event, as defined in the security assignment agreement, all the payments made under or in relation to the assigned documents shall be transferred to the assignee directly. All amounts received by the assignor under the assigned documents shall also be transferred to the assignee towards repayment of secured claim. The security assignment agreement typically provides for a notice of assignment to the debtor. If the debtor is not notified of the assignment, performance of an obligation to the former creditor shall be effective, unless the debtor knew of the assignment at the moment of the performance.

1.8 Super-priority loans in bankruptcy

New loans granted to an insolvent debtor during the insolvency proceedings as well as new loans approved in the arrangement with creditors (in case the arrangement has been revoked and bankruptcy proceedings started) have priority over claims of unsecured lender under loans granted prior to the declaration of bankruptcy. Having said that, rights of the new lender will not affect rights of the secured creditors.

Creditors may contractually agree that a lender intending to lend new money to an insolvent debtor will be secured ahead of or *pari passu* with the existing secured creditors. This would require consent of the creditors' council and entry of the new security into the relevant registers.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

While in theory, varying of the tenor of the loan does not affect the accompanying security, the security is typically amended in such circumstances. Yet, any changes made to the tenor of the loan must be registered with the relevant registries (e.g. Land and Mortgage Register or registered Pledges Register).

2. SECURITY INTERESTS

2.1 How to establish and perfect a security interest

Creation of a valid security interest requires: (i) a creditor and a security provider to enter into a security document; and (ii) complete perfection steps (i.e. acts of publicity) where required.

The security interest includes:

- registered pledge, financial pledge, and ordinary pledge;
- mortgage;
- transfer of ownership for security purposes; and
- security assignment.

Depending on the security interest, the act of perfection is one or more of: (i) the registration of the security with the respective registry; (ii) hand-over of a movable subject to transfer of ownership for security purposes or an ordinary pledge; (iii) notification of a third party (e.g. a debtor of an assigned receivable or a company which shares have been pledged).

It is market standard that a borrower and a security grantor enter into submission to enforcement in the form of a notarial deed along with signing the finance documents. Such a submission to enforcement does not create a security interest or a guarantee but substitutes a court judgement or an arbitral award and allows enforcement to begin relatively quickly.

2.2 Ranking of pledges/mortgages

The rank of a registered pledge or mortgage depends on when the respective security document was submitted for registration (act of perfection) with the relevant registry.

A financial pledge created later has priority over a financial pledge created earlier, unless the pledgee was aware of the existence of another security when the new pledge was created. There are no rules of priority of submissions to enforcement, but enforcement proceedings may, once commenced, be joined by other creditors holding enforcement titles.

2.3 Can ranking of consensual security be changed by agreement of the creditors?

The priority of mortgages may be changed by an agreement and must be registered with the applicable land and mortgage register.

Creditors whose claims are secured with a registered pledge and financial pledge may alter their priority.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge	Registration with the Pledge Register
RIGHTS/RECEIVABLES	Pledge or Assignment	Registration with the Pledge Register or third-party notification
SHARES	Pledge	Registration with the Pledge Register. If any shares are issued, hand-over of the share certificates. Also, annotation in the issuer's book of shares
REAL ESTATE	Mortgage	Registration with the Land and Mortgage Register

2.5 Availability of floating charge

Polish law recognizes floating charges over all assets of a company which include all accounts receivable, existing now or in the future, but do not include real estates.

2.6 Trust and parallel debt issues

Polish law provides for a "security administrator" institution as a type of agency. A security administrator acting on behalf of creditors might be appointed with respect to: (i) mortgages and registered pledges in lending transactions; and (ii) all types of security interest securing claims under notes (*obligacje*).

Security interest is registered in the name of the security administrator. The security administrator can enforce against the secured assets in its capacity for the secured party and is bound to distribute the enforcement proceeds among the creditors. Enforcement proceeds do not form a part of the security administrator's bankruptcy estate.

The security administrator institution is used mainly in domestic transactions.

In cross-border financings, security is most often established to the benefit of a security agent and secures a "parallel debt" claim whereby the parties to an English law facility agreement or intercreditor agreement agree that the security agent shall be the joint and several creditor with respect to each and every obligation of the borrower towards each finance party.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE ENFORCEMENT
GUARANTEE	Yes (unless the bank or insurance guarantee document expressly provides otherwise)	No
SURETY	Yes	No
MOVABLES/RIGHTS PLEDGE	Yes	Yes (in case of registered pledges)
RECEIVABLES ASSIGNMENT	Yes	Yes
SHARE PLEDGE	Yes	Yes (in case of registered and financial pledges)
REAL ESTATE MORTGAGE	Yes	No
TRANSFER OF OWNERSHIP RIGHT	Yes	Yes

2.8 Security and loan transfers

As described above, a loan under Polish law may be transferred by an assignment of rights and a transfer of contractual position by the debt assumption.

Under an assignment of rights, the security interest will follow a transfer of the loan agreement, except for the bank guarantee and submission to enforcement where, a new bank guarantee/submission to enforcement should be issued in favour of the new finance party.

Where the assignee is to step into the original lender's duties restricted for banks, the parties shall pay attention to regulatory aspects of the transaction.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

There are two types of insolvency proceedings:

- Bankruptcy proceedings (*Postępowanie upadłościowe*), which usually lead to the liquidation of the assets of the insolvent debtor,
- Restructuring proceedings (*Postępowania restrukturyzacyjne*), which primarily aim at avoiding a declaration of bankruptcy and enabling the debtor to undergo a restructuring.

3.2 Applicable insolvency test and directors' duty to file

Two separate insolvency tests (each of which triggers insolvency) for a corporate debtor apply for the purpose of assessing the existence of insolvency:

- Balance sheet test: payable obligations exceed the value of the debtor's assets ("over-indebtedness") and such situation has continued for more than 24 months;

- Cash flow test: a debtor has lost the ability to perform its due monetary obligations (presumed if delay in payment exceeds three months) ("inability to pay").

Directors of a corporate debtor are obliged to file an application for bankruptcy with the competent court within a 30-day period after the debtor becomes insolvent. A director risks criminal and civil liability in case of non-compliance.

The act on specific support measures in relation to the spread of the virus SARS-CoV-2 ("Anti-crisis Law"), which came into force on 18 April 2020, provides for special arrangements with respect to the obligation to file a bankruptcy petition during the state of epidemic.

According to the provisions of the Anti-crisis Law, the term for filling a petition for bankruptcy by the debtor does not start to run and, where it had already started to run, it is interrupted and will start to run afresh following the termination of the state of epidemic. Where the grounds for declaration of bankruptcy occurred during the state of emergency or state of epidemic caused by COVID-19 it is presumed by law that debtor's insolvency arose because of COVID-19. However, the presumption may be rebutted.

If the debtor properly files the bankruptcy petition, despite the provisions of Anti-crisis Law, and no other bankruptcy petitions have been filed, the deadlines contemplated under the Bankruptcy Law, which are determined by the date of filling of bankruptcy petition, shall be prolonged by the number of days between filling date and the last day of term for filling of bankruptcy petition, provided in the Bankruptcy Law, aside from application of the provisions of Anti-crisis Law.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Bankruptcy proceedings are initiated by the competent court upon an application by a debtor or one or more of its creditors.

The competent court appoints a bankruptcy receiver (*syndyk masy upadłości*), who assumes control of the business of the debtor and its assets. Typically, the debtor's assets will be liquidated, i.e. sold by the bankruptcy receiver by way of auction sales, public tenders or unrestricted sales. The unsecured creditors will be satisfied from the liquidation proceeds only after the full satisfaction of the preferred claims, such as costs (expenses connected with the securing, administration and liquidation of the bankruptcy estate) as well as claims arisen from or in connection with the bankruptcy and the restructuring proceedings.

3.3.2 Restructuring proceedings

Restructuring proceedings are initiated by the competent court upon application by an insolvent debtor or a debtor threatened with insolvency. Another proceeding called deep reform restructuring proceedings can also be initiated by creditors.

Generally, a restructuring motion will take precedence over a bankruptcy petition.

The following restructuring proceedings are available:

TYPE OF RESTRUCTURING PROCEEDINGS	CHARACTERISTICS
ARRANGEMENT APPROVAL PROCEEDINGS *(POSTĘPOWANIE O ZATWIERDZENIE UKŁADU)*	General information: Available for debtors whose disputed claims do not exceed 15 % of the total claims; The debtors that can obtain on their own (i.e. without court participation) approvals for the arrangement terms from majority of creditors holding at least two thirds (2/3) of the total sum of claims; Debtor continues to manage its business subject to the involvement of a licensed supervisor (*nadzorca układu*). Simplified proceedings for the arrangement approval in relation to COVID-19 outbreak – entered into force as of 24 June 2020, which have the following additional features: Available for debtors, who enter into an agreement for exercising supervision over the course of the proceedings with a restructuring adviser; Debtor may announce the opening of an arrangement approval proceedings in the Court and Commercial Gazette (*Monitor Sądowy I Gospodarczy*) after preparation of arrangement proposals, table of claims, table of disputed claims and after having forwarded them to the court supervisor (*nadzorca sądowy*), however not later than 30 June 2021; After the announcement until discontinuation or conclusion of the approval proceedings, initiating enforcement proceedings in respect of claims covered by an arrangement approval or creditor‘s claim on the property of the debtor secured by mortgage, pledge, registered pledge, tax lien and/or maritime mortgage, is not permitted; During simplified proceedings for the arrangement approval, debtor is entitled to conduct matters within the ordinary course of business. Matters exceeding the ordinary course of business require for their validity consent of the court supervisor (*nadzorca sądowy*). Encumbrance of components entered into the arrangement estate and the remedial estate by mortgage, pledge, registered pledge and/or maritime mortgage to secure claims not covered by the arrangement, shall not be regarded as ineffective in relation to the bankruptcy estate or the remedial estate, if they have been undertaken based on arrangement supervisor’s authorisation; If the arrangement is not approved or the arrangement approval proceedings are discontinued, the debtor will have a right to file a simplified application for the opening of remedial proceedings or a bankruptcy petition, within two weeks from issuance of decision on the refusal to approve the arrangement or within seven days from issuance of the decision on discontinuing the proceedings; The above special legislation is being criticized for the lack of adequate remedies for the creditors and it remains to be seen whether the debtor’s protection embodied in the law will not turn out to be excessive.
ACCELERATED ARRANGEMENT PROCEEDINGS *(PRZYSPIESZONE POSTĘPO WANIE UKŁADOWE)*	Debtor continues to manage its business under the control of a court supervisor (*nadzorca sądowy*); Restructuring court organizes a creditors meeting for the purpose of voting on the arrangement.
ARRANGEMENT PROCEEDINGS *(POSTĘPOWANIE UKŁADOWE)*	Disputed claims exceed 15 % of the total claims; More formal proceedings; Similar in terms of the impact on the debtor‘s management rights and the protection from creditors as the accelerated arrangement proceedings.
DEEP REFORM RESTRUCTURING PROCEEDINGS (*POSTĘPOWANIE SANACYJNE*)	Intended to enable deep economic restructuring of the debtor‘s assets and obligations; Debtor‘s business is typically managed by an administrator (*zarządca*); The administrator is equipped with various powers similar to bankruptcy receiver, including the right to avoid executory contracts that are burdensome to the estate.

While in principle the broader the restructuring, the deeper protection against creditors, the debtor should be more constrained in the management of its estate.

3.4 Timing and costs of insolvency proceedings

The duration of bankruptcy proceedings will depend on several different factors. Although there is no general rule, in our experience more complex bankruptcy proceedings may take several years.

The restructuring proceedings were designed to be a very quick restructuring tool according to the drafters of Restructuring Law to take between two weeks and 12 months. This holds true for certain types of proceedings, but it can occur that proceedings last more than 12 months or even more than 24 months.

The costs of insolvency proceedings depend on the size and complexity of the proceedings.

3.5 Challenge of preferential transactions and suspect periods

3.5.1 Bankruptcy proceedings

An agreement concluded by the debtor made within one year prior to filing a petition for bankruptcy will be ineffective if the value of the debtor's performance substantially exceeds the consideration paid (if any) by the third party.

The establishment of a security interest in respect of a debt which is not yet due or a payment which is not yet due, and which was made by the debtor within six months prior to filing of the bankruptcy petition, will be deemed ineffective unless a third party to which the debt is owed, or in favour of which security has been established, can prove that, at the time the security was granted, it was not aware of the existence of any grounds for bankruptcy.

Transactions performed for due consideration by the debtor within six months preceding the date of filing a bankruptcy petition will be ineffective if they were entered into with:

- family members (if the debtor is an individual); or
- if the debtor is a legal entity: (i) shareholders, authorized representatives, or their spouses; (ii) affiliated companies or their shareholders; (iii) authorized representatives of such affiliated companies or their spouses; (iv) and the debtor's parent company or subsidiary.

In the case of third-party security (i.e. when the bankrupt party is not a personal debtor of the secured creditor), the bankruptcy receiver may claim ineffective security established by a debtor within one year prior to filing a petition for bankruptcy if a debtor has received no consideration or consideration of a very low value.

3.5.2 Restructuring proceedings

Asset disposals made by the debtor during the one-year period prior to the filing of a petition for opening of deep reform restructuring proceedings will be deemed ineffective if the value of the debtor's performance significantly exceeds any consideration paid to the debtor.

A security established by a debtor within one year prior to filing a petition for opening of deep reform restructuring proceedings will be ineffective if the value of the secured asset, compared to the obtained consideration, exceeds certain limits or if security has not been directly established in connection with receipt of consideration by the debtor.

In connection with the suspension of directors' filing duties as a result of COVID-19 outbreak, it remains to be seen whether unreliable debtors will be tempted to dispose of the assets in the insolvency zone or satisfy only selected creditors. There will clearly be an incentive to attempt an expedited restructuring within the new simplified proceedings for the approval of the arrangement but, as mentioned above, those proceedings offer lesser protections to creditors compared to the other restructuring proceedings.

3.6 Impact of insolvency proceedings on security and enforcement

3.6.1 Bankruptcy proceedings

Secured creditors have a preferential position in bankruptcy proceedings.

From the date of the commencement of bankruptcy proceedings, no new security rights may be established with respect to assets that form part of the bankruptcy estate (save for the mortgages for which an application was filed not later than six months before the date of filing of an insolvency petition).

3.6.2 Restructuring proceedings

After the commencement of restructuring proceedings, it is not possible to create a new security interest in order to secure a pre-petition debt. However, if a motion to register a mortgage or registered pledge is filed more than six months before the filing of a motion to open restructuring proceedings, the security will be registered.

The pre-petition security interests persist in the restructuring proceedings and claims secured by them are, in principle, not affected by the arrangement.

Enforcement proceedings initiated before the opening of the deep reform restructuring proceedings, are suspended by law as of the date of opening of such proceedings. The seizure performed before the opening of the deep reform restructuring proceedings may be lifted by the judge-commissioner upon the debtor's request. Initiation of the enforcement proceedings addressed to the property entered into the remedial estate or performance of the order on securing the claims are not permitted after opening of the deep reform restructuring proceedings.

The limitation period for the claims, which cannot be pursued during the deep reform restructuring proceedings, shall not begin to run, and commenced limitation period shall be suspended for the duration of the deep reform restructuring proceedings.

Similarly, in the case of arrangement proceedings, initiation of the enforcement proceedings concerning claims subject to the arrangement is forbidden. Enforcement proceedings initiated already shall be suspended by law as of the date of opening of accelerated arrangement proceedings.

The secured creditors are not allowed to pursue their claims, being subject to the arrangement for the duration of accelerated arrangement proceedings. As in the case of the deep reform restructuring proceedings limitation periods for pursuing claims do not start to run, and limitation periods which commenced shall be suspended for a period of accelerated arrangement proceedings.

3.7 Secured creditors in insolvency proceedings

Claims secured over debtors' assets and capable of being satisfied from these assets will be referred to as "Secured Claims" in this paragraph.

Priority of the Secured Claims

A Secured Claim enjoy in principle the pre-petition priority.

Satisfaction of the Secured Claims

Secured Claims are satisfied from the proceeds of the disposal of the secured assets by the administrator. The administrator prepares a so-called separate distribution plan, in which he/she shall include the sum obtained from the disposal of the secured assets and shall present a list of secured creditors entitled to the liquidation proceeds.

3.7.1 Bankruptcy proceedings

Individual enforcement

Existing individual enforcement is discontinued, and new enforcement cannot be initiated upon declaration of the debtors' bankruptcy.

3.7.2 Restructuring proceedings

As a matter of principle secured creditors are treated preferentially in restructuring proceedings with respect to their Secured Claims to the extent they can be collected from the underlying collateral. Otherwise they are treated equally with the unsecured creditors (e.g. with respect to the arrangement and individual enforcements).

Individual enforcement

Secured creditors may initiate and continue existing individual enforcements of their Secured Claims outside the restructuring proceedings. This does not apply to individual enforcements which are stayed and cannot be initiated upon opening of: (i) simplified restructuring proceedings; or (ii) deep reform restructuring proceedings.

In the first instance, individual enforcements are stayed and cannot be initiated for four months from the date of opening of the proceedings. They may be continued after the lapse of this period if by then the debtor has not filed to the court for approval of an arrangement adopted by the creditors or the Secured Claim is not covered by the arrangement. In case of the latter, and assuming that the debtor filed for the approval of arrangement, such Secured Claim could arguably be enforced only after the debtor's motion for the approval of arrangement has been finally approved or dismissed.

In deep restructuring proceedings, enforcement is stayed for the duration of proceedings. In case of the disposal of collateral by the administrator (outside the ordinary course of business), the secure claims are satisfied from the proceeds of sale. The administrator prepares a so-called separate distribution plan, in which he/she shall include the sum obtained from disposal of the secured assets and shall present a list of secured creditors entitled to the liquidation proceeds.

Arrangement

In principle, Secured Claims are not covered by the arrangement unless the secured creditor agrees to it.

This does not apply in the simplified restructuring proceedings and in the so-called partial arrangements (which can be proposed by the debtor in connection with restructuring proceedings other than arrangement proceedings) if the debtor's proposal provides for full satisfaction of the Secured Claim (even if the proposal provides for rescheduling the payment dates) or satisfaction at a level not lower than in case of forced sale of the collateral.

Priority of the Secured Claims

A secured creditor will in principle enjoy its pre-petition priority.

Even if a secured creditor is crammed down in the circumstances described above it will continue to enjoy the pre-petition priority with respect to the claim modified by the arrangement, unless the creditor waives such priority.

3.8 Survival of powers of attorney

3.8.1 Bankruptcy proceedings

Powers of attorney (including commercial power of attorney (*prokura*)) expire upon the declaration of bankruptcy of the debtor.

3.8.2 Restructuring proceedings

Powers of attorney (including commercial power of attorney (*prokura*)) expire upon the commencement of deep reform restructuring proceedings.

In other types of restructuring proceedings, powers of attorney given by the debtor in the ordinary course of business survive but may be revoked by an administrator (if appointed), which would result in the removal of managerial powers of the debtor.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

The court bailiff (*komornik sądowy*) will start enforcement based on an enforcement title (*tytuł wykonawczy*), which may be:

- a final, conclusive and binding judgment of a Polish court or another court of an EU Member State;
- a settlement effected before a Polish court, arbitrator or mediator; or
- a notary deed on acknowledgement of a debt and consent to direct enforceability.

Typical court enforcement methods are public auction, payroll deduction or sale of moveable or immovable assets.

Registered pledges and financial pledges may also be enforced out-of-court as set out in the relevant security agreement, e.g. by way of seizure of title, sale in an auction supervised by a notary public or bailiff and set off. This offers more flexibility and may be less time consuming than ordinary court enforcement proceedings.

4.2 Timing and costs of enforcement proceedings

Time and costs of enforcement proceedings depend on the type of security interest and method of enforcement. In general, out-of-court enforcement proceedings are more effective. In our experience, court enforcement proceedings usually take up to 12 months but may take up to a few years. Creditors must pay court and bailiff fees in advance. These are subsequently returned following successful enforcement, provided that the debtor's assets are sufficient.

Enforcement commenced by way of reliance on submission to enforcement may take less than six months. Enforcements that require a prior litigation obviously take longer and are less cost effective.

This chapter was written by Lech Giliciński and Przemek Kozdój.

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WOLF THEISS

ROMANIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

A negative pledge clause is invalid and thus not binding to the parties of the agreement or to third parties.

Non-disposal clauses are invalid against third parties but may however effect parties to the agreement with respect to the right to claim damages.

Non-disposal clauses included in immovable mortgage agreements securing a mortgage loan are valid and may be registered with the relevant land register in order to ensure publicity against any third party. A creditor may challenge such a disposal if it has not consented to it (expressly or implicitly) and where it becomes impossible for such creditor to enforce the mortgage in accordance with its ranking.

1.2 Restrictions on accelerating a loan

In general, Romanian law does not restrict the ability of parties to a facility agreement from agreeing on any event of default, but this may not be triggered solely by the opening of insolvency proceedings. Creditors must, however, act in a reasonable manner.

A creditor is permitted to enforce a mortgage granted in its favour provided that the creditor has reasons to believe that the sale of the mortgaged asset would impede the enforcement of the mortgage; or where the security provider does not properly maintain the charged assets; or other factual circumstances occurring as a result of the debtor's actions, which may render the enforcement of the mortgage difficult or impossible.

1.3 Effectiveness of a non-assignment clause

In general, non-assignment clauses are valid. However, monetary claims can always be assigned irrespective of the prohibitions of the underlying agreement. Breach of such obligations may entitle the non-defaulting party to claim damages.

1.4 Common methods for loan transfers

The most common methods for loan transfers entail an assignment of contract (*cesiune de contract*) or an assignment of receivable (*cesiune de creanță*). The preferred method is by way of assignment of contract as both rights and obligations are transferred.

Novation, sub-participation or silent assignment is also possible. However, different rules apply to the transfer of the security interests securing the transferred loan in such cases.

Parties must be mindful that licensing restrictions apply with respect to the ability to purchase performing loans.

1.5 Effectiveness of a contractual subordination

Contractual subordination is not regulated, and in absence of case law it is possible that it may be disregarded by the court, the insolvency administrator or liquidator in an insolvency procedure.

There are arguments to support contractual subordination given that Romanian insolvency law provides for the subordination of shareholder loans or loans granted by affiliates.

1.6 Subordination by operation of law

Shareholder loans granted by shareholders holding at least 10 % of a company's share capital or of voting rights, or loans granted by a member of the same economic interest group are treated as subordinated debt in case of insolvency.

1.7 Validity of a forfeiture agreement

In general, an agreement for the forfeiture of the security interest (i.e. the secured creditor may keep the collateral in lieu of the secured liability) is not legally valid and therefore not binding.

However, with respect to movable assets, taking the asset in settlement of the claim is allowed, provided that the debtor and its third party creditors agree and such consent is granted after the event of default which triggered the enforcement has occurred.

1.8 Super-priority loans in bankruptcy

Creditors granting loans to a debtor during the observation period (*perioada de observaţie*) or in the course of insolvency proceedings enjoy a super-priority right, which may lead to an automatic reduction of the recovery rate of a secured creditor.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

Amending the interest rate or maturity date of a loan does not automatically necessitate amending or retaking the security. If, however, the maximum secured amount is affected by such changes (e.g. to take into account a larger additional secured amount as a result of an increase in the interest rate), then the security documents must be amended to reflect this. Personal guarantors must consent to such changes in order for the personal security to cover any such changes.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, a title instrument and an act of perfection (i.e. an act of publicity) are required.

Title instruments include:

- agreement creating a movable mortgage over assets, agreement creating a movable mortgage over bank accounts, agreement creating a movable mortgage over receivables, agreement creating a movable mortgage over shares and agreement creating an immovable mortgage;

- surety (*fideiusiune*) agreement and corporate guarantee agreement.

Registration formalities must be observed for the perfection of mortgages. No formalities are necessary for sureties and corporate guarantees where perfection occurs upon signing of the respective security agreement.

2.2 Ranking of pledges/mortgage

The rank of a movable mortgage depends upon the date when the movable mortgage is recorded in the public register.

The rank of a real estate mortgage depends on the exact time when the application for registration of the mortgage is submitted to the Land Register (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

Creditors can agree to modify the ranking. The new ranking must be registered with the relevant registry.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Movable mortgage	Registration with the National Register of Publicity over Movable Assets (the "National Register")
BANK ACCOUNT	Movable mortgage	Registration with the National Register, notification of account bank with bank account control granted by account bank to creditor
RECEIVABLES	Movable mortgage or assignment	Registration with the National Register and third-party notification of the debtors; movable mortgages over rent receivables and insurance proceeds under insurances related to immovable assets should also be registered with the Land Register
SHARES	Movable mortgage	Registration with the National Register and registration with the Shareholders' Register and notification of company (if not party to the agreement)
REAL ESTATE	Immovable mortgage	Registration with the Land Register (*Cartea Funciară*)

2.5 Availability of floating charge

A mortgage over a universality of assets may be taken. However, because the nature and content of the universality must be described as accurately as possible, and any asset exiting the universality is transferred free of any encumbrances, usually such a mortgage contains also a provision regarding the creation of security over distinct categories of assets (e.g. inventory, machinery, equipment, etc.).

2.6 Trust and parallel debt issues

The concept of "fiducia" is rather similar to the concept of a common law trust. It also allows for movable mortgages to be held by an agent on behalf of creditors but does not apply to immovable mortgages.

Therefore, it is still questionable whether this creates the required ownership necessary to create a valid and enforceable security interest.

This is typically resolved by a "parallel debt structure" whereby the parties to the facility agreement agree that the security agent shall be the joint and several creditor of each and every obligation of the borrower towards each finance party (other than the security agent).

In addition to "joint and several creditorship", active solidarity between lenders is also possible as long as the security agent is also a lender (irrespective of the amount of its commitment), as well as agency agreements (*contract de mandat*) concluded among the lenders whereby the lenders appoint the security agent to act on their behalf.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
CORPORATE GUARANTEE	Yes	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes, if contractually agreed but not widely used in practice
ACCOUNT PLEDGE	Yes	Yes, if contractually agreed but not widely used in practice
RECEIVABLES PLEDGE	Yes	Yes, if contractually agreed but not widely used in practice
SHARE PLEDGE	Yes	Yes, if contractually agreed but not widely used in practice
REAL ESTATE MORTGAGE	Yes	No

2.8 Security and loan transfers

In case of the transfer of a loan, accessory security generally follows the loan and is automatically available to the new lender (except for real estate mortgages where certain formalities must be observed).

In case of novation, the novation documentation must state expressly that the security is maintained in favour of the new creditor. The transfer of immovable mortgages must be notarised (*formă autentică*) which means that parties must be mindful of the transfer formalities and the costs entailed.

Non-accessory security, such as personal or autonomous guarantees, is not automatically transferred to the new lender and would typically need to be re-issued or confirmed.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

Two types of insolvency proceedings may be initiated:

- Bankruptcy proceedings (*faliment*), which generally lead to the liquidation of the assets forming the bankruptcy estate;
- Judicial reorganisation (*reorganisare judiciară*), which aims primarily at avoiding bankruptcy and rescuing the debtor by restructuring the company.

The insolvency procedure may take the form of a general procedure (where the debtor may enter into judicial reorganisation or bankruptcy following the observation period) or a simplified procedure (where the debtor enters into bankruptcy directly or following a maximum 20-day observation period).

Insolvency proceedings may be initiated by the competent court upon the application by the debtor facing illiquidity (voluntary insolvency) or by one or more of the creditors (involuntary insolvency).

3.2 Applicable insolvency test and directors' duty to file

One single insolvency test applies, i.e. the cash flow test: a company does not have sufficient financial resources to pay its due and payable debts (illiquidity).

Insolvency may be either: (i) actual (*prezumată*), in which case the debtor is obliged to apply for the opening of insolvency proceedings; or (ii) imminent (*iminentă*), in which case the application by the debtor is optional.

The director of a company is obliged to convene a general shareholders' meeting and notify the competent court within 30 days of the date of actual insolvency. In case of non-compliance, the director risks criminal liability.

3.3 Describe insolvency proceedings

3.3.1 Insolvency proceedings

The opening of insolvency proceedings becomes effective on the date on which the Syndic Judge has ruled upon it. The decision is published in the online Insolvency Gazette.

As of this date:

- all judiciary and extra judiciary claims and procedures for the recovery of debts are stayed and the statute of limitation applicable to these actions is suspended;
- the debtor enters into the "observation period" (*perioada de observație*);
- the debtor may be divested of the power to administrate its business;
- no interest, penalty or increase of any kind which occurred before the opening of the insolvency proceedings may be added to the existing debts (except with regard to the claims of the secured creditors);
- all documents issued by the debtor, the receiver or the liquidator must bear the information that the company is "in insolvency" or, as case may be, "in bankruptcy" in Romanian, French and English.

Upon the opening of bankruptcy proceedings, any obligation of the debtor that is not then due is automatically accelerated and assumed to be due. Judicial reorganisation prevents such acceleration in the interest of preserving the debtor's business.

Liquidation proceeds obtained from the realisation of encumbered assets are distributed in the following order of priority:

- taxes, stamp duties and any other costs related to the realisation of those assets, including administration costs in relation thereto;
- receivables of those creditors whose claims arose after the opening of the insolvency proceedings and in relation to which the law recognises a priority rank (if any), for debts which arose after the commencement of the insolvency proceedings; and
- receivables of the secured creditors having a security interest over the relevant asset which were duly established prior to the commencement of the insolvency proceedings.

Liquidation proceeds obtained from the realisation of assets which are free of encumbrances are distributed in the following order of priority:

- taxes, stamp duties and any other costs related to the bankruptcy proceedings;
- creditors enjoying a super-priority for financing granted to ensure the funds necessary for the continuation of the debtor's ordinary activities;
- receivables arising out of employment relationships;
- receivables arising out of the activity carried out by the debtor after the opening of insolvency proceedings;
- budgetary claims;

- third party receivables representing alimony obligations or other similar periodical payments;
- receivables arising out of loan agreements granted by credit institutions, as well as any receivables arising out of services agreements, supply agreements, or other agreements and leases concluded prior to the opening of bankruptcy proceedings, including bonds;
- other unsecured claims;
- subordinated debt.

If, at any stage of the bankruptcy proceeding, it is discovered that the assets are insufficient to cover all administrative expenses, the Syndic Judge will issue a decision of termination of the bankruptcy proceedings and order the deletion of the debtor from the trade registry.

3.3.2 Reorganisation process

Within 40 days of being appointed, the receiver must propose either the implementation of a reorganisation plan or, if reorganisation is not possible, the opening of bankruptcy proceedings. The proposal is subject to the approval of the creditors' meeting. If creditors holding at least 20 % of the claims propose a reorganisation plan, then it will be construed as a veto against a proposal of the receiver for the opening of bankruptcy proceedings.

A reorganisation plan shall pass if approved by: (i) creditors holding at least 30 % of the total claims registered with the table of claims; and (ii) creditors holding the majority claims in value in each class of creditors (secured, unsecured, employees, budgetary and essential suppliers).

The court may confirm a reorganisation plan which has not been approved by all creditor classes, provided that: (i) the majority of the classes of creditors voted in favour of the plan or, in the event there are only two classes, the class with a higher value of claims has voted in favour of the plan; (ii) at least one of the classes that are adversely affected by the plan accepts the plan; and (iii) dissenting creditors will be subject to fair and just treatment.

The confirmed reorganisation plan creates binding obligations on the debtor. It can be amended at any time during the reorganisation period. However, its duration may not exceed a maximum period of four years as of the initial confirmation date.

In case of the failure of the reorganisation plan, any agreed haircut will be reversed (i.e. each creditor will be entitled to claim and receive the value of its claim as registered with the table of claims prior to the confirmation of the reorganisation plan).

3.4 Timing and costs of insolvency proceedings

The length of time of the insolvency proceedings will depend on several different factors (e.g. the extent of the assets and liabilities of the obligor, the number of creditors, whether the receiver/liquidator challenges any transactions of the obligor in court, etc.).

3.5 Challenge of preferential transactions and suspect periods

The receiver/liquidator may challenge certain types of fraudulent acts or transactions, as follows:

- gratuitous transfers (save for sponsorships with humanitarian purposes) performed within a period of two years prior to the opening of the insolvency proceedings;
- any commercial transaction not completed at arm's length concluded within a period of six months prior to the opening of the insolvency proceedings;

- deeds concluded by the insolvent company with the intent of concealing assets from its creditors or otherwise diminishing their rights and involving collusion with the counterparty (hardening period of two years);

- transfers of asset ownership to a creditor for the payment of a debt or for the benefit of such creditor, if the amount which the relevant creditor could have obtained in a potential bankruptcy scenario is less than the value of the transfer (hardening period of six months);

- establishment of a preference right for an unsecured debt (hardening period of six months);

- certain prepayments of debts which would have otherwise become due after the date on which the insolvency proceedings were opened (hardening period of six months);

- transfers of assets or assumptions of debt for the purpose of concealing or delaying the state of insolvency or prejudicing the interests of creditors (hardening period of two years); and

- transactions concluded with certain persons who had a legal relationship with the debtor (e.g. member of the board or director, shareholder, member of the supervisory board or spouse or next of kin (up to fourth degree) of such persons) if such transactions result in defrauding other creditors (hardening period of two years).

The right to challenge the above transactions is subject to a statute of limitation which cannot exceed 16 months from the date on which the insolvency proceedings are opened.

3.6 Impact of insolvency proceedings on security and enforcement

The opening of insolvency proceedings stays: (i) all judiciary and extra-judiciary claims and procedures for the recovery of debts; and (ii) the statute of limitation applicable to these actions. The actions taken by a secured creditor against the co-debtors or third-party security providers shall not be affected by the insolvency of the debtor.

The security held by a creditor entitles it to register its claim as a secured creditor. Further, a secured creditor may ask the Syndic Judge to approve enforcement of certain assets outside of the insolvency proceedings if certain requirements are met.

Any proceeds arising from a forced sale in an enforcement procedure started prior to the commencement of the insolvency proceedings which have not yet been collected by the creditor will be credited to the insolvency account (less the enforcement costs and the fees of the enforcement officer). These amounts are either transferred to the secured creditor within 30 days or are retained and used in the insolvency proceedings. In the latter case, the respective creditor receives protection of its rights in the insolvency proceedings or, if such protection is not possible, priority in ranking.

A security interest created over the debtor's bank accounts entitles the secured creditor to request the receiver to transfer the credit balance of such account to its bank account within five days from the date of the request.

3.7 Secured creditors in insolvency proceedings

The law recognises a super-priority right to creditor(s) granting loans to the debtor during the observation period or in the course of insolvency proceedings ("preferred lender(s)"). This may lead to an automatic reduction of the recovery rate of other secured creditors. Such loans are to be secured by assets which, unless agreed otherwise with the existing secured creditors, are not subject to any encumbrance. If the existing secured creditors do not agree to the assets being encumbered in favour of the preferred lender(s), the proceeds to be distributed in the course of the insolvency proceedings to the existing secured creditors shall be diminished pro rata.

Secured creditors, i.e. those with an established mortgage, lien, pledge or any other security interest over certain assets of the debtor, have priority in the settlement of claims with respect to their respective collateral, after deducting the costs related to the sale of those assets and satisfaction of the claims of any preferred creditor(s) (if any).

3.8 Survival of powers of attorney

A power of attorney is automatically cancelled upon commencement of bankruptcy proceedings.

This may affect the secured creditor's ability to affect a transfer of the collateral to a potential purchaser in a private enforcement.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

If a debtor is not willing to, or is no longer in a position to perform its obligations the creditor may enforce its claim.

In order to enforce against a debtor, the claim of the creditor must be due and payable, certain and liquid. Further, the creditor will have to produce a legally valid enforcement title in relation to the right sought to be enforced as well as a court order approving the initiation of enforcement proceedings.

In case of real estate assets, no out-of-court proceedings are available. Enforcement proceedings involve the following steps:

- the court approves the commencement of enforcement proceedings (*încuviinţarea executării silite*);
- the bailiff issues a summons which is registered with the Land Registry;
- if the debtor does not pay the debt within 15 days of the receipt of the summons, the bailiff proceeds with the sale of the mortgaged assets via: (i) an amiable sale; (ii) a direct sale; or (iii) an auction sale.

In relation to the enforcement of movable assets, the creditor may choose to:

- sell the mortgaged asset;
- appropriate the mortgaged asset in settlement of the claim; or
- take possession of the mortgaged asset for administration purposes.

Alternatively, an enforcement officer appointed by the creditor will take an inventory of the assets subject to enforcement and seize them (*a sechestra*). The seizure of the assets is published in the National Register and the Trade Registry.

If within 15 days from the date of the seizure the debtor does not repay the due amounts, the secured creditor is entitled to: (i) proceed with an amiable sale of the mortgaged assets; or (ii) to sell the mortgaged assets directly to a third party or via public auction.

In relation to enforcement proceedings over shares issued by a Romanian company, the enforcement officer prepares a tender book (*caiet de sarcini*) which shall include all documents necessary for potential bidders to evaluate the value of the shares. Further legal provisions may apply if the shares are listed.

4.2 Timing and costs of enforcement proceedings

There is no fixed deadline within which the entire enforcement procedure must be finalised. Based on experience, the process normally takes between 6 to 18 months.

The fees of the enforcement officer differ, and various arrangements may be reached, i.e. either fixed fees or a percentage of the claim. However, for claims of an amount higher than RON 400,000 (approximately EUR 90,000) the minimum fee set by law is RON 5,500 (approximately EUR 1,223) plus a percentage up 0.5 % of the amount exceeding RON 400,000 of the claim which is subject to enforcement.

The creditor must advance the enforcement costs.

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SERBIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In general, a negative pledge undertaking is legally valid and binding, except with regard to real estate. Although it is not, in any case, effective towards third parties acting in good faith.

1.2 Restrictions on accelerating a loan

There are no explicit restrictions on a lender's ability to accelerate a loan upon the occurrence of any event of default agreed in the credit documentation, but the loan may not be accelerated due to non-fulfilment of an insignificant part of the obligation.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment is legally valid and binding between the contracting parties but is not effective towards third parties acting in good faith.

1.4 Common methods for loan transfers

There are several methods that can be used for transfer of loans under Serbian law. In practice, a loan is usually transferred to a third party by way of an assignment agreement.

In general, all claims (regardless of nature or maturity) may be assigned to a third party without limitation, and only the borrower must be notified about such transfer.

A transfer of agreements includes a transfer of the entire contractual position, i.e. all claims, receivables, rights, interests, obligations and undertakings under the agreement. Consent of the debtor is required.

However, bank loans cannot be assigned save to another bank (note that this prohibition does not apply to non-performing loans and cross-border loans by non-resident banks).

1.5 Effectiveness of a contractual subordination

The concept of contractual subordination is not recognized under Serbian law.

1.6 Subordination by operation of law

Serbian law recognizes only subordination of shareholders' claims towards the company. Pursuant to the commercial entities law, a company may not make payments to its shareholders if, after such payments, the company would be unable to settle its obligations towards third party creditors as they fall due.

1.7 Validity of a forfeiture agreement

With respect to mortgages, an agreement for the forfeiture of the security interest (i.e. the secured creditor may keep the collateral in lieu of the secured liability) is valid only if concluded upon maturity of the secured claim and in the form envisaged by Serbian mortgage law.

As for movable pledges, this is generally possible except when the pledgor is a natural person who has entered into the pledge agreement outside of the scope of commercial activities.

1.8 Super-priority loans in bankruptcy

In accordance with Serbian insolvency law, lenders and other creditors that provide financing to a debtor in the course of insolvency are entitled to priority payments in insolvency proceedings. However, claims arising from super-priority loans will not affect existing security, and therefore secured loans will continue to rank ahead of any new funding unless otherwise agreed on by the creditors.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

Change of interest rate and tenor of secured loans does not trigger an obligation for the creditor to retake the security. However, when the security is real estate, such change of interest rate and tenor of the loan should be registered in the Serbian cadaster. The only exception to this rule is prescribed by Serbian mortgage law which states that a change of loan interest rate results in an obligation to retake the security established on real estate when the increase of interest rate results in an overall increase of the secured amount, provided that there is more than one mortgage on the mortgaged real estate.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, a title instrument and an act of perfection (i.e. an act of publicity) are required.

2.1.1 Security instruments

Title instruments include:

- movables pledge agreement, accounts pledge agreement, receivables pledge agreement, shares pledge agreement, mortgage agreement, insurance pledge agreement, guarantee agreement; and
- surety agreement.

2.1.2 Perfection of a security interest

The act of perfection requires registration with the relevant public registry (i.e. cadaster with respect to mortgages, pledge registry with respect to movable property, shares in limited liability companies, bank accounts, receivables and central register of securities with respect to shares in joint stock companies).

In case of a guarantee or surety (both personal security interests), the act of perfection is the signing of the respective title instrument.

2.2 Ranking of pledges/mortgages

The principle of “first in time, first in right” applies, i.e. priority ranking will depend on the exact time (day, hour, minute) when the mortgage/pledge was filed for registration to the relevant cadaster/pledge registry (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

Serbian law does not explicitly provide for the possibility that the ranking of a mortgage/pledge can be changed by the agreement of creditors.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge	Registration with the Pledge Register or physical delivery of the movable to the pledgee
BANK ACCOUNT	Pledge	Registration with the Pledge Register and notification of account bank
RECEIVABLES/RIGHTS	Pledge	Registration with the Pledge Register and notification of a third part debtor
SHARES	Pledge	Registration with the Pledge Register/Central Register of Securities
REAL ESTATE	Mortgage	Registration with the respective cadastre

2.5 Availability of floating charge

Movable assets categorized by kind may also be pledged if their quantity and manner in which they can be differentiated from other assets of the same kind is specified in the pledge agreement. A portfolio of movable assets at a fixed location may also be the subject of a pledge, including inventories that consist of movable assets intended for sale or leasing, as well as raw materials and materials used in a commercial activity. In such cases, the pledge shall be extended to all movable assets that become a part of this portfolio upon the registration of the pledge, provided they are owned by the same pledgor.

2.6 Trust and parallel debt issues

In Serbia there is no structure comparable with a common law trust.

The above issue is typically solved through a so-called “joint and several creditorship” concept, which has, however, not yet been legally tested in Serbia.

In addition, in the context of pledges of movable assets and mortgages, the pledgee/mortgagee can appoint a third party to hold the security and take legal actions to protect the creditor’s interests and also to enforce the secured claims. The third party can also be entered into the Pledge Registry/cadaster as holder of the security.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	No/Yes (depending on the type of guarantee)	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes, if contractually agreed
ACCOUNT PLEDGE	Yes	N/A
RECEIVABLES PLEDGE	Yes	Yes, if contractually agreed
SHARE PLEDGE	Yes	Yes, if contractually agreed
REAL ESTATE MORTGAGE	Yes	Yes, if contractually agreed

2.8 Security and loan transfers

Accessory security will normally be transferred to the new creditor upon the assignment of the claim. It is advisable to notify the debtor subsequently about the transfer. Security cannot be transferred independently of the underlying claim.

Transfer of a mortgage will not be effective unless the new secured creditor is entered into the cadaster on the basis of a transfer agreement, which is concluded in the form of Serbian notarial deed. Pledgees may be entered in the Pledge Registry on the basis of a transfer agreement, which can be Serbian but also foreign law documents, and which does not need to be notarized.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

There are two types of insolvency proceedings:

- Bankruptcy proceedings (*Bankrotstvo*), which generally lead to the liquidation of the assets forming the bankrupt estate; and
- Restructuring proceedings (*Reorganizacija*), which primarily aim at (partially) discharging the bankrupt debtor's debts while preserving its business as a going concern.

Upon the opening of bankruptcy proceedings, any obligations of the bankrupt debtor that are not yet due are assumed to be due.

3.2 Applicable insolvency test and directors' duty to file

Serbian insolvency law provides the following grounds for bankruptcy:

- continuing inability of the debtor to settle debts, i.e. the debtor has been in payment default for at least 45 days or has ceased to make payments for a period of at least 30 days (inability to pay);
- a company's due and payable obligations exceed the value of the company's assets (over indebtedness); and/or
- failure to fulfil an adopted restructuring plan.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Upon receipt of an application to initiate insolvency proceedings, the court initiates so-called "preliminary insolvency proceedings" (*prethodni stečajni postupak*), which are aimed at determining the grounds for opening the insolvency proceedings.

Subsequently, the competent court appoints an insolvency administrator and convokes a creditors' hearing. The court's ruling on the initiation of the insolvency proceedings must be delivered to the bankruptcy debtor itself, to whomever filed the request for opening of the bankruptcy proceedings, the National Bank of Serbia (as the institutions that handles forced collection) and to the commercial registry agency. Also, a special notification must be published in the Official Gazette of the Republic of Serbia and both court's physical and electronic bulletin board.

As a general rule, in case restructuring proceedings have not been initiated and no restructuring plan has been adopted, the bankrupt debtor's assets are liquidated by way of selling these assets to the highest bidder. Liquidation proceeds are distributed to the company's creditors in accordance with the rules set out in insolvency law.

Serbian insolvency law sets out the following order of settlement of the bankruptcy creditors:

- costs of insolvency proceedings and the obligations of the insolvency estate;
- the unpaid net wages of employees as well as the unpaid social and pension contributions;
- claims based on any public revenues that fell due in the three months preceding the institution of insolvency proceedings;
- claims of other unsecured creditors; and
- claims of related parties (pursuant to the definition of a related party in Article 125 of the Serbian insolvency law).

A person who has the right to request segregation of a certain asset from the bankrupt estate (e.g. a lessor repossessing a leased asset) is not treated as a bankruptcy creditor; such asset is not included in the bankruptcy estate.

3.3.2 Restructuring proceedings

Restructuring may be proposed simultaneously with filing the application to initiate insolvency proceedings but, in general, cannot be proposed later than 90 days following the initiation of those proceedings. The bankrupt debtor remains under the insolvency administrator's supervision. Insolvency proceedings may be re-initiated if the bankrupt debtor is in breach of the obligations set forth in the restructuring plan and/or insolvency law.

In the context of bankruptcy proceedings, it is the insolvency administrator, either secured or unsecured creditors and the shareholders owning at least 30 % of the stake in the bankruptcy debtor that are entitled to propose a restructuring plan.

Restructuring proceedings are opened if and when the creditors adopt a restructuring plan submitted by the bankrupt debtor.

The restructuring plan is passed with a simple majority (in value) of the votes of each class of creditors and requires subsequent court approval.

The approved restructuring plan creates binding and enforceable obligations for the bankrupt debtor.

Possible measures for implementation of a restructuring plan include debt to equity swaps as well as cancellations of the existing shares or issuance of new shares.

When approved by the creditors, the restructuring plan becomes a new agreement for the settlement of claims specified therein. However, the bankrupt debtor remains under the supervision of the named licensed independent expert and insolvency proceedings may be reinitiated if the bankrupt debtor is in breach of the obligations set forth in the restructuring plan and/or insolvency law.

3.4 Timing and costs of insolvency proceedings

Unofficial statistics in Serbia differentiate between the duration of insolvency proceedings initiated under the previous law, which is around three years and ones that were initiated under the law of 2009 (as amended), duration of which is roughly 1 year and 7 months.

3.5 Challenge of preferential transactions and suspect periods

The insolvency administrator has the right to challenge preferential legal acts or transactions in the event:

- the bankrupt debtor granted certain creditors a preference (new security or settlement of claims), and such creditors knew or should have known of this intention (suspect period of six months);
- of an act that causes direct damage to the bankrupt debtor's creditors (suspect period of six months);
- of the provision of a security for, or settlement of, an obligation to which the creditor was not entitled, or was entitled but not in the way and at the time such security was provided or claim settled (suspect period of one year);
- an insolvent debtor has granted a loan to a related party (suspect period one year);
- an insolvent debtor has intentionally put certain creditors at a disadvantage compared to its other creditors, and such other creditors knew of this intention (suspect period of five years).

Providing security by the insolvent debtor to a related party has no legal effect in the insolvency proceedings in the period of one year before the opening of insolvency proceeding, or when the insolvent debtor was permanently insolvent.

3.6 Impact of insolvency proceedings on security and enforcement

A validly established *in rem* security interest gives the secured creditor a preferential claim regarding the respective collateral. The collateral is separated from the insolvency proceedings.

If these creditors' claims are not settled in full by the sale of assets subject to security, they may claim the unsettled part as unsecured bankruptcy creditors.

Any security (consensual or liens arising at law) on the assets of the bankrupt debtor obtained within 60 days prior to the opening of insolvency proceedings will not give the creditors the position of secured creditor. On the basis of the decision of the insolvency judge, the competent body will delete such rights from the respective public records.

3.7 Secured creditors in insolvency proceedings

A validly established in rem security interest gives the secured creditor a preferential claim with regard to the respective collateral.

The secured creditor will have the preferential right to be satisfied from the proceeds of the sale of the collateral before any other creditors in accordance with the preference order set out in the Serbian insolvency law.

3.8 Survival of powers of attorney

Powers of attorney (relating to the company's assets that form the bankruptcy estate) granted by a company's representative becomes ineffective as of the date of the opening of the insolvency proceedings.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

Out-of-court enforcement is standard market practice as regards pledges of ownership interests in limited liability companies, movables, mortgages and IP rights.

However, for various reasons a secured creditor may have to pursue judicial enforcement with regard to its collateral in accordance with the law on enforcement and security (*Zakon o izvršenju i obezbeđenju*) which requires completion of the following steps:

- obtaining a directly enforceable title for enforcement;
- filing a motion for enforcement (*predlog za izvršenje*) with a competent court and obtaining a court's decision on enforcement;
- making an annotation of the court's decision on enforcement in the relevant cadaster (applicable to mortgages only);
- obtaining appraisal of a real property/movables;
- conducting sale of the real property/movables (by public auction or directly negotiated sale, which is applicable in certain cases only); and
- disbursing proceeds in settlement of all creditors' claims.

A title for enforcement (*izvršna isprava*) may be:

- a final, conclusive and binding: (i) court decision; (ii) court settlement; or (iii) arbitral award;
- a final, conclusive and binding decision adopted in administrative or misdemeanour proceedings;
- a directly enforceable mortgage agreement concluded in accordance with the law on mortgage, and/or pledge/mortgage deed; or
- an extract from the Pledge Registry.

4.2 Timing and costs of enforcement proceedings

It is very difficult to assess the length of judicial enforcement proceedings. The Enforcement and Security Law generally stipulates that the procedure of enforcement is to be treated as urgent. However, in practice the enforcement proceedings often take longer, and its duration depends on a number of issues, such as the object of enforcement, the court's caseload, and any objections raised by the bankrupt debtor.

In practice, the enforcement proceedings in Serbia may take between three months and several years.

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SLOVAK REPUBLIC

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

A negative pledge undertaking is legally valid and binding only between the parties. Loan agreements customarily contain negative undertakings that the borrower, for example, cannot grant another pledge without the bank's consent.

1.2 Restrictions on accelerating a loan

Slovak law does not restrict the ability of the parties to a facility agreement to agree on any event of default.

1.3 Effectiveness of a non-assignment clause

Non-assignment clauses are legally valid. An assignment made in breach of such a clause is invalid (i.e. also vis-à-vis third parties).

1.4 Common methods for loan transfers

Under Slovak law, a creditor may assign its receivable to another person by means of a written contract even without the debtor's consent (assignment of the receivable). Assumption of debt can also be executed by means of a written contract, however, it is subject to the creditor's approval. Transfer of a contract as whole is not a recognized concept under Slovak law.

1.5 Effectiveness of a contractual subordination

Contractual subordination of claims is effective and explicitly regulated in Slovak law.

1.6 Subordination by operation of law

In bankruptcy proceedings, in addition to contractual subordination, certain claims of creditors related to the bankrupt debtor are treated as subordinated by operation of law.

1.7 Validity of a forfeiture agreement

A forfeiture agreement (i.e. the secured creditor may keep the collateral in lieu of the secured liability) concluded prior to maturity of the secured liability is invalid.

1.8 Super-priority loans in bankruptcy

Unsecured loans granted to a debtor based on a restructuring plan are treated as super-priority claims in the event the restructured debtor falls into bankruptcy.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

In general, it is not necessary to retake the security. In case of altering the conditions within the loan agreement which expressly relate to the security agreement, such modifications must be reflected in the security agreement accordingly, unless the security agreement refers to the loan agreement as amended at any time.

2. SECURITY INTERESTS

2.1 How to establish a security interest

A title instrument and usually also an act of perfection is required to establish a valid security interest.

Title instruments include:

- movables pledge agreement, account pledge agreement, receivables pledge agreement, agreement on security assignment of rights or receivables, share pledge agreement, ownership interest pledge agreement; and
- mortgage agreement.

A separate act of perfection, i.e. registration in a specific register (e.g. Central Notarial Register of Pledges), is required in case of *in rem* rights. Perfection of a pledge over movables is also possible by a simple handover. An act of perfection is not required in case of guarantees or sureties.

2.2 Ranking of pledges/mortgages

The rank of a pledge depends on the timing of its registration or a respective agreement of the creditors. Registered pledge has a precedence over a non-registered pledge.

The rank of a real estate mortgage depends on the exact time of its registration in the Land Register (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

Creditors may agree on the rankings of their respective securities. Such an agreement becomes effective upon registration of the consensual rankings in the register. An agreement disadvantaging an enforcement right of a creditor who is not party to the agreement is invalid vis-à-vis this creditor.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge	Registration in the Central Notarial Register of Pledges or hand-over of the movables to the pledgee / appointed third party
BANK ACCOUNT	Pledge or assignment	Registration in the Central Notarial Register of Pledges or a third-party notification to the account bank
RECEIVABLES	Pledge or assignment	Registration in the Central Notarial Register of Pledges or third-party notification to debtor
SHARES / OWNERSHIP INTERESTS	Pledge	Registration with the Commercial Register (limited liability, company) / central securities depository (joint-stock corporation)
REAL ESTATE	Mortgage	Registered with the Land Register

2.5 Availability of floating charge

Slovak law does not recognize floating charges over all the assets of a company. A similar effect may be achieved by a pledge of enterprise or of the inventory.

2.6 Trust and parallel debt issues

Slovak law does not have a concept comparable to a common law trust. Legal scholars agree that a common law trust does not create the ownership over the secured claims which is required to create a valid and enforceable accessory security interest.

The above issue is typically solved by appointing the security agent as joint and several creditor of each and every obligation of the borrower towards each finance party (other than the security agent). This has not been tested in the courts.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	Yes	Yes, if contractually agreed
ACCOUNT PLEDGE	Yes	Yes, if contractually agreed
RECEIVABLES PLEDGE	Yes	Yes, if contractually agreed
SHARE / OWNERSHIP INTEREST PLEDGE	Yes	Yes, if contractually agreed
REAL ESTATE MORTGAGE	Yes	Yes, if contractually agreed

2.8 Security and loan transfers

Security is transferred by operation of law upon assignment of the loan. However, if a secured party is changed, it is customary to retake the security.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

Slovak law stipulates two kinds of insolvency proceedings for companies:

- Bankruptcy proceedings (*konkurzné konanie*), generally leading to the liquidation of the company's assets; and
- Restructuring proceedings (*reštrukturalizačné konanie*), the primary aim of which is to reorganise an insolvent company, approve a plan of modifying (cutting) and repaying the debtor's debts and ensure the debtor's existence as a going concern.

3.2 Applicable insolvency test and directors' duty to file

Two separate insolvency tests (each of which triggers insolvency) for a company are applied under Slovak law:

- Balance sheet test: a company which is obliged to maintain books for accounting purposes has more than one creditor and its due obligations exceed the value of its assets ("over-indebtedness")
- Cash flow test: a company has defaulted for more than 30 days in payment of at least two monetary obligations to at least two creditors ("inability to pay")

An over-indebted company and each director of such a company are obliged to file for bankruptcy proceedings within 30 days. A director faces criminal liability and financial liability in case of non-compliance.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Bankruptcy proceedings are initiated by filing an application with the competent court. The application may be filed by the debtor, its creditor or an appointed liquidator.

Bankruptcy proceedings have two phases: examination phase and actual bankruptcy proceedings.

3.3.1.1 The examination phase

The examination phase starts on the date of the publication of the court's decision in the Commercial Gazette.

As a result:

- the debtor is restricted, and its actions are limited to ordinary legal acts;
- enforcement, execution and security enforcement proceedings cannot commence, and on-going proceedings are stayed;
- winding-up proceedings are stayed; and
- the debtor cannot merge, amalgamate or split-up.

If the bankruptcy application was filed by the debtor, the court will either declare the debtor's bankruptcy or, if it is unclear whether the available assets will suffice to cover the costs of the bankruptcy proceedings, appoint a preliminary bankruptcy trustee.

If the bankruptcy application was filed by a creditor, the court will forward the application to the debtor with a request to prove its solvency. If the debtor fails to do so, the court will either declare the debtor's bankruptcy or, if it is unclear whether the available assets will suffice to cover the costs of the bankruptcy proceedings, appoint a preliminary bankruptcy trustee. If the available assets do not suffice to cover the costs of the bankruptcy proceedings, the proceedings are stopped.

3.3.1.2 The actual bankruptcy proceedings

The actual bankruptcy proceedings are commenced, and the debtor is officially declared bankrupt on the day of publication of the court's decision in the Commercial Gazette. The court appoints a bankruptcy trustee and requests the creditors to lodge their claims. The bankruptcy trustee assumes control of the debtor's business and assets.

Restructuring proceedings cannot be initiated or continue during the bankruptcy proceedings.

The debtor's assets are liquidated, i.e. sold to the highest bidder. Liquidation proceeds are distributed per the principles set out in the Bankruptcy Code. In general, secured claims are satisfied from the separate bankruptcy estate, standard claims are satisfied from the common bankruptcy estate and subordinated claims are satisfied from the remaining proceeds from the common bankruptcy estate. Slovak bankruptcy law does not recognize a priority claim as such, and only certain claims against the bankruptcy estate listed in the Insolvency Act (e.g. fixed fee of the bankruptcy trustee and reimbursement of his/her expenses, taxes, customs duties, health and social insurance contributions) have priority.

3.3.2 Restructuring proceedings

Restructuring proceedings are initiated by filing an application with the competent court. The application may be filed by the debtor or its creditor (with the debtor's consent) and must be accompanied by a restructuring evaluation report, prepared by an appointed restructuring trustee, recommending restructuring of the debtor.

Restructuring proceedings have two phases: examination phase and actual restructuring proceedings.

3.3.2.1 The examination phase

The examination phase starts on the date of the publication of the court's decision in the Commercial Gazette.

Commencement of the restructuring proceedings has the following effects:

- debtor can perform only ordinary legal actions – other actions are subject to the restructuring trustee's approval;
- enforcement, execution and security enforcement proceedings cannot commence, and on-going proceedings are stayed;
- the second contractual party cannot withdraw from the contract on grounds of the debtor's delay in performance or commencement of its insolvency proceedings;
- set offs cannot be effected; and
- the debtor cannot merge, amalgamate or split-up.

The aim of the restructuring proceedings is to reorganize an over indebted entity and ensure its subsequent existence as a financially sound entity by way of the debtor and the creditors agreeing on a restructuring plan.

Preconditions for restructuring proceedings are:

- the debtor conducts a business activity;
- the debtor is insolvent or at risk of becoming insolvent;
- at least two years have passed since the last restructuring of the debtor or its legal predecessor;
- the accounting books of the debtor provide true and credible image of the financial situation of the debtor;
- it is possible to preserve a substantial part of the enterprise; and
- it is possible to satisfy the claims of the creditors to an extent greater than under bankruptcy proceedings.

3.3.2.2 The actual restructuring proceedings

The actual restructuring proceedings are commenced on the day of publication of the court's decision in the Commercial Gazette. The court appoints a restructuring trustee and requests the creditors to lodge their claims. After the period for lodging the claims, a creditor's meeting is held and the creditors' committee is elected. The creditors' committee represents the interests of all creditors.

Restructuring proceedings prevent the commencement or continuation of the bankruptcy proceedings. Further, stayed enforcement and execution proceedings are terminated. Court and arbitration proceedings are stayed.

The restructuring plan is prepared by: (i) the debtor (if the restructuring proceedings were initiated by the debtor); or (ii) the restructuring trustee (if the restructuring proceedings were initiated by the creditors). In the restructuring plan, the creditors are divided into groups and the amount and time frame for the satisfaction of the creditors per group is proposed.

The restructuring plan must be approved by:

- the creditors' committee – the restructuring plan may be passed for the creditors' approval only after it has been approved by the creditors' committee;
- all creditors – the restructuring plan must be approved by each group of creditors and simultaneously by the majority of votes of all creditors calculated by the amount of their respective lodged claims; and
- the court.

Restructuring proceedings are terminated upon the court's approval of the restructuring plan. The debtor will be released from its novated debts upon fulfilment of the restructuring plan (cram-down).

3.4 Timing and costs of insolvency proceedings

The duration of bankruptcy proceedings depends on several different factors (e.g. the amount of the debtor's assets and liabilities, number of creditors, whether an application for restructuring proceedings is filed, whether the bankruptcy trustee challenges any transactions of the debtor in court). In our experience more complex bankruptcy proceedings may take even several years.

Restructuring proceedings take up to nine months. The timing of the stages of the restructuring proceedings is set out in the Insolvency Act.

3.5 Challenge of preferential transactions and suspect periods

The bankruptcy trustee and the creditor of a receivable with the trustee has the right to challenge preferential legal acts or transactions of the debtor in court. Creditors have this right only in case the bankruptcy trustee does not exercise his/her right in due time after receiving a motion from the creditor. Successfully challenged transactions are ineffective vis-à-vis the creditors.

The following preferential transactions are recognized:

- transfer of assets was affected without due consideration (general suspect period of one year, and in case of counterparties related to the debtor, three years);
- debtor has intentionally put certain creditors at a disadvantage compared to the other creditors (general suspect period of one year, and in case of counterparties related to the debtor, three years); and
- the debtor intentionally entered into a transaction curtailing its creditors and the other party knew or should have known of the debtor's intention (suspect period of five years).

In addition, in case the bankruptcy proceedings were cancelled and reinitiated within six months, the debtor's non-ordinary legal acts performed after the cancellation of the bankruptcy proceedings may be challenged.

3.6 Impact of insolvency proceedings on security and enforcement

Upon the declaration of bankruptcy by the competent court, all the debtor's obligations which are not yet due are accelerated and assumed to be due, thus permitting liquidation of the assets.

Enforcement and execution proceedings are barred/cancelled.

In general, new security cannot be created over the debtor's assets. Existing security may be enforced only as set out in the Insolvency Act. Assets constituting the collateral form a separate bankruptcy estate.

Upon the commencement of restructuring, enforcement and execution proceedings are barred or cancelled. New security cannot be created over the debtor's assets and, in general, enforcement of security is barred/stayed.

3.7 Secured creditors in insolvency proceedings

A validly established *in rem* security interest gives the secured creditor a preferential claim with regard to the respective collateral.

3.8 Survival of powers of attorney

Powers of attorney and similar authorizations granted by the debtor cease to be valid upon the opening of bankruptcy proceedings.

This may affect the secured creditor's ability to carry out a transfer of the collateral to a potential purchaser in a private enforcement since the bankruptcy trustee will have assumed control over the debtor's assets.

Authorizations are not affected by the opening of restructuring proceedings.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

A creditor holding a collateral (pledge) may decide to enforce the pledge either: (i) pursuant to the provisions of the Enforcement Act, (ii) by auction, or (iii) in any other way agreed in the pledge agreement (e.g. private tendering procedure or direct sale).

If the creditor has to enforce its collateral in accordance with the Enforcement Act, the following is required:

- obtaining of a title for enforcement (e.g. a court ruling on non-payment by the borrower);
- filing of a motion for enforcement with the enforcement court; and
- enforcement through public auction, enforcement through payroll deduction, assignment of the debtor's receivables towards third parties, sale of movable or immovable assets, security bills or enterprise.

A title for enforcement may be in particular:

- a final, conclusive and binding judgment of a Slovak court;
- a foreign enforcement title enforceable in Slovakia (e.g. under Brussels 1a);
- enforceable arbitral award including a settlement sanctioned by the arbitration court; or
- a notary deed on acknowledgement of a debt and consent to direct enforceability.

4.2 Timing and costs of enforcement proceedings

With regard to judicial enforcement proceedings, in our experience the enforcement procedure takes between six months to one year (starting with the filing of the enforcement application and ending with the distribution of the monies realized to the creditor).

There is a fixed fee EUR 16.50 for filing a motion for enforcement. In the event the enforcement is unsuccessful (e.g. the debtor has no assets), the creditor has to cover the costs of the court executor related to administration of the enforcement.

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SLOVENIA

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

In general, a negative pledge undertaking is legally valid and binding between the contracting parties. It will be effective in respect to third parties if the negative pledge is registered with the Central Securities Clearing Corporation for securities (*delnice*), with the Court Register for business shares (*poslovni deleži*) and with the Land Register for real estate and, in our opinion, also if the third party was aware of the contractual agreement of the negative pledge.

1.2 Restrictions on accelerating a loan

In general, Slovenian law does not restrict the ability of parties to a facility agreement to agree on any event of default.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment with regard to monetary claims has relative effect if concluded between two business entities, i.e. such contractual prohibition is effective only between the parties to the facility agreement, and any assignment by a lender to a third party is valid. Nevertheless, the debtor may still fulfil its obligation to either the lender or to a third party (i.e. the assignee).

1.4 Common methods for loan transfers

There are no special provisions governing transfers of loans. Under general rules of civil law, loans can be transferred by way of:

- an assignment of claim; or
- a transfer of contract.

The selected technique of the transfer depends on:

- the status of the loan (e.g. agreement terminated/accelerated, still in force); and
- contractual provisions of the loan.

ASSIGNMENT OF A CLAIM	TRANSFER OF CONTRACT
Only rights (claims) of the creditor are transferred and obligations remain with the original creditor.	Full contractual position of the creditor (rights and obligations) is transferred to the transferee.
Debtor's consent is not required.	Debtor's consent is required.
Used when: ▪ loans are already accelerated, or ▪ no remaining obligations of the creditor exist.	Used when: ▪ loans have not been accelerated, or ▪ remaining obligations of the creditor exist, or ▪ where maximum mortgage is given as collateral.

Special rules apply to transfer of loans arising from consumer contracts and financial leasing agreements.

1.5 Effectiveness of a contractual subordination

Contractual subordination (i.e. an agreement between the debtor and the creditor that the claims arising from their relationship shall only be settled after settlement of other non-secured claims against the debtor) is expressly recognized by law.

1.6 Subordination by operation of law

1.6.1 Concept of equity-replacing shareholder loan

Pursuant to the Slovenian Companies Act, a shareholder loan granted to a company in financial distress is treated similarly to equity contributions in case of bankruptcy proceedings or compulsory settlement proceedings (equity-replacing shareholder loan).

The provisions on equity-replacing shareholder loans refer to direct shareholders in limited liability companies and direct shareholders in joint stock companies whose voting rights exceed 25 %.

Any repayment of an equity-replacing shareholder loan is prohibited in insolvency.

Similar rules apply to security interests provided by a shareholder to its company's creditors while such company is in financial distress.

If an equity-replacing shareholder loan was repaid within one year before the filing of an application for insolvency, the relevant shareholder has to pay back to the company the amount received.

1.7 Validity of a forfeiture agreement

An agreement for the forfeiture of the security interest (i.e. the secured creditor may keep the collateral in lieu of the secured liability) over financial security (i.e. financial instruments or loans) is legally valid and binding only if agreed in accordance with the Slovenian Act on Financial Collateral.

In respect to other types of security interests (e.g. mortgage over real property, pledge of movables), a forfeiture agreement may only be validly entered into after the secured liability becomes due and payable.

TYPE OF SECURITY	VALIDITY OF A FORFEITURE AGREEMENT
MORTGAGE OVER REAL ESTATE	Full contractual position of the creditor (rights and obligations) is transferred to the transferee
NON-POSSESSORY PLEDGE OF MOVABLES	Debtor's consent is required.
POSSESSORY PLEDGE OF MOVABLES	Used when: ▪ loans have not been accelerated; ▪ remaining obligations of the creditor exist; or ▪ where maximum mortgage is given as collateral
PLEDGE OF DEMATERIALIZED SECURITIES	Allowed by law
PLEDGE OF BUSINESS SHARES IN A LIMITED LIABILITY COMPANY	Written form required/assumed in case of commercial contracts
PLEDGE OF CLAIMS (E.G. RECEIVABLES)	Allowed by law/assumed in case of commercial contracts

1.8 Super-priority loans in bankruptcy

Slovenian law recognizes super-priority of claims of creditors who are willing to finance the insolvent debtor in the course of formal insolvency proceedings (provided that such loan is obtained in compliance with statutory requirements).

1.9 Varying interest rate and tenor of the loan – must security be retaken?

In general, retaking of security is not necessary in case a variable interest rate is agreed upon or if the tenor of the loan is changed. However, market practice is that such security is retaken. In the case of mortgages or non-possessory pledges over movables, reductions of interest rates (in case of fixed interest rates, or in case of alleviating amendments of variable interest rates) may be registered with the respective registries.

2. SECURITY INTERESTS

2.1 How to establish a security interest

To establish a valid security interest, a title instrument and an act of perfection (i.e. an act of publicity) is required.

Title instruments include:

- movable pledge agreement, account pledge agreement/account security assignment, receivables pledge/security assignment agreement, share pledge agreement and mortgage agreement, inventory pledge agreement; and
- guarantee agreement and surety agreement.

In case of a guarantee or surety (both personal security interests), the act of perfection falls together with the signing or handover of the respective title instrument.

In case of *in rem* rights, a separate act of perfection is required.

2.2 Ranking of securing pledges/mortgages

The rank of a pledge depends upon when the respective act of perfection is made.

The rank of a real estate mortgage depends on the exact time when the application for registration of the mortgage is received by the Land Register (subject to actual registration).

2.3 Can ranking of consensual security be changed by agreement of the creditors?

In our view, ranking of consensual security may be changed by the agreement of the creditors affected by such change. In any case, no change may have adverse effect against any third creditors.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Non-possessory pledge	Notarial deed and registration with the public register
BANK ACCOUNT	Pledge or security assignment	Notification to debtor
RECEIVABLES	Pledge or security assignment	Notification to debtor
SHARES	Pledge	In case of a limited liability company: registration in the court register / in case of a joint stock company: registration with Central Securities Clearing Corporation
REAL ESTATE	Mortgage	Registration with the Land Register

2.5 Availability of floating charge

Slovenian law does not recognize the concept of a floating charge over all assets of a company.

However, with regard to inventory pledges, pledged inventories may be exchanged during the validity of the pledge. Furthermore, one may also pledge its future receivables arising out of the specified contract or transaction.

2.6 Trust and parallel debt issues

There is no structure comparable with a common law trust in Slovenia, and the consensus in the legal community is that a common law trust does not create ownership with regard to the secured claims, which is required to create a valid and enforceable accessory security interest.

The above issue is typically solved through a parallel debt structure, whereby the parties to the facility agreement agree that the security agent shall be the joint and several creditor (*solidarni upnik*) of each and every obligation of the borrower towards each finance party (other than the security agent).

The above concept has not yet been tested in the Slovenian courts, but there are good legal arguments that such a parallel debt concept, if properly implemented, will be upheld in front of the Slovenian courts.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	Yes/No	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE	Yes	Yes
ACCOUNT PLEDGE	Yes	Yes, if contractually agreed
RECEIVABLES PLEDGE	Yes	Yes, if contractually agreed
SECURITIES PLEDGE	Yes	Yes, if contractually agreed
SHARE PLEDGE	Yes	Yes, if contractually agreed
REAL ESTATE MORTGAGE	Yes	No

2.8 Security and loan transfers

Collaterals are accessory rights and are therefore generally transferred by law to the assignee together with the transferred claim. An exception is the maximum mortgage, which is in principle non-transferable, but may be, in accordance with legal theory, transferred if the entire contractual position is transferred. Otherwise, a new maximum mortgage should be established by the mortgagor in favour of the new creditor (whereby in case there are any mortgages registered in favour of other creditors, the new maximum mortgage will have the last rank).

Additional documents and actions are required to perfect the transfer of some types of collateral:

SECURITY INTEREST	FORM REQUIREMENTS	PERFECTION REQUIREMENTS
GUARANTEE	N/A	Notification of the guarantor
SURETY	N/A	Notification of the surety
NON-POSSESSORY MOVABLES PLEDGE	Assignor's signature must be notarized	Registration with the Pledge Register
POSSESSORY MOVABLES PLEDGE	Assignor's signature must be notarized (to ensure enforceability of the pledge)	N/A
ACCOUNT PLEDGE / ACCOUNT SECURITY ASSIGMENT	N/A	Notification of the debtor bank
RECEIVABLES PLEDGE / RECEIVABLES SECURITY ASSIGNMENT	N/A	Notification of the debtor
SHARE PLEDGE – LIMITED LIABILITY COMPANY	Notarial deed	Registration with the Court Registry
SECURITIES PLEDGE – JOINT STOCK COMPANY	Written; additional requirements (usually personal identification) may be imposed by the pledge agent (brokerage company, bank etc.)	Registration with the Central Securities Clearinghouse Corporation
REAL ESTATE MORTGAGE	Assignor's signature must be notarized	Registration with the Land Registry

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

There are two main types of insolvency proceedings:

- Bankruptcy proceedings (*stečaj*), which generally lead to the liquidation of the assets forming the bankruptcy estate;
- Compulsory settlement (*prisilna poravnava*), which primarily aims at eliminating a certain percentage of the debtor's debts while preserving its business as a going concern, by postponing maturity and reducing the amount of outstanding claims.

3.2 Applicable insolvency test and directors' duty to file

Detailed rules are provided for determining a company's insolvency. However, in practice the following two tests (each of them triggers insolvency) are typically applied:

- Balance sheet test: (i) company's due and payable obligations exceed the value of the company's assets (over-indebtedness); or (ii) the loss of the current financial year together with the loss(es) carried forward exceeds 50% of the registered share capital and such loss cannot be covered with profits and reserves.
- Cash flow test: (i) due and payable claims in excess of 20% of the accounts payable as stated in the last audited financial statements against a company have been overdue for at least two months (inability to pay); or (ii) if the funds in accounts are insufficient for executing the enforcement order or realising the enforcement draft, and such situation continues without interruption for a period of 60 days or with interruptions for more than 60 days of the most recent 90-day period, and such situation continues on the

date prior to filing the petition for the initiation of bankruptcy proceeding or if the company does not have at least one bank account open with payment services providers in Slovenia and if it has not settled its liabilities under the enforcement order within 60 days of the date when the enforcement order becomes final.

Within one month after a company has become insolvent, the management of the company must present a report on financial restructuring measures to the supervisory board – and if proposed, an increase in the share capital of the company – to shareholders at the shareholders' general meeting.

The management of a company is obliged to file for bankruptcy within three days after:

- the management has established in its report that the possibility of successful execution of compulsory settlement is lower than 50%;
- the general meeting has not passed a resolution on an increase of subscribed capital as proposed in the management's report; or
- the resolution for the capital increase was passed, but the shares were not subscribed and paid-up within the determined time limit (no longer than 15 days following the publication of the call).

The management must initiate compulsory settlement proceedings no later than three months after insolvency became apparent if no out-of-court settlement was possible and the management established in its report that the possibility of successful compulsory settlement is higher than 50%.

The management shall be liable to creditors and risk claims for damages, as well as criminal liability in case of noncompliance with the duty to report and the duty to initiate the respective insolvency proceedings.

3.3 Describe insolvency proceedings

3.3.1 Bankruptcy proceedings

Bankruptcy proceedings can be initiated by:

- the debtor;
- personally liable shareholder of the debtor;
- any creditor (who demonstrates the probability of his claim against the debtor who is the subject of its bankruptcy filing and the circumstances of the debtor's delay of more than two months in payment of such claim); or
- the Public Scholarship, Development, Disability and Maintenance Fund of the Republic of Slovenia (*Javni štipendijski, razvojni, invalidski in preživninski sklad Republike Slovenije*) (which demonstrates the probability of a claim of employees against the debtor who is the subject of the bankruptcy filing and the circumstances of the debtor's delay of more than two months in payment of such claim).

The competent court appoints a bankruptcy receiver (*stečajni upravitelj*), who assumes control of the debtor's business and its assets.

Typically, debtor's assets are liquidated, i.e. sold to the highest bidder. Liquidated assets are distributed to the debtor's creditors in accordance with the priority principles as laid out in the Slovenian Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (*Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju*) ("Insolvency Act").

In accordance with the Insolvency Act the following order of payment applies:

- secured claims to be satisfied out of collateral;
- claims of unsecured creditors and of secured creditors to the extent not covered by collateral.

First, the costs of the bankruptcy proceedings are paid from the bankruptcy estate. Furthermore, the Insolvency Act lists the following priority claims:

- employees' salaries and wage compensations for the last six months immediately prior to initiation of bankruptcy proceedings and compensation for unused annual leave in the current calendar year;
- compensations for accidents related to work for the debtor, and occupational diseases;
- unpaid compensations for termination of working relationship prior to initiation of bankruptcy proceedings;
- salaries and wage compensations for employees whose work is no longer necessary due to the initiation of bankruptcy proceedings for the period from the initiation of bankruptcy proceedings until the expiration of the notice period;
- compensations to employees who had their employment contract terminated by the receiver, since their work became unnecessary due to the initiation of bankruptcy proceedings or during the proceedings;
- taxes and security contributions that must be paid together with the above-mentioned salaries / compensations;
- claims of the tax authority originating in the year immediately prior to the commencement of bankruptcy proceedings;
- claims, arising out of loans, approved on the basis of the act governing rescue and restructuring aid for companies and cooperatives in difficulty, and guarantees issued for these loans; and
- all claims arising out of legal acts of the bankruptcy receiver.

3.3.2 Composition proceedings

Composition (i.e. compulsory settlement) proceedings are initiated by the competent court upon a filing by a debtor who faces insolvency, by its personally liable shareholder(s), or by its creditors having a sum of financial claims against the debtor exceeding 20% of its financial liabilities.

The opening of compulsory settlement proceeding becomes effective the day following the publication of the content of the composition edict in the Slovenian online insolvency database *http://www.ajpes.si/*.

The competent court will appoint an administrative receiver who supervises and supports the debtor; the debtor does not lose control over its business and assets, though it may need consent of the administrative receiver, insolvency court, or creditors' council for some operations.

In compulsory settlement proceedings, the debtor has the opportunity to negotiate for the discharge of its outstanding debts. The Insolvency Act does not limit the percentage of discharge.

A majority in number of the creditors, representing at least 60% in value, must agree to the financial restructuring plan. The court then issues a decision on the compulsory settlement, after which the debtor is obliged to carry out the financial restructuring measures as referred to in the financial restructuring plan. The management must periodically report on implementing financial restructuring measures and submit the report to the court.

Pursuant to the Insolvency Act, a simplified compulsory settlement is also possible, namely for private entrepreneurs and micro companies, where average number of employees does not exceed ten, net turnover

represents less than EUR 700,000 and the value of assets does not exceed EUR 350,000. The court only confirms the simplified compulsory settlement, as the list of claims is prepared by the debtor himself and agreed with the creditors.

Compulsory settlement proceedings do not affect the position of secured creditors.

The compulsory settlement procedure is intended to reorganize the company, with the aim that it can continue to exist and operate, by all means under certain changed conditions. However, if the creditors' claims are not adequately repaid despite the compulsory settlement, the court *ex officio* initiates the bankruptcy proceeding.

3.4 Timing and costs of insolvency proceedings

The duration of bankruptcy proceedings will depend on several different factors (e.g. the extent of the assets and liabilities of the debtor, the number of creditors, whether the bankruptcy receiver challenges any transactions of the debtor in court, etc.). Although there is no general rule, in our experience more complex bankruptcy proceedings may take up to several years.

3.5 Challenge of preferential transactions and suspect periods

The bankruptcy receiver and each creditor have the right to challenge legal acts or transactions which occurred within a certain period prior to filing a petition for the initiation of bankruptcy proceedings, if such legal acts or transactions:

- have decreased the value of debtor's assets, which, as a consequence, put creditors at a disadvantage; or
- have resulted in the preference of an individual creditor provided that the debtor was insolvent at the time of entering into such legal acts or transactions and the counterparty knew, or should have known, that such debtor is insolvent. Such actual or assumed knowledge is not required if the transaction was not entered into at arm's length. Moreover, knowledge is assumed (but may be rebutted) in case the act or transaction: (i) was unusual; or (ii) was entered into within three months prior to filing for bankruptcy.

The time limit for the enforcement of the claim is one year following the final notice of initiation of bankruptcy proceedings, extended to three years where a gift or transaction was undervalued.

3.6 Impact of insolvency proceedings on security and enforcement

In principle, no new enforcement proceedings can be started after the initiation of insolvency proceedings.

3.6.1 Impact of composition proceedings on enforcement

Upon the initiation of compulsory settlement, enforcement proceedings are stayed and may be continued only on the basis of an order of the insolvency court.

3.6.2 Impact of bankruptcy proceedings on enforcement

Enforcement proceedings are stayed unless the assets have already been sold.

Composition proceedings do not affect security rights and pertaining enforcement proceedings.

3.6.3 Impact of bankruptcy proceedings on security

Bankruptcy proceedings do not affect contractually established security. In respect to security obtained in the course of enforcement proceedings:

- if the creditor has registered its secured claim in the bankruptcy proceedings within three months following the initiation of bankruptcy proceedings, security stays in existence. Otherwise, the security is lost;
- if security has been obtained in the course of enforcement proceedings and the assets were already sold, the creditor does not have to register its secured claim and bankruptcy proceedings do not affect security.

3.7 Secured creditors in insolvency proceedings

A validly established *in rem* security interest gives the secured creditor a preferential claim regarding the respective collateral.

Generally, collateral will be realized in the course of the bankruptcy proceedings. Enforcement proceeds are distributed in the order of priority as laid out in the Insolvency Act.

If the collateral agreement grants the creditor the right to enforce out of court, the creditor can continue with such sale outside of the bankruptcy proceedings.

3.8 Survival of powers of attorney

Any appointment as a legal representative or as an agent granted by a company will automatically cease to be valid upon the opening of bankruptcy proceedings over its assets.

This may affect the secured creditor's ability to affect a transfer of the collateral to a potential purchaser in a private enforcement.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

A secured creditor may have to pursue judicial enforcement with regard to its collateral in accordance with the Slovenian Enforcement Act (*Zakon o izvršbi in zavarovanju*) which requires completion of the following steps:

- obtaining a title for enforcement (*izvršilni naslov*), e.g. ruling on non-payment by the borrower;
- filing of a motion for enforcement (*predlog za izvršbo*) with the competent Slovenian county court;
- obtaining a decision of the competent Slovenian county court that judicial enforcement is permissible (*sklep o izvršbi*);
- enforcement through public auction; and
- the proceeds of the public auction are distributed to the secured creditor to settle secured claims.

A title for enforcement may be, in particular:

- a final, conclusive and binding judgment by a Slovenian court;
- a final, conclusive and binding judgment by a court of a Member State as defined in 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 domestic arbitral award declared enforceable or a foreign arbitral award recognized pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;
- a settlement effected before a Slovenian court; or
- a directly enforceable notarial deed.

4.2 Timing and costs of enforcement proceedings

With regard to judicial enforcement proceedings, in our experience the enforcement procedure takes about one to two years (starting with the filing of the enforcement application and ending with the distribution of the monies realized to the secured creditor). This duration also depends on the court's case load and any defensive pleadings pursued by the secured creditor.

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UKRAINE

1. GENERAL ISSUES AFFECTING LENDERS

1.1 Validity of a negative pledge clause

Generally, under Ukrainian law, a negative pledge undertaking is legally valid and binding.

1.2 Restrictions on accelerating a loan

There are no statutory restrictions for the acceleration of a loan in the case of non-performance of payment obligations by the borrower. However, under currency control laws, the National Bank of Ukraine (the "NBU") is authorized to introduce temporary restrictive measures, including specific requirements for cross-border capital transfers in case of, inter alia, financial instability of the Ukrainian banking system or deterioration of Ukraine's payment balance. Such measures may include limitations on cross-border payments by Ukrainian residents including earlier performance of their obligations towards non-Ukrainian parties.

1.3 Effectiveness of a non-assignment clause

A prohibition of assignment with regard to monetary claims is effective vis-à-vis third parties. Any assignment by a lender in violation of such prohibition may be contested by the borrower. There are certain exceptions, for instance, for a transfer of receivables based on a factoring agreement to a bank or financial institution qualified to render factoring transactions, and for the assignment of monetary claims by an insolvent bank to an appointed accepting bank.

1.4 Common methods for loan transfers

There is no special statutory act governing loan transfers except for a procedure for loan transfers by an insolvent bank set forth by the deposit guarantee system laws.

Based on Ukrainian general civil law, the claims under a loan can be transferred by virtue of: (i) sale or assignment of right to claims (receivables) on the basis of an assignment agreement or sale and purchase agreement; or (ii) factoring based on a factoring agreement.

As clarified by the courts, claims under a bank loan can be transferred only to a bank or another financial institution.

1.5 Effectiveness of a contractual subordination

A contractual subordination agreed to in a standard intercreditor agreement may not be recognized in insolvency proceedings or in a voluntary winding-up to the extent that it alters the priority of claims established by Ukrainian statutory law.

1.6 Subordination by operation of law

Ukrainian banking law provides for the ranking of subordinated creditors of a bank below all other bank creditors. Also, statutory subordination applies to registered encumbrances over the same collateral. Otherwise, the concept of subordination by operation of law (including shareholders' loans) is unknown under Ukrainian law.

The restructuring plan of a debtor, in the course of financial restructuring or pre-insolvency procedures, may provide for different categories of creditors, as well as establish different terms for satisfaction of claims of creditors of the respective category.

1.7 Validity of a forfeiture agreement

An agreement for the forfeiture of the security interest, i.e. whereby the secured creditor may appropriate the collateral over movable or immovable assets in case of non-performance of secured claims upon their maturity, is legally valid and binding.

1.8 Super-priority loans in bankruptcy

As a matter of Ukrainian insolvency law, loans received for making a redundancy payment to dismissed employees of the insolvent debtor are treated as extra-priority claims. Also, the secured claims of an insolvent debtor are referred to extra-priority claims. Otherwise, Ukrainian insolvency law does not provide for super-priority ranking of loans.

1.9 Varying interest rate and tenor of the loan – must security be retaken?

In general, Ukrainian law does not require security created over assets to be retaken in cases of a varying interest rate or loan tenor. This, however, may depend on the wording of the underlying security documents and description of the secured obligation provided therein. Also, depending on the wording of the security documents and their perfection, the interest rate and/or tenor fluctuation may need to be reflected in the relevant state registers.

In case of suretyship agreements, increases of the interest rate and extension of loan maturity are likely to be treated as an extension of the liability of the surety provider and as such it will require the surety provider's consent. In the absence of such consent, the surety provider will be liable within the original terms.

2. SECURITY INTERESTS

2.1 How to establish a security interest

Depending on the type of collateral, the following may be required to establish a valid security interest: (i) a security instrument; (ii) an act of perfection (publicity requirement); and/or (iii) other actions or documents.

2.1.1 Security instruments

Security instruments should contain all essential conditions required by Ukrainian law (which includes, among others, the details of the security provider and security holder, the amount and term of secured obligation and description of collateral). A security instrument for the security over immovable properties, transport vehicles or receivables under a notarized agreement should be notarized. Notarial certification is also required for the agreement on creation of security trust over immovable properties.

2.1.2 Perfection of a security interest

Perfection of a security interest over assets located in Ukraine is carried out by registration with: (i) the State Register of Encumbrances over Movable Assets (the "Encumbrances Register") for the pledge or security trust over movable assets; and (ii) the State Register of Property Rights over Immovable Properties (the "Immovable Properties Register") for the mortgage or security trust over real estate.

Registration of the security and security trust over immovable properties is also required for their validity.

2.1.3 Other requirements

Depending on the type of collateral, other requirements may come into play, such as for instance: (i) a written notification of a debtor under the contract for the pledge of receivables thereunder; (ii) handing over certain types

of securities to a secured party for the creation of security over the rights arising from such securities; or (iii) blocking securities at the securities account maintained by the relevant depository institution.

2.2 Ranking of pledges/mortgages

As a general rule, the ranking of security is determined by the respective act of perfection, i.e. by the order of registration with the Encumbrances Register or Immovable Properties Register. This general rule is subject to certain exceptions. For instance, the seller of goods sold on credit ranks the highest upon registration with the Encumbrances Register, irrespective of other encumbrances previously registered.

2.3 Can ranking of consensual security be changed by agreement of the creditors?

Generally, under Ukrainian law, the statutory ranking of security cannot be changed by agreement of creditors subject to the following provisions.

Pursuant to Ukrainian insolvency law rules and laws on financial restructuring, in the course of pre-insolvency, insolvency or financial restructuring procedure, the restructuring plan of the debtor may provide for a change of priority of the pledge or mortgage. However, the change of priority must be consented to by the secured party concerned.

2.4 Common *in rem* security interests

ASSET	SECURITY	PERFECTION
MOVABLES	Pledge or security trust	Registration with the Encumbrances Register (for possessory charge) physical delivery of the movables to the pledgee or labelling the pledged movables.
BANK ACCOUNT RECEIVABLES	Pledge	Notification to the account bank; and registration with the Encumbrances Register.
RECEIVABLES	Pledge or security trust	Notification to the debtor; and registration with the Encumbrances Register.
EQUITY SHARES	Pledge	Registration with the Encumbrances Register; (for registered shares) reflecting encumbrance (blocking) at the securities account maintained by the relevant depository institution
REAL ESTATE AND CONSTRUCTION IN PROGRESS, INCLUDING ANY RIGHTS THERETO	Mortgage or security trust	Registration with the Immovable Properties Register

2.5 Availability of floating charge

Ukrainian law does not recognize the floating charge concept as existing in common law jurisdictions. However, a security interest over a fluctuating pool of assets can be created under Ukrainian law.

2.6 Trust and parallel debt issues

There is no structure comparable with a common law trust in Ukraine, and therefore security should be granted directly to a finance party. Under the security trust structure introduced in 2019, a trustee can be the only party whose claims are secured by trust (fiduciary transfer of title).

The above issue is typically solved through “parallel debt” and “joint and several creditorship” structures whereby the parties to an English law governed facility agreement agree that the security agent shall be the joint and several creditor of each and every obligation of the borrower towards each finance party (other than the security agent). As a result, the security is created in the name of the security agent (i.e. a secured creditor of record) for the purposes of security perfection with public registers.

The above structures have not been tested in Ukrainian courts yet, but there is a consensus in the legal community that, if properly implemented, they will be upheld by Ukrainian courts.

2.7 Availability of private sale and its main conditions

SECURITY INTEREST	ACCESSORY	PRIVATE SALE
GUARANTEE	No	N/A
SURETY	Yes	N/A
MOVABLES PLEDGE AND SECURITY TRUST	Yes	Yes, if contractually agreed
BANK ACCOUNT RECEIVABLES PLEDGE	Yes	N/A
RECEIVABLES PLEDGE AND SECURITY TRUST	Yes	Yes, if contractually agreed
SHARE PLEDGE	Yes	Yes, if contractually agreed
REAL ESTATE MORTGAGE AND SECURITY TRUST	Yes	Yes, if contractually agreed

2.8 Security and loan transfers

The obligations of a security provider under Ukrainian law governed security document are secondary to primary obligations, i.e. the secured claims. Accordingly, if a finance party assigns its rights under the secured claims, it must also assign its rights under the security documents.

The assignment of rights under the security documents will require registration of a new finance party (as a new security holder) with the Encumbrances Register or Immovable Properties Register. The assignment under the security documents executed in a notarized form requires notarization of the relevant transfer document.

The assignment of rights under a security trust agreement may require a notarized consent from the security provider.

3. INSOLVENCY PROCEEDINGS

3.1 Types of insolvency proceedings

Ukrainian insolvency law provides for the following insolvency proceedings with respect to:

- a debtor – a legal entity: (i) asset management (*rozporyadzhennya maynom borzhnyka*); (ii) financial rehabilitation (*sanatsiya*); and (iii) liquidation (*likvidatsiyna protsedura*); and
- a debtor – an individual: (i) debt restructuring (*restructuryzatsiya borgiv*); and (ii) debt settlement (*pogashennya borgiv*).

The insolvency case involving a debtor which is a legal entity begins with an asset management procedure and, depending on its results, the debtor will be subject to either a financial rehabilitation or liquidation procedure. If the rehabilitation procedure is unsuccessful, liquidation proceedings will be opened.

Depending on the type and/or activities of a corporate debtor, its insolvency may be regulated by either special rules envisaged by insolvency law or other statutory acts. For instance, insolvency of banks is regulated by banking law and the deposit guarantee system law.

With respect to insolvency of individual debtors, the first proceedings introduced is debt restructuring. If it is unsuccessful, the debtor will be subject to debt settlement proceedings.

Given that insolvency of individual debtors has not been widely used yet (it was introduced in 2019) and it may be initiated only based on the debtor's insolvency application, the below will cover only the insolvency of debtors as legal entities.

3.2 Applicable insolvency test and directors' duty to file

Ukrainian insolvency laws have been amended recently to remove any specific criteria upon which the insolvency case may be initiated. An insolvency may be started if one or more creditors have overdue debt from the debtor. The grounds for the court to reject an insolvency application have been also reduced. However, if there is an issue of law between the creditor and debtor which is subject to resolution in action proceedings, the court will reject the application.

A corporate debtor is required to initiate its own insolvency if satisfaction of claims of one or several creditors results in the inability of the debtor to satisfy the claims of other creditors in full.

3.3 Describe insolvency proceedings

3.3.1 Insolvency proceedings

The court takes a decision on the commencement of the insolvency case at the preparatory hearing, which generally must be held within 14 days after the acceptance of the insolvency application by the court. Simultaneously with the opening of the insolvency procedure, the court takes a decision on: (i) opening the asset management proceedings and making the official announcements; (ii) introduction of a moratorium; and (iii) appointment of an insolvency (asset) manager and his/her remuneration.

Within 30 days after the announcement, the creditors whose claims to the debtor have matured before the opening of the insolvency case, are required to submit their claims to the court handling the debtor's insolvency. Claims recognized by the court are included into the register of the creditors' claims.

The asset management proceedings should be completed within 170 calendar days. If based on its results, the creditors have not (i) adopted a restructuring plan or (ii) filed an application to the court on recognizing the debtor bankrupt and opening liquidation proceedings, and provided that there are signs of insolvency, the court declares the debtor bankrupt and opens the liquidation proceedings.

In general, the liquidation of the debtor results in a seizure of all of the company's activities and collection of all its assets in order to satisfy as many creditors' claims as possible. If the bankrupt's assets are sufficient to satisfy all claims, the debtor will survive the liquidation and will be able to continue its business operations.

All distributions to creditors in the course of insolvency are made in accordance with the register of the creditors' claims in the following order:

- first priority – employees' salary, other employment-related payments, payments to creditors under insurance agreements, compensations to the State Budget resulting from the implementation of the decisions of the European Court of Human Rights against Ukraine, reimbursement of expenses for insolvency proceedings for, *inter alia,* publications, court fees, asset safekeeping, etc., expenses for conducting audit of the debtor;

- second priority – compensation of damage to life and health, state social security payments, claims of individuals - trustees (depositors) of trust companies or other entities that have attracted the property (funds) of trustees (depositors);

- third priority – taxes (duties) and related payments, claims of the state authority managing state reserve;

- fourth priority – all other unsecured claims;
- fifth priority – claims of employees to return contributions to the debtor's authorised capital; and
- sixth priority – all other claims.

3.3.2 Rehabilitation proceedings

Rehabilitation proceedings are initiated by a court ruling based on the application of the creditors' assembly. The law does not set forth any time period within which the rehabilitation must be finalized, but a restructuring plan must provide for a specific term for restoration of the debtor's solvency. Generally, rehabilitation proceedings are comprised of a system of measures intended to foster the financial rehabilitation of the debtor. The list of such measures stated in the insolvency law is not exhaustive; it includes granting loans, corporate restructuring of the debtor, its debts and assets and/or the change of debtor's legal form and its business operations.

Along with the initiation of rehabilitation proceedings, the court appoints a rehabilitation manager who takes over the authorities of the debtor's management which results in dismissal of the debtor's CEO and termination of the powers of the debtor's corporate bodies. The rehabilitation manager receives full control over the company, including over the disposal of its assets.

The rehabilitation manager is responsible for the preparation and submission to the court of a restructuring plan (outlining the measures for the restoration of the debtor's solvency) which must be approved by the creditors' assembly and the secured creditors.

The rehabilitation proceedings terminate based on the application of the creditors' assembly to the court: (i) due to the fulfilment of the restructuring plan and restoration of the debtor's solvency; or (ii) requesting recognition of the debtor as bankrupt and opening the liquidation proceedings.

3.4 Timing and costs of insolvency proceedings

The timing of insolvency proceedings depends on a variety of factors (e.g. the amount of assets and liabilities of the debtor, the number of creditors, etc.). Although there is no general rule, in our experience, more complex insolvency proceedings may take up to several years.

The cost of insolvency proceedings, *inter alia,* includes:

- a court fee for: (i) filing an insolvency application amounting to 10 subsistence wages (approx. EUR 735), plus the person filing for the insolvency (either creditor or debtor) is required to advance the remuneration of the asset manager for 3 months of work; (ii) filing an application for recognition of creditor's claim – 2 subsistence wages (approx. EUR 150);
- remuneration to the insolvency manager and reimbursement of his/her expenses incurred in the insolvency proceedings. The amount of remuneration is set forth by insolvency law and consists of a basic and supplementary portion. The basic remuneration of an asset manager and liquidator is determined based on the debtor's CEO average salary for the last 12 months but cannot be lower than 3 minimum statutory wages (approx. EUR 540) per month. The basic remuneration of a rehabilitation manager is determined by the creditors' assembly but cannot be lower than 4 minimum statutory wages (approx. EUR 700) per month. The supplementary portion is linked to the amount of the debtor's assets collected (amount to 5 % of the assets collected) and creditors' claim's discharge (3 % of such claims); and
- other amounts including, *inter alia*, expenses for the audit of the debtor, making official announcements, storage, and sale of the debtor's assets.

3.5 Challenge of preferential transactions and suspect periods

The court, at the request of an insolvency manager or any creditor, may recognize invalid agreements executed by the debtor within three years before or after the initiation of the insolvency based on the following grounds set forth by insolvency law (and provided that such agreements caused damages to the debtor or creditor(s)):

- performance by the debtor of property obligations prior to their maturity;
- assumption of liabilities by the debtor before the commencement of the insolvency procedure which resulted in its insolvency or inability to perform payment obligations towards other creditors (partially or fully);
- disposal, or acquisition, by the debtor of assets for a value lower or higher than their market value, provided that the debtor's assets were or have become insufficient for the satisfaction of all creditors' claims;
- payment to the creditor or acceptance of the assets as a consideration for the performance of debtor's claims at a time when the amount of the creditors' claims exceeded the value of the debtor's assets; and
- granting security by the debtor to secure payment obligations.

The following grounds for the recognition of the debtor's agreements as invalid do not require providing damages:

- gratuitous disposal of assets or assumption of obligations without consideration by the other party or waiver of property claims by the debtor;
- execution by the debtor of an agreement with a related party; or
- execution by the debtor of a gift agreement.

Should the court recognize the debtor's agreement as invalid based on the above grounds, the creditor is required to return the assets it received from the debtor to the liquidation estate or reimburse their value.

In the course of rehabilitation proceedings, a rehabilitation manager is allowed to withdraw from an agreement which remains not fully performed and has been executed by the debtor before the opening of insolvency, if:

- performance of the agreement causes losses to the debtor;
- it is a long-term (with over a year tenure) agreement or aimed to obtain positive results for the debtor in the long run, except in cases of production with a technological cycle exceeding the terms of debtor's rehabilitation; and
- performance of the agreement creates conditions preventing from restoration of the debtor's solvency.

3.6 Impact of insolvency proceedings on security and enforcement

The moratorium (automatic stay) introduced by the court simultaneously with the opening of insolvency generally results in suspension of all enforcement procedures opened against the debtor as well as procedures to enforce security. The law allows completion of the enforcement procedures which, as of the opening of the insolvency proceedings, reached the stage of the sale of assets or distribution of the sale proceeds.

In general, the moratorium is terminated with the termination of the insolvency procedure. However, with respect to satisfaction of secured creditors' claims, the moratorium is automatically terminated after 170 calendar days from the date of introduction of the asset management proceedings, if the court has not ruled within this time period regarding the debtor's liquidation or rehabilitation.

3.7 Secured creditors in insolvency proceedings

As a matter of Ukrainian insolvency law, the secured creditors, i.e. the creditors whose claims are secured by the debtor's assets, are in principle:

- entitled to initiate insolvency proceedings (if the value of security is insufficient to repay all secured claims, such a creditor will be considered as secured only in the part actually secured by the debtor's assets);
- allowed to waive their security, fully or partially;
- not authorized to vote at the creditors' assembly, but are allowed to participate in the creditors' representative bodies with an advisory vote;
- entitled to block such strategic decision as approval of the restructuring plan and the terms of sale of the collateral securing their claims, and
- treated as extra-priority creditors whose claims are being repaid out of the sale of collateral.

3.8 Survival of powers of attorney

The powers of attorney issued by the debtor will not automatically cease to be valid upon the opening of the insolvency case against this debtor.

The exercise of certain authorities by representative will be limited by the restrictions imposed on the debtor by the insolvency law such as e.g. prohibition to alienate or create security over debtor's immovable assets, issuance of surety or transferring the debtor's assets into management and conducting some other transactions/ actions for the debtor.

4. JUDICIAL ENFORCEMENT PROCEEDINGS

4.1 Describe judicial enforcement proceedings

The judicial enforcement of claims by a creditor, including a secured creditor, requires the completion of the following principal steps:

- obtaining the title for enforcement, e.g. a court decision on debt collection from the debtor or levying execution on the collateral;
- obtaining a writ of execution from the competent court;
- submitting the writ of execution to the State Enforcement Agency (the "enforcement authorities") or a private enforcement officer;
- conducting the enforcement procedure by the enforcement authorities or a private enforcement officer (e.g. search of the debtor's assets which can be foreclosed, foreclosure upon the collateral, etc.); and
- the distribution of enforcement proceeds, if any, to the creditor.

In general, the title for enforcement which can be enforced in Ukraine may be:

- a final, conclusive and binding judgment by a Ukrainian court followed by the relevant writ of execution;
- a notarial writ of execution; or
- a final, conclusive and binding arbitral award issued in a member state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In order to recognize and enforce a foreign arbitral award in Ukraine the claimant should file an application on recognition and enforcement of arbitral award to the Ukrainian court of general jurisdiction at the location of the debtor, i.e. a person against whom the collection under the award is sought.

If there is an agreement between the parties concerning extra-judicial enforcement on the basis of a notarial writ of execution, it is possible to apply to the State Enforcement Agency or a private enforcement officer for enforcement once the mentioned writ of execution is obtained.

4.2 Timing and costs of enforcement proceedings

The law outlines specific deadlines for the completion of the various steps within the enforcement procedure, but it does not provide any deadline for the completion of the whole procedure.

As a practical matter, the length of the procedure depends on a variety of factors from workload of enforcement authorities to the availability of debtor's assets for collection. In case the debtor has funds at its bank accounts, then the collection may be rather swift, provided that the claimant works closely with the enforcement officer involved. Private enforcement officers have proved to be more efficient, but usually they are engaged to work with the debtors with more or less good financial position or holding saleable assets.

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