K&L GATES

European Insolvency and Enforcement Country Guide

Introduction

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

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

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

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

The guide has been prepared by lawyers in each of these countries, who act regularly in enforcing secured and unsecured claims for banks, both on a domestic and a cross-border basis.

K&L Gates LLP's geographical coverage means that we and, through our network of local counsel relationships, can offer our clients banking and finance experience in structuring and documenting finance transactions as well as enforcement and restructurings in the countries covered in this guide, other key jurisdictions in Europe, the Middle East, Africa and the Far East.

The sections on the position in England, Germany and France have been prepared by K&L Gates LLP; all other sections have been prepared by a firm in our network of local counsel relationships in each relevant jurisdiction.

If you have any questions or need case specific advice, please do not hesitate to contact Andrew Petersen (Email: andrew.petersen@klgates.com; Telephone: +44 (0)20 7360 8291).

Note on legislative framework for cross-border enforcement

The central legislation which governs cross-border enforcement within the EU comprises principally: (i) the Brussels Regulation (Regulation (EU) 44/2001), for judgments given in proceedings commenced before 10 January 2015; and (ii) the Recast Brussels Regulation (Regulation (EU) 1215/2012), which applies to judgments given in proceedings commenced on or after 10 January 2015.[1] Both (referred to collectively in these notes as the "**Brussels Regulations**") have direct effect within EU member states.[2]

As between EU member states and the European Free Trade Area ("**EFTA**") member states Iceland, Switzerland and Norway (but excluding Lichtenstein), the Lugano Convention of 2007 (the "**Lugano Convention**") applies as enacted in each jurisdiction, for example by the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131) in the UK.

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

Under the Regulations, a party who has obtained judgment in another European member state applies for recognition of that judgment to a nominated central authority in each given member state of the European Union or certain of the EFTA countries (i.e. Iceland, Norway and Switzerland but not Liechtenstein, together the "**EFTA Countries**").

In recent years, in recognition of the increasingly international nature of trade and financing, various efforts have been made to introduce a framework for cross-border insolvencies. For lenders with security over real estate located in the European Union the regime which will be relevant is under Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency (recast) (the "**EU Regulation**") which came into force on 26 June 2017 and replaced Council Regulation (EC) (No 1346/2000) on insolvency proceedings (the "**EC Regulation**") which came into force on 31 May 2002.

The EC Regulation introduced an ordered regime (now governed by the EU Regulation) that applies where an insolvent company has affairs that extend into more than one member state of the EU. Insolvency in one member state is now automatically recognised, without further need for formalities or court applications, throughout the EU. The EU Regulation gives guidance and definition to the respective roles of officeholders where more than one set of insolvency proceedings has been brought against the same debtor in various member states. From a

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

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

secured creditor's perspective, it provides a mechanism for the recognition of security interests and the enforcement over, and recovery of, a debtor's assets anywhere in the EU.

Note and Disclaimer

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

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

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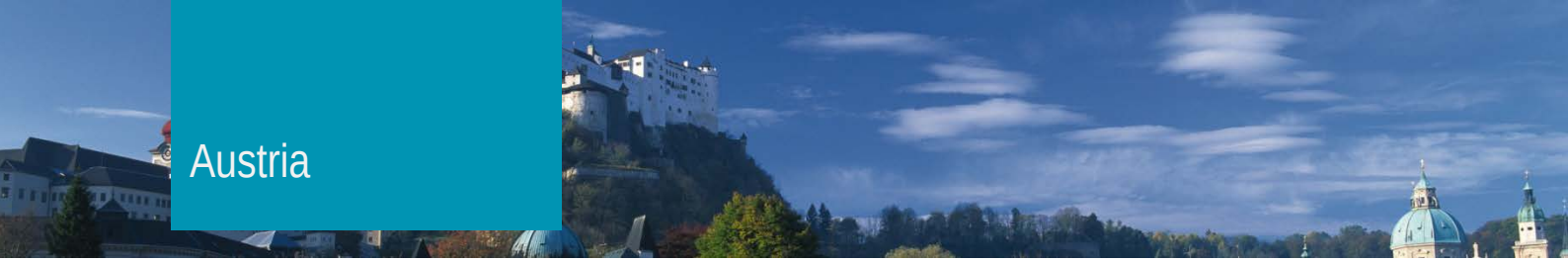


Under Austrian law, enforcement of unsettled claims usually occurs by way of court proceedings. However, there are alternative options, particularly for secured creditors who usually enjoy preference over any other creditor even in the course of usual court enforcement.

In the event of insolvency proceedings, the debtor's assets are usually subject to administration by insolvency administrators and the regular enforcement system does not apply. Therefore, the overview below only applies outside of insolvency proceedings.

Enforcement of Security

Under Austrian law, the only security right enforceable vis-à-vis third parties and which also grants priority to the secured creditor (except for actual property rights) is the *Pfandrecht* (pledge or lien). Regarding real estate property, such security is referred to as *Hypothek* (mortgage). Any other form of security, such as a guarantee, does not create a security interest over certain assets but merely reduces the creditor's default risk by enabling him to assert its claim towards an additional person or institution.

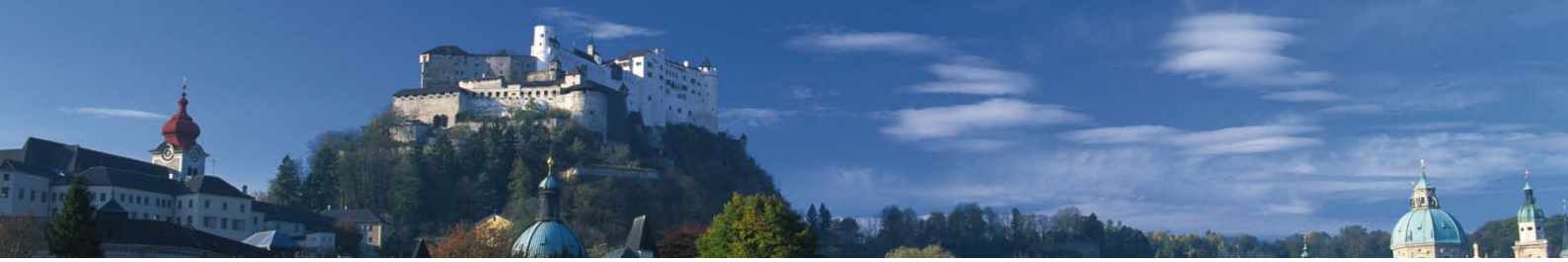
Due to Austrian law's strict publicity requirements, a pledge is only validly created with effect vis-à-vis third parties if its existence is sufficiently visible to them. Therefore, charges over real estate, moveable assets and any sort of non-physical property (claims, shares etc.) can only be established if:

- the respective mortgage is registered in the land register; or

- moveable assets are actually handed to the creditor. This also applies to bearer instruments (such as bonds). Wherever an actual handover is not possible, the law stipulates that sufficient publicity must be ensured through appropriate "signs". For example, warehouses may be pledged if signs are put up which provide information about the respective transaction. Additionally, it is required that the debtor actually transfers control over the asset to the creditor. It is thus not possible to only formally pledge moveable assets, but nevertheless let them be continuously used by the debtor without any visible alteration; or

- the respective third party is informed about the pledge regarding a debtor's claim towards said party. For example, the debtor's regular income could effectively be pledged by notifying the debtor's employer. Equally, stocks held in a custody account could serve as security if the respective bank is notified. With regards to company shares that are not certified by transferable documents (particularly shares in *GmbHs* which constitute the Austrian equivalent of PLCs), the company itself must be informed.

If a pledge has been established, the creditor is entitled to enforce the respective security as soon as the underlying claim becomes due. Such enforcement can either take place by way of court proceedings or by out-of-court realisation of the pledge.



Out-of-court enforcement

Out-of-court enforcement is only permissible where the pledge concerns a moveable physical asset. This also includes bearer instruments. If this is the case, the creditor may sell the asset in its possession in order to satisfy its claim.

The debtor must be informed about the creditor's intent to initiate out-of-court enforcement sale of the asset is permissible a month after the warning to the debtor has been issued. If the respective pledge has been made in the course of an agreement that is business-related for both parties, the said period is reduced to one week. Exceptions apply, for example where the goods in question are perishable.

When selling the pledged asset, the creditor must put it up for public auction which should be held by an appropriately licensed contractor. If the assets have an objective market value, they may be sold directly at this price. This is particularly applicable to securities such as bonds and stocks.

Out-of-court enforcement is only permissible if the respective purchasing price is paid right away. If the creditor allows a third party to take possession of the pledged asset before having received the purchasing price, the buyer's subsequent failure to pay will not be the responsibility of the debtor. Furthermore, the creditor is obliged to inform the debtor as soon as the pledged asset has been realised.

The parties to the pledge agreement are free to contractually opt out of out-of-court enforcement or agree on alternative ways of enforcement. However, the parties may not stipulate that the creditor shall gain possession over the pledged asset in the case of default (*lex commissoria*) unless the pledged asset consists of money.

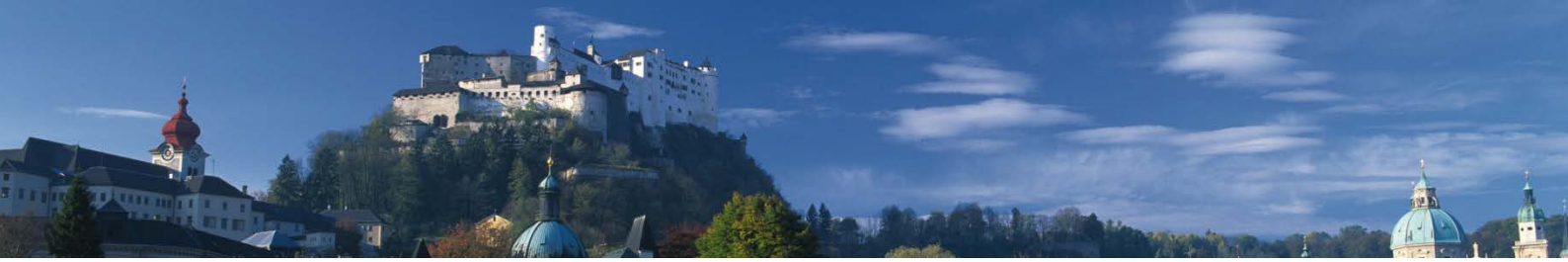
Court enforcement

In order to initiate court enforcement, the creditor must first obtain an enforceable judgment of an Austrian court. If the pledged asset is property of the debtor, an action in relation to the underlying claim must thus be brought. Alternatively, if the asset belongs to a third party, then the creditor must directly sue the owner in order to obtain permission to enforce the pledge (*Pfandrechtsklage*).

When a judgment has been obtained, the creditor may initiate enforcement proceedings which are subsequently handled by a court bailiff. The following enforcement options are available to the creditor:

Public Sale

The option of public sale by way of auction can be employed regardless of whether the assets that have been pledged are real estate or moveable assets. However, as mentioned above in



relation to out-of-court enforcement, assets which have an objective market value can be sold directly without an auction taking place. In particular, this applies to certain securities such as stocks and bonds. In such cases, it is at the discretion of the bailiff whether an auction is to be held. The secured creditor will have a preferential claim over the proceeds.

Share pledges are also enforced by way of public sale. As pointed out above, the enforcement of a share pledge cannot occur by way of appropriation of the shares. However, the creditor is free to bid in a public auction or buy the shares directly where they have an objective market value. The debtor, however, cannot participate in an auction. The same applies for the owner of the pledged asset where it does not belong to the debtor himself.

Forced Administration

Mortgages may also be enforced by way of forced administration. If the creditor chooses to file the relevant application, the court appoints a public administrator to whom the owner's right to use and administer the respective real estate property is transferred. The public administrator is to submit a bill on a yearly basis. The proceeds are then distributed after a court hearing has taken place. As long as there are no mortgagees with a higher priority, the secured creditor will have a preferential claim.

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

Enforcement of a Security Assignment of Receivables

Court enforcement of a security assignment of receivables occurs through the court ordering the debtor to refrain from disposing of the respective receivables whereas the concerned third party (e.g. the debtor's employer) is instructed not to fulfil its obligations towards the debtor. The respective court decision thus contains two separate orders (*Doppelverbot*).

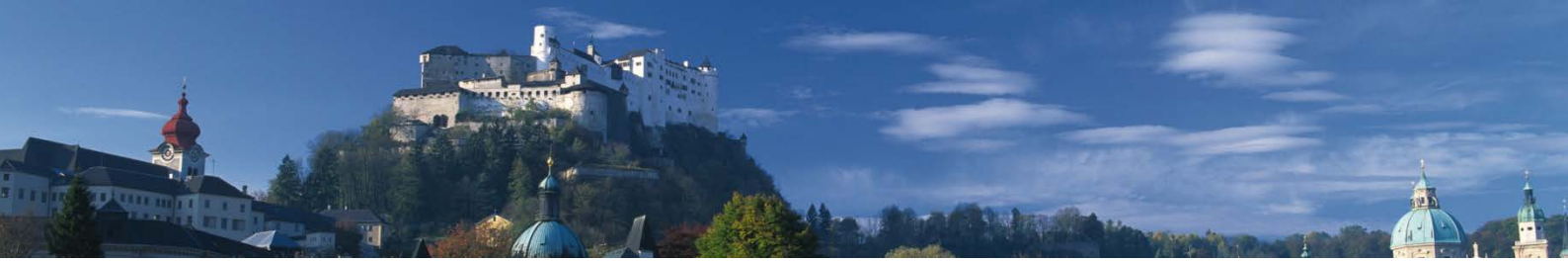
Subsequently, the creditor is entitled to collect the respective claim. He may, however, also choose alternative options of enforcement such as the public sale of the claim in question.

Enforcement of unsecured debt

Out-of-court Remedies

Depending on the specific circumstances, an unsecured creditor may have certain options that do not require immediate initiation of court proceedings:

- setting off debts against opposite debts (*Aufrechnung*);



- if the debt in question stems from an agreement that both parties have entered into in the course of their business activities, the creditor has the right to retain all objects owned by the debtor which have come into its possession due to their business relationship (*unternehmerisches Zurückbehaltungsrecht*). If the debt is not settled, the creditor may deal with these assets as if they had been pledged as securities. However, out-of-court enforcement is not permissible without first obtaining a court judgment regarding the underlying claim.

Obtaining Judgment/Execution Proceedings

An unsecured creditor can take court action to recover a debt. After obtaining an enforceable judgment he may then choose between the options of enforcement already outlined above:

- public sale of property;
- forced administration of real estate property; or
- collection of receivables.

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

Enforcement of foreign judgments

Enforcement of foreign judgments is subject to recognition in Austria of the respective decision.

The following framework applies to foreign court judgments rendered within the European Union that are to be recognised and enforced in Austria:

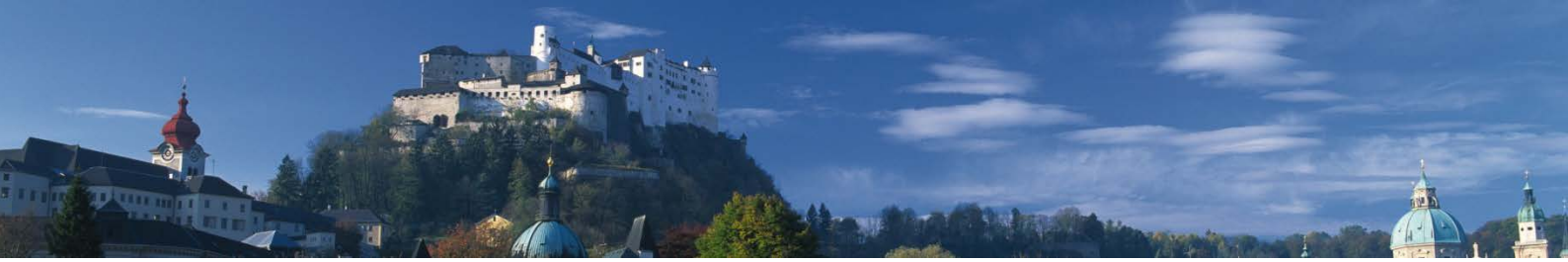
Enforcement in civil and commercial matters

Rulings that have been issued by a court of an EU member state can be enforced in all member states without substantive review of the judgment. A declaration of enforceability is not required (Brussels Regulation (EU) 1215/2012).

Enforcement of uncontested claims

For uncontested claims, the European Enforcement Order, which has to be issued by the court of origin on the party's request, provides for a similar procedure.

Upon the court-of-origin's confirmation that the court order meets the requirements as stipulated in Regulation (EU) No. 805/2004 (creating a European Enforcement Order for uncontested



claims), provision of the original of such certification as well as a copy of the respective ruling is sufficient for initiating enforcement proceedings in any other EU jurisdiction (except Denmark).

Enforcement on the basis of a European Order for Payment

The aim of the European Order for Payment is to simplify cross-border proceedings concerning undisputed claims in civil or commercial matters. Such a payment order pursuant to Regulation (EU) No. 1896/2006 creating a European order for payment procedure is recognised and enforced in all EU member states (except Denmark). A declaration of enforceability is not required. A European Payment Order can only be obtained for monetary claims.

If Austrian courts have jurisdiction, all applications for issuing a European Order of Payment must be filed with the District Court for Commercial Cases in Vienna. If the debtor does not dispute the claim within thirty days after being served with the payment order, the issuing court will declare the payment order enforceable.

Enforcement of minor claims of up to EUR 2,000.00

For claims of up to EUR 2,000 a more simplified procedure is available.

Pursuant to Regulation (EU) No. 861/2007 establishing a European Small Claims Procedure, proceedings are initiated by the filing of a standard form (in Annex A of the Regulation) to the competent court which is determined by the general criteria of competence. After being served with the standard form, the defendant has the possibility to reply within thirty days. The entire proceedings are conducted in writing. A judgment based on such standard form is recognised and enforceable in all EU member states (except Denmark) without a separate declaration of enforceability being required.

Enforcement of Security

The below overview describes certain aspects of the rights and obligations of secured and unsecured creditors under Belgian law as of 1 November 2015. On 1 January 2017 the law of 11 July 2013 on security interests over movable good will enter into force and might change some of the rules described below, amongst others, in relation to the enforcement procedures.

Security rights under Belgian law are divided into two categories:

- Real securities (*zakelijke zekerheidsrechten*) strengthen the position of a creditor by creating a security interest over the pledged or mortgaged assets (or part thereof) of the debtor, enforceable vis-à-vis third parties, and grant the secured creditor priority over unsecured creditors (or lower ranking secured creditors) in case of enforcement of the collateral.

- Personal securities (*persoonlijke zekerheidsrechten*) will not create a security interest over assets but they will contractually add a second debtor to the original debtor (similar to an English law guarantee. For the purpose of the below overview a creditor benefiting from a personal security only will be considered as an unsecured creditor.

A typical security package under Belgian law includes mortgages over real estate, pledges over receivables, bank account pledges, share pledges and business pledges (a business pledge is to a certain extend similar to the English law concept of floating charge). We assume in the below overview that all pledges relate to commercial transactions and therefore are considered commercial pledges.

Enforcement of mortgages

A mortgage is enforced by obtaining first an enforceable judgment of a Belgian court in relation to the underlying claim, and in relation to the enforcement of the mortgage. The court will appoint a bailiff and the mortgaged property will be sold by way of public auction. The secured creditor will have a preferential claim over the proceeds of the public auction, subject, as the case may be, to mortgagees with a higher priority, and/or liens that operate by way of law (e.g. to the benefit of tax or social security authorities).

Enforcement of share pledges

The enforcement of a share pledge will occur, after notification of the pledgor, by way of private sale by the pledgee or, if the parties agreed thereto in the pledge agreement, by way of appropriation of the shares, whereby the secured obligation shall be decreased with the value of the shares appropriated, calculated on the basis of a method agreed between the parties. There is no prior decision by the court required for the enforcement of a share pledge.

Enforcement of receivables pledges

After notification of a receivables pledge the underlying debtor can only validly discharge its obligation in the hands of the pledgee unless otherwise decided by the parties. The receivables pledge is thus enforced by: (i) receiving directly the amounts due under the receivables; followed by (ii) a set-off of the amounts collected against the secured debt. Pledges of bank accounts follow the same regime as receivables pledges.

Enforcement of business pledges

A business pledge (*Pand over handelsfonds / Gage sur fonds de Commerce)* is a pledge over a company's business assets and enterprise. The pledgor can continue to use the assets as is the case with a floating charge under English law. This type of security can only be granted to a bank which has been duly licensed by an EU member state. The enforcement takes place by way of public auction after approval thereto being granted by the president of the competent commercial court.

Enforcement of Unsecured Debt

Contractual/Legal Remedies

Depending on the specific debtor/creditor relationship, an unsecured creditor can take the following actions in the case of default of its contractual counterparty:

- An unpaid seller can claim a retention of title (*eigendomsvoorbehoud*) over the asset held by the debtor;
- Exception on adimpleti contractus: a creditor can suspend the execution of its obligations under a contract if the debtor fails to fulfil its obligations;
- Setting off the debt owed against monies owed by the creditor to the debtor (*schuldvergelijking*);

Obtaining Judgment/Execution Proceedings

An unsecured creditor can take court action to recover a debt. The following main enforcement options are available:

- Compulsory enforcement;
- Seizure of the debtor's goods; and/or
- Seizure of earnings or third party order.

Compulsory enforcement

In principle, a creditor is entitled to immediate execution (this is similar to specific performance in the UK). Compulsory enforcement therefore entails the debtor being forced to comply with its obligations. This requires an enforceable title (usually a judgment or a notarial deed). The title must contain an authorisation for compulsory enforcement and must accurately describe the obligations imposed on the debtor. The title must be executed by a bailiff.

If the enforcement takes place on the basis of a judgment, this judgment shall first be notified to the debtor. The notification will include an order to comply with the obligations. If the enforcement takes place on the basis of a notarial deed, notification is not required.

If the judgment is not final, execution will, unless otherwise specified by the court, be suspended until all possibilities of appeal have been exhausted.

Seizure of the debtor's goods

In cases where compulsory enforcement is not possible, or in case of a payment obligation, the creditor can seize the assets of the debtor, organise a sale of the assets by way of public auction and be paid out of the proceeds.

In principle, a creditor will execute its right of recovery by seizing the assets of the debtor by following the executory seizure procedure (*uitvoerend beslag*) provided that the claim is certain, fixed and payable and provided that the creditor is a holder of an enforceable title, a notarial deed or an administrative deed such as a tax constraint. From the moment the creditor holds an enforceable title, the right of recovery is no longer subject to judicial authorisation.

If the creditor does not hold an enforceable title he can, under certain circumstances, seek a conservatory seizure (*bewarend beslag*). Further, it may also be appropriate to seek and obtain seizure of earnings or a third party order (*derdenbeslag*). The court will then address a third party who owes money to the debtor and will order the debtor to pay the money directly to the creditor.

One peculiarity is that, unlike all other creditors who have the freedom of choice as to which goods of the debtor they wish to seize, the mortgage creditor must comply with Article 1563 of the Judicial Code which states that the mortgage creditor can only enforce on immovable assets on which he has a mortgage. He can only seize other immovable assets if the immovable assets on which he has a mortgage are insufficient.

Recognition and Enforcement of Foreign Judgments

The enforcement of a foreign judgment (by a court) requires the exequatur of the foreign judgment.

The recognition and enforcement of a judgment obtained in another country than Belgium is regulated on the basis of the Brussels Regulations.

The party claiming the exequatur needs to deposit a unilateral petition at the clerk's office of the Court of First Instance. A foreign judgment will not be recognised or be executed if:

- the consequence of the recognition or of the execution would be manifestly incompatible with public policy;
- the rights of the defence are infringed;
- the judgment is only obtained to escape the application of the law applicable according to the Belgian International Private Law in a matter in which parties cannot freely dispose of their rights;
- the judgment is still susceptible to an appeal in the State were the judgment is given;
- the judgment is incompatible with a judgment given in Belgium or with a prior foreign judgment which can be recognised in Belgium;
- the claim abroad was established after establishment in Belgium of a claim which is still pending between the same parties and with the same subject;
- the Belgian judges are exclusively competent to hear the claim; and
- the competence of the foreign judge was solely granted in the presence of the defendant or the property without direct connection with the proceedings of the State of which the judge is a member.

Enforcement of Secured Debt

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

The most common types of security under Bulgarian law include (1) mortgages; (2) non-possessory pledges; and (3) financial collateral. The type of security to be taken will depend on the available collateral and will determine the procedure and scope of the enforcement rights of the creditor. However, each of the different security instruments has the same ranking outside insolvency and within insolvency proceedings.

Mortgage

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

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

The mortgage is established by means of a written contract in the form of a notarial deed registered with the Real Estate Registry in Bulgaria. The registration of the mortgage is a condition for its validity and not only a perfection requirement. Creation of a mortgage involves payment of certain notarial and registration fees calculated as a percentage of the secured debt.

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

Under the Bulgarian Civil Procedure Code, the creditor is entitled to commence enforcement of the security under the mortgage deed by directly obtaining a court order for immediate payment together with a writ of execution. Thus, the mortgagee is not entitled to first obtain a final and effective court judgment in order to proceed with enforcement, which significantly reduces the time and costs for enforcement as compared to non-secured debt.

The court payment order with writ of execution is being issued in a formal procedure where the creditor does not have to prove its receivables, but only file a standard application form and pay

a statutory fee of 2% of the security interest. On the grounds of the writ of execution, it is entitled to commence enforcement proceedings through a bailiff.

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

Non-possessory (registered) pledge

Together with the mortgage, the most commonly used secured instruments include non-possessory (registered) pledges. Registered pledges are a type of security instrument that creates limited rights *in rem* over certain classes of assets without the need for physical delivery or control by the creditor. Assets that may be provided as security under a non-possessory registered pledge include movable assets (including unfinished goods and raw materials), accounts receivables, company shares in limited liability companies and book-entry securities. Registered pledges allow also for the creation of security interests over floating pools of movable assets, accounts receivables and securities, as well as over the entire going concern (commercial enterprise of a company).

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

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

One of the main benefits of registered pledges is that they can be enforced out-of-court, without the need of obtaining prior judgment, writ of execution or any other form of court action. The foreclosure starts with the secured creditor filing a statement with the relevant public registry with which the pledge is registered and sending a separate foreclosure notice to the pledgor. As of

the moment of filing of the foreclosure statement the secured creditor is entitled to take possession of the pledged asset and/or take measures to preserve its value. As of that moment the floating charges freeze and crystallise with respect to any assets that are considered part of the floating pool. The secured creditor may choose the sale method (as opposed to the procedure under the Bulgarian Civil Procedure Code). However, the secured creditor is required to act with the care of a "good merchant". For the purposes of the foreclosure, the secured creditor has to appoint an accountant that acts as depository for collection and distribution of the proceeds from the sale. Upon the sale of the collateral, the depository draws a list of the secured creditors and distributes the foreclosure proceeds in accordance with their priority or share of the secured claim, if they enjoy the same priority.

It should be noted that in the event of foreclosure of a registered pledge over an equity interest in an LLC (in Bulgarian: "OOD or "EOOD") the secured creditor is not entitled to sell the security interest or become its beneficial owner. The only method for satisfaction of the secured debt is either through liquidation of the wholly owned LLC, or by redemption of the equity interest by the LLC. Both of these methods can effectively result in the liquidation of the issuer and the sale of the assets. For that reason in practice this security interest is very rarely enforced and is mostly used as a negative pledge protection.

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

Financial collateral

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

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

Possessory pledges

(a) Creation of a possessory pledge requires transfer of possession of the secured asset from the pledgor to the pledgee (i.e. the secured creditor). There is no specific form of a valid pledge agreement, however for the security interest to be enforceable *vis-à-vis* any third party the pledge has to be executed in written form and dated, and has to contain details regarding the security asset and the secured liabilities. Compliance with these requirements entitles the creditor to commence enforcement on the pledged security by obtaining a court order for immediate payment with a writ of execution as described above, instead of filing a claim and obtaining final court judgment.

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

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

Enforcement of Unsecured Debt

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

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

Contractual / Legal "Self-Help" Remedies

Set-off

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

Direct debit

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

Judicial enforcement

(a) *Obtaining a court order and writ of execution without filing a claim*

Bulgarian Civil Procedure Code provides a shorter procedure for enforcement of debts that are documented by specific documents ("Qualifying Documents"). Qualifying Documents include, among others, (i) extracts from the credit statement of a licensed bank (considering the general principle of freedom to provide cross-border services, EU banks should have the same rights as local banks, but Bulgarian court practice is inconsistent on this matter); (ii) notary deed or settlement or other contract with notary certifications of the parties' signatures; (iii) contractual mortgage; (iv) promissory notes or letters of credit, etc. In case the creditor has such documents or its claim is not more than BGN 25,000 (approx. EUR 12,782) it is entitled to obtain a court order for payment together with a writ of execution, without the need to first obtain a court judgment confirming the amount due. The issuance of such writ of execution requires the payment of a statutory fee of 2% of the claimed amount.

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

(b) *Filing a claim, obtaining a final court decision and issuance of a writ of execution*

In case the unsecured creditor is not entitled to obtain a writ of execution under item (a) above, its only option to enforce payment of its receivable is by filing a claim and commencing a lawsuit against the debtor. In this case, the creditor shall pay a statutory fee of 4% of the claimed amount. Only after a final court decision is enacted is the creditor entitled to obtain a writ of execution and initiate enforcement proceedings by a state or private enforcement agent.

Recognition and Enforcement of Foreign Judgments

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

Enforcement of judgments of EU Member State countries

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

The Brussels Regulations

Upon adoption of Regulation (EU) 1215/2012 (the Recast Brussels Regulation) any judgment issued by a court of an EU member state is enforceable on the territory of Bulgaria without issuance of a writ of execution. The creditor shall present the Bulgarian enforcement agent with a certified copy of the judgment together with a certificate issued by the court of origin evidencing that it is enforceable in the country of origin. Upon commencement of enforcement, the enforcement agent shall present the debtor with the certificate and with a certified copy of the judgment (in case he has not already been served with it). The debtor has the right to challenge the enforcement before the District Court within its registered address and the court's judgment on such challenge is subject to a two-instance appeal.

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

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

Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment Procedure

It applies to due and payable and uncontested monetary receivables, regardless of their amount. Regulation 1896/2006 provides a procedure for obtaining European Order for Payment. Once issued, this Order has to be certified as enforceable by the court of origin. If this requirement is fulfilled, the Order can be enforced on the territory of Bulgaria. In such case the creditor is entitled to obtain a writ of execution issued by the respective District Court within the area of the registered address of the debtor or where the enforcement should take place, and commence enforcement proceedings under Bulgarian law.

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

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

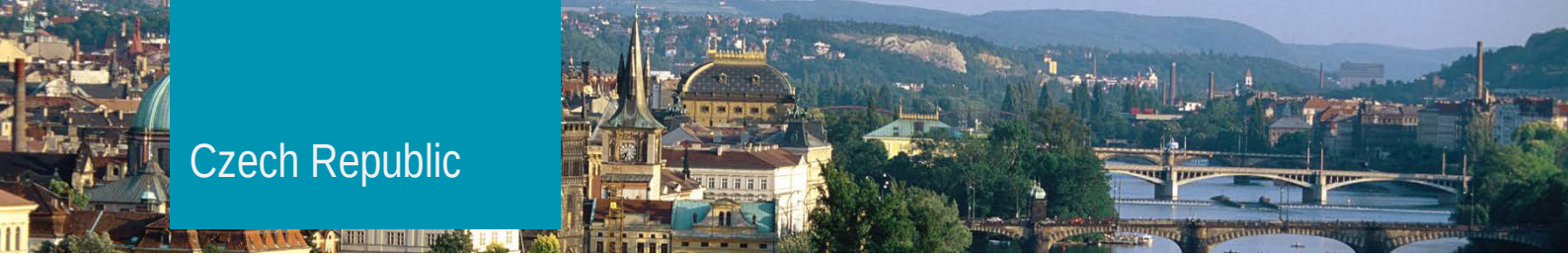
Enforcement of judgments of Third-Party countries

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

Recognition of insolvency proceedings under the EU Regulation

EU Regulation

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



Enforcement of Security

In the Czech Republic, debts are typically secured by: (i) a pledge (a negative pledge is also admitted) of ownership interest, real property, moveable assets, securities, receivables (from bank accounts, insurance agreements, lease agreements or trade receivables etc.), patents and trademarks; (ii) security assignment of receivables or moveable assets or securities; and (iii) other instruments such as guarantees or blank promissory notes.

Below we provide a general overview of enforcement of security outside of insolvency. These procedures become unavailable in the case of insolvency, where the debtor's assets become subject to administration by the insolvency administrator and where, generally speaking, the secured creditors have a preferred right of satisfaction from the sale (or other method of disposal) of assets to which they had an established security interest prior to insolvency.

Enforcement of Pledge

In general, a pledge may be enforced by way of: (i) private sale; (ii) sale in public auction; or (iii) enforcement proceedings (court enforcement or execution enforcement). In addition, there are also some specific rules depending on the type of the pledged asset.

The pledgee must notify the pledgor at least 30 days in advance of the commencement of enforcement of the pledge. If the pledge is registered in a public register, such as cadastral register or the register of pledges, the pledgee must also notify the relevant register of the commencement of enforcement.

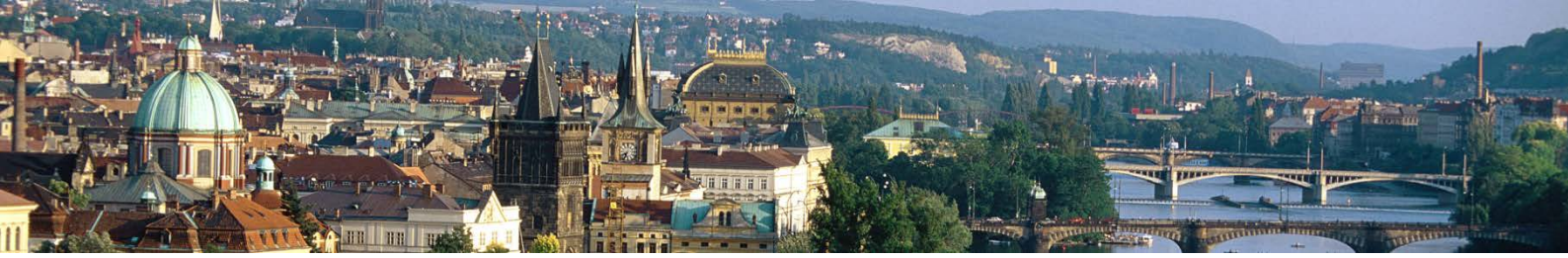
With the exception of private sale (and enforcement under the specific rules listed below) all types of enforcement require an enforcement title: (i) an enforceable decision of a court or an arbitration court; or (ii) a notarial deed by which the debtor consents that if he fails to perform the relevant debt when due, the notarial deed shall constitute an enforcement title.

The pledgee may request the court to issue an order of court sale of the pledge and then enforce it by way of (i) court enforcement; or (ii) execution enforcement as described below.

Enforcement of pledge of ownership interest

When a secured debt becomes due the pledgee is entitled to receive directly from the company all payments or performance relating to or derived from the ownership interest (such as dividends) and to use them to satisfy the secured debts.

The pledgor and the pledgee may stipulate that if the pledgee fails to sell the ownership interest the pledgee acquires the ownership interest (under ordinary commercial terms) automatically or upon request by the pledgee.



Enforcement of pledge of receivables

Unless otherwise agreed, before the secured debt becomes due, the debtor pays its debt jointly to the pledgor and the pledgee and, after the secured debt becomes due, exclusively to the pledgee. When the secured debt becomes due and the pledged receivables are not yet due the pledgee is entitled to have the receivables assigned to them. This rule also applies to profits and other monetary payments under pledged securities.

Private sale or acquisition by the pledgee

The pledge may be sold in a private sale or acquired by the pledgee, provided that it is agreed by the pledgor and the pledgee and they set rules for such procedure including a price calculation mechanism. In the absence of such an agreement the pledgor and the pledgee may agree on the private sale and price after the secured debt becomes due. The pledgee is required to act with due care with respect to both the pledgor's and the pledgee's interests.

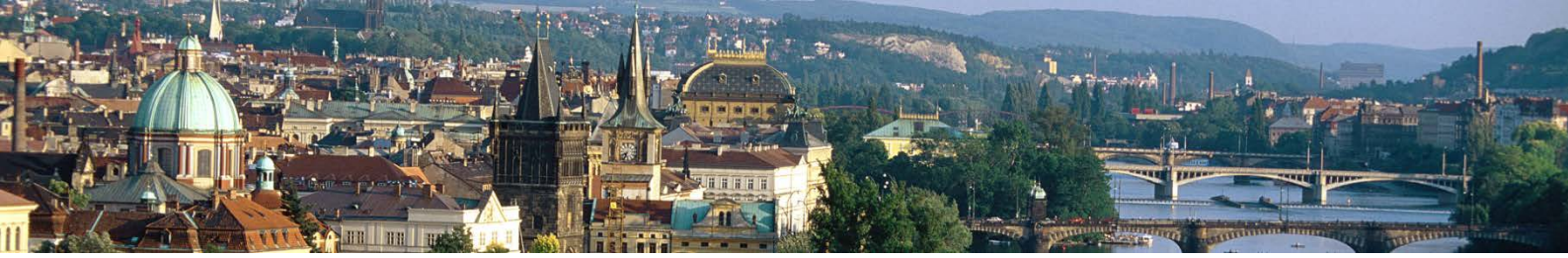
Sale in public auction

The pledgee may request the sale of the pledge in a public auction. The involuntary public auction is performed by an auctioneer under an agreement entered into between the pledgee and the auctioneer who specifies, amongst other things, the lowest acceptable bid. The auctioneer ensures valuation of the pledge. In some cases, such as with real estate, an expert opinion may be required to assist with the valuation. The auctioneer notifies the owner of the pledge, the pledgor, the debtor and creditors secured by the pledge. Following notification, all actions of the pledgor to alienate or encumber the pledge are invalid. Creditors whose claim is secured by the pledge may submit their claims at least 15 days before the public auction. The auctioneer issues auction orders at least 15 days before the public auction takes place.

During the auction, the pledge is knocked down to the highest bidder. If the highest bidder pays the price, they acquire the asset with effect from the knock down. At the transfer of the pledge the oldest security interests over the pledge submitted to the auction, along with all more recent ones, cease to exist. All debts secured by such security interests become due to the extent that they are satisfied in the public auction. Any older security interests persist and are effective toward the purchaser. The pre-emptive right to pledge ceases to exist but rights in rem are not affected by the sale in the auction. If the proceeds from the auction are not sufficient to pay all submitted claims, they are satisfied in the order set by law with secured debts having priority. If the lowest bid was not offered, the auction may be repeated. In a repeated auction the lowest bid is 70% of the lowest bid in the previous auction.

Enforcement proceedings

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



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

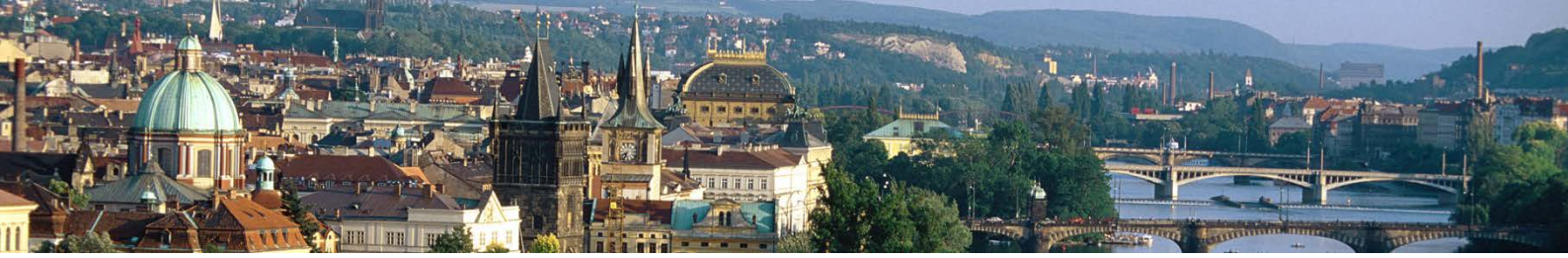
The auction takes place at least 30 days after the court issues the auction order. If the estimated price of the individual assets is higher than EUR 45,000 the court will require payment of an advance. In the auction the lowest bid equals one third of the estimated value of the asset. The court will knock down the highest bid. If the highest bidder pays the price, they acquire the asset with effect from the knock down. If there are more creditors and they cannot be satisfied in full, the proceeds are distributed as follows: (i) the cost of the enforcement; (ii) the creditor which had retention rights over the asset; and (iii) the rest of the creditors are paid according to the order in which they applied for an enforcement order or in which they joined the enforcement proceedings. For the order of secured debtors, the day of creation of the security is decisive. By transfer of the property all pledges, retention rights and other rights encumbering the asset cease to exist. The auction may also be conducted electronically using the Internet.

There are some specific additional rules in the case of court enforcement by sale of real estate. Rights such as leases, emphyteutic leases (in Czech: *pacht*), and rights in rem which are not registered in the cadastral register and which are not listed in the auction order or submitted to the court cease to exist after the knock down. If there is a pre-emptive right or option to buy back, they can be performed only in auction and cease to exist by the knock down. The lowest bid is two thirds of the estimated value of the real estate. Within 15 days from publication of the decision on knock down, anyone can offer to buy the real estate for a price at least 25% higher than the highest bid. The court asks the highest bidder to inform them within three days if they wish to increase the offer price. If the lowest bid was not offered during the auction, the court will order a new auction upon request of the pledgee or another person who joined the enforcement proceedings. The lowest bid in (i) the second auction equals 50%; (ii) the third auction equals 40%; (iii) the fourth auction 30%; and (iv) the fifth auction 25%; of the estimated price.

In execution enforcement the pledge may be enforced by sale of pledged movables or real estate. The enforcement is performed upon request by the pledgee who must designate an executor to perform the enforcement. The executor will ask the competent court for authorisation to perform the enforcement. The execution enforcement is otherwise substantially similar to the court enforcement described above.

Enforcement of Unsecured Debt

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



Recognition and Enforcement of Foreign Judgments

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

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

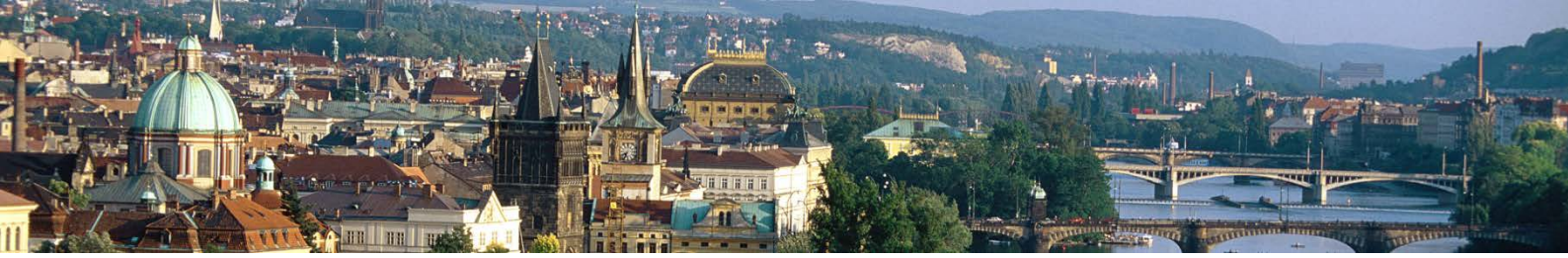
Under the Brussels Regulations a decision of a court of an EU member state can be enforced in other EU member state, without declaration of enforceability or substantive examination of the decision.

Enforcement of uncontested claims

A simplified procedure is available for uncontested claims under Council Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims. If a judgment is certified as a European Enforcement Order in the EU member state of origin, it shall be recognised and enforced in the other EU member states without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Enforcement on the basis of a European Order for Payment

A simplified procedure is available for uncontested monetary claims under Regulation No. 1896/2006 creating a European order for payment procedure. At least one of the parties must be domiciled or habitually resident in an EU member state other than the EU member state of the court seized. The applicant completes an application for a European Order for Payment using a standard form which is annexed to the Regulation. If the requirements are met, the competent court issues an order for payment. If the defendant fails to lodge a statement of opposition within 30 days from the delivery, the court declares the order for payment enforceable. The order for payment is then recognised and enforced in other EU member states (with the exception of Denmark) without the need for a declaration of enforceability and without any possibility of opposing its recognition.



Enforcement of minor claims up to EUR 2,000

A simplified procedure is available for minor claims in civil and commercial matters with the value of the claim up to EUR 2,000 (under Council Regulation (EC) No. 861/2007). At least one of the parties must be domiciled or habitually resident in an EU member state other than the EU member state of the respective court. The claimant initiates the procedure by filling a standard form which is annexed to the Regulation with the competent court. Unless it is necessary to hold an oral hearing or a party requests it, the procedure is conducted as a written procedure. The court sends the filling together with a standard answer form to the defendant within 14 days and the defendant may reply within 30 days from delivery. The decision is enforceable notwithstanding any possible appeal in another EU member state without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Enforcement of Security

English law allows security holders to realise their security both within and outside formal insolvency processes of the borrower entity. The most common methods of enforcing security under English law are: (i) the appointment of a receiver over specific asset(s) (frequently property) of the borrower company; (ii) sale of a charged property as mortgagee in possession; and (iii) the appointment of an administrator over the borrower company and all of its assets.

(a) *Appointment of Receiver*

Receivership is a contractual remedy for the enforcement of security and court approval is not required. The relevant security document will detail the circumstances in which the security holder can appoint a receiver and the extent of the receiver's powers. Receivers appointed over property also have a series of statutory powers set out in the Law of Property Act 1925 although these are quite limited. A receiver's main function is to take control of the secured assets, to sell the assets and to apply the proceeds of sale towards discharging the debt owed to the security holder.

There are two different types of receiver:

- a fixed charge receiver; and
- an administrative receiver.

If a loan is charged on a specific asset, a fixed charge receiver will be appointed in respect of that specific asset alone. A fixed charge receiver is typically appointed under a legal mortgage in relation to a particular property.

However, where a debenture creates charges over the entire business and assets of a company, an administrative receiver may be appointed over that company's entire business. In these circumstances an administrative receiver will, in addition to performing its duties as receiver, also act as a manager of the business for the duration of the receivership. Security holders are now barred from appointing administrative receivers under debentures created after 15 September 2003. As a result, the procedure is used infrequently and has largely been superseded by administration as the preferred method of enforcement.

(b) *Mortgagee in Possession*

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

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

(c) ***Administration***

A chargeholder that has the benefit of a qualifying floating charge (one that either states it is a qualifying floating charge and/or secures all or substantially all of a company's assets) may appoint an administrator over the company. The appointment can be made in court or out of court using a streamlined procedure that involves completing prescribed forms, filing them in court and serving them on specified parties (the company and the proposed administrator). The company or the directors of the company may also appoint an administrator, but are obliged to give notice to a holder of a qualifying floating charge if they intend to do so.

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

(i) rescuing the company as a going concern;

(ii) achieving a better result for creditors than would likely have been achieved if the company went straight into liquidation; or

(iii) realising property in order to make a distribution to secured or preferential creditors.

The administrator is an officer of the court with duties to all creditors and not just to the chargeholder that appointed him. He may sell assets subject to a floating charge (but has to account for the proceeds of sale to the chargeholder) but requires court permission or consent from the chargeholder to deal with fixed charge assets.

After appointment, the administrator may choose to continue to trade the business (although any costs he incurs in doing so will have priority over all creditors save for fixed chargeholders) with a view to creating value for creditors or arrange for immediate disposal on appointment (a "pre-pack" administration). A pre-pack is a pre-arranged sale by a company in administration of its business or assets (or both) that completes either immediately upon the appointment of the administrators or shortly after the administrators are appointed. Pre-packs can result in a quick and relatively smooth transfer of a business, potentially preserving goodwill and jobs. Crucially, they avoid the need for an administrator to secure funding for the purpose of trading the business prior to a sale. An administrator who enters into a pre-pack is subject to various statutory and professional obligations that seek to make him and the process transparent and accountable to creditors.

The most important benefit of administration is that during the course of administration there is a moratorium on legal action and any form of enforcement against the company.

Recognition of insolvency proceedings under the EU Regulation

The scope of the EU Regulation is limited to certain types of insolvency procedures and insolvency practitioners. These are set out in Annexes A and B respectively to the EU Regulation. Out of the procedures referred to in this country guide, only administration is a recognised procedure in relation to an English debtor. The appointment of a receiver (be it an administrative, LPA, or other fixed charge receiver) is not recognised as either a main or secondary proceeding and, therefore, does not trigger the provisions of the EU Regulation.

Enforcement of Unsecured Debt

Contractual/Legal "Self-Help" Remedies

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

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

Obtaining Judgment/Execution Proceedings

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

- **Seizure and Sale of Goods.** The judgment can be sent to the Sheriff in the High Court or a Bailiff in the County Court who has the power to seize the debtor's moveable goods (i.e. chattels) up to the value of the judgment.
- **Charging Order.** If the debtor has property, it may be possible to register a charging order on that property to secure the value of the judgment debt. A charging order does not have priority over existing security irrespective of whether the debt existed prior to the secured debt; however, it will have priority over subsequent security.

- **Attachment of Earnings/Third Party Order.** It may also be possible to seek and obtain an Attachment of Earnings Order or a Third Party Order (e.g. a Garnishee Order). A Garnishee Order is a court order which directs a third party (who owes money to a debtor) to pay those sums directly to the creditor.

Recognition and Enforcement of Foreign Judgments

In England, a variety of common law or statutory rules apply to the enforcement of foreign judgments. Which of those rules apply depends on the origin of the judgment sought to be recognised or enforced.

Under the Regulations, a party who has obtained judgment in another European member state applies to a nominated central authority in each given member state of the European Union or certain of the EFTA Countries (i.e. Iceland, Norway and Switzerland but not Liechtenstein). In the case of England and Wales, the nominated authority is the High Court.

An order for recognition or enforcement of a foreign judgment may be granted on proper proof of the foreign judgment without any re-trial or examination of the merits of the case. However, depending on the circumstances (and, in particular, whether judgment was given elsewhere in the UK or EU, or in a non-EU jurisdiction), an English court may only give such an order subject to a number of qualifications, including the following:

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

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

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

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

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

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

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

In the case of uncontested claims, it may be possible to recognise or enforce a judgment of the courts of an EU member state pursuant to Council Regulation (EC) No. 805/2004 which created

a European Enforcement Order ("**EEO**") for uncontested claims procedure. The EEO further simplifies and expedites the process of having a judgment in the member state of origin enforced in another member state. The EEO procedure goes further than the procedure under the Brussels Regulations in that where a judgment has been obtained in a member state and the appropriate EEO certificate (specifying details concerning the judgment itself) has been issued, it can be enforced in the member state of enforcement, without any intermediate examination of the judgment in the member state of enforcement.

Enforcement of Security

Under general French law, the enforcement of mortgages, pledges and other security interests can only occur once the secured debt is due and payable. First, a secured creditor must request the relevant borrower to pay the outstanding amount ("*sommation de payer*"). If the borrower does not pay within the period specified in the request, the secured creditor can start enforcement proceedings. Enforcement of a security interest is generally made through a court process whereby the relevant asset is sold by way of an auction. In respect of certain security interests, the relevant asset can also be attributed to the secured creditor under the Court's control and valuation of the asset.

With respect to certain assets such as cash or financial instruments, the law permits contractual provisions allowing the secured creditor to take possession and appropriate the relevant asset are permitted by the law. This may allow a swift and simple enforcement.

Mortgage

In the case of the debtor's default, the beneficiary of a mortgage may obtain a court order transferring title to the secured party as payment of its claims, require the sale of the property at a public auction and be repaid out of the proceeds or, if provided by the mortgage agreement, an automatic transfer of ownership of the mortgaged property.

Mortgages require notarized deeds, registered at the French Land Registry, which are considered as enforceable title. Notaries determine the establishment of contractual mortgage instruments. Otherwise, the mortgage will be invalid and unenforceable. This kind of enforcement is a long process which can take 6 to 12 months, and sometime longer. The enforcement process is usual for residential properties (e.g. individuals) but is rare for other assets (e.g. commercial assets with a high value).

Any property in France may be mortgaged and there is no limit on the number of mortgages that may be created over the same property. Priority between mortgages applying to the same property is governed by the chronological rank of registration of the security.

If the mortgagee does not benefit from a contractual clause providing for an automatic transfer of ownership upon enforcement of the security, the enforcement of the mortgage will follow a certain process starting with the seizing of the property to sell it.

The seizure and sale of the mortgaged property

The beneficiary of a mortgage may apply to the court for an order to seize the property to be served on the debtor by a bailiff.

According to article 2458 of the French Civil Code (*Code civil*), the beneficiary of a mortgage can sell the property. There are two options for the sale:

(i) private sale: the debtor must comply with the necessary formalities of the sale. Otherwise, it will turn into a compulsory sale of the property; and

(ii) compulsory sale: the property is sold by way of a public auction before the court (Tribunal de Grande Instance) with the creditor being represented by a lawyer. The sale is completed by court decision. The creditor has to notify this decision to the debtor and the others creditors. An overbid or a reiteration of the auction is possible.

There are certain extra requirements in the enforcement procedure if the enforcement relates to the main residence of an individual.

The transfer of ownership of the mortgaged property

According to the article 2459 of the French Civil Code, it may be agreed in the mortgage deed that the creditor is to become the owner of the mortgaged property. In this case, the value of the property shall be determined on the day of the transfer by an expert designated by the parties, or judicially.

The enforcement of the security must be proportionate to the actual loss of the mortgagee. If the mortgaged property value is superior to the debt, the creditor must return the extra amount to the debtor.

Lender's pledge (privilège du prêteur de deniers)

The lender's pledge is a right derived from the lender's claim for preference over other creditors, even mortgagees. This lien is a right over the purchased asset. It may exist only if the loan contract is subject to French Law and if the loan was granted to purchase a real property located in France. It is created by notarized deed for the benefit of a lender funding the purchase of an immovable property. A lender's pledge is specific to French Law. The guaranteed monies are the amount of the loan, plus interest for a three-year period.

Pledge over shares, receivables, ongoing business and bank accounts

The pledge is created by way of contract between the creditor and a debtor or another third party and it can be used to secure the payment of any type of debt. If the debtor defaults, the creditor can (i) apply for a court order transferring ownership of the pledged asset to it, (ii) be paid in cash from the proceeds of the auctioned asset or, (iii) if provided by the pledge agreement, choose an alternative out-of-court enforcement processes. In the latter case, the secured creditor is automatically vested with title to the property after an expert's appraisal.

Enforcement of Unsecured Debt

Contractual/Legal "Self-Help" Remedies

In the event of the bankruptcy of the debtor, the unsecured creditors usually obtain a *pari passu* distribution out of the assets of the insolvent company on a liquidation in accordance with the size of their debt after the secured creditors have enforced their security and the preferential creditors have exhausted their claims.

Depending on the specific debtor/creditor relationship, an unsecured creditor can benefit from certain contractual or legal "self-help" remedies under French law, such as:

(i) suspension of creditor obligations ("*exception d'inexécution*"): if the creditor can testify that its own obligations are sufficiently connected to the defaulting debtor's debt, he has the right to suspend them until its claim is satisfied.

(ii) right of detention ("*droit de rétention*"): if the creditor possesses some of the debtor's goods, he has the right to retain and keep them until the debtor has complied with all its obligations under the contract.

(iii) right of dissolution of the contract ("*résolution judiciaire*"): the creditor has the right to claim the dissolution of its contract with the defaulting debtor. A legal action will not be necessary if it is stated in the contract.

(iv) penalty clause ("clause pénale"): the contract may stipulate that one of the parties shall pay an amount of money in case this party does not fulfil its obligations. However, according to the French Civil Code, the judge, even if not requested to do so, may moderate or increase the agreed penalty if it is evidently excessively high or low.

(v) attachments ("*saisie conservatoire*"): this protective measure allows freezing of any asset belonging to the debtor. The asset cannot then be transferred until the creditor obtains an enforceable debt instrument. Again, the creditor must take action on the merits of the protective measures within one month.

(vi) orders authorising the taking of security ("s*ûretés judiciaires*"): these orders authorise a creditor to take security on the debtor's immovable property ("*hypothèque judiciaire provisoire*"), goodwill ("*nantissement judiciaire provisoire de fonds de commerce*") and shares or securities ("*nantissement judiciaire provisoire d'actions, parts sociales*"). Once a court order granting protective measures is obtained, the creditor must take an action on the merits within one month, otherwise the order becomes invalid.

(vii) right of subrogation: Under this mechanism, in return for payment of the debts valued by a third party, the full rights of the creditor against the relevant debtors are transferred immediately to him without any notification or filing requirements.

Obtaining Judgment / Execution Proceedings

Seizure of the debtor's property: If a creditor has an enforceable debt instrument (created by a deed executed before a notary or a court decision), he can seize any asset belonging to the defaulting debtor. If the debtor still does not pay, the creditor can auction the asset and be paid out of the proceeds. The main types of seizure are: seizure of tangible property ("*saisie-vente*"), seizure of intangible property ("*saisie-attribution*") and seizure of immovable property ("*saisie-immobilière*").

Recognition of Foreign Judgments

The enforcement of foreign, non-EU judgments must be distinguished from the enforcement of judgments between the EU member states.

Enforcement of judgments between the EU Member States

Under the recast Brussels Regulation (article 39), a judgment given in a member state which is enforceable in that member state shall be enforceable in the other member states. As a member of the European Union, France is required to observe and apply the respective EU regulations regarding the recognition and enforcement of judgments between EU member states.

Enforcement of foreign non-EU judgments

If the judgment is related to property matters, the enforcement requires recognition by way of the exequatur procedure. Exequatur is a concept specific to private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad.

Article 509 of the French Code of civil procedure provides that: judgments rendered by foreign courts and deeds received by foreign officers shall be enforceable on the territory of the French Republic in the manner and under the circumstances specified by law. This article is interpreted and completed by the decisions of the French Supreme Court (*Cour de cassation*). In the 2007 Cornelissen case (*Cornelissen Cass.Civ February 20th, 2007 n°05-14082*), The French Supreme Court ruled that French courts must verify that the foreign judgment meets three conditions. The French judge will verify that:

(i) the foreign Court has proper jurisdiction under French law; and

(ii) the foreign judgment complies with French procedural and substantive public policies; and

(iii) the foreign judgment was rendered without fraudulent forum shopping (evasion of the law).

These three conditions apply cumulatively which means that recognition of the foreign judgment will be denied if one of them is not met.

According to article R212-8 of the French Code of Judicial Organization, relevant civil courts are competent to learn about claims of recognition or enforcement of judgments of foreign courts. The competent court is determined by the domicile of the defendant or the registered office of the legal person.

However, that recognition will not be necessary in cases where a treaty has been entered into via bilateral conventions between France and the foreign country or via multilateral treaties.

Once a foreign judgment has been recognised in an exequatur judgment, the applicant can then proceed with enforcement.

Enforcement of Security

In Germany, charges over real property, receivables, shares and bank accounts are typically provided for by way of land charge, security assignment of receivables, share pledge and account pledge.

Below we provide for an overview on enforcement of security by the secured creditor outside an insolvency procedure. These procedures are not available in the case of insolvency procedures where the debtor's assets become subject to administration of the insolvency administrator and are typically sold by the insolvency administrator, in which case the chargees usually have a preferred right of satisfaction.

Enforcement of Land Charge

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

Forced administration

In cases of forced administration the property becomes subject to administration by a public administrator. The respective application is to be filed with the court where the relevant property is situated. In such filing the applicant may propose an administrator to the court, but the court is not bound by such a proposal. In cases of forced administration the right of the owner of the property to use and administer the property is transferred to the court appointed administrator. Rental income deriving from the property is collected by the administrator for the purpose of payment of enforcement costs and satisfaction of the secured obligations. If the property is not rented out but the owner of the property operates its own property related business (such as hotels, inns, amusement parks, rehabilitation clinics or gas stations) on the property, the administrator can even continue to operate such business.

Forced administration is a useful instrument for the chargee to safeguard the property and the rental income and to ensure proper management of the property at a stage where the chargee may not yet want to initiate forced sale, in particular if the chargee wishes to gain time for a restructuring or other solution.

Public sale

The public sale is carried out by the court where the relevant property is situated. In cases of enforcement with respect to several properties located in different court districts, the chargee may apply for public sale of all properties by only one of those courts. Prior to the auction the court appoints a property appraiser for the determination of the fair market value of the property.

The appraisal will be submitted to the involved parties and is generally available for inspection or copying at the court.

The date and venue of the auction as well as certain information about the property, including the assessed fair market value, will be publicly announced by the court. The timing of the procedure depends on the court's workload. This is a time consuming bureaucratic process that takes at least half a year, but can – and typically does – take longer.

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

The sale is effected by way of public auction which is accessible for everybody without prior appointment. In the auction, bidders need to provide security in cash or by way of bank confirmed cheque in the amount of 10% of the assessed fair market value of the property. The property is sold to the bidder with the highest bid, unless the court rejects acceptance of a bid as insufficient for the reasons described in more detail below.

If the auction proceedings are pursued by a prior ranking creditor any encumbrances ranking behind the land charge in favour of the foreclosing prior ranking chargee will cease to exist even though they may not be satisfied.

If the auction proceedings are pursued by a lower ranking chargee the prior ranking chargee will normally access the enforcement proceedings by way of submission of a respective filing to the court. After accession to the auction proceedings the prior ranking chargee will become master of the proceedings. After the successful auction all encumbrances will cease to exist and the claims of the prior ranking chargee are to be covered by the enforcement proceeds. If the prior ranking chargee does not access the auction proceedings the prior-ranking encumbrances will remain in force and are not to be covered by the enforcement proceeds and are taken over by the successful bidder.

Denial of acceptance of a bid

Denial ex officio

On the first auction date, the court would deny the acceptance of a bid (ex officio) if the highest bid (including the value of the remaining charges, if any) is less than 50% of the assessed market value of the property. Remaining charges are the charges which are taken into account in the determination of the amount of the lowest bid and which are not to be covered by the payment (e.g. a prior ranking easement on the property which remains unaffected). The purpose of this rule is to protect the owner from dissipation of the property.

Denial upon application

Further, at the first auction date the court would deny the acceptance of a bid upon application, if the highest bid including the value of the remaining charges is less then 70% of the assessed market value of the property and if the applicant, the secured obligation of which can (wholly or partly) not be satisfied by the bid, would be satisfied in the case of a bid (including the value of the remaining charges) in the amount of at least 70% of the assessed market value of the property.

The application can be made by any chargee who could claim a higher amount of the proceeds of the enforcement in case the 70% limit would have been reached by the highest bid. In other words: the application cannot be made by a creditor whose claims would, even in the case of a bid, (including the value of the remaining charges) in the amount of 70% of the fair market value, remain wholly unsatisfied.

Example: Fair market value of the property: EUR 300,000
70% Value: EUR 210,000
Continuing rights: EUR 120,000
Highest Bid: EUR 80,000
Claim of the chargee: EUR 90,000

The highest bid including the continuing rights (EUR 120,000 + 80,000 = EUR 200,000) is less than 70% of the fair market value of the property. The secured obligation of the chargee can (partly) not be satisfied in the case of the given highest bid in the amount of EUR 80,000, but would be satisfied in case of a bid in the amount of EUR 90,000.

Furthermore, the court will deny the acceptance of a bid upon application of a third party which is not entitled to apply for denial as described above, but whose rights are impaired by the acceptance of the bid and which undertakes to cover the damage arising by denial of acceptance of the bid.

Subsequent to the acceptance of the bid, the court announces a date for the distribution of the enforcement proceeds. To the extent this has not yet been effected by then, creditors need to announce their entitlement to the distribution proceeds. In the hearing for the distribution of the proceeds the court announces the available enforcement proceeds and determines their distribution which is effected firstly for the satisfaction of the enforcement costs and secondly to the creditors in the order corresponding to the rank of charges.

Enforcement of a Security Assignment of Receivables

Enforcement of a security assignment of receivables is governed by the provisions as agreed under the security assignment agreement. In general, it occurs by way of enforcement notice to the third party debtor by the assignee and collection of the receivables by the assignee to the extent they have become due. The enforcement usually requires that a warning notice is

furnished upon the assignor which provides for a grace period of one week in case of a commercial transaction, otherwise one month.

Enforcement of a Share Pledge

Enforcement of a share pledge occurs by way of public sale of the shares. Assuming the share pledge provides that the pledges can be enforced without an enforceable title by the pledgee (which would be standard in share pledge agreements in Germany) the steps of enforcement are as follows:

Enforcement proceedings

Prior to initiating the enforcement procedure, the pledgee needs to give a warning notice to the pledgor. Sale of the shares must not occur prior to the lapse of one week (provided the pledge is a commercial transaction for the pledgor and the pledgee otherwise the period is one month after such notification.

The pledgee determines the modalities of enforcement of the share pledge including place and time of the auction which is to be publicly announced. The pledgor and third parties with a right in the shares are to be notified of the auction by the pledgee.

Unless otherwise agreed between the parties, the successful bidder has to pay the purchase price immediately in cash. By acceptance of the bid by the auctioneer, usually a Notary Public, the bidder becomes shareholder after notarization of the purchase and transfer agreement. By transfer of the pledged shares all lower ranking charges in the shares are extinct.

Distribution of proceeds

Subsequent to settlement of enforcement costs, the remainder of the enforcement proceeds are paid out to the pledgee. If the shares have been pledged more than once, the enforcement proceeds are distributed to the pledgees in accordance with their rank of pledge.

Account Pledge Agreement

Enforcement of account pledges occurs by way of enforcement notice to the third party debtor and collection of the funds. The enforcement usually requires that a warning notice is furnished upon the pledgor which provides for a grace period of one week in case of a commercial transaction, otherwise one month.

Enforcement of foreign judgments

Enforcement of foreign judgments against assets which are not charged for the benefit of the creditor is subject to recognition of the foreign judgment.

Foreign judgments of a court of an EU member state can be recognised and enforced in Germany as follows.

Enforcement in civil and commercial matters

A judgment of a court of a member state of the EU can be executed in other European member states without substantive examination of the judgment and without any declaration of enforceability being required (Brussels Regulation (EU) 1215/2012).

The advantage of this procedure is that the debtor will not be heard prior to the granting of the order of enforcement which reduces the risk that the debtor takes measures to jeopardise the enforcement.

Enforcement of uncontested claims

A similar procedure is available for uncontested claims by way of European enforcement order which is to be issued on request by the court of origin.

In such cases the court of origin confirms the compliance with the rules of EU Regulation No. 805/2004 creating a European Enforcement Order for uncontested claims.

With the original of such a certification as well as a copy of the court decision or settlement the creditor is then able to pursue enforcement proceedings in the jurisdiction of the debtor's seat or residence.

Enforcement on the basis of a European Order for Payment

The European Order for Payment should simplify cross-border proceedings relating to undisputed civil or commercial law claims and is recognised and enforced within European member states (with the exception of Denmark) without the need for a declaration of enforceability. The European order is available only for monetary claims.

For the application for a European Order for Payment the creditor has to file form A (Annex I) to the Regulation (EU) No. 1896/2006 to the competent court which is subject to the usual criteria of competence, such as agreed legal venue, seat/residence of the debtor, etc. The application has to include the following information: name and addresses of the parties, the amount of the claim, interest, brief description of the matter in dispute, including basic facts of the case, description of evidence, reasons for competent jurisdiction and description of cross-border character of the matter. If the debtor does not oppose within a month after the service of the payment order the issuing court will declare the European Order for Payment enforceable.

Enforcement of minor claims up to EUR 2,000.00

For minor claims a further simplified procedure is available.

The European small claims procedure for claims in the field of civil and commercial law up to EUR 2,000.00 has to be initiated by the filing of the respective standard form (Annex A to the Regulation (EU) No. 861/2007) to the competent court which is subject to the usual criteria of competence, such as agreed legal venue, seat/residence of the debtor, etc. The European small claims procedure is conducted in written form. The competent court will service the standard form to the defendant who can reply within 30 days. After the judgment is given it will be recognised and enforced within the EU member states without a separate declaration of enforceability being necessary.

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

On 15 March 2014 the new Hungarian Civil Code (Act V of 2013 on the Civil Code) came into force in Hungary. Its provisions have to be applied on facts, legal statements and legal relationships arising after its entry into force. However, on such facts, legal statements and legal relationships that arose before the new Civil Code came into effect, the former Civil Code (Act IV of 1959 on the Civil Code) must be applied.

The new Civil Code has significantly changed the legal system of Hungary, including the regulation of the collateral security system. The most important changes regarding this area have been the following:

- forbidding security agreements with a fiduciary element and considering charge as the fundamental collateral security;
- introducing a new collateral register;
- introducing the concept of the security agent; and
- introducing the so-called "independent" restraint on alienation.

In this summary, we focus mainly on the provisions of the new Civil Code. However, due to the above reasons, the old regulations still have to be considered in practice.

Types of security in the new system

Types of charge

The rules of charge have changed significantly since the introduction of the new Civil Code. Currently, only possessory charge and mortgage exist, although under different regulations. The limited security charge, charge on financial assets (i.e. floating charge) and independent charge have been removed. The former concepts however have not disappeared entirely from legal practice. The new security regulation has substituted them to some extent; for example, instead of taking a charge over financial assets, there can be a pledge over property that is identified by detailed description. Another important change is that the new Civil Code now allows the creditor to gain ownership of the pledged assets and also contains detailed rules on the sale of pledged property other than by judicial enforcement.

Prohibition of security agreements with a fiduciary element

The most important change in connection with the regulation of collateral securities was the prohibition of transfer of ownership, right to purchase and assignment for security purposes (according to Section 6:99 of the Civil Code: *"Any clause on the transfer of ownership, other right or claim for the purpose of security of a pecuniary claim, or on the right to purchase, with the exception of the collateral arrangements provided for in the directive on financial collateral arrangements, shall be null and void."*). A common feature of these securities was that they

could be enforced by creditors simply and easily, but they did not guarantee proper protection of the debtors' interests. Debtors had very little chance to check, and the creditors could gain ownership of the asset securing the collateral during enforcement. This provided numerous opportunities for creditors to abuse the confidence of debtors. However, there are three exceptions to the nullity of fiduciary collateral arrangements listed in the Civil Code: factoring, financial lease and retention of title.

Charge (zálogjog) in general

Under Hungarian law, a charge (*zálogjog*) may be established on one or more existing or future, conditional or unconditional pecuniary claims for a specific amount or for an amount which can be determined. If the charge is not arranged for a pecuniary claim, the charge shall guarantee the claim for damages resulting from the failure to satisfy a claim, or shall guarantee other receivables. However, a charge must not be established on claims that cannot be enforced in court.

Regarding pledged goods, any asset of value can be pledged as security. A fraction or part of a thing may not be pledged as security, with the exception of the ownership share in a joint property, or the share of the chargee in a thing that is owned by more than one person, or a specific part of a divisible claim.

As soon as a pledge agreement is entered into, a charge is established and it is necessary:

(i) to have the charge registered in the relevant register (mortgage/non-possessory charge); or

(ii) to transfer possession of the pledged property to the chargeholder (possessory lien/possessory charge).

1) Mortgage (*jelzálogjog*)

Both movable and immovable assets can be charged by a mortgage.

Mortgages over immovable assets (i.e. real estate properties) should be registered at the land registry. Mortgages over those movable properties whose ownership is recorded (e.g. cars, airplanes and vessels), are also registered in public registers. However, other movable properties, rights and receivables can be charged by a mortgage registered in the so-called collateral register (or credit security registry).

Registration in the real estate register and in public registers of certain movable properties or rights shall be effected by a written pledge agreement or upon the chargee's consent for registration, if the pledge agreement or the consent for registration uniquely identifies the

pledged property and the chargee is shown as the owner or beneficial user of the thing or right in the real estate register or in public registries of certain movable assets or rights.

A pledged property shall be registered in the collateral register only if it is uniquely identified or if a detailed description is provided. Registration shall not be prevented even if the pledged property to be registered does not exist, or the chargee has no right of disposition at the time of registration.

Pledged property identified by detailed description

According to Section 5:102 of the new Civil Code, if the pledged property registered in the collateral register has been identified by detailed description, the charge shall at all times pertain to those things, rights and claims identified by said detailed description, over which the chargee has the right of disposition. The charge shall remain in effect even after the right of disposition ceases if the pledged property has been sold outside the course of trade or to a bad faith buyer making the acquisition for consideration.

Although the concept of charge over financial assets (i.e. floating charge) has been dismissed by the new Civil Code, this section suggests that the most important function of this type of charge has remained: there is still a possibility to use movables (current assets such as raw material supply, stock, accessories) and claims as collateral securities without hindering the normal operations and the opportunity for the chargee to process or dispose of the pledged properties.

2) Possessory lien (*kézizálogjog*)

Only movable property can be the subject matter of possessory lien.

In the case of a possessory lien, transfer of possession may also be satisfied if possession is maintained jointly by the chargeholder and the chargee, or if the asset concerned is safeguarded on their behalf by a third party pledgee. If the asset in question is held by a third party, and the transfer of the possession is considered completed upon conveying the claim for the thing to the party acquiring possession, a possessory lien shall be considered established upon the owner having notified the secondary possessor concerning the pledge. The possessory lien is not considered to be established if the transfer of possession is carried out by means of an agreement between the owner and the creditor to that effect, where the owner retains possession as a secondary possessor.

Security deposit (*óvadék*)

The most common form of security on financial instruments qualifying as security is a security deposit *(óvadék)*. Security deposits are a specific kind of possessory lien entitling the secured creditor to enforce the security by directly acquiring the ownership of the charged asset. If an asset is subject to both a registered non-possessory charge and a security deposit, the security deposit will have priority ranking.

This is a collateral security which may be arranged:

(i) on money and securities in the form of a possessory lien;

(ii) on dematerialised securities in the form of a possessory lien;

(iii) on payment account balances; or

(iv) on other assets, if they are transferred from the possession of the collateral provider to the possession or control of the collateral taker, or otherwise removed from the unrestricted control by the collateral provider.

Enforcement of Security

The chargeholder's right to satisfaction shall apply in the case of default when the claim secured by a pledge falls due. According to the new Civil Code, the chargeholder has the option to exercise its right to satisfaction either by way of judicial enforcement or by other means. A charge on payment account balances may be enforced by way of judicial enforcement.

Exercising the right to satisfaction by way of judicial enforcement requires an enforceable court decision in connection with the claim. The detailed regulation on this matter is not included in the Civil Code, but in Act LIII of 1994 on Judicial Enforcement.

According to the Civil Code, the right to satisfaction by means other than by judicial enforcement shall be exercised at the chargeholder's discretion:

(i) through the sale of the pledged property by the chargeholder (A);

(ii) through the acquisition of the pledged property by the chargeholder (B); or

(iii) through the enforcement of a charged right or claim (C).

Please note, below we describe the general rules of the above methods outside of judicial enforcement. As these are relatively new provisions, consistent legal practice yet to evolve regarding this matter.

A. Sale of the pledged property by the chargeholder

At least ten days before the sale, the chargeholder shall send a notice in writing to the relevant persons informing them of his intention to sell the pledged property.

No prior notification is needed if (i) the pledged property is perishable, (ii) its value is likely to diminish considerably upon any delay, or (iii) it is a share or right traded on the stock exchange.

Following the effective date of the right to satisfaction, the chargeholder shall have the right to take possession of the pledged property for the purpose of sale, and to this end, to call the chargee to release the pledged property into its possession by the specified time limit (at least ten days in the case of movable properties and at least twenty days for real estate properties). Following the effective date of the right to satisfaction, and upon the chargeholder's request, the chargee shall release the pledged property in its possession to the chargeholder within the prescribed time limit for the purpose of sale, to permit the chargeholder to take possession of the pledged property, and shall refrain from any conduct aimed at preventing the chargeholder from carrying out the sale. Failure to take possession shall have no bearing on carrying out the sale of the pledged property.

The chargeholder shall be entitled to transfer the ownership of the pledged property instead and on behalf of the owner of such property. The pledged property may be sold as is, or after commercially justified processing or conversion; privately or publicly.

The chargeholder may acquire ownership of the pledged property he is selling in the case of public sale, or if the pledged property is traded on the stock exchange.

After the pledged property is sold, the chargeholder shall prepare a financial statement in writing, and send it to the chargee and to all persons to whom prior notification is to be sent. Then, the chargeholder shall, without delay, distribute the purchase price received plus the proceeds collected, minus the costs arising out of or in connection with the safeguarding, maintenance, processing, conversion and sale of the pledged property, taking into consideration the ranking of the charges, and the amounts of the claims secured by such charges, among the holders of the charge on the pledged property, and to pay the remaining amount to the chargee.

B. Acquisition of ownership of the pledged property by the chargeholder

Any agreement concluded for transferring ownership of the pledged property to the chargeholder at the time of the opening of the right to satisfaction shall be null and void.

Following the effective date of its right to satisfaction, the chargeholder may offer the chargee the option to accept ownership of the pledged property in satisfaction of the secured claim in whole or in part. The persons to be notified may object to the chargeholder's offer if it is considered to jeopardise satisfaction of their secured claim.

If the chargee accepts the chargeholder's offer in writing within twenty days from the date of receipt thereof, and the persons to be notified do not object in writing, the chargeholder and the chargee shall enter into a sales contract, on the basis of which the chargee is required to transfer possession of the pledged property, or to authorise the registration of ownership. Upon the transfer of ownership, the claim secured by a pledge shall cease to exist in part or in whole, according to the contents of the offer.

In some cases the chargeholder can exercise the right to direct satisfaction of the debt. If collateral security is provided in connection with money, payment account balances, or securities traded on the stock exchange, or any other securities whose market price is listed publicly, or securities embodying pecuniary claims whose market price can be determined at that time independent from the parties and under conditions fixed in the securities, the chargeholder shall be entitled to acquire ownership. Ownership shall be acquired by way of a unilateral statement addressed to the chargee of the pledged property up to the amount of the secured claim at the effective date of the chargeholder's right to satisfaction of the debt, or, if it was acquired previously, the chargeholder may terminate its obligation to transfer to the chargee assets of the same type and amount as the collateral security received. The chargeholder shall settle accounts in writing with the chargee immediately after exercising the direct right to satisfaction and must pay to the chargee the amount remaining after the secured claim is satisfied.

C. Enforcement of a charged right or claim

If the subject of a mortgage is a claim against a third party, the mortgage holder may give performance instructions to the mortgagor, and shall be allowed, after the date of maturity of the claim, to enforce the claim in place of the original mortgage holder against the mortgagor. This provision shall apply even if the mortgage pertains to a right.

Enforcement of Unsecured Claims

If a creditor wants to enforce a claim that has not been secured, he has several options to choose from:

(i) submitting an application for an issue of an order for payment. The order for payment procedure is a simplified non-judicial civil proceeding for the collection of pecuniary claims that fall within the competence of a notary public. If the order of payment is issued, the defendant may lodge a statement of opposition to it, and in this case, the proceedings turn into a court procedure;[1]

(ii) bringing the case before a court to start a civil procedure or initiating an arbitration proceeding, and, if these prove successful, initiating an enforcement procedure;[2] or

(iii) initiating the liquidation of the debtor (if the debtor is not a natural person). The liquidation proceeding is an out-of-court civil proceeding aimed to provide

[1] The detailed rules of this process are in Act L of 2009 on the Order for Payment Procedure.

[2] The detailed rules of these procedures are in Act III of 1952 on the Code of Civil Procedure, Act LIII of 1994 on Judicial Enforcement and Act LXXI of 1994 on Arbitration.

satisfaction to the creditors of an insolvent debtor upon its winding-up without succession.[3]

Recognition and Enforcement of Foreign Judgments

Pursuant to Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a judgment of another member state of the European Union will be recognised and enforced in Hungary without any special procedure being required, if the conditions under the regulation are met.

A judgment of a non-EU member state will not be recognised if Hungarian courts have exclusive jurisdiction concerning the matter (e.g. over real estate in Hungary, the liquidation of Hungarian companies or in proceedings concerning the registration of rights, facts, and data into official records in Hungary) to which the decision pertains.

Otherwise, foreign judgments will generally be recognised if:

(i) the jurisdiction of the court or authority in question is found legitimate under the rules of Hungarian conflicts of law;

(ii) the judgment is construed as definitive (final and binding), according to the law of the country where it was made; and

(iii) there is reciprocity or an international treaty between Hungary and the state of the court or authority which made the decision.

In commercial disputes where the parties have agreed on the jurisdiction, reciprocity or an international agreement is not needed, provided that the parties' agreement satisfies certain criteria.

Even if the above mentioned conditions exist, the foreign judgment will not be recognised if:

(i) the recognition would violate public policy in Hungary;

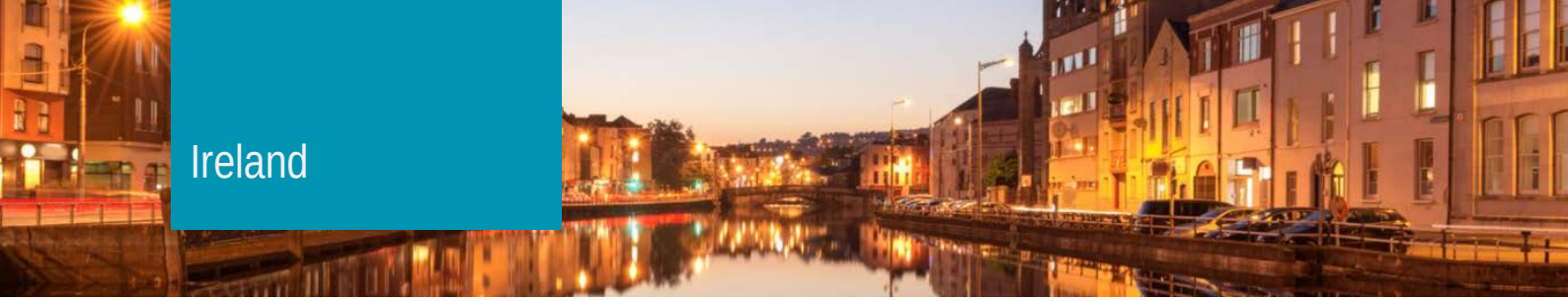
(ii) the losing party was not properly served with the proceedings, the party against whom the decision was made did not attend the proceeding either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated was not served at its place of domicile or residence properly or in a timely fashion in order to allow adequate time to prepare its defense;

[3] The detailed rules of liquidation are in ACt XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings.

(iii) the foreign proceedings were in serious breach of basic principles of Hungarian law;

(iv) proceedings had already been commenced for the same right on the same factual basis before a Hungarian court or other Hungarian authority, before the foreign proceedings were commenced; or

(v) a Hungarian court or other Hungarian authority has already resolved a case by definitive decision concerning the same right on the same factual basis and between the same parties (principle of res judicata).



Enforcement of Security

Generally speaking, Irish law allows secured creditors to enforce their security without the necessity of having to take any proceedings before the courts. The most common methods of enforcing security under Irish law are: (i) the appointment of a receiver; and (ii) the power of sale conferred on mortgagees.

Appointment of Receiver

Receivership is a contractual remedy for the enforcement of security and court approval is not required. For the enforcement of all forms of fixed charge, either a receiver is appointed pursuant to the terms of the charge deed or the chargeholder becomes a mortgagee in possession of the charged asset.

For floating charges, the process is the same but the chargeholder must first crystallise the charge in accordance with the relevant provisions of the charge deed. The relevant security document will detail the circumstances in which the security holder can appoint a receiver. A receiver's main function is to take control of the secured assets, to sell such assets and to apply the proceeds of sale towards discharging the debt owed to the security holder.

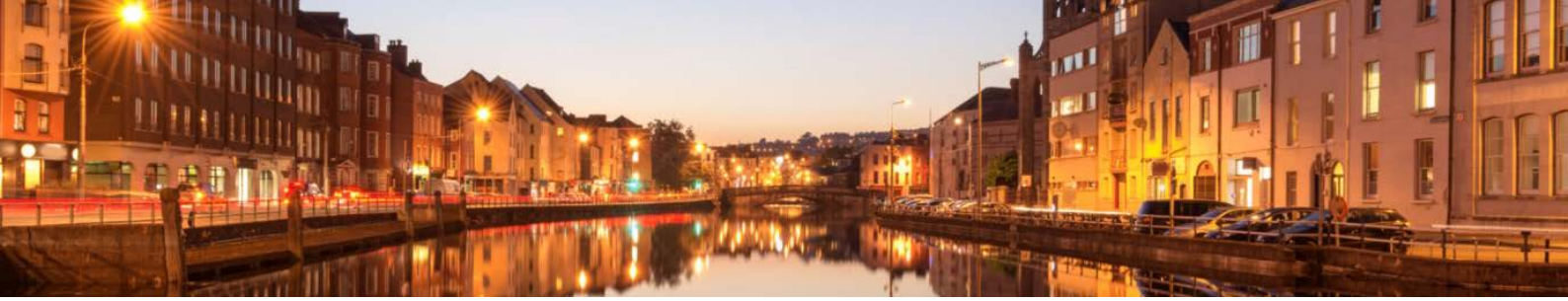
There are two different types of receiver:

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

If a loan is charged on a specific asset, a fixed charge receiver will be appointed in respect of that specific asset alone. A fixed charge receiver is typically appointed under a legal mortgage in relation to a particular property.

However, where a debenture creates charges over the entire business of a company, a receiver and manager may be appointed over that company's entire business. In these circumstances a receiver and manager will, in addition to performing its duties as receiver, also act as a manager of the business for the duration of the receivership.

It is important that all formalities of the appointment are strictly complied with as otherwise the appointment will be invalid. An appointment may be invalid if the circumstances justifying an appointment have not arisen or conditions for the making of an appointment have not been met. The mortgage debenture usually specifies the events upon the happening of which the holder of the mortgage debenture is entitled to appoint a receiver. The usual such event is the non-payment on the due date of monies secured by the security document. Where this ground is relied upon, a demand is usually required.



In Ireland, pre-pack receiverships involve the sale of all or part of a business of an insolvent company, which is negotiated before enforcement and completed shortly after the receiver has been appointed. This option is commercially attractive as it overcomes the negative publicity associated with an insolvency procedure and it can be an effective means to preserve the goodwill of the business.

A receiver has an obligation to obtain the best price for the secured assets so a receiver in a pre-pack will require a significant level of comfort as to the market value of the assets which he will be asked to sell within hours/days of its appointment. A prudent receiver will require evidence of market testing and an independent valuation. The extent of the evidence which can be produced to a proposed receiver to provide comfort that the proposed price represents market value will be case specific.

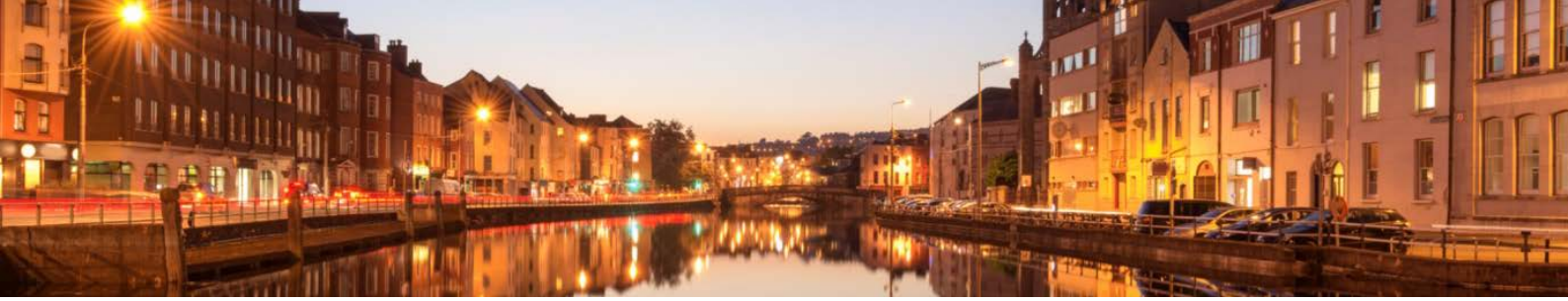
Mortgagee in Possession

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

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

Examinership

The main exception to the enforcement of security by a security creditor arises in the context of examinership. Examinership is a corporate rescue procedure for insolvent Irish companies analogous to chapter 11 bankruptcy and administration in the US and UK respectively. The key feature of examinership is a period of 70 days (with a possible extension of 30 days) during which the company is protected from its creditors and the appointment of an independent officer to examine the company's affairs to, if possible, formulate proposals for a compromise or scheme of arrangement in relation to the survival of the company. These proposals are put before meetings of the members and creditors of the company and seek the confirmation of the proposals by the court. The effect of the appointment of an examiner is to suspend the rights of a secured creditor for the protection period but, subject as set out below, the appointment does not of itself affect the security itself or the rights of the secured creditor.



Enforcing a Personal Guarantee

If there is likely to be a shortfall between the realisations from the secured assets and the debt level, the creditor may also wish to pursue guarantors for judgment.

If the lender is owed a liquidated sum in excess of €1,000,000, there are two options available to it to obtain judgment against the debtor, namely:

- the traditional High Court debt collection procedure; and
- the fast track debt collection procedure available in the Commercial Court, to the extent that it forms part of a larger more complex matter that merits a hearing in the Commercial Court.

Enforcement of Unsecured Debt

Contractual/Legal "Self-Help" Remedies

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

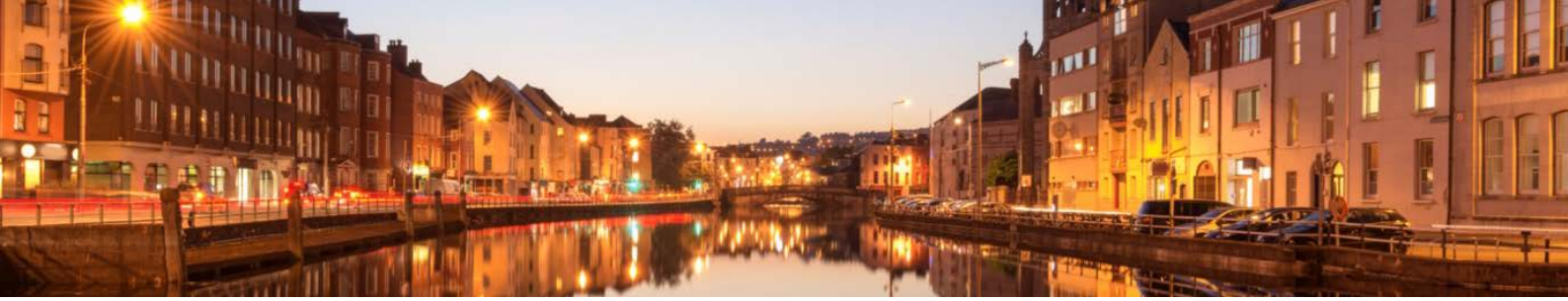
- (in the case of trade creditors) claiming retention of title in any asset held by the debtor;
- forfeiting a lease or seizing the debtor's goods in lieu of rent;
- setting off the debt owed against monies owed by the creditor to the debtor; or
- claiming a lien on the debtor's assets.

Obtaining Judgment/Execution Proceedings

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

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

- **Seizure and Sale of Goods.** The judgment can be sent to the Sheriff/County Registrar who has the power to seize the debtor's moveable goods (such as vehicles, for example) up to the value of the judgment.



- **Registration of Judgment.** This involves the registration of the judgment in the Register of judgments in the Central Office of the Irish High Court. The Register is available for inspection by any interested party and entries in the Register are often published in trade journals, such as the Stubbs Gazette. The consequence of this is that until the debt is repaid, the judgment will show up on any judgment search conducted against the debtor (standard, for example, in conveyances of property) and may create negative publicity for the debtor and/or damage its credit rating.

- **Examination of Debtor.** The debtor can be examined as to its means in the District Court and an Instalment Order made against him/her. If the application is successful, the debtor must pay a certain amount each week/month as decided by the court.

- **Judgment Mortgage.** If the debtor has property, it may be possible to register a Judgment Mortgage on that property. A judgment Mortgage involves the registration of a judgment for a debt against the assets of a person against whom the judgment has been received. A Judgment Mortgage does not have priority over existing security irrespective of whether the debt existed prior to the secured debt however it will have priority over subsequent security.

- Attachment of Earnings/Third Party Order. It may also be possible to seek and obtain an Attachment of Earnings Order or a Third Party Order (e.g. a Garnishee Order). A Garnishee Order is a court order which directs a third party (who owes money to a debtor) to pay those sums directly to the creditor.

Recognition of Foreign Judgments

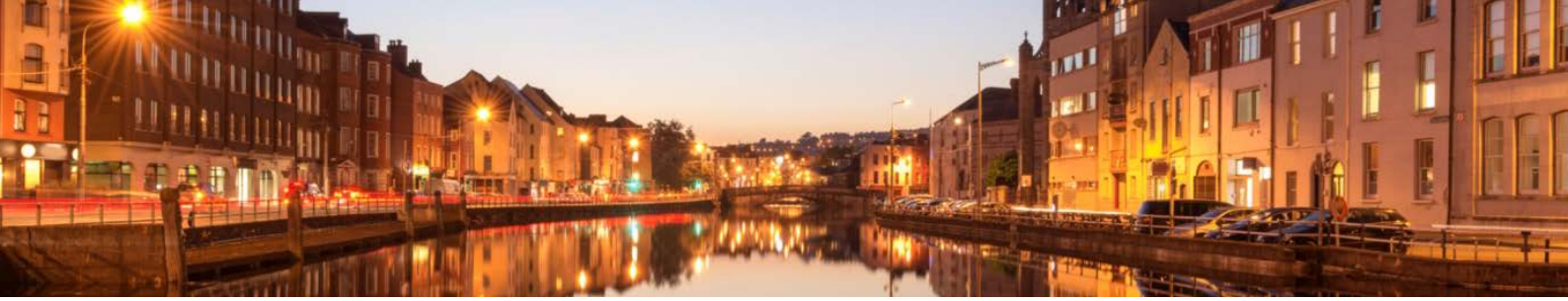
Under the Brussels Regulations, a party who has obtained judgment in another European member state applies to a nominated central authority in each given member state of the European Union or certain of the EFTA Countries (i.e. Iceland, Norway and Switzerland but not Liechtenstein). In the case of Ireland, the nominated authority is the Master of the High Court. A judgment of the courts of any member state should generally be recognised and enforced by the courts of Ireland pursuant to the terms of the Regulations. Such order should be granted on proper proof of the foreign judgment without any re-trial or examination of the merits of the case subject to the following qualifications:

(i) that the foreign court had jurisdiction, according to the laws of Ireland;

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

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

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



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

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

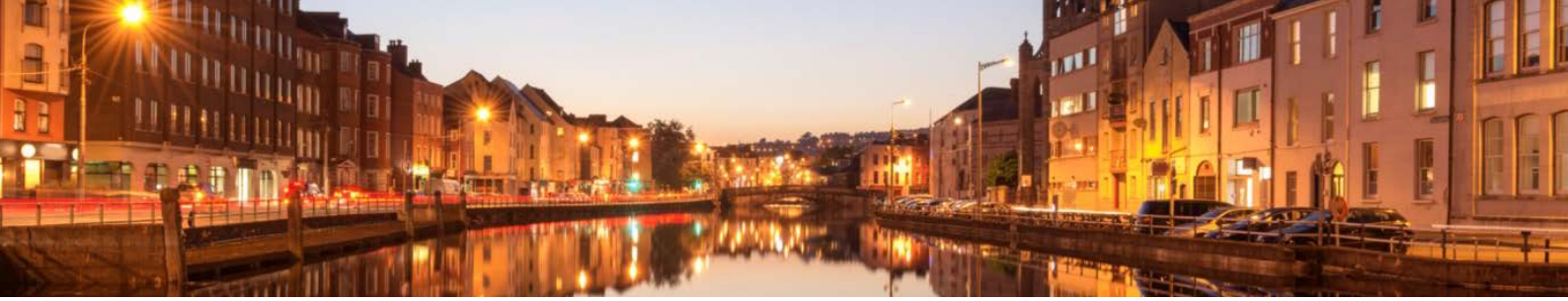
(vii) that the procedural rules of the court giving the foreign judgment have been observed.

In the case of uncontested claims, a judgment of the courts of the countries referred to above would generally be recognised and enforced pursuant to Council Regulation (EC) No. 805/2004. The European Enforcement Order ("**EEO**") procedure further simplifies and expedites the process of having a judgment in the member state of origin enforced in another member state. The EEO procedure goes further than the procedure under the Brussels Regulations in that where a judgment has been obtained in a member state and the appropriate EEO certificate (specifying details concerning the judgment itself) has been issued, it can be enforced in the member state of enforcement, without any intermediate examination of the judgment in the member state of enforcement. Thus, to take the example of Ireland, the process of having the Master of the High Court examine the judgment that came from the member state of origin had been by-passed by the EEO procedure. However, it should be noted that the EEO procedure is applicable only to uncontested claims. Cross border enforcement of judgments obtained in defended cases are only enforceable pursuant to the Brussels Regulations.

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

Code of Conduct for Business Lending to Small and Medium Enterprises (the "Code")

Prior to enforcing security, financial institutions need to be mindful of the Code, which sets out certain obligations which a regulated entity, such as banks, have to comply with when dealing with a borrower in financial difficulties. The majority of these obligations deal with arrears problems. Regulated entities should give a borrower reasonable time to resolve an arrears problem and assist the borrower to resolve the problem. This could be dealt with by a bank presenting certain options, which have to be accepted within a reasonable time frame. A regulated entity is under an obligation to advise a borrower on the possible impact on other accounts held by that borrower.



Nothing in the Code prohibits a regulated entity from acting with all necessary speed in the case of a liquidation, receivership, examinership or similar insolvency event, or where there is reasonable evidence of fraud, terrorist connections, money laundering and/or misrepresentation.

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

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

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

Out of Court Enforcement of Securities

(a) ***Pledge in Possession***

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

The pledge is enforceable with priority against third parties when:

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

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

Due to the requirement of the transfer of the possession, this security cannot be utilised with reference to plants, machinery, and assets that are utilised by the borrower in its ordinary course of business.

Article 2798 of the Italian Civil Code states that the creditor can always bring an action before the court requiring that possession of the goods is awarded to the creditor in payment of its credit, up to the full amount of the debt. The value of the goods shall be confirmed by way of appraisal conducted by independent experts or, alternatively, according to the current market price if such price exists. A similar provision also exists in cases where a credit is the object of the pledge (Article 2804 of the Italian Civil Code).

(b) ***Mortgage enforcement***

A mortgage is perfected and enforceable against third parties once it is executed in writing before a Notary Public and registered in the Land Registry Office (*Conservatoria dei Registri Immobiliari*) of the place where the property is located.

According to Article 2891 of the Italian Civil Code, within 40 days of the notice (previously served), any inscribed creditor or its surety has a right to demand the expropriation of the property by bringing an enforce proceeding before the President of the competent court, which has jurisdiction according to the Code of Civil Procedure provided that certain conditions are met, and notices are given to interested parties.

(c) ***Pledge over receivables***

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

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

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

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

Out of Court Enforcement of Unsecured Debts

Contractual/Legal "Self-Help" Remedies

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

- **Right of subrogation:** when the debtor fails to take the necessary actions to safeguard its assets, the creditor may substitute the debtor in taking such actions. The final aim for the creditor is to safeguard the debtor's assets against which he will enforce its rights.

- **Claw back:** sometimes a debtor can unlawfully try to avoid the creditor's enforcement by selling/donating (by means of true or simulated agreement) its assets. A creditor can file a claim before a court to have those actions annulled.

- **Attachment:** the creditor may obtain the attachment of the debtor's assets to prevent damages or to have its credits repaid.

- **Penalty clause:** the parties may contractually agree the payment of a penalty which shall apply in case the debtor does not fulfil its obligations. In some cases, such provisions may provide for some assets to be ready to be seized (e.g. a sum kept in an escrow account).

- **Right of withdrawal:** the parties may agree that a party is entitled to withdraw from an agreement if the other party fails to fulfil its obligations.

- **Right of retention:** in some circumstances the creditor may have the right to retain the debtor's assets (already in its possession) in order to force the debtor to pay.

- **Setting-off:** the creditor may have the right to set-off its debt towards the debtor.

In-Court Enforcement of Secured and Unsecured debt

Obtaining Judgment/Execution Proceedings

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

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

- **Seizure and Sale of Goods:** the judgment can be sent to the different Registrars who have the power to seize the debtor's moveable goods (such as vehicles, for example) up to the value of the judgment. Then, the goods (movable or immovable) will be sold by the court through enforcement judicial proceedings.

- **Attachment of Earnings/Third Party Order:** it may be possible to seek and obtain an Attachment of Earnings Order or a Third Party Order. The courts will issue an order which directs a third party (who owes money to a debtor) to pay those sums directly to the creditor. If the debtor is, for example, an individual with personal income such as a pension or salary, the creditor may obtain the attachment of such income up to specific amounts (usually 20% of the monthly amount of the pension or of the salary). Then,

enforcement proceedings will be started in which the court shall order the third party to pay the creditor directly any amount due by the same third party to the debtor.

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

Protection of Debtors

Temporary protection of the debtor from its creditor(s) in Italy is possible only pursuant to bankruptcy legislation, for example in the following circumstances:

- **Bankruptcy proceedings:** from the date when the bankruptcy is declared by the tribunal, an automatic stay prevents creditors from taking action against the debtor to recover sums due.

- **Preventive bankruptcy agreement (*e.g. concordato preventivo*):** from the date when the debtor files its request to be admitted to such a procedure.

- **Debt restructuring agreement (*e.g. accordo di ristrutturazione dei debiti*):** from the date when such agreement is published on the Companies' Register up to the following 60 days. The tribunal must consider such request within 30 days from its filing and whenever it will consider the same based on reasonable grounds will give the debtor 60 days to file the restructuring agreement entered into with creditors. Therefore, even during the term during which the negotiations between the debtors and creditors will be carried out, the debtor (for 60 days from the date when the tribunal considered its restructuring proposal based on reasonable grounds) will be protected against creditors' claims.

- **Extraordinary administration of large companies in crisis (*e.g. amministrazione straordinaria per le grandi imprese in crisi*):** from the date when the insolvency of the debtor company is declared.

Different debtor protections apply in the above procedures, however, in general, the approval of any of the above procedures temporarily prevents creditors from individually enforcing their rights or from enforcing their rights outside such procedures.

Recognition of Foreign Judgments

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

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

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

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

(iv) the foreign judgment is final and conclusive;

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

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

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

In case the judgment to be enforced has been issued by another member State of the European Union, then such judgment - pursuant to the Brussels Regulation (Regulation (EU) 1215/2012), is automatically enforced, without the need of an exequatur to be issued by the competent Court of Appeal.

In the case of uncontested claims, a judgment of a court of a member state of the European Union would generally be recognised and enforced pursuant to Council Regulation (EC) No. 805/2004. The European Enforcement Order ("**EEO**") procedure further simplifies and expedites the process of having a judgment in the member state of origin enforced in another member state. The EEO procedure goes further than the procedure under the Brussels Regulation (Regulation (EU) 1215/2012) in that where a judgment has been obtained in a member state and the appropriate EEO certificate (specifying details concerning the judgment itself) has been issued, it can be enforced in the member state of enforcement, without any intermediate examination of the judgment in the member state of enforcement.

Business Lending Regulations

In Italy, when lending money financial institutions must comply with several regulations (often issued by the Bank of Italy) that aim to offer clients complete and clear information on the contractual and economic conditions according to which a credit facility will be made available. Furthermore, several financial institutions also agreed to enter into contractual agreements among themselves as "*Patti Chiari*" (e.g. "Fair Agreements") and the "*Codice di comportamento nel settore bancario e finanziario*" (e.g. "Financial and banking behaviour code") which aim to strengthen the protection of clients. An infringement of those regulations or contractual provisions, according to Italian courts, may imply an obligation for banks to pay damages to their clients/debtors.

The Bank of Italy has also set special provisions concerning disputes between financial institutions and their clients, the settlement of which is attributed to third parties who are able to guarantee to clients speedy, economical and effective protection.

The lending institution undertakes to check the claims made by the client, by indicating, if the complaint is considered to be grounded, actions through which the same lending institution intends to remedy the situation and the time needed for this purpose. Alternatively, if the complaint is considered not to be grounded, a clear and detailed explanation of the reasons for the rejection will be provided as well as the necessary information about the possibility of appeal to the Banking and Financial Arbitrator (*Arbitro Bancario e Finanziario*).

The lending institution must adhere to the Banking and Financial Arbitrator (*Arbitro Bancario e Finanziario*). If the client is not satisfied with the answer provided by the lending institution, or if the lending institution fails to provide an answer, then subject to the presence of certain conditions the client may appeal under the provisions of the Bank of Italy dated 18 June 2009 regarding "Measures on extrajudicial dispute resolution's systems in relation to transactions and banking and financial services".

Enforcement of Security

Dutch law allows security rights holders to enforce their security rights outside the normal liquidation process. In Dutch civil law security rights are divided into two categories depending on the nature of the asset or goods (according to Article 3:227 of the Dutch Civil Code (Burgerlijk Wetboek, "DCC"):

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

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

The common methods of enforcing security rights under Dutch law are: (i) immediate execution (prior default notice (*ingebrekestelling*) required); and (ii) sale after a court has established the default of the debtor (Articles 3:250, 3:251 and 3:268 DCC).

Immediate execution

Both types of security rights provide the right for immediate summary execution without court approval. According to Article 3:248 DCC and 3:268 DCC respectively, a creditor is authorised to immediately execute a security right in the event that the debtor is in default with regard to obligations secured by its security rights.

In principle, the enforcement of a right of pledge on movable assets occurs by a public auction in which the creditor himself may also bid. The auction takes place in accordance with the local customs and conditions, and specific rules may apply depending on the circumstances. The creditor is obliged to inform the debtor about its intention to enforce at least three days prior to the scheduled auction (Article 3:249 DCC). The debtor is authorised to remedy its default until the auction takes place. Both the creditor and the debtor may request a judge (*voorzieningen rechter*) to order a sale other than by auction or determine a fixed value for which the pledged asset will be accrued (*verblijven*) to the creditor (Articles 3:250 and 3:251 DCC). Depending on the nature of the security right differing execution rules may apply.

A right of pledge over receivables is enforced by collecting the receivable. In the event of an undisclosed pledge, the pledged receivable can only be collected following notification of the pledge to the debtor of the pledged receivables. The pledgee becomes entitled to notify this debtor if the pledgor is in default with regard to obligations secured by the pledge.

The enforcement of a security right in the form of a right of mortgage through immediate execution occurs by a public auction supervised by a Dutch civil law notary (*notaris*). Both the

creditor and the debtor may request a(n) (interlocutory) judge to determine that the secured asset is sold by means of a private sale instead of a public auction (Article 3:268 DCC).

Enforcement of Unsecured Debt

Dutch law provides a creditor with various rights to protect its interests, even in the case of unsecured debts.

Contractual/Legal "Self-Help" Remedies

Depending on the relationship between the parties, the creditor is provided with, amongst others, the following rights under Dutch law, for example:

- In the event a debtor has a claim which is due and payable against its creditor, the creditor has the right to suspend (*opschortingsrecht*) its own obligations until its claim is satisfied, provided that the obligations and the claims are sufficiently connected. Such a connection may be assumed, inter alia, in the event that the reciprocal obligations result from the same juridical relationship or from regular previous dealings between the parties involved (Article 6:52 DCC). However, no right of suspension exists to the extent that (a) the performance of the obligation of the debtor is prevented by the creditor's defaults; or (b) the performance of the obligation of the debtor is permanently impossible.

- In the case of a contractual relationship, if the debtor fails to fulfil its commitment towards the creditor, the creditor in turn is allowed to suspend the performance of its obligation under the contract against the debtor. In case of partial or improper performance, suspension is allowed only to the extent justified by the failure to perform (Article 6:262 DCC).

- If the performance by the creditor consists of delivery of goods, it has the right of retention (*retentierecht*) which permits it to suspend the delivery of goods to the debtor until the claim has been settled (Article 3:290 DCC).

- The parties have the right to set-off (*verrekening*) their obligations towards the other party with claims against that other party (Article 6:127 DCC); these rights may be restricted on the basis of legal and contractual provisions.

- In order to protect its rights, a creditor can consider supplying its goods subject to retention of title (*eigendomsvoorbehoud*) (Article 3:92 DCC).

Collection proceedings

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

Although it is not recommended, even a judgment that is not yet final and conclusive (*in kracht van gewijsde gegaan*) may be enforced. However, such enforcement is subject to suspension as a result of an appeal procedure.

A judgment does not always prompt the debtor to pay. In such cases the creditor may consider establishing an executory attachment (*executoriaal beslag*) on (all) movable and/or immovable assets of the debtor. The enforcement of the judgment takes place by a public sale of the assets. The revenues of such a sale will be used to pay the claim of the creditor. Any surplus will be paid to the debtor or other creditors of the debtor.

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

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

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

Recognition and Enforcement of Foreign Judgments

A Dutch court may only refuse to recognise and enforce a judgment by another EU court on the following limited grounds and only upon an application of any interested party to the relevant court:

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

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

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

(iv) Irreconcilability with an earlier judgment given in another EU member state or in a third State involving the same cause of action and between the same parties,

provided that the earlier judgment meets the conditions necessary for its recognition in the Netherlands; or

(v) If the judgment conflicts with certain jurisdiction rules of the Brussels Regulation (Regulation (EU) 1215/2012).

A direct enforcement of a foreign judgment in the Netherlands can only take place in cases where the Netherlands and the country where the judgment was rendered entered into an enforcement treaty or an EU instrument is in place.

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

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

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

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

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

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

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

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

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

Additionally, according to Polish law, if the debtor executes a notarial deed confirming its consent to the enforcement of its debts, then the creditor so secured is allowed to commence the execution of the debt after obtaining a writ of enforcement (a rubber stamp that is put on the document by a court stating that the claim may be enforced) from a court without a need to conduct a regular trial. Polish law also recognises bank execution titles ("**BET**"), which effectively fulfill the same role and are issued by banks. However, on 15 April 2015, the Polish Constitutional Court found the bank privilege regarding the issuance of BETs inconsistent with the constitutional principle of equal treatment. The Polish Parliament has already adopted a new law repealing the provisions pertaining to BETs and the Polish president signed it on 26 October 2015. The new law comes into force within 14 days after publication in the Journal of Laws. In practice, the courts have already started dismissing motions to issue the writ of enforcement with respect to BETs.

Please find below an overview on enforcement of security by secured creditors outside an insolvency procedure. These procedures are not available in the case of insolvency proceedings where the debtor's assets become subject to administration by the insolvency administrator and are typically sold by the insolvency administrator, in which case the secured creditors' claims enjoy preferred rights of satisfaction.

Enforcement of Security

Court enforcement proceedings

(a) ***Enforcement of a mortgage***

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

Enforcement proceedings against real property are conducted by a court enforcement officer (a bailiff) whose actions are supervised by the relevant court. In order to commence the enforcement proceedings the creditor needs to hold an enforcement title. It should be noted that the establishment of a mortgage over the real property gives the creditor priority over other

creditors in satisfaction of claims from the proceeds obtained after the sale of the debtor's real property, but does not constitute an enforcement title by itself. Therefore, the creditor must first apply to the court for a writ of enforcement to be affixed to the enforcement title, e.g. a notarial deed confirming the debtor's consent to the enforcement of its debts or final and non-appealable judgment.

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

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

(b) ***Statement on submission to enforcement***

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

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

(c) ***Enforcement of a civil law pledge***

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

Out-of-court proceedings

(a) ***Enforcement of a registered pledge***

Polish law provides for various enforcement methods with respect to registered pledges. Apart from traditional enforcement through court proceedings, which is usually costly and time consuming, Polish law offers other enforcement methods which are simpler and cheaper. Such other methods may be used only if the pledge agreement allows.

- Taking over the object of a registered pledge: the creditor may satisfy its claim by seizing the ownership of the assets which are subject to the pledge. This may be done, provided that the registered pledge has been established over:

  (i) publicly traded securities;

  (ii) commonly traded commodities;

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

  (iv) receivables from a bank account.

- Sale of the object of a registered pledge: the pledgee may also satisfy its claims by an out-of-court public auction of the property conducted, by a Notary Public or a bailiff within 14 days from the day when the pledgee submits a request to sell the object of a registered pledge.

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

In any event, the court enforcement procedure may be used under general law even if such a method was not envisaged in the pledge agreement. In such a case, at the first stage the creditor must obtain the enforcement title and then obtain an execution clause.

(b) ***Enforcement of a financial pledge***

A financial pledge may only be used to secure limited types of claims (mainly bank pecuniary claims) and may be established only on shares, monies and financial instruments. It is enforced

by seizure of the assets on which the pledge was established. Seizure of the assets takes place on the date when the foreclosure notice is served on the debtor.

(c) ***Enforcement of security assignment/ transfer of ownership***

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

Enforcement of Unsecured Debt

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

(a) ***Article 527 of Polish Civil Code***

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

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

(b) ***Liquidated damages***

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

Recognition of Foreign Judgments

General rules

Court rulings delivered in civil matters by foreign courts are recognised by virtue of law in Poland except if:

(i) the ruling is not non-appealable in the state where it was issued;

(ii) the ruling was issued in a case which falls under the exclusive jurisdiction of Polish courts;

(iii) a defendant who did not defend on the merits of the case was not duly served an initial pleading in due time to enable him to defend himself;

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

(v) a case involving the same claim between the same parties had been brought before a court in the Republic of Poland before it was brought before a court of a foreign state;

(vi) the ruling is contrary to a previous non-appealable ruling of a Polish court or a previous non-appealable ruling of a court of a foreign state recognised in the Republic of Poland, issued in a case involving the same claim between the same parties; and

(vii) recognition of the ruling would be contrary to the basic principles of the legal order of the Republic of Poland (the public order clause).

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

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

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

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

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

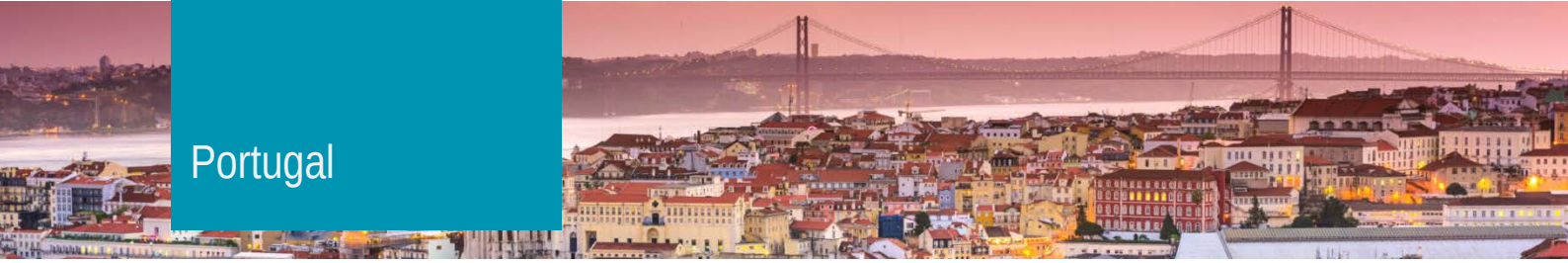
(iv) compulsory administration over the debtor's enterprise or agricultural farm.

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

Court rulings issued in other European member states may be enforced in Poland without substantive examination of the judgment in accordance with the Brussels Regulations.

Orders issued in EU Member States

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



General

Where security has been created in the form of a mortgage, the enforcement proceedings must be carried out in court.

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

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

In the event that the lender does not have an enforcement title, the lender will have to first obtain a court decision recognising the claim and then proceed to enforcement. Pursuant to Portuguese law, a contract signed by an obligor under which payment obligations (in amounts which are, or can be, determined) have been agreed, is deemed to be an enforcement title.

In the context of a loan secured by a mortgage or a pledge, a public deed granted by a Public Notary creating the mortgage or the pledge agreement will be deemed as executory titles.

Enforcement of Mortgages

(i) Filing of enforcement request by the lender to the court

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

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

(ii) Court notifies debtor of the enforcement request and seizure of assets

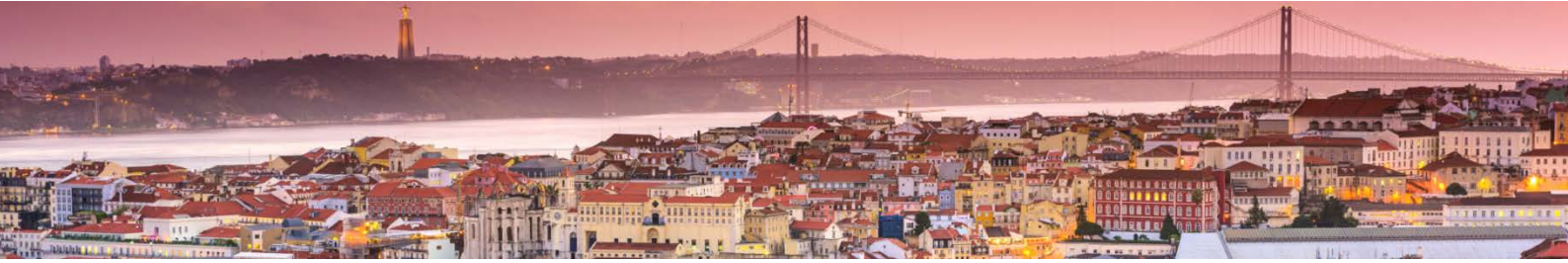
The debtor may decide to pay, oppose (20 days to file opposition), or not oppose and not pay.

If the debtor opposes, it must provide a deposit to suspend the enforcement proceedings.

The lender is notified of the opposition in order for it to contest.

(iii) Seizure of assets

The enforcement agent seizes the mortgaged asset (by electronic communication made by the court directly to the land registry office).



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

(iv) Court notifies other creditors

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

Other creditors submit their respective claims within 15 days.

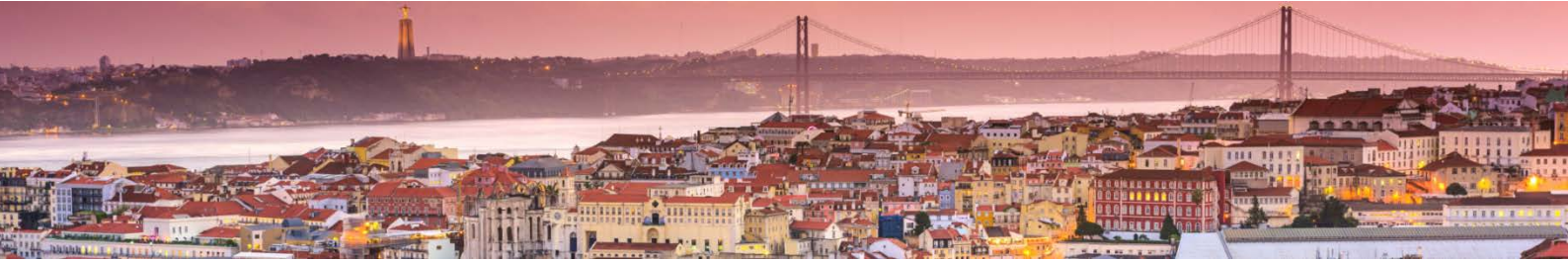
(v) Court issues decision of ranking of creditors

The ranking of creditors in enforcement proceedings is as follows:

- court expenses with the maintenance, liquidation and enforcement of the mortgaged asset;
- credits of employees that work at the mortgaged property;
- property taxes (Property Purchase Tax (IMT) and Immovable Property Tax (IMI)) due to the State and Tax Authorities in relation to the mortgaged property as regards the ongoing and previous two years; and
- mortgaged credit.

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

- debts of the insolvent estate (i.e. court costs, payment to insolvency administrator, expenses with management and liquidation of insolvency assets), which will be paid firstly with any income of the insolvent estate and, secondly, pro rata with proceeds of sale of all the assets of the insolvent estate (subject in any case to a maximum of 10% of proceeds of secured assets);
- credits of employees that work at the mortgaged property;
- property taxes (IMT and IMI) due to the State and Tax Authorities in relation to the mortgaged property which became due during the period of 12 months prior to commencement of the insolvency proceeding; and
- mortgaged credit.



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

(vi) Sale of seized assets

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

(vii) Forms of payment (if debtor does not pay voluntarily)

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

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

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

(viii) General timing

Not less than two years, assuming there is no opposition by the debtor, no appeal against the court decision, no bankruptcy of the debtor, existence of seizable assets and market conditions for sale of seized assets, and subject to complexity of case and work volume of the relevant court.

(ix) Preservation / conservation of asset

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

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

(x) Lease /rental agreements

In the case of shopping centres, (i) the shop lease agreements remain in force and effect during enforcement; (ii) the transfer of the mortgaged property to a third party does not lead to termination of lease agreements; (iii) shop owners do not have special rights in the context of the

enforcement proceedings; and (iv) lease agreements typically do not foresee exit/termination upon transfer/change of control of the property.

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

(xi) Moratorium / standstill

Under Portuguese law there are two types of special recovery proceedings that establish a standstill period: (i) PER *(Processo Especial de Revitalização)* and (ii) SIREVE *(Sistema de Recuperação de Empresas por via Extrajudicial)*.

The enforcement proceedings are suspended if a special recovery proceeding is commenced upon joint request by (i) in the case of PER, the debtor and at least one creditor, and (ii) in the case of SIREVE, the debtor that must identify the creditors (or a single creditor) that represent(s) at least 50% of the company's debt.

Extra-judicial enforcement of the pledge

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

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

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

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

Enforcement of Unsecured Debt

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

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

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

If the debtor does not (i) oppose the payment procedure, or (ii) pay within 15 days, the creditor will have an enforceable title. If the debtor contests the process, the payment procedure will proceed according to declarative action rules.

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

Enforcement of Foreign Judgments

Any final judgment obtained in a competent jurisdiction in respect of any sums payable would be enforced by the courts of Portugal under the conditions set forth in the Brussels Regulation (Regulation (EU) 44/2001) or the Lugano Convention or, if and when such conventions are not applicable, would be enforced by the courts of Portugal without re-examination of the merits of the case provided that:

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

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

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

(iv) it would not be adjudged res judicata by the Portuguese courts;

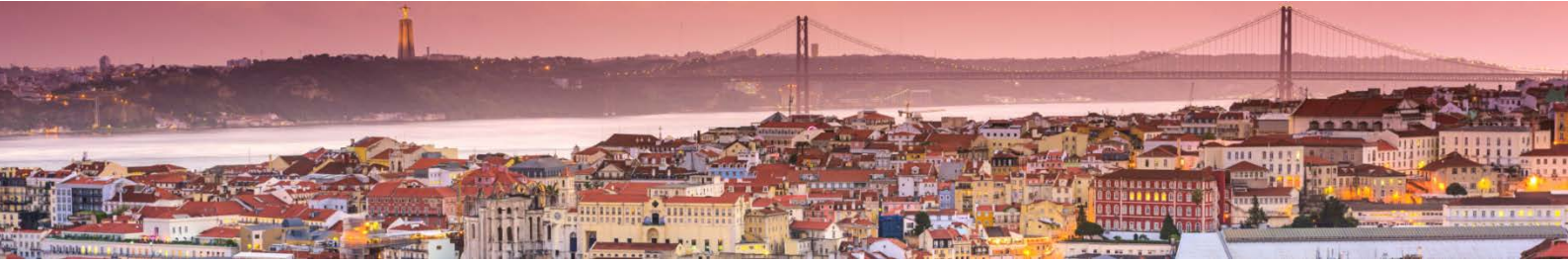
(v) the defendant was duly served for the action in accordance with the law of the country in which the judgment was issued and that the principles of the right to a fair trial (principio do contraditório) and equal treatment of the parties have been complied with; or

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

The procedure for recognition and enforcement thereof in Portugal must be carried out in accordance with Regulation (EU) 44/2001 as follows:

(i) Application for enforcement

The final decision issued by the competent court can only be executed and enforced in Portugal once it has been declared enforceable by the competent Portuguese court upon the request of the interested party.



Accordingly, an application for the execution and enforceability of the final decision must be filed with (the relevant Portuguese Court) in order to obtain the exequatur from this court in accordance with Regulation (EU) 44/2001.

This application must be accompanied by (i) a certified copy of the final court decision (as well as a translation thereof in Portuguese) (ii) a certificate issued by the foreign court in accordance with the form set out in Annex V to Regulation (EU) 44/2001 and (iii) a duly executed power of attorney.

(ii) Exequatur

Provided that the above requirements have been met, the Portuguese Court shall accept the final foreign court decision and declare its enforceability. This decision will be immediately notified to the applicant and the defendant.

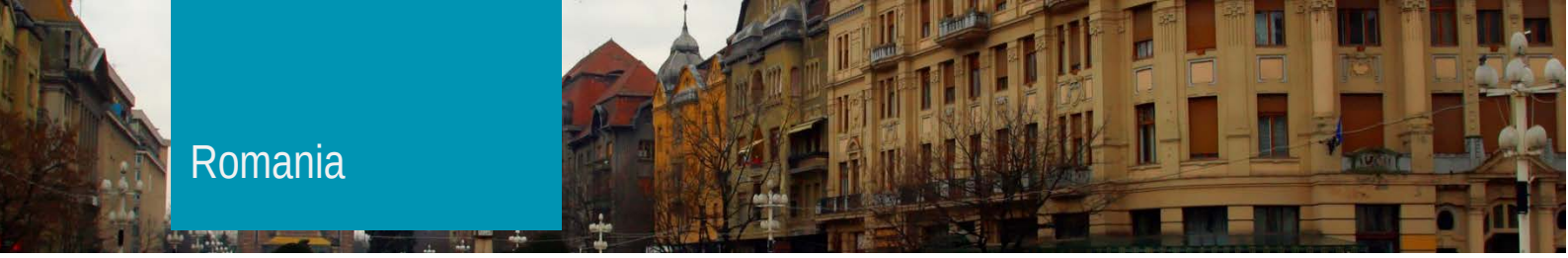
(iii) Appeals

The defendant may first appeal in respect of the decision of the Portuguese Court with the Tribunal da Relação de Lisboa (the Appeal Court of Lisbon) within one month of the date of notification of the decision of the Portuguese Court.

During that month, the applicant may file for interlocutory injunctions (*providências cautelares*) to seize assets of the defendant.

The defendant has the right to a second appeal in respect of the decision of the Appeal Court of Lisbon in respect of the first appeal mentioned in the previous paragraph, although its scope is limited to matters of law.

However, it should be noted that the Appeal Court of Lisbon can only reject or revoke the decision of the Court in the event that any of the conditions set out in (a) to (f) above have not been complied with.



Enforcement of Security

Romanian legislation is mainly established to encourage the parties to resolve the matters in court under the authority of a state representative. As a result, enforcement of security in Romania is, in principle, a process which involves the recourse of the creditor to enforcement officers (bailiffs) and is supervised by a court of law. The enforcement proceedings are, in most cases, relatively formal and slow, with numerous opportunities for challenges and procedural delays.

In order to be able to request an enforcement officer to commence the enforcement procedure a creditor would need to hold a writ of enforcement (*titlu executoriu*), such as a final decision of a court of law, a mortgage agreement validly concluded or an authentic deed. All writs of enforcement, other than court decisions, must be vested with an "executory form" by the competent court of law (*investire cu formula executorie*) before the creditor is able to apply for the approval of their enforcement. This procedure generally entails verification by the court that the document observes the formal requirements to be deemed a writ of enforcement. After vesting with an "executory form", the writ of enforcement is subject to a second procedure involving enforcement officers approving the enforcement.

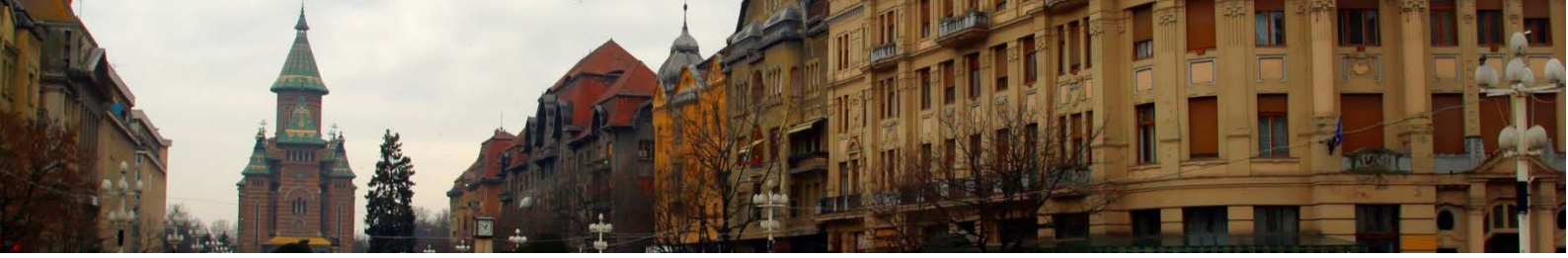
There are, however, certain limited cases expressly regulated by the Romanian legislation where a creditor is not required to go through a legal process to enforce its claims, for example, where it is expressly allowed in the moveable mortgage agreement for the creditor to take over the moveable assets and/or the title over such asset by its own means only subject to a prior notice to the debtor. Otherwise, any action of the creditor to recover its debt, secured or not, must be made through an enforcement officer and the court of law.

(a) Mortgage on real estate

Enforcement of mortgages on real estate (such as land and buildings) is regulated by the Romanian Civil Procedure Code. The enforcement procedure is mandatory and cannot be amended by the mutual agreement of the parties before the commencement of the enforcement. Any enforcement rules agreed by the parties and which are contrary to the rules set out in the Civil Procedure Code are not enforceable.

Approval of the enforcement

Validly concluded mortgage agreements are deemed to be writs of enforcement. The creditor benefiting from a mortgage can enforce the mortgage directly, without being required to first obtain a court decision attesting the failure of the debtor to fulfil its contractual obligations or the entitlement of the creditor to commence the enforcement. However, before starting the enforcement, the creditor must follow the procedures described above involving the vestment of the mortgage agreement with an "executory form" by the competent court of law and the approval of the enforcement by the competent enforcement officer in the jurisdiction where the real estate is located.



Sale of real estate by means of public auction

The enforcement officer will firstly summon the debtor to make the due payment and grant 15 days for the payment. Within ten days after being summoned, the mortgagor has the legal right to address a request to the court to allow the payment of the entire debt within six months.

If the mortgagor does not pay after receiving the summons or does not ask for or obtain the six months term, the mortgaged assets will be sold either: (i) by direct or amicable sale with the approval of both the parties and under the supervision of the enforcement officer; or (ii) by sale at public auction.

As a first step, the value of the mortgaged property will be determined by the enforcement officer or, if the parties so request, by an independent valuer. This can be done by an independent valuator if the parties so request or the enforcement officer can perform the valuation himself.

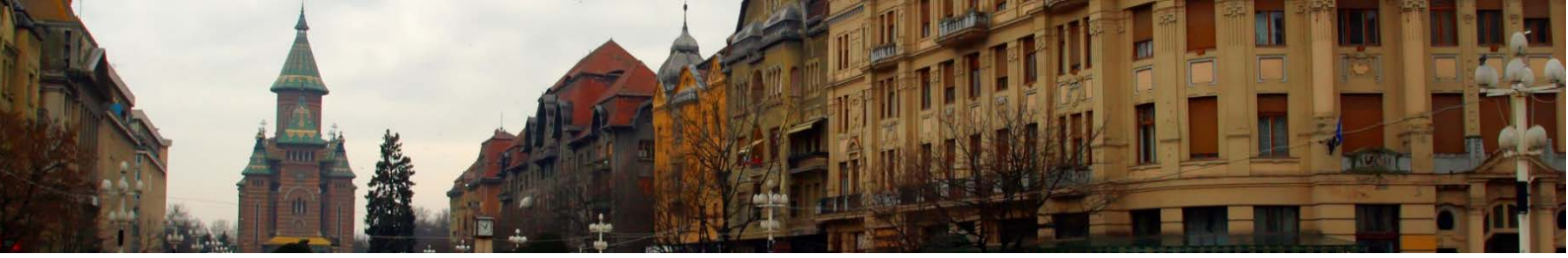
The public auction will be set between 20 to 40 days from the date that an announcement for the public auction is published. The starting price is the one determined by the valuation. If such price is not offered by any bidder, another auction shall be set at which the starting price shall be set at 75% of the initial valuation. Should such a price not be offered by any bidder, then the asset shall be sold for the highest price offered. A third auction can be set if, at the second auction, the asset could not be adjudicated for more than 30% of the initial valuation. The starting price for the third auction will be 50% of the initial valuation. If the adjudicator is the creditor himself, the legislation provides that the price offered cannot be less than 75% of the initial valuation.

Following the forced sale, the enforcement officer will issue the adjudication deed and will start the distribution of the sale price which will be made by observing the distribution rules set forth by the Romanian Civil Procedure Code.

(b) Mortgage on moveable assets

Mortgage on tangible moveable assets

Enforcement of moveable mortgages can be carried out either in accordance with the provisions of the Romanian Civil Code or the provisions of the Romanian Civil Procedure Code. With respect to pledges on moveable assets entered into prior to the date of the entry into force of the Romanian Civil Code (1 October 2011), the rules governing the enforcement of such pledges are not entirely clear. Some practitioners consider that the enforcement of such pledges should also be subject to the rules of the Romanian Civil Code, rather than the provisions of the moveable security law in force at the date of the mortgage's execution i.e. Title VI of Law no. 99/1999 regarding certain measures for the acceleration of economic reform. This belief is based on the general principle that enforcement procedures are of immediate application.



Romanian law allows the creditor to cease the enforcement procedure commenced at any time based on the provisions of the Romanian Civil Code and start enforcement based on the Romanian Civil Procedure Code and vice versa, provided that the creditor acts in good-faith and these changes are notified to the debtor. From a practical standpoint, switching between the two procedures may not be efficient from a timing and financial perspective. The Romanian Civil Code procedure is more flexible and the vast majority of creditors opt for this procedure over the one provided by the Romanian Civil Procedure Code (which is similar to that described above in respect of real estate assets).

The enforcement means available under the Romanian Civil Code are: (i) the sale of the secured asset; (ii) takeover of the secured asset on account of the creditor's receivables; and (iii) the takeover of the secured asset for management purposes. However, such means of enforcement are regulated only with respect to tangible assets and the Romanian Civil Code fails to provide an enforcement procedure applicable to certain intangible assets, such as shares.

Approval of the enforcement

The approval for enforcement is similar with that applicable in the case of the mortgages on real estate. For more details, please refer to section (a) above on mortgages on real estate.

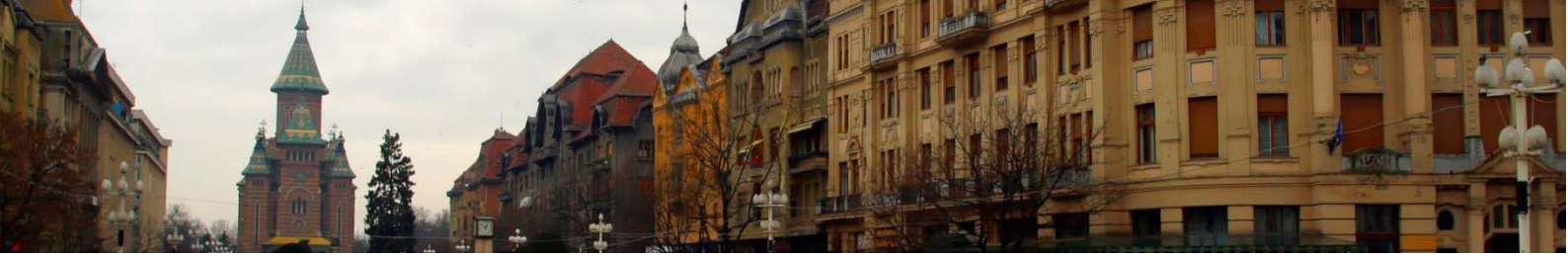
Takeover of the assets/title to assets

A preliminary (and optional) phase in an enforcement procedure is the taking possession of the mortgaged assets and the title over such assets by the creditor. This can be done by the creditor either by using its own means or through an enforcement officer, subject to a prior notice to the mortgagor.

The sale of the asset

The creditor can sell the mortgaged assets either by public bid or by direct sale to a third party by means of one or several agreements, globally or individually, at any time or place. The parties may provide the method of sale in the mortgage agreement provided that certain requirements are observed, such as the notification of the sale by the creditor and the sale to be conducted in a commercially reasonable manner with regards to the method, time, place and any other terms and conditions of such sale.

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



The secured creditor may acquire the mortgaged asset on account of its receivable either at a public auction or through a direct sale though in the latter case only to the extent that assets of the same type are usually sold on a regulated market.

Prior to the scheduled sale, the creditor must observe certain notification/publicity formalities: (i) send an enforcement notice to certain interested third parties (e.g. the debtor, joint debtors, personal guarantors, the mortgagor and other secured creditors) regarding the initiation of the enforcement; and (ii) register an enforcement form with the Electronic Archive for Moveable Security Interest in Romania ("**Electronic Archive**"). Failure to observe such formalities may trigger the nullity of the enforcement procedure and render the creditor liable for damages.

Taking over the asset on account of the creditor's receivable

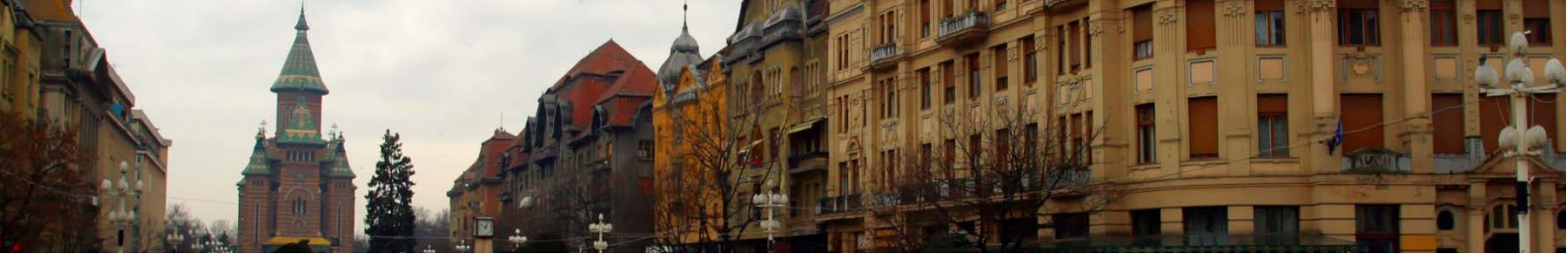
As an alternative to the sale of the mortgaged assets, the creditor may opt to take over the assets on account of its receivable. This procedure is available if: (i) the mortgagor has given its written consent to the takeover following the occurrence of an event of default in relation to the secured obligations; and (ii) the creditor has notified certain interested parties (e.g. the debtor, joint debtors, personal guarantors, the mortgagor, other secured creditors), it has registered an enforcement form with the Electronic Archive and none of these recipients are opposed to the takeover.

Taking possession of the asset for management purposes

This means of enforcement is available with respect to a mortgage created on the moveable assets pertaining to an undertaking. Subject to the notification of the interested parties and the registration of an enforcement form with the Electronic Archive, the creditor, or a person appointed by the creditor or the court, can temporarily take over the management of the assets of the respective undertaking until the secured obligations are discharged.

(c) ***Mortgage on shares in limited liability companies***

The legal framework in respect of the enforcement of shares in a limited liability company is viewed as problematic in Romania and there are enforcement officers who, due to this reason, abstain from undertaking enforcement measures on shares of limited liability companies. More specifically, the Romanian Civil Code completely fails to regulate the enforcement of intangible assets (such as shares), while the Romanian New Civil Procedure Code expressly provides that the shares of a limited liability company may be subject to enforcement, but fails to regulate the procedure of such enforcement. There are, however, legal arguments to support the opinion that the rules regarding enforcement of moveable mortgages over tangible assets should also be applicable to intangible moveable assets. However, there is no substantial doctrine, case law or market practice so far confirming such an interpretation.



(d) ***Pledge in possession***

A creditor may benefit from a pledge in possession (*gaj*) created over tangible moveable assets or securities in material form. In order to benefit from priority in ranking against other security interests, such as a moveable mortgage, the pledge in possession must be registered with the Electronic Archive and the creditor must remain in possession of the asset. Enforcement of the pledge in possession is subject to the same rules applicable to the enforcement of mortgages on moveable assets.

(a) ***Personal guarantees***

In principle, personal guarantees (*fideiusiune*) or letters of guarantee are not deemed writs of enforcement under Romanian law. If the guarantor refuses to make a payment under the personal guarantee, the creditor will need to obtain a court decision against the respective guarantor in order to be able to enforce the personal guarantee. The creditor can start enforcement over any assets of the debtor (moveable or immoveable) existing at that time of the enforcement in its patrimony. The enforcement will be subject to the rules provided by the Romanian Procedure Civil Code regarding enforcement of moveable or immoveable assets depending on the assets that are being enforced. In case the respective assets are mortgaged in favour of other creditors, these creditors will be regarded as secured creditors and will be paid with priority from the enforcement proceeds.

Recognition and enforcement of foreign judgments

A judgment of a court of an EU member state would be recognised by a Romanian court according and subject to the provisions of the Romanian Civil Procedure Code pertaining to matters of international private law and the regulations.

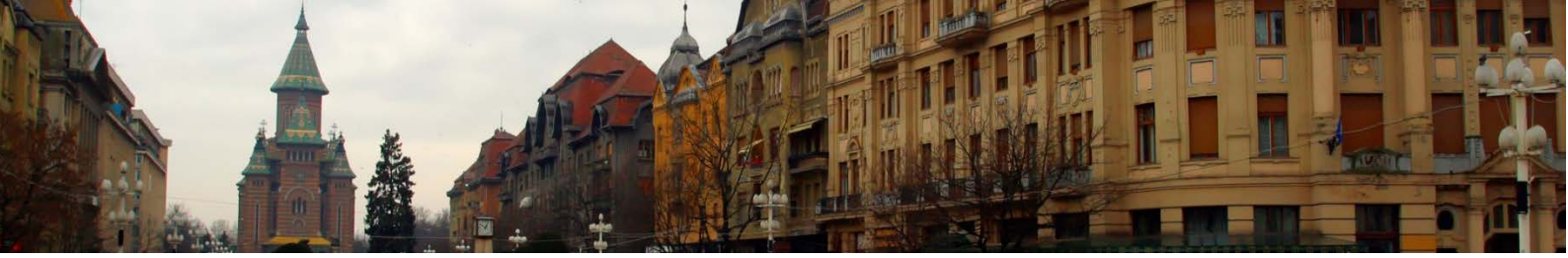
A judgment of a court of a non-EU member state will be recognised and enforceable in Romania, without re-examination of the merits of the case, provided that the following conditions are met:

(i) the judgment is final (non-appealable) according to the law of the state in which it was issued;

(ii) the court issuing the judgment had jurisdiction to adjudicate the matter, without such jurisdiction becoming applicable exclusively based on the presence of the defendant or on some of its assets without direct connection with the claim brought in court in the respective jurisdiction;

(iii) enforcement reciprocity exists between Romania and the state of the court which issued the decision;

(iv) the party against whom recognition and enforcement is sought had been duly served with process by the foreign court. If the judgment was issued in the



absence of the party against whom enforcement is sought, the judgment must attest that the respective party received in due time the summons for the term when the discussions on the merits of the case where held, as well as the claim filed with the foreign court and such party was allowed to defend itself and appeal the judgment.

(v) the judgment is enforceable in accordance with the law of the state of the issuing court; and

(vi) the right to seek enforcement of the foreign judgment has not expired under the applicable statute of limitation under Romanian law (currently, three years from the date on which the foreign judgment becomes a writ of enforcement in the jurisdiction where it was obtained).

In the case of uncontested claims, a judgment of a court of an EU member state would be recognised and enforced in Romania according to EC Regulation No. 805/2004 of the European Parliament and the European Council creating a European Enforcement Order for uncontested claims. A judgment certified as a European Enforcement Order can be enforced in Romania without intermediate examination of the judgment by a Romanian court of law.

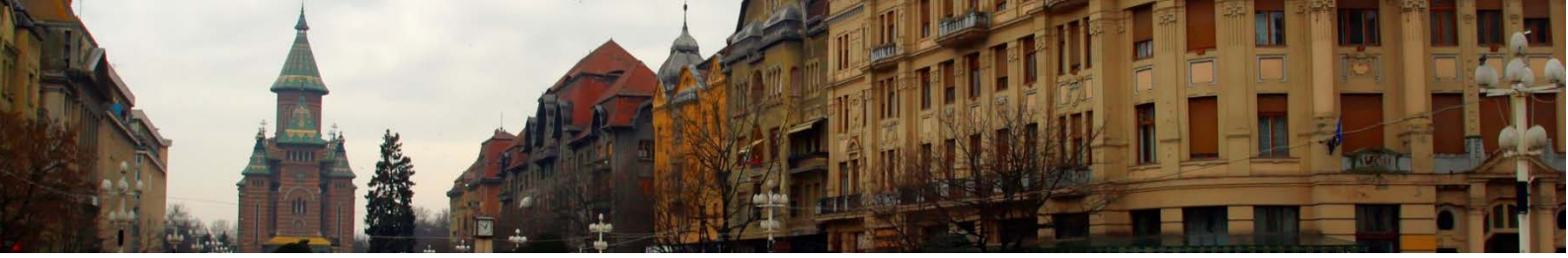
Other European regulations applicable in Romania in relation to foreign judgments are: (i) Council Regulation (EC) No. 1896/2006 creating a European order for payment procedure; and (ii) Council Regulation (EC) No. 861/2007, establishing a European Small Claims Procedure.

Impact of pre-insolvency and insolvency procedures on debt recovery

Before the commencement of insolvency proceedings, the relevant debtor may enter into insolvency prevention mechanisms (*concordat preventiv*), which would determine the suspension of enforcement proceedings, even for creditors which are not part of the concordat preventiv. There is another insolvency prevention mechanism regulated by the insolvency legislation – the ad-hoc mandate, but this structure is almost never used in practice.

Following the validation of the concordat preventiv by the insolvency judge, all enforcement procedures against the debtor are suspended. At the request of the conciliator, and conditional upon the debtor granting guarantees to the creditors, the insolvency judge may postpone the due date of the receivables of the creditors which did not execute the concordat preventiv for a maximum period of 18 months. No interest, penalties or other related expenses will apply during this period.

The commencement of the insolvency proceedings will also lead to a stay of the creditors' enforcement claims (with a few limited exceptions), of all interest, penalties and expenses in relation to unsecured and secured debts, until the approval of a reorganisation plan, as well as of



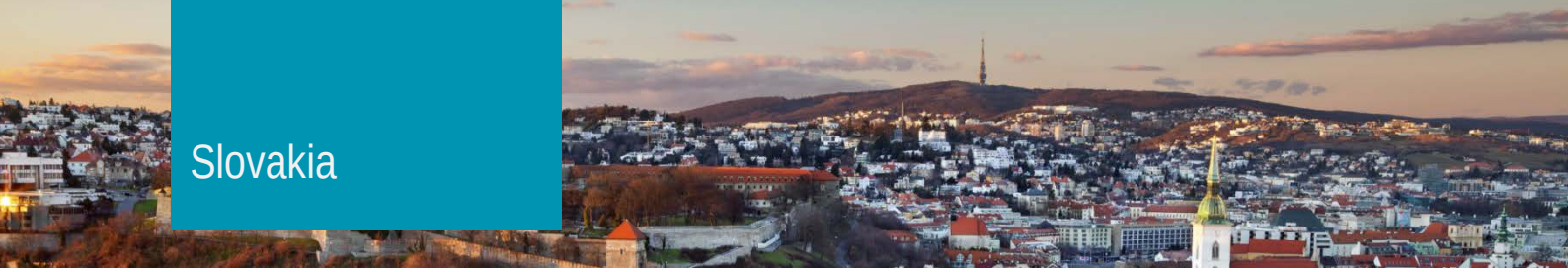
the limitation period applicable to creditors' enforcement claims and the potential annulment of "fraudulent transactions".

As an exception, the secured creditor may request the insolvency judge to lift the stay over the enforcement on the charged asset, and to proceed to its immediate sale and allow the expedited enforcement of their claims during the insolvency procedure, provided that: (i) taxes, stamp duties and other expenses related to the sale of such assets, including the expenses necessary for the conservation and administration of these assets, as well as for the remuneration of the judicial administrator, the liquidator and the other experts involved in the proceedings, are paid; and (ii) at least one of the following conditions is met:

(i) the value of the secured claim (or of the part of it) is equal to, or higher than, the value of the secured asset, and: (a) the secured asset is not of vital importance for the success of the proposed reorganisation plan; or (b) the secured asset is part of a functional unit, and by its separate sale, the value of the remaining assets has not decreased; or

(ii) the secured claim is lacking adequate protection due to the fact that: (a) the secured asset is decreasing in value or there is a serious risk that it may suffer an important loss of value; (b) the value of a lower-ranking secured claim decreases due to the accrual of the interest and penalties of any kind in favour of a higher ranking secured claim; or (c) the secured asset is not insured against the risk of being destroyed or damaged.

In practice, there are cases where the effects of pre-insolvency and insolvency mechanisms have been used abusively by debtors with the intention of paralysing enforcement actions started by the creditors and to benefit from a stay of creditor's claims and the interest, penalties and other expenses. In principle, commencement of the insolvency procedure in bad faith by the debtor triggers the liability of the debtor in tort for damages and, in certain cases, can result in criminal liability.



Enforcement of Security

In the Slovak Republic debts are typically secured by: (i) a pledge (a negative pledge is also admitted) of ownership interest, real property, moveable assets, securities, receivables (from bank accounts, insurance agreements, lease agreements or trade receivables etc.), patents and trademarks; (ii) security assignment of receivables, moveable assets, securities; and (iii) other instruments such as guarantees or blank promissory notes.

Below we provide an overview of enforcement of security (specified under letter (i) above) by the secured creditor outside an insolvency procedure. These procedures are not available in the case of insolvency procedures where the debtor's assets become subject to administration by the insolvency administrator and are typically sold by the insolvency administrator, in which case secured creditors usually have a preferred right of satisfaction from the sale of the pledged asset.

Enforcement of Pledge

In general a pledge may be enforced (i) in a manner defined in the contract; (ii) by sale in public auction; or (iii) through enforcement proceedings (court enforcer). In addition, there are also some specific rules depending on the type of the pledged asset.

The pledgee must notify the pledgor at least 30 days in advance of the commencement of enforcement of the pledge. If the debtor and the pledgor are not the same person, the pledgee must also notify the debtor. If the pledge is registered in the public register of pledges, the pledgee must also notify such register of the commencement of enforcement.

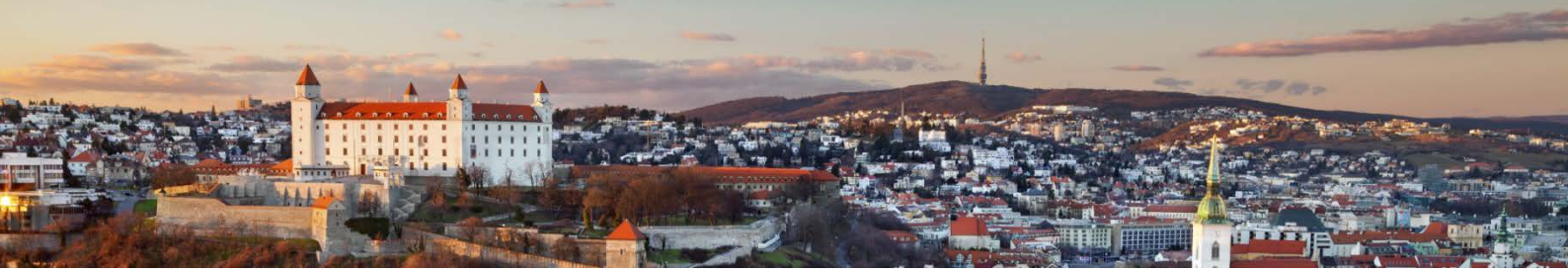
With the exception of the private sale (and enforcement under specific rules listed below) all types of enforcement require an enforcement title: (i) enforceable decision of a court or an arbitration court; or (ii) notarial deed by which the debtor consents that if he fails to repay the relevant debt when due, the notarial deed shall constitute an enforcement title.

The pledgee may request the court to issue an order on court sale of the pledge and then enforce it by way of execution enforcement as described below.

Enforcement of pledge of receivables

When the secured debt becomes due, the pledgee is entitled to the receivable, the interest and other performance derived from the receivable in the amount of the secured debt.

The pledge is effective with respect to the garnishee only if he is notified by the pledgor in writing, or if the pledgee proves the existence of the pledge to the garnishee. In that case, the garnishee is obliged to pay the debt, when it becomes due, directly to the pledgee.



Enforcement in manner defined in the contract

The contract between the pledgor and the pledgee may stipulate the way in which the pledge will be monetised. The standard stipulation is a private sale of the pledge. Other available options are direct sale of the pledge through an agent or private tender.

The pledgee is obliged to act during the sale of the pledge with due care to sell the pledge for a price at which the same or a comparable asset is usually sold, under comparable conditions at the time and place of the sale of the pledge.

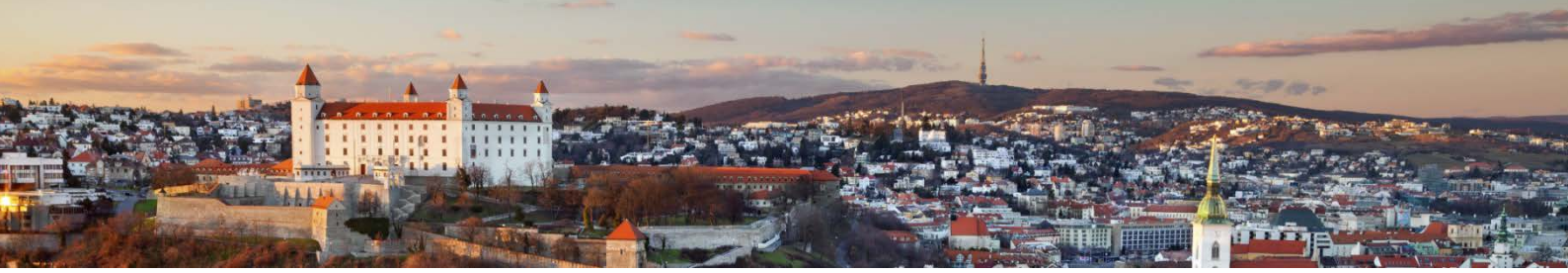
Sale in public auction

The pledgee may request sale of the pledge in public auction. The public auction is performed by an auctioneer under an agreement entered into between the pledgee and the auctioneer which specifies (among other things) the lowest bid. The auctioneer ensures valuation of the pledge. In some cases, such as with real estate, an expert opinion is required. The auctioneer notifies the owner of the pledge, the pledgor, the debtor and creditors secured by the pledge. During the auction, the pledge is knocked down to the highest bidder. If the highest bidder pays the price, they acquire the asset with the effect from the knock down. By the transfer of the pledge the highest priority security interest over the pledge submitted to the auction, along with all lower priority ones cease to exist. Any security interests with higher priority persist and are effective towards the purchaser. The pre-emptive right to a pledge ceases to exist but rights in rem are not affected by the sale in auction. If the proceeds from the auction are not sufficient to pay all submitted receivables, they are satisfied in the order set by law (secured debts are in the first (priority) group).

Enforcement proceedings

The pledge may be enforced in execution enforcement by the court enforcer. The enforcement is performed upon request by the pledgee who must designate a court executor to perform the enforcement. The executor will ask the competent court for authorisation to perform the enforcement.

The court enforcer orders enforcement of the decision and forbids the pledgor to alienate or encumber the assets included in the inventory. The court enforcer estimates the value of the assets with the assistance of the expert if necessary. The assets are then sold in an auction. The court enforcer issues and publishes an auction order. If the highest bidder pays the price, they acquire the asset with the effect from the knock down. If there are more creditors and they cannot be satisfied in full, the proceeds are distributed as follows: (i) the cost of the enforcement; (ii) the creditor which had retention rights over the asset; and (iii) the rest of the creditors are paid according to the order in which they applied for an enforcement order or the order in which they joined the enforcement proceedings. For the order of secured debtors the day of creation of the security is decisive. The existence of the pledges and their transfer on the purchaser is governed by the same rules as in the case of sale in public auction.



Enforcement of Unsecured Debt

The unsecured debt may be enforced by the court enforcer or in insolvency proceedings.

Recognition and Enforcement of Foreign Judgments

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

When requesting court enforcement of a foreign decision in property matters in the Slovak Republic, the competent court will, as a preliminary question, assess whether the foreign decision fulfils conditions for recognitions which include: (i) the Slovak courts did not have exclusive jurisdiction over the matter and the body that issued the decision had jurisdiction under Slovak law; (ii) the decision is final and enforceable in the country in which it was issued; (iii) the decision decides the merit of the issue; (iv) the participant against which the decision was issued was not denied the possibility to properly participate in the proceedings which led to the foreign decision; (v) the Slovak courts did not issue a decision on the matter and there is no other decision on the matter already recognised in the Slovak Republic; and (vi) the decision is not against public policy.

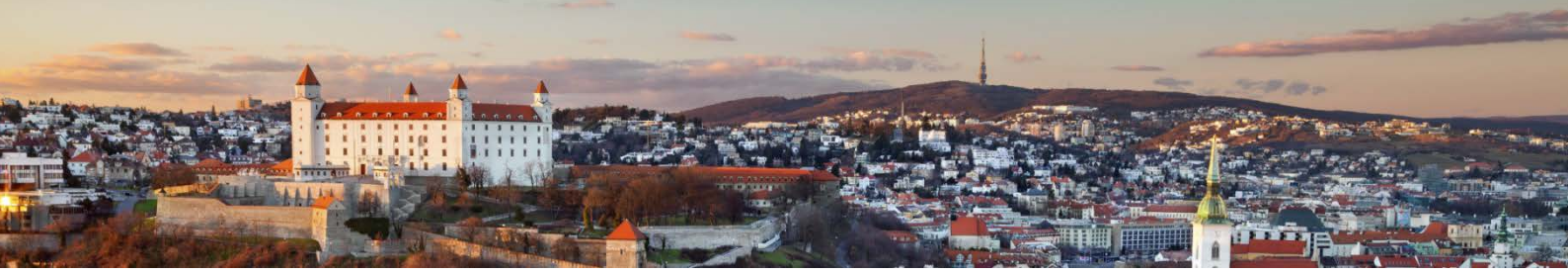
Under the EU Regulation 1215/2012 a decision of a court of an EU member state can be enforced in other EU member state, without a declaration of enforceability or substantive examination of the decision.

Enforcement of uncontested claims

A simplified procedure is available for uncontested claims under Regulation No. 805/2004 creating a European Enforcement Order for uncontested claims. If a judgment is certified as a European Enforcement Order in the EU member state of origin, it shall be recognised and enforced in the other EU member states without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Enforcement on the basis of a European Order for Payment

A simplified procedure is available for uncontested monetary claims under Regulation No. 1896/2006 creating a European order for payment procedure. At least one of the parties must be domiciled or habitually resident in an EU member state other than the EU member state of the court seized. The contestant fills an application for a European order for payment using a standard form which is annexed to the Regulation. If the requirements are met, the competent court issues an order for payment. If the defendant fails to lodge a statement of opposition within 30 days from the delivery, the court declares the order for payment enforceable. The order for payment is then recognised and enforced in other EU member states (with the exception of



Denmark) without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Enforcement of minor claims up to EUR 2,000

A simplified procedure is available for minor claims in civil and commercial matters where the value of the claim is up to EUR 2,000 (under Regulation No. 861/2007). At least one of the parties must be domiciled or habitually resident in an EU member state other than the EU member state of the respective court. The claimant initiates the procedure by filling a standard form which is annexed to the Regulation with the competent court. Unless it is necessary to hold an oral hearing or a party requests it, the procedure is conducted as a written procedure. The court sends the filling together with the standard answer form to the defendant within 14 days and the defendant may reply within 30 days from delivery. The decision is enforceable, notwithstanding any possible appeal in another EU member state without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Enforcement of Security

The two most common types of *rights in rem* which are used in Spain are mortgages and pledges, although other types do exist. The most common security package in banking transactions in Spain is made up of: (i) mortgages on real estate; and (ii) pledges on shares or units (*acciones o participaciones sociales*), receivables and credit rights arising from bank accounts.

Nonetheless, each security package must be tailored according to the nature of the financing and the particular circumstances of the creditor, debtor and its assets.

Mortgages

According to Spanish Law, there are two main types of mortgages (*hipotecas*): (i) mortgages over real estate or other immovable assets; and (ii) mortgages over chattels or movable assets.

Although mortgages in banking transactions usually secure monetary obligations, they may also secure fulfilment of non-monetary obligations, such as negative pledge covenants, in which case they will secure the compensation or indemnification claims resulting from the default of such obligations.

Mortgages created on real estate assets are the most typical in rem security rights in Spain. They grant an exclusive right for the creditor in order to have its credit satisfied against the value of the assets with preference over any other creditor. Such mortgages do not imply the transfer of the possession of the real estate assets before the potential enforcement of the security and a mortgage on real estate assets "runs with the land".

Under current Spanish Law, it is possible to create mortgage structures like contingent/conditional mortgages (*hipotecas condicionadas*), floating mortgages (*hipotecas flotantes*) and reverse mortgages (*hipotecas inversas*).

As regards formal requirements, mortgages on real estate must be: (i) granted by the real estate title holder in a public deed granted before a Public Notary; and (ii) registered at the Land Registry (*Registro de la Propiedad*). The deed of mortgage contains a number of formalities, one of the most important being the maximum mortgage liability, which is the maximum amount for which the asset is charged.

The granting of mortgages involves notary fees and registry fees, and accrues Stamp Duty (*Actos Jurídicos Documentados* "AJD") amounting from 0.5% to 1.5% of the maximum mortgage liability, which may result in a significant cost (the rate depends on the specific region in Spain where the property is located).

A chattel mortgage may be created on certain movable assets such as motor vehicles, planes, machinery or industrial property. Although these are commonly used in certain deals, chattel mortgages are not as common as real estate mortgages or pledges in banking transactions.

Please note that chattel mortgages must also be granted in a notarial deed and registered at the Movable Assets Registry (*Registro de Bienes Muebles*).

Pledges

A pledge may be granted to secure any kind of obligation and it may be created on certain movable assets or credit rights. Again, there are two main types of pledges under Spanish law: (i) possessory pledges; and (ii) non-possessory pledges.

(i) Possessory Pledges (*prendas ordinarias o con desplazamiento*),

Possessory pledges imply the transfer of possession of the asset in favour of the creditor or a third party. In the event of the debtor's default, the creditor may sell the pledged asset to discharge the debtor's liabilities to it, in priority to the claims of any other creditors.

Apart from the effective transfer of the possession, the granting of a possessory pledge must be in a public deed in order to have effects vis-à-vis third parties (*erga omnes*). No registration is required and so the only costs are the notary fees in the event of granting a public deed.

The usual assets granted as security in banking transactions by means of possessory pledges are shares, securities, receivables and credit rights. In the case of receivables and credit rights, transfer of possession is replaced by a notice to the relevant obligor communicating the creation of the pledge over such assets.

(ii) Non-Possessory Pledges (*prendas sin desplazamiento*)

Furthermore, it is also possible to set up a pledge on movable assets that does not entail the transfer of possession and thus permits the debtor to continue using the secured asset in the industrial process. Non-possessory pledges may be created on assets listed in the Law 16/1954 of Chattel Mortgage and Non-Possessory Pledge, which are, amongst others, machinery, stock goods, raw materials and credit rights.

This non-possessory pledge must be granted in a public deed and registered with the Movable Assets Registry. In certain cases it is possible to grant this type of pledge in a form of notarial deed (*póliza*) that does no accrue stamp duty tax.

Pledges over future receivables

(iii) Other issues

It should be noted that, in accordance with the Insolvency Law 22/2003 (recently amended by Law 9/2015), in the event that insolvency proceedings are instituted, the credits held against the insolvent company that have been secured by pledges over future credits, shall be classified as credits with special privilege, but only if such future credits arise from agreements that have been perfected, or from legal relationships that have been constituted prior to the declaration of insolvency. To benefit from such privileged status, the pledge has to be granted before a Notary Public or, in the case of non-possessory pledge, it has to be registered with the Movable Assets Registry.

It should also be noted that some Spanish Regions (Comunidades Autónomas), like Catalonia or Navarra, have established specific regulations for pledges granted in their territory or on assets located therein.

Financial Collateral Arrangements

Financial collateral arrangements are currently regulated by Royal Decree Law 5/2005, which implemented the EU Directive 2002/47/EC and EU Directive 2009/44/EC of the European Parliament in respect of financial instruments, cash deposited in bank accounts and credit claims. Pursuant to the Royal Decree Law, the only formality required to create a valid financial guarantee is that it is contained in a written agreement between the parties. Nonetheless, the collateral being provided should be delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf.

A key difference with financial collateral arrangements is that the creditor may dispose of the assets granted as security but must return to the debtor equivalent assets on the maturity date of the secured obligations. For this to be applicable, the deed must establish: (i) an express agreement to entitle the creditor to dispose of the assets; and (ii) the procedure to do so.

In addition, it should be noted that the beneficiary of such guarantees benefits from a privileged regime in the event of insolvency of the debtor.

Enforcement of Secured Debt

Spanish Law provides several proceedings for the enforcement of securities. In particular, the most common proceedings for the foreclosure of a mortgage are the judicial foreclose procedure and the out of court proceedings (the notarial procedure). The foreclosure of mortgages entails the sale of the mortgaged property though a public auction arranged before the relevant court or Notary Public. Within the judicial proceedings, the procedural regulation provides that the parties may agree upon a specific procedure to sell the mortgaged property. Moreover, the judge may entrust the sale of the property to a specialised person or entity. Foreclosure is designed to obtain the best possible price within reason.

Spanish law grants the secured creditor the possibility of accepting title to the property in satisfaction of the secured amount, but it may be required to acknowledge full satisfaction of the total outstanding amount, or at least of a certain proportion of the debt, in accordance with the procedural regulation on this matter.

The enforcement proceedings for chattel mortgages and non-possessory pledges are similar to the regulation established for the mortgages on real estate, but it is important to take into account the differences between them.

For the enforcement of a pledge of shares/units, judicial and notarial procedures can be followed, although the latter is normally faster and more efficient.

In any event, the parties can agree on a different procedure for the enforcement of collaterals. For example, the parties may establish a method to enforce the collateral via a financial collateral agreement. This implies that the parties may agree on the set-off or assignment of the asset to discharge the secured obligations.

Enforcement of Unsecured Debt

Under Spanish law, no special formalities are needed for an unsecured financing agreement to be valid and effective. However, notarisation of the agreement has a procedural advantage for lenders, as it provides direct access to summary (or "*executive*") enforcement proceedings.

Judicial executive proceedings (*procedimiento ejecutivo*) are an easy and expeditious way of claiming from the borrower or the guarantor any amount owed under an agreement.

The judicial claim would only need to be accompanied by the following documents:

- the deed by which the agreement was raised to public status before a Spanish Notary;
- documents that justify the amount of due and claimable debt; and
- proof of the notification to the debtor or the guarantors (if applicable).

Furthermore, the debtor has limited grounds on which to challenge the enforcement, i.e. the debt has already been paid and/or the amount due has been calculated incorrectly. Any other grounds (such as invalidity of the agreement and/or unenforceability of the debt) shall have to be alleged within an ordinary declarative proceeding which would entail the stay of the enforcement proceedings.

By contrast, in order to enforce an agreement that has not been raised to public status, the lenders have to claim the debt by means of an order-for-payment procedure (*procedimiento monitorio*) related to certain invoices or a declarative proceeding (*procedimiento declarativo*),

which does not affect enforcement of the debt, but leads to a statement of the existence of the right to be repaid. The recovery of the debt by means of enforcement proceedings typically takes from four up to six months. Order-for-payment proceedings are faster (i.e. two to three months) but they can only be initiated if the debt is supported by instruments such as invoices or similar instruments. Declarative proceedings are longer and may take from one to three years. In light of the above, market practice in Spain is for lenders to require the enforcement of the finance documents before a Spanish Notary.

Recognition of Foreign Judgments

Recognition

Under the Brussels Regulations, a judicial judgment rendered in a member state of the European Union shall be recognised in the other member states without any special procedure being required.

As regards countries outside the European Union, the foreign judicial judgment must be recognised by the Spanish Court (First Instance Court) prior to its enforcement. However that recognition will not be necessary in certain cases where a treaty has been entered into via bilateral conventions between Spain and the foreign country (i.e. Colombia, Uruguay, Israel, Brazil, Mexico, China, Morocco, Thailand, El Salvador, Tunisia and Russia).

In the absence of an applicable convention or treaty providing for the recognition and enforcement of a foreign judgment, Spanish courts will render a foreign judgment in accordance with Law 29/2015, of 30 July 2015, on international legal cooperation in civil matters which derogates the articles of the Spanish Civil Procedure Act 1881. The new regulation, which will apply in civil and commercial matters, takes a broad and favourable approach to international legal cooperation, even in the absence of reciprocity, although it envisages the possibility of refusal in cases of a repeated lack of cooperation or a legal prohibition on providing it.

The foreign final and conclusive judgment will not be recognised in Spain when:

- it is contrary to public policy;
- the decision has been issued with manifest infringement of the rights of defence of any party;
- a foreign judgment has been given on a matter for which the Spanish courts have exclusive jurisdiction;
- the judgment is irreconcilable with a judgment given in Spain;

- the judgment is irreconcilable with a judgment given previously in another member state, and such judgment meets the conditions necessary for its recognition in Spain; and

- there is pending litigation in Spain between the same parties and on the same matter which began before the litigation process abroad.

Enforcement

The First Instance Court is the competent judicial authority for enforcing the judgment.

The Spanish Civil Procedure requires all the documents to be submitted before the court be translated into Spanish. It is important to emphasize that since the other party can challenge the translation, even though it is not strictly necessary, a sworn translation will be required. An apostille certificate in accordance with the Hague Convention is required in the majority of cases.

Non-EU Member States

Foreign judgments in civil and commercial matters which are enforceable in their origin country shall be enforceable in the Kingdom of Spain once exequatur has been obtained in accordance with the provisions of Law 29/2015, of 30 July 2015, on international legal cooperation in civil matters.

The procedure to enforce foreign judgments starts with a request submitted by the applicant. The following documents must be attached:

(i) the original or certified copy of the foreign judgment, duly authenticated or certified;

(ii) a document certifying that, if the judgment was given in default, the debtor was notified;

(iii) any document evidencing that the judgment is final, conclusive and enforceable; and

(iv) the relevant translations.

The claim and documents are analysed by the court clerk, who issues a decree notifying the defendant of the claim and allowing them to oppose the declaration of enforceability within thirty days.

EU Member State

Any enforceable judgment given in a member state of the European Union on or after 10 January 2015 in respect of a matter coming within the scope of the Brussels Regulations would be

recognised and enforceable in Spain, without the need for a declaration of enforceability or exequatur.

A judgment will not be recognisable only in cases listed in Article 45 of the Brussels Regulation (Regulation (EU) 1215/2012).

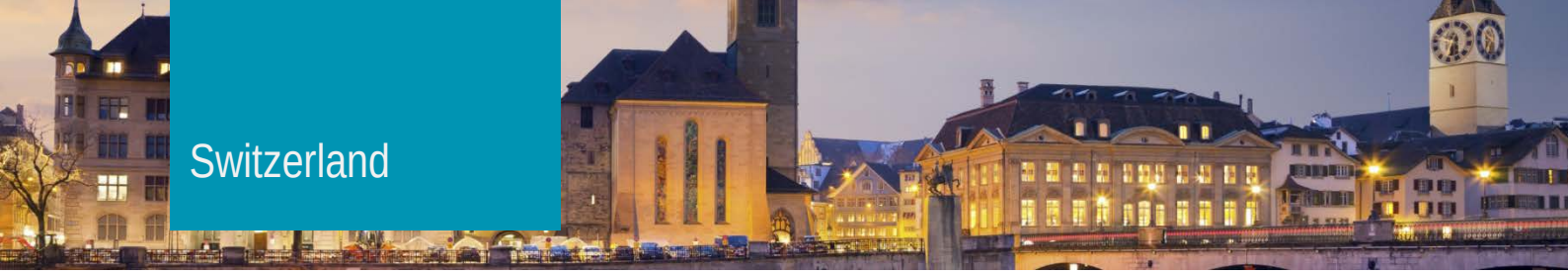
For the purposes of enforcement in Spain of a judgment given in another member state, the applicant shall provide the First Instance Court of the territorial district where the party against whom enforcement is sought is domiciled or where the judgment has to be enforced with: (i) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (ii) the certificate issued pursuant to Article 53 of the Brussels Regulation (Regulation (EU) 1215/2012), certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

Other European regulations applicable to the enforcement of a foreign judgment are:

(i) Council Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims;

(ii) Council Regulation (EC) No. 1896/2006 creating a European order for payment procedures; and

(iii) Council Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure.



Switzerland

Enforcement of debts in general (secured/unsecured debts)

In Switzerland, the enforcement of (monetary) claims is mainly governed by the Swiss Federal Act on Debt Enforcement and Bankruptcy of 11 April 1889 ("**DEBA**"). The DEBA provides for different types of debt enforcement proceedings, depending, amongst others, on whether the enforcement relates to a claim secured by a pledge or not, and whether the debtor is subject to bankruptcy or not. According to the DEBA, all debt enforcement proceedings (whether debts are secured by pledge or not and whether the debtor is subject to bankruptcy or not) are divided into two parts: the preliminary proceedings and the execution proceedings, the preliminary proceedings being essentially the same for all types of debt enforcement proceedings.

Preliminary Proceedings

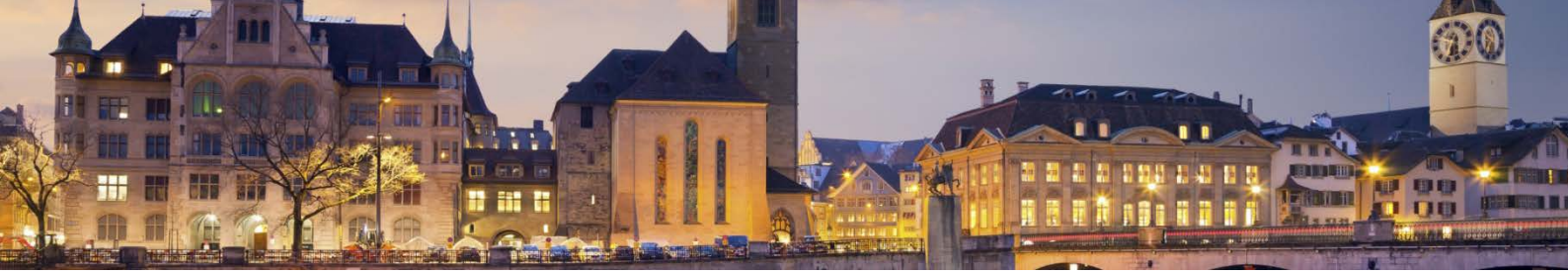
Creditors initiate debt enforcement proceedings by filing a debt collection request against the debtor with the competent debt collection office ("**DCO**"). If the debt is secured by a pledge, the creditor must specify the object of the security in the request. This debt collection request does not require any proof of the validity of the creditor's claim. The DCO will then serve a summons for payment (*Zahlungsbefehl*) to the debtor.

By the summons, the debtor is ordered either to file a verbal or written objection (*Rechtsvorschlag*) with the DCO within 10 days from the receipt of the summons for payment or to pay the sum claimed within 20 days (longer payment periods apply in case of debts secured by a pledge). If the debtor does neither of these actions, the proceedings take their course and lead to seizure or bankruptcy (depending on the execution proceeding, see below). If the debtor pays the sum claimed, enforcement proceedings are discontinued. If the debtor files an objection, the creditor has three possibilities:

- If the creditor is already in possession of an enforceable judgment or a notarised deed confirming the contested debt, he may apply in summary proceedings before the competent court for the definitive dismissal of the debtor's objection.

- If he is in possession of a signed or notarised promise by the debtor to pay the amount at stake (acknowledgement of debt), he may apply in summary proceedings to the competent court for the provisional dismissal of the objection. The provisional dismissal becomes effective if the debtor does not subsequently initiate a lawsuit contesting the validity of the creditor's claim within 20 days.

- Finally, if the creditor has neither an enforceable judgment or notarised deed confirming the contested amount, nor a written acknowledgement of debt, he must file an ordinary lawsuit against the debtor with the ordinary courts to have its claim confirmed and have the debtor's objection dismissed.



Execution proceedings

If no objection is filed by the debtor, or once the filed objection is definitively dismissed by the competent court, the creditor may request the continuation of the enforcement proceedings (*Fortsetzungsbegehren*). Upon such request, the DCO will initiate the execution proceedings.

The form of the execution proceedings depends, amongst other things, on whether the enforcement relates to a claim secured by a pledge or not, and whether the debtor is subject to bankruptcy or not. Please note that, while entities and certain partnerships registered with the commercial register are subject to bankruptcy, individuals are only subject to bankruptcy if they are registered with the commercial register either as owner of a business, as member of a partnership, as member with unlimited liability of a limited partnership, or as member of the board of a partnership limited by shares. The most important forms of execution proceedings are the following ones:

- **Debt collection by seizure of assets:** If the debt is not secured by a pledge, and if the debtor is not subject to bankruptcy, the enforcement leads to the seizure and realisation of the debtor's asset as far as needed for the satisfaction of the creditor's claim. In this context it is also possible to seize the earnings of the debtor: the third party which owes money to the debtor (e.g. its employer) is ordered to pay a specific amount directly to the DCO, which keeps the received sums in custody until distribution to the creditor(s) can be made.

- **Bankruptcy proceedings:** If the debt is not secured by a pledge and if the debtor is subject to bankruptcy, bankruptcy proceedings ensue. Bankruptcy proceedings lead to the liquidation of the debtor's estate and the proportionate satisfaction of all of the debtor's creditors through the distribution of the proceeds.

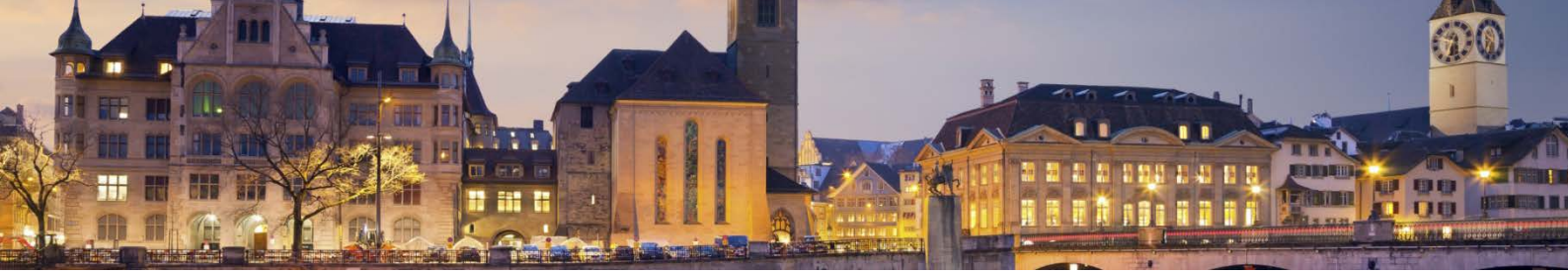
- **Debt collection by realisation of the pledged assets:** If the creditor’s debt is secured by a pledge, the pledged asset is seized by the DCO and sold as described below (unless the parties have agreed to the possibility of a private enforcement, in which case the pledgee has the possibility to realise the pledged asset by way of private enforcement and without the need to go through the preliminary proceedings set out above).

Enforcement of Security in particular

There are three main forms of enforcement with regard to security in Switzerland: (i) private enforcement; (ii) enforcement according to the DEBA; and (iii) "enforcement" with regard to assets transferred by way of security.

Private enforcement:

A private enforcement of pledged assets by the secured party is permitted if: (i) the security provider has not been declared bankrupt; and (ii) if the parties have agreed to the possibility of a



private enforcement in advance (typically in the security agreement). Private enforcement is possible with regard to all types of assets. Furthermore, private enforcement can be performed without any need to go through the preliminary proceedings of the DEBA set out above.

However, please note that in the case of a pledge over intermediated securities, a private enforcement does not require that the parties have agreed to the possibility of a private enforcement but is only permitted with regard to intermediated securities which are traded on a representative market. In contrast to the pledges over any other type of assets, pledges over intermediated securities can be subject to a private enforcement even in the case of bankruptcy of the security provider.

Private enforcement can take place by (i) a private sale, (ii) a public auction, or (iii) a purchase of the relevant assets by the secured party itself (*Selbsteintritt*) if the value of the pledged asset can be objectively determined. Any surplus remaining after the application of the proceeds to the secured claims has to be transferred to the pledgor.

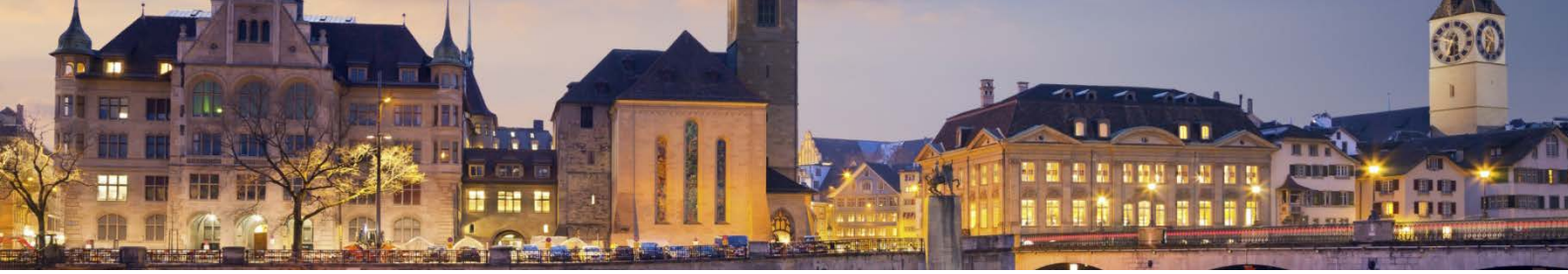
Enforcement according to the DEBA

Pledged assets are enforced according to the rules set out in the DEBA, if bankruptcy proceedings have been opened with regard to the security provider (in which case a private enforcement is not possible anymore, except with regard to intermediated securities, which are traded on a representative market), if the parties have not agreed to the possibility of a private enforcement in advance, or if the pledgee decides not to use the possibility of a private enforcement.

The pledged assets are normally realised by the DCO (or the bankruptcy administration in case if bankruptcy proceedings have been opened with regard to the security provider) by way of a public auction. Pledged assets can, however, also be realised by the DCO (or the bankruptcy administration) by way of a private sale in certain situations (e.g. in case of assets which have a market price or which are subject to deterioration).

"Enforcement" with regard to assets transferred by way of security

If the assets have not been pledged but have been transferred by way of security, a "real" enforcement is not necessary as the secured party is already the formal owner of the respective assets. In such a case, the secured party will typically keep the transferred assets and in the case of an enforcement event, make a fair valuation of such assets, apply the proceeds to the secured claims and return any remaining surplus to the security provider. As in the case of a private enforcement, there is also no need to go through the preliminary proceedings of the DEBA set out above, before such "enforcement".



Contractual or Legal "Self-Help" Remedies

Depending on the particular debtor/creditor relationship, creditors may avail themselves of certain contractual or legal "self-help" remedies under Swiss law, in particular the following:

- According to Article 82 of the Swiss Code of Obligations, a party to a bilateral contract may not demand performance until it has performed or offered to perform its own obligation, unless the terms or nature of the contract allow it to do so at a later date. In other words, a party may hold back its performance as long as the counterparty has not performed its own obligation.

- Where two parties owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set off its debt against its claim.

- Reservation of ownership in respect of assets transferred to the acquirer; such reservation is, however, only effective provided it is entered in the official register kept by the debt collection office at the domicile of the acquirer (this is neither very practical nor common).

- In case of a lease of business premises, the lessor has a right of retention for one year's rent already due and the rent of the current half year over the movables located in the rented premises and forming part of the furnishings or appliances used therein.

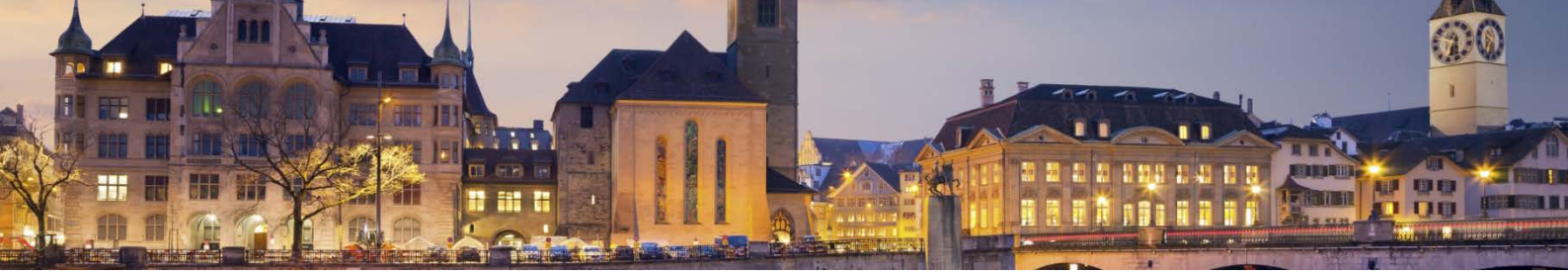
Debt restructuring agreements

As an alternative to bankruptcy, the DEBA also provides for the possibility to enter into a court-mediated debt restructuring agreement.

A court-mediated debt restructuring agreement requires the consent of either a majority of the creditors representing two-thirds of the total amount of the claims, or a quarter of the creditors representing at least three-quarters of the total amount of the claims. In addition, such court-mediated debt restructuring agreement has to be ratified by the court. The agreement may be either negotiated during a debt restructuring moratorium granted by the court upon request of the creditors or the debtor, or during the bankruptcy proceedings. Once ratified by the court, the restructuring agreement takes effect with respect to all creditors and sets an end to all ongoing debt enforcement proceedings.

Two types of restructuring agreements can be concluded, ordinary debt restructuring agreements and debt restructuring agreements with assignment of assets:

- In the case of an ordinary debt restructuring agreement, the debtor and its creditors either agree on a specific payment plan, thereby giving the debtor more time to pay its



debts in full, or they agree that the creditors waive part of their claims. The ordinary debt restructuring agreement thus results in a restructuring of the debtor's debts, thereby allowing the debtor to avoid liquidation and to continue its business.

- The debt restructuring agreement with assignment of assets, on the other hand, usually leads to the liquidation of the debtor's business and the dissolution of the debtor; the debtor and the creditors agree that the debtor assigns all its assets to the creditors for realisation by a liquidator elected by the creditors and supervised by a creditors' committee in satisfaction of the creditors' claims (theoretically, the debtor and its creditors may also agree that only part of the debtor's assets be assigned, but this is seldom the case). The part of the creditors' claims that cannot be satisfied from the proceeds of the realisation of the assigned assets is normally waived. The realisation of the assets by the liquidator is similar to that in bankruptcy proceedings, but with more flexibility.

Recognition of Foreign Judgments

The Convention on jurisdiction and the enforcement of judgments

In civil and commercial matters the Lugano Convention of 30 October 2007 on jurisdiction and the enforcement of judgments applies in particular between Switzerland and member states of the European Union.

As a principle, a judgment given in a contracting state (the "**Contracting State**") shall be recognised in the other Contracting States without any special procedure being required. However, any interested party who raises the recognition of a judgment as the principal issue in a dispute may apply for a decision that the judgment be recognised.

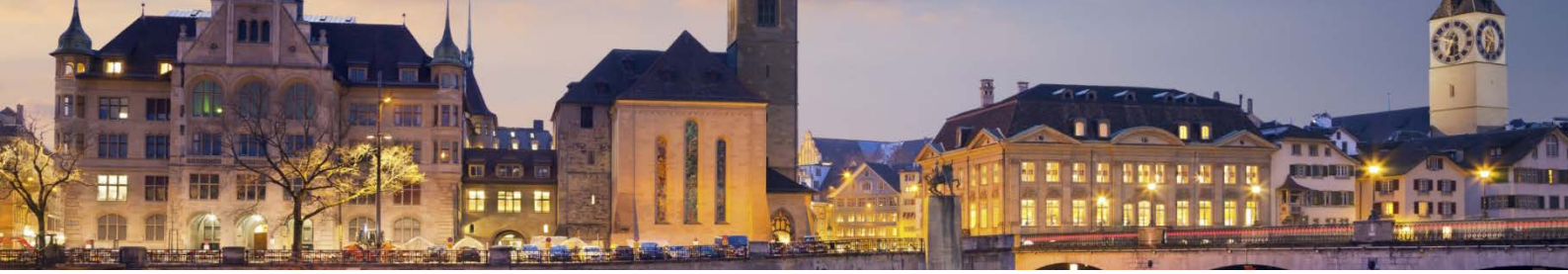
An order of recognition should be granted provided the following conditions are met:

- the recognition is not manifestly contrary to public policy in the State in which recognition is sought;

- if the foreign judgment was given in default of appearance, the defendant must have been duly served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way to enable him to arrange for its defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

- the foreign judgment is not irreconcilable with a judgment given in a dispute between the same parties in the state in which the recognition is sought;

- the foreign judgment is not irreconcilable with an earlier judgment given in another state bound by the Lugano Convention or in a third state involving the same cause of action



and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the state in which recognition is sought; and

- the foreign judgment does not conflict with the jurisdictional provision contained in the Lugano Convention.

There are no other conditions for the foreign judgment to be recognised. In particular, under no circumstances may a foreign judgment be reviewed as to its substance.

The Swiss Federal Statute on International Private Law

In case the Lugano Convention is not applicable (e.g. in the case of bankruptcy), the recognition of a foreign Judgment is subject to the Swiss Federal Act on Private International Law of 18 December 1987 ("**PILA**"). According to the provisions of the PILA, a foreign judgment will be recognised if the following requirements are met:

- the foreign court had jurisdiction;
- the judgment of such foreign court has become final and non-appealable;
- the recognition of the foreign judgment is not manifestly contrary to the public policy in Switzerland;
- the counterparty has been properly served with process according to the law of the state of its domicile or ordinary residence or the counterparty has unconditionally joined the proceedings;
- the proceedings leading to the judgment have respected the principles of a fair trial (as understood in Switzerland) and, in particular, that the counterparty has been granted the right to be heard and the possibility to properly defend its case; and
- no action between the same parties and on the same subject matter has been commenced or decided first in Swiss court and no judgment between the same parties and on the same subject matter has been first rendered by a foreign court, which judgment may be recognised in Switzerland.

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