

# Guide to Cross-Border Secured Transactions



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# Introduction

Dear Reader,

In a globalized world, many companies engage daily in cross-border commercial transactions. This requires dealings to be structured in a manner that suitably manages risk. As this is commonly achieved via security agreements, familiarity with the specifics of cross-border taking and enforcing of security in various jurisdictions can help companies safely conduct businesses outside their home countries.

To do this, companies need current, easy-to-use information relative to secured transactions in the jurisdictions where they do business. As a result, the Deloitte Legal Guide to Secured Transactions was produced by legal practices of the Deloitte Touche Tohmatsu Limited member firms from 27 jurisdictions\* across Europe, South America and South-East Asia. It was prepared based on research carried out during 2012-2013 in each of these jurisdictions, and includes country-specific information provided by local lawyers.

This guide is intended to be a useful tool for creditors and security providers tackling complex issues relevant to cross-border secured transactions. Topics covered for each jurisdiction include:

- Types of security available
- Types of assets subject to security
- Types of obligations that may be secured
- Validity, publicity and other perfection requirements
- Costs of set up and publicity of security
- Timing for publicity/ perfection requirements
- Rights acquired by the secured creditor
- Governing law issues
- Legal concerns when taking security
- Enforcement issues: court involvement, timing, challenges and cancellation risks
- Secured creditor's position in insolvency

However, the information included in this guide is general in nature and laws may change. The information herein is not meant to replace transaction-specific legal advice in any of the jurisdictions covered. While there may be similarities across the jurisdictions surveyed, differences are substantial. As such, granting, taking and enforcing security remain areas where local expertise is essential for each transaction.

The next section of our guide contains highlights and recommendations from the drafters, followed by detailed information for each of the jurisdictions surveyed.

Please direct questions or requests for further information to the local contacts listed for each jurisdiction. Their details are included at the end of each country guide.

Thank you for your interest in our guide and we hope you shall find the information useful.

Yours sincerely,

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# Highlights and Recommendations

## **Types of assets subject to security**

Generally, across jurisdictions, security may be established over all types of assets. However, we encountered jurisdictions where security over certain assets may only be established to the benefit of certain specific creditor categories. Such cases include:

- Belgium: The pledge of a business may be granted only to credit institutions\*;
- Belarus: Mortgages on land may be taken only by banks holding a special license;
- Ukraine: Agricultural land may only be mortgaged to banks.

Additionally, restrictions may also relate to the characteristics of the asset itself. For example, the pledge of shares of Belgian or Russian companies may be prohibited by the companies' articles of association. Other restrictions include the interdiction to mortgage a business as a going concern, which applies in Thailand.

## **Secured obligations**

There are few limitations to the types of obligations that may be secured. Notably, however, in the Netherlands, rights of mortgage and rights of pledge can only be used to secure monetary claims, while retention of title may only be used to secure supplier credit.

## **Publicity of the security**

Generally, across the jurisdictions featured in this guide, security interests must be registered or filed with a public authority. Throughout this guide, registration or filing is referred to as publicity formalities.

### **• Effects of publicity formalities**

Publicity of the security has two types of effects:

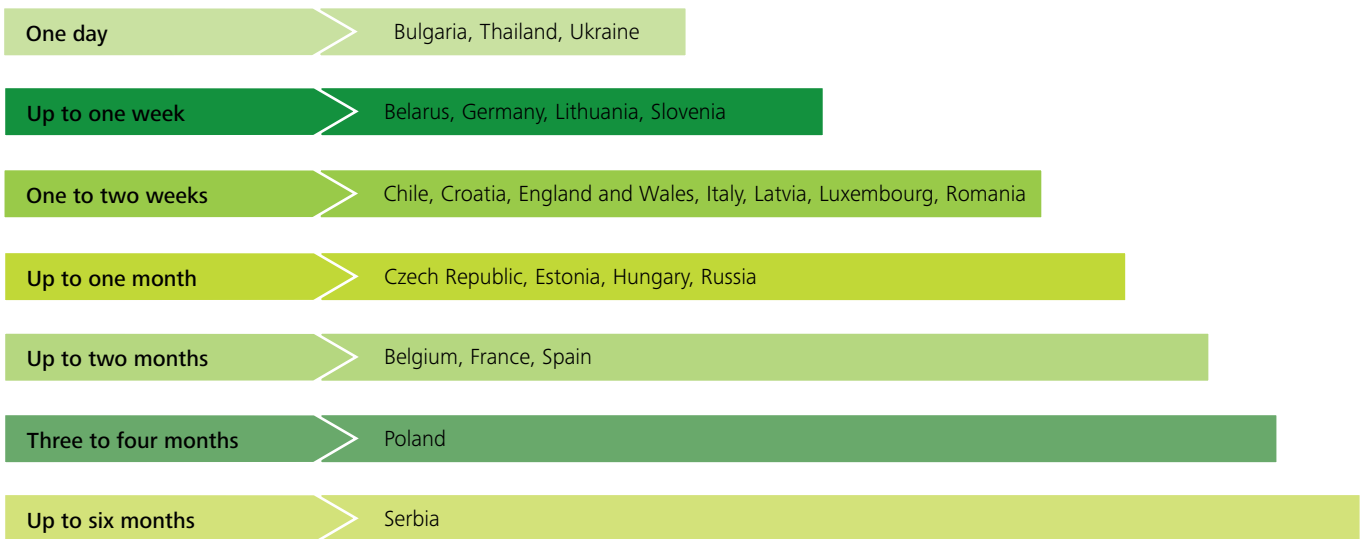
- o Constitutive effects, i.e., the security is not validly established until the relevant publicity formalities are carried out – this applies, for example, in Chile, Croatia, Serbia; or
- o Enforceability effects, i.e., the validity of the security is not affected by the lack of/ delay in performing the publicity formalities; however, until such formalities are carried out, the security is not enforceable towards third parties. This is currently the case in Romania, Belgium and other jurisdictions.

### **• Timing for publicity formalities**

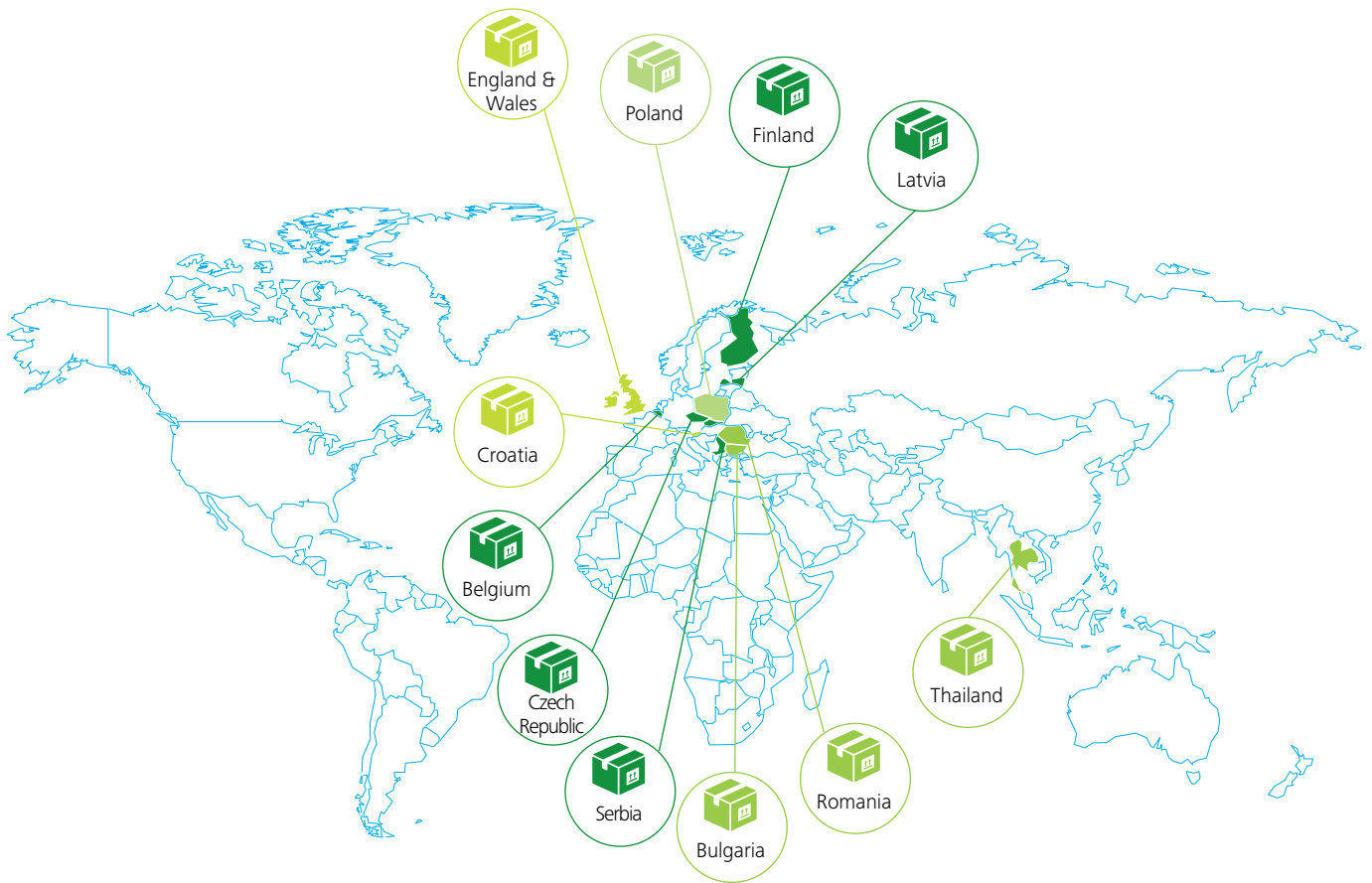
One area that differs widely among jurisdictions is the duration of carrying out publicity formalities. The maps overleaf illustrate the differences based on type of assets (i.e., real estate and non real estate).

\*As of 1 January 2015, this limitation shall no longer apply

## Publicity Timing - Real Estate Assets



Publicity Timing - Non Real Estate Assets



### Cost of carrying out publicity formalities











Countries surveyed have substantially different approaches. For instance, in Finland or in the Netherlands publicity formalities are free of charge or the applicable costs are immaterial. In the majority of cases, however, taking security triggers significant costs, often related to the value of the secured liabilities or of the asset subject to security. Such costs generally differ based on the object of the security:

- Mortgages over real estate assets usually trigger notary fees, mortgage fees or taxes and registration fees with the land registries;
- Security over non-real estate assets usually triggers costs related to registration which generally is significantly lower than the cost for taking security over real estate.

### Publicity Costs - Real Estate Assets



#### Real Estate

|  |   |
|--|---|
| <br>Belarus           | <ul style="list-style-type: none"><li>• EUR 50 land book fee</li><li>• EUR 75 notary fee</li></ul>  |
| <br>Belgium          | <ul style="list-style-type: none"><li>• registration fee 1% inscription fee of the amount of the mortgage</li><li>• inscription fee 0.30% of the amount of the mortgage</li></ul> |
| <br>Bulgaria        | <ul style="list-style-type: none"><li>• notary fee: maximum EUR 3,000</li><li>• land registry fee: 0.01% of the value of the secured amount</li></ul>                             |
| <br>Chile           | <ul style="list-style-type: none"><li>• depend on loan amount, with a cap on notary fees at approx. EUR 183,000</li></ul>   |
| <br>Colombia        | <ul style="list-style-type: none"><li>• notary fee of 0.3% of the secured claim</li><li>• registration fee of 0.5% of the secured claim</li></ul>                                 |
| <br>Croatia         | <ul style="list-style-type: none"><li>• notary fee: from 0.5% to 1% of the value of the asset or of the value of the secured claim (whichever is lower)</li></ul>                 |
| <br>Czech Republic  | <ul style="list-style-type: none"><li>• varies from 1% to 0.05% depending on the value of the mortgage</li></ul>  |
| <br>England & Wales | <ul style="list-style-type: none"><li>• between GBP 0 and EUR 300</li></ul>   |
| <br>Finland         | <ul style="list-style-type: none"><li>• not material, not related to value of the transaction or of the secured amount</li></ul>  |
| <br>France          | <ul style="list-style-type: none"><li>• real estate security tax: 0.05% of the secured amount</li><li>• land registration tax: 0.715% of the registered amount</li></ul>          |

## Real Estate



- notary fees: depend on the value of the secured claim and capped at EUR 660,000; for mortgages set up by credit institutions the applicable fees are 25% of the regular fees
- land registry fee: EUR 40 per real estate



- notary fee: approx. 2% of the value of the secured amount, but the notary may reduce at its discretion



- land book fee: 0.1% of the value of the obligation but capped at EUR 1425
- notary fee: 71 EUR



- less than EUR 200



- registration fee 0.24% of the value of the secured debt
- mortgage tax of 0.05% for the first registration and every renewal
- notary fee also applies and depends on the value of the secured amount



- notary fee: up to approx. EUR 1200 and civil law transaction tax of 0.1% of the amount secured



- notary fee: 0.07% of the value of the secured amount
- land registry fee: 0.1% of the value of the secured amount



- less than EUR 150



- less than EUR 1500



- less than EUR 150



- notary fee: percentage of the secured amount; fee agreed between the parties and the notary for secured amounts higher than EUR 6 million
- registry fee: 0.02% of the secured liability
- stamp duty: 0.5% to 1.5% of the secured liability



- less than EUR 150
- notary fee: 0.01% of the value of the mortgage



- registration cost less than EUR 20



Publicity Costs - Non - Real Estate Assets

 Non Real Estate



|  |  |
|--|--|
| Less than EUR 50   | Latvia, Poland   |
| Up to EUR 100  | Bulgaria, Chile, Croatia, Czech Republic, England & Wales, Romania, Serbia, Slovenia |
| Up to EUR 150  | France, Hungary  |
| Pledge over business/floating charge: 0.5% on the amount of the floating charge  | Belgium  |
| Registration fee 0.24% of the value of the secured debt and mortgage tax of 0.05% for the first registration and every renewal | Luxembourg   |
| Free of charge   | The Netherlands  |

### Concerns when taking security

Common concerns among the jurisdictions surveyed include risks related to financial assistance, corporate assets abuse, absence of a valid cause/corporate benefit, and cancellation of fraudulent acts both in and out of an insolvency procedure. However, there are also material differences in local laws.

For example, in Croatia, financial assistance is permitted provided that certain requirements are observed. To contrast, in Ukraine, the financial assistance restriction applies only to banks. In England and Wales, it applies to public companies and to private companies for the acquisition of their public parents.

As another example, in the Netherlands the transfer of property for the purpose of securing obligations is prohibited, while the Luxembourg law provisions on transfer of ownership as security stand out as one of the most effective types of security interests available across the jurisdictions surveyed.

### Effectiveness of security: enforcement and insolvency

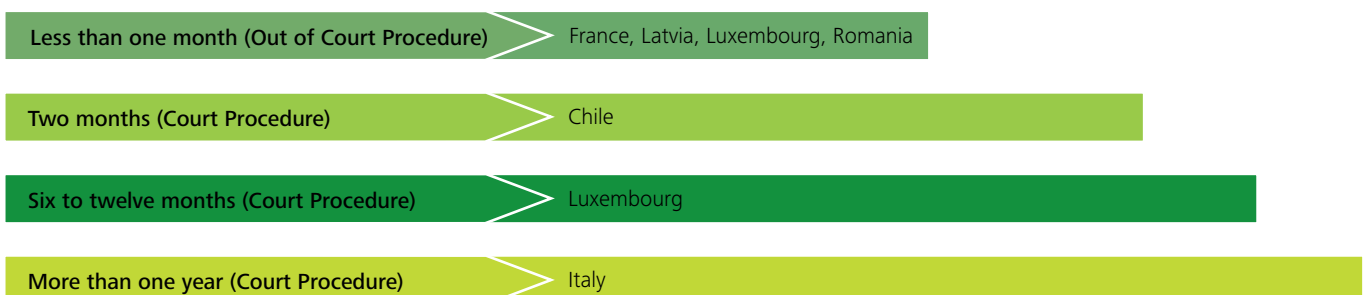
Enforcement and insolvency are key to the effectiveness of the security interests, from both a legal and practical perspective.

#### Enforcement

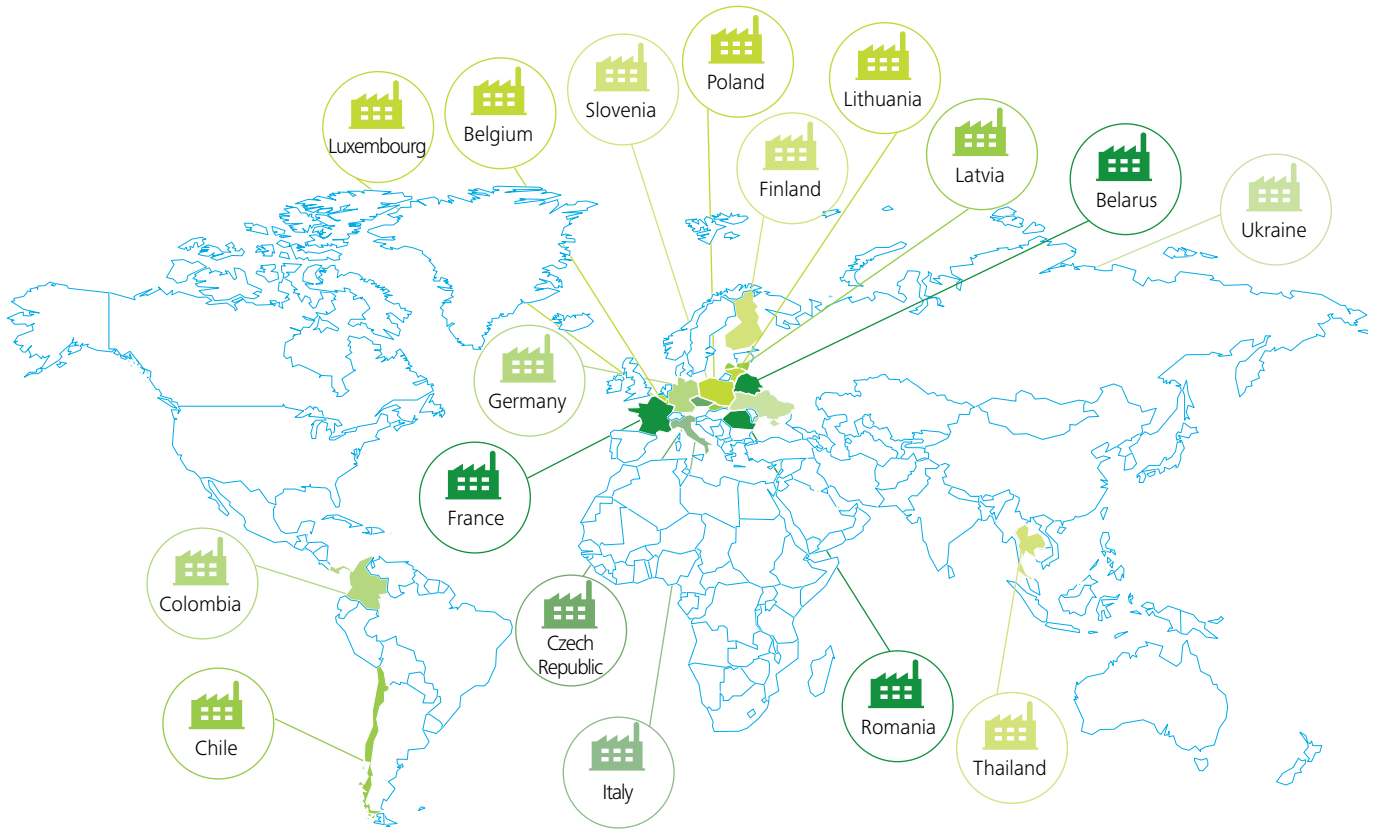
As regards enforcement, an important variable across jurisdictions is whether or not court involvement is required before the creditor may start enforcement actions against the assets subject to security. Some jurisdictions have specific formalities, which, if carried out, permit enforcement without first going to court. Examples include Poland and Serbia, where the collateral provider may sign a declaration on submission to enforcement, in which case no court verdict is needed before starting the enforcement proceedings.

In Lithuania, no court order is required to begin the enforcement process; however, an executive record will be issued by the notary. In other jurisdictions, court involvement depends on the type of asset subject to security, such as in Romania, where out of court enforcement is possible only for security over non-real estate assets. The time required for enforcement can also determine effectiveness of security. This varies depending on the type of security enforced and relevant jurisdiction.

### Enforcement Timeframes - Non Real Estate Assets



## Enforcement Timeframes - Real Estate Assets



Finally, there are substantial differences among jurisdictions relative to the possibility and effect of potential challenges to the enforcement. Approaches range from the case of the Netherlands where the debtor has no rights of challenge in respect of property law security rights, to Romania where challenges suspend by law the enforcement process in case of non real estate mortgages.

### **Creditor protection in insolvency**

Again, insolvency regimes vary significantly. Areas explored in this guide include:

- Creditor ability to enforce security where the security provider becomes insolvent;
- Rights of a secured creditor to influence decisions taken within an insolvency process;
- Ranking of a secured creditor in the distribution of proceeds of assets brought as security.

Some legal regimes are very protective for the secured creditors, such as the Netherlands where holders of a right of pledge or a right of mortgage can execute their security rights as if there was no bankruptcy of the debtor. Under others, a secured creditor is not even the first to satisfy its claims out of the proceeds of the asset subject to the security. Examples of this approach include Estonia and Romania, where liquidator fees are covered first, or Belarus, where the secured creditor ranks fourth, as is the case of floating charge holders in England, or fifth, as is the case in France.

## **Our Recommendations**

### **The sooner, the better: always consider the local specifics from the structuring phase**

When structuring (whether as lender or security provider) a collateral package covering several jurisdictions, consider the specificities of the local laws. There may be significant opportunities in terms of creditor protection, or risks triggered by defences available to the collateral provider. These vary substantially across borders.

### **The role of the local legal advisor and aspects to be considered in legal opinions**

Seek legal advice when structuring the secured transaction and read carefully the qualifications in the legal opinions. For example, insolvency-related qualifications are common; however, the position of a secured creditor in insolvency varies significantly across the jurisdictions we surveyed.

### **The potential impact of cross-border corporate reorganizations on access to secured finance**

Effects of granting/taking security across borders should be considered in multi-jurisdiction corporate restructuring or mergers and acquisitions, as placing a holding company in a particular jurisdiction could impact substantially (both as opportunities and as legal risks) the access to secured financing.

### **Loan restructurings and the domicile of holding companies: security dynamics**

Similarly, in cases of loan restructuring or insolvency procedures, consider that the dynamics thereof could be significantly affected by, for example, the holding company whose shares are pledged being incorporated in one jurisdiction or the other. Therefore, such issues are best considered in advance, at the transaction structuring stage.

# Country Guides



# Belarus

## 1. Types of security available to creditors

- Guarantees (including a bank guarantee);
- Suretyships;
- Pledges: security over a movable asset, including a pledge of goods in circulation (floating charge);
- Mortgages over immovable assets (real security). Only banks that have special licenses may be pledgees under the contracts of mortgage of land plots;
- Assignments for security purposes, ownership right reservation clauses, ROT (retention of title) etc.
- Other rights providing for preference by law over certain assets: privileges: preferences granted by law to a creditor in consideration of the quality of a certain claim (such as: the seller's claim for the unpaid price of an asset, retention rights, others – as per the Civil Code);
- Retention rights: any person who must return an asset to its owner may retain such asset until it receives reimbursement for the necessary and useful expenses covered related to the asset or, as the case may be, indemnification for the prejudices caused by the asset;
- Earnest money (deposit). Earnest money is by definition forfeited on breach of contract. In fact, on breach by buyer, seller retains the earnest money, while in seller's breach, buyer is entitled to twice the value of the earnest money.

## 2. Types of assets which may be subject to security

- Mortgages (pledges) and other types of security may be set up over all types of assets, including rights;
- Mortgage of a building shall be permitted only with the simultaneous mortgage of the land on which the building is located;
- The mortgage (pledge) extends over the proceeds received from the mortgaged (pledged) asset alienation if such a condition is specified in agreement;
- The mortgage (pledge) agreement may provide for a pledge of movable assets (res) and property rights, which the mortgagor acquires in the future.

## 3. Type of obligations that may be secured

- Mortgages (pledges), suretyships may secure obligations of any kind, including future obligations. The guarantee can secure only real obligation;
- The mortgage (pledge), suretyship, guarantee secure the principal debt, interest, fees, penalties, enforcement and preservation costs with the same ranking.

## 4. Validity requirements for security documents

- The mortgage (pledge) agreement must identify the person establishing the mortgage, the cause of the secured obligation and must describe the asset subject to security and its value. The secured obligation must be reasonably determinable on the basis of the agreement;
- Form of the agreement:
  - o The mortgage (pledge) agreement, guarantee, suretyship shall be made in written form;
  - o The agreement on pledge of property or rights on property that secure obligations under the contract subject to notarization shall be notarized;
  - o The mortgage agreement must be registered in the manner prescribed for the registration of transactions with the appropriate property. However, the mortgage agreement providing for the security of real property that is acquired from the mortgagor in the future is not subject to state registration;
  - o Mortgage agreement that secures obligation under the contract, which must be notarized, shall be notarized as well.
- Pledge of securities shall be registered by professional participant of securities market.

## 5. Publicity requirements

- Real estate mortgages: registration with the territorial organization on state registration of immovable property, rights thereto and transactions.
- Pledge of securities: registration with professional participant of securities market.
- Pledge of vehicles may be registered with the State Automobile Inspection (GAI).

## 6. Other perfection requirements

The right of pledge (mortgage) arises from:

- The conclusion of the agreement;
- In respect of assets to be transferred to the pledgee (mortgagee) - from the transfer of the property, unless otherwise provided in the pledge (mortgage) agreement;
- If the registration of the pledge (mortgage) agreement is required - after such registration.

## 7. Costs of set up and publicity of security

Real estate mortgages:

- Approx. EUR 50 per registration with the territorial organization on state registration of immovable property, rights thereto and transactions.

Notary fees:

- Approx. EUR 75 (including state duty in the amount of approx. EUR 45).

## 8. Timing for publicity/perfection requirements

Real estate mortgages:

- Registrations are made by the territorial organization on state registration of immovable property, rights thereto and transactions within seven days (one month - in case of the necessity of requesting additional documents from other organizations).

## 9. What types of rights does a secured creditor acquire?

Creditor may satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors.

The pledgee (mortgagee) is entitled to:

- Check the availability and storage conditions of the pledged property;
- If a pledger violates his obligations, the pledgee has a right to claim early fulfilment of the obligation secured by a pledge (mortgage);
- To satisfy his claim according to the obligation secured by a mortgage directly from the insurance compensation for the loss or damage of property subject to a mortgage, no matter for whose benefit it is insured.

## 10. Governing law issues

The law of the country where the pledger has a principal place of activity is applied to the pledger agreement, unless it is otherwise provided by agreement of the parties.

The law of the country where the property is located is applied to the rights and obligations under the contract that is the subject of real estate. Belarusian legislation is applied anyway in relation to the property that is to be registered in the Republic of Belarus.

## 11. Legal concerns/prohibitions related to granting/ taking security

Mortgages of land may be used only by banks.

Corporate assets abuse:

The agreement concluded by a legal entity in conflict with the goals of its activity may be deemed invalid by a court at the suit of a shareholder or a public authority, if the other contracting party was aware or must have been aware of the illegality of it, but concluded the agreement.

Illegal use of the assets or credit worthiness by the company's founder, administrator, director or legal representative, for a purpose that is contrary to that company's interests, or for his/ her own interest or for the purpose of favoring another company in which he/ she holds a direct or indirect interest may contain elements of crimes.

Insolvency risk: the pledge/ mortgage agreement may be recognized as void by the court, upon request of the administrator, under certain conditions; further details at item 13.



## 12. Enforcement

### **Court involvement required?**

As a general rule approval for initiation of enforcement for real estate mortgages is granted by the court. Out of court the enforcement is possible on the basis of notarized agreement between the mortgagee and the mortgagor, signed once the reasons for the property foreclosure arise.

Meeting the claims of the mortgagee on repayment of bank credit resulted from the mortgaged property alienation is possible out of court without public auction on the basis of notarized contract signed between mortgagee and mortgagor once the reasons for the property foreclosure arise. In this case the agreement should not provide for transfer of ownership right of the mortgaged property to the mortgagee.

Creditor's claim is met by the pledged movable property by court order, unless otherwise provided by agreement between the mortgagor and the mortgagee. However, if the subject of pledge is in the possession of the pledgee, the claim may be satisfied in the order prescribed by the contract of pledge (e.g., the out-of-court procedure), unless the legislation stipulates otherwise.

Sale of mortgaged (pledged) property to which the debt has been levied is made by sale at public auction.

### **Average timing**

Real estate mortgages and pledges: at minimum 2-3 months in case of no challenges and minimum terms set by law are observed; otherwise it may take significantly longer, depending on challenges filed.

If out of court procedure is used – 1-2 months or more.

### **Rights of challenge for the debtor/ third parties**

The general rules on the protection of persons whose rights are violated. The debtor or another person may challenge the court resolution to execute the claim and subsequent related actions if they have been conducted in violation of the law.

### **Cases of cancellation/ reversal of enforcement**

Real estate mortgages and pledges: inobservance of the legal provisions for carrying out the enforcement procedure itself or for any enforcement act triggers cancellation of the unlawful act. In case the writ of execution or the enforcement itself is cancelled, the interested party may request restoration to the original condition (restitutio in integrum).

## 13. Secured creditors' position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

Claims of creditors on obligations secured by a pledge of property are satisfied in the fourth turn.

Court can recognize the pledge/ mortgage agreement as being void at the request of the administrator in the case of bankruptcy if it was made by the debtor:

- Before the opening of bankruptcy proceedings, and
- Along with the emergence of the debt or immediately after its occurrence and if it is concluded:
  - Within six months prior to the commencement of insolvency proceedings or after the commencement of court proceedings in the case of insolvency, or
  - With an interested person in respect of the debtor within one year prior to the commencement of the bankruptcy case or after the commencement of the economic court proceedings in the case of insolvency. The agreement cannot be invalidated if the person or the debtor can prove that the debtor was not insolvent at the time of the agreement's conclusion and did not become insolvent as a result of the mortgage/ pledge.

### **Secured creditors rights in influencing decisions in the creditors assembly**

The resolutions of the assembly of creditors are made by a majority of the creditors.

A creditor at the assembly of creditors has the number of votes in proportion to the amount of its claims against the debtor. In other words, creditors who have the greatest claims (more than 50% of the total claims) against the debtor, determine the resolution of the assembly of creditors.

The claims of the secured creditors are to be satisfied from the assets of the debtors, including those not subject to the pledge.

The resolution of the assembly of creditors is adopted only if all creditors with the claims secured by a pledge voted in favour of the resolution.

### **Secured creditors ranking in the distribution of liquidation proceeds**

The fourth turn, after satisfaction of the individuals to whom the debtor is liable for injury to life or health, payment of wages (dismissal pay) and taxes.

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# Belgium

## 1. Types of security available to creditors

The security interests that may conventionally be agreed upon between a creditor and its debtor under Belgian Law can be divided in two main categories:

### Security interest in rem

Security interests in rem are exhaustively listed under Belgian law, and include:

1. Pledge over tangible assets (main feature: dispossession of the pledged asset, the asset must be delivered into the possession of the Pledge)
  - Pledge over receivables;
  - Pledge over contracts;
  - Pledge over bank accounts;
  - Pledge over intellectual property;
  - Pledge over shares;
  - Pledge over tangible assets;
  - Pledge over business (floating charge): the pledgor may carry on running the business as usual.

Please note that the Belgian legal system on moveable assets is up for a thorough reform which is expected to enter into force as of 1 January 2015. Items marked with an (\*) will be impacted by the upcoming reform

2. Title transfer as security interest is also recognized in certain instances (e.g., within the scope of the Act implementing the Directive 2009/ 44 EC on Financial Collateral Arrangements (the "FCA"), in the context of operational or financial leaseings or property reserve clauses). For the purposes of this high level overview, these have not been discussed below. (\*)
3. Mortgage over real estate (security interest over real estate, which is owned, or held on a long lease or in usufruct, etc.).
4. Security interest over ships and planes which are owned, or held on a long lease or in usufruct, etc. - For the purposes of this high level overview, these have not been discussed below.

### Personal Security interests

Under such security interest, a third-party (such as a guarantor or a caution) will secure the claim of the creditor on the debtor, by committing its entire estate, and/ or by, in turn, granting one of the security interests listed above. Personal security interests are not listed exhaustively under Belgian law. The most typical forms of personal security interests include sureties (*caution/ borgstelling*) and guarantees.

This description does not cover legal priority rights (*privilèges/ voorrechten*) which are granted by operation of law to certain creditors.

A specific type of quasi-security which is rather common in Belgian finance practice is the mortgage mandate, i.e., a mandate to a person appointed by the lender to register a mortgage, on behalf of the debtor or third party providing security, in favor of that lender.

## 2. Types of assets which may be subject to security

### Any element of the debtor's assets including future assets.

Pledge on future assets can only be pledged under a:

- Pledge over receivables;
- Pledge over bank accounts;
- Pledge over business (de facto comprised). (\*)

Pledge over future shares, IP rights, tangible assets can only be covered by means of an undertaking of the Belgian company to pledge such assets.

Particularities:

- Pledge over business: this "floating charge" security includes all the elements that constitute the goodwill without having to enumerate them (exception for stock which you have to enumerate). The beneficiary must be a credit institution; (\*)
- Pledges on financial securities benefit from the favorable treatment as provided by the FCA.

\*as of 1 January 2015, the above items marked with an (\*) will be impacted by the upcoming reform

### 3. Types of obligations that may be secured

Conventional security interests can secure obligations of any kind.

All-sums security interests: a security interest on conditional or future debts is valid under Belgian law as long as the future debt is sufficiently determined or determinable which is the case if:

- The agreement creating the security interest allows to define and identify the debt, and
- It results from the elements of the cause that the (future) debt was part of what the parties intended to secure.

### 4. Validity requirements

#### Formalities:

All security interests under Belgian law (with the exception of mortgages) can be created by means of a private agreement.

Mortgages and pledges of business/ floating charges must however be created by means of a notarial deed and registered at the competent mortgage registry. (\*)

#### General validity requirements:

General validity requirements that are applicable to all agreements:

- Consent of the parties;
- Capacity of the parties;
- Determination of the object of the security taking (a determined or determinable asset);
- Legitimate cause (the cause of the agreement must not be prohibited by law or contrary to morals and public order and it must not be the same as the cause of the initial contract);
- In the case that security is granted by an individual: restrictions on security granted without consideration and limitations resulting from the marital status (which may require spousal consent).;
- In the case that security is granted by a legal entity: authorization by the competent bodies, conformity with corporate interest, no infraction on specific restrictions (e.g., financial assistance rules, prohibition of "misuse" of corporate assets, etc.).

#### Specific validity requirements:

Mortgages and Floating charges:

- Formal notarial deed;
- Secures a specific amount, must accurately define the mortgaged real estate.

Pledge over tangible assets:

- The pledge is perfected via the dispossession of the pledged asset to the pledgee or to a third party pledgeholder, the pledge will cease to be valid when the dispossession is discontinued. (\*)

Pledge over shares and other financial instruments:

- Articles of association must be reviewed, may contain restrictions to the granting of a pledge over shares.

Pledge over invoices:

- Endorsement of invoices to be pledged, by way of security (realization of dispossession requirements);
- Not mandatory, pledge as receivables is a more common and simple procedure.

Pledge over receivables:

- When the pledgor is considered to have its establishment or center of main interest in Belgium and the Pledge is governed by Belgian law: the dispossession is realized by the mere execution of the pledge agreement.

Surety (*caution/ borgstelling*)

- As per Articles 2021 and 2039 of the Belgian Civil Code, one cannot secure a larger amount than that which has to be paid by the debtor of the main agreement.

### 5. Publicity requirements

Mortgage:

- Registration of the mortgage with the appropriate local mortgage register for it to be effective vis-à-vis third parties.

Floating Charge/ pledge on business:

- Must be recorded in the mortgage register for each judicial district in which the Pledgor has a place of business in order to be effective vis-à-vis third parties. This registration has a maximum effectiveness of 10 years but is renewable.

\*as of 1 January 2015, the above items marked with an (\*) will be impacted by the upcoming reform

## 6. Other perfection requirements

### Pledge over IP rights:

- Trademark: inscription of an extract of the Pledge in the trademark register will perfect the Pledge;
- Patent: written notification of the Pledge to the Service for Intellectual Property;
- Copyright: Notification to third parties to whom claims can be addressed.

### Pledge over invoices:

- Notice to the pledged debtors by registered mail that they can validly pay to the Pledgee.

### Pledge over shares and other financial instruments under the FCA:

- Registered shares: a statement of the Pledge must be added to the share register for the enforceability of the Pledge against third parties/ notification of the Pledge to issuer of pledged shares/ acceptance of Pledge by Debtor;
- Bearer shares: delivery of the bearer certificates to the Pledge or agreed third parties for the dispossession and enforceability against third parties;
- Dematerialized shares: registration of the shares on a special pledge account of an associated member of the CIK, for the dispossession and enforceability against third parties;
- Other financial securities/ cash amounts: booking on a specific account;
- Receivables falling under the scope of the FCA (including any receivable owed by or to a credit institution): perfection towards third parties is realized by entry into the pledge agreement. Perfection towards the pledged debtors is achieved through notification or acknowledgement of such debtor.

### Pledge over receivables:

When the Pledgor is considered to have its establishment or center of main interest in Belgium and the Pledge is governed by Belgian law: it is enforceable against third parties by the execution of the agreement and it is enforceable against the Debtor of the Pledge by the notification of the Pledge to such Debtor or by acceptance of the Pledge by the Debtor.

## 7. Costs of set up and publicity of security

### Mortgage:

- Registration duties: fee of 1%, payable on the amount of the mortgage;
- Inscription duties: fee of 0.30%, payable on the amount of the mortgage.

Pledge of business/ floating charge: registration duties 0.5%, payable on the amount of the floating charge  
Plus notary fees and mortgage registration fees

## 8. Timing of publicity/ perfection requirements

### Pledges on receivables/ financial instruments/ cash on bank accounts:

- In principle a (very) limited amount of days (i.e., in relation to receivables the time required to get a receipt of notification by the debtor or formal acknowledgement by such counterparty).

### Mortgage

- Typically, the registration of a new mortgage (including, as the case may be, the cancellation of previous mortgage registrations, provided instruction thereto is timely given) takes 4-8 weeks.

## 9. What types of rights does a secured creditor acquire?

### Security Interest in rem:

- Priority right on the proceeds in case of foreclosure;
- In some instances, appropriation right; and (\*)
- In case of dispossession, a retention right on the asset up until repayment of the secured obligation.

### Personal security interest:

- A direct claim on the third party granting the security, upon terms and at conditions that may be agreed upon.

\*as of 1 January 2015, the above items marked with an (\*) will be impacted by the upcoming reform

## 10. Governing law issues

- Personal security interests are subject to the *lex contractus*;
- Mortgages, floating charges, Pledges on IP-rights are governed by the law of the jurisdiction where the collateral is registered (*lex rei sitae*). The same goes, in principle, for Pledge on other moveable assets;
- However, specific rules of conflicts of law apply in the following cases:

|                                  | Law applicable on the Pledge Agreement | Law applicable to the effectiveness of the Pledge vis-à-vis third parties | Law applicable to the effectiveness vis-à-vis the Debtor of the collateralized asset (when applicable) |
|----------------------------------|--|---|--|
| Cash/ Bank Account               | Lex contractus                         | Law of the Pledgor  | Law of the bank account  |
| Financial Instruments on account | Lex contractus                         | Law of the jurisdiction where the account is held.                        | N/A  |
| Receivables                      | Lex contractus                         | Law of the Pledgor  | Law of the receivable  |
| Shares                           | Lex societatis                         | Lex societatis  | N/A  |

## 11. Legal concerns/ prohibitions related to granting/ taking security

### Corporate purpose and formalities

Transactions or actions to be entered or executed by a Belgian company have to comply with the company's articles of association and in particular the purpose clause.

### Corporate benefit/ corporate interest

A Belgian company must pursue the "corporate benefit"/ "corporate interest" when granting a security. However, this is an appreciation to be made by the competent corporate body and depends on the factual situation.

### Financial assistance

A Belgian company may only provide security with the view to the acquisition of its shares by a third party under very strict conditions, which render financial assistance difficult in practice. (article 629 of the Belgian Company Code, (SA/ NV)), article 329 of the Belgian Company Code (SPRL/ BVBA)).

### Actio pauliana risk

A creditor or another person (e.g., liquidator) may invoke the legal remedy of *actio pauliana* for the cancellation of any deed or act entered into by their debtor which is fraudulent towards them.

### Claw-back risk

Under Belgian law, certain transactions may be void and unenforceable against the liquidator of the bankrupt estate if:

- What was paid by the company materially exceeds the value received by it as consideration, to the extent such transaction has been entered into during the suspect period. (Article 17, 1° of the Belgian bankruptcy law dated 8 August 1997);
- The recipient of the payment or the counterparty under the transaction had knowledge of the cessation of payments, being that the said payment must have been detrimental to the bankrupt estate (Article 18 of the Belgian bankruptcy law dated 8 August 1997).

### Gratuitous surety granted by an individual (*caution à titre gratuit/ kosteloze borg*)

When a third-party (physical person) grants a surety to the benefit of a debtor without deriving any profit therefrom, specific rules apply to such surety. In case of insolvency of the principal debtor, the surety is subjected to a judicial control and may be partially or fully released, depending on the financial capacity of the natural person granting the security.

### Family/ matrimonial regime law restrictions

When the security interest is granted by a married physical person, his/ her partner may have an annulment claim under the matrimonial regime and should therefore acknowledge that the contemplated operation is not contrary to the interest of their household.

## 12. Enforcement

### **Court involvement**

#### Mortgage:

- Creditor instructs a bailiff to serve an order to the debtor that has to be accompanied by a copy of the mortgage document or court decision which is invoked by the creditor to demand payment. A copy of the order is registered with the mortgage register;
- Within 6 months of this first order a second document is served. It is a document of seizure which is also registered with the mortgage register;
- Within a month of service of the document of seizure, the creditor has to petition the court to appoint a notary public instructed to sell the immovable asset (via an auction sale or, with authorization of the court, a sale on the market).

#### Pledge over IP/ tangible assets/ business:

- Pledgee must request judicial authorization.

#### Pledge over receivables/ contracts:

- Pledgee must request judicial authorization.

#### Pledges over financial instruments governed by the FCA

- Unless agreed otherwise by the parties:
  - Pledgee can sell or become rightful owner without prior notification or court permission;
  - Provided the agreement provides valuation rules, it may also allow for appropriation of the financial instruments by the Pledgee.
- The above apply notwithstanding any insolvency proceedings, seizure of the instruments or other form of concurrence.

#### Pledge over bank accounts:

- Pledgee becomes rightful owner of the cash in the bank account, notwithstanding any insolvency proceedings, seizure of the instruments or other form of concurrence;
- Unless agreed otherwise by the parties.

### **Average timing**

#### Mortgage

- The enforcement and the sale should take between four to six months if no complications arise (and provided there is a market for the property).

#### Pledge over shares or financial instruments

- The law does not require the use of an administrator, receiver or court-appointed person to oversee the sale of shares or financial instruments. It can therefore be implemented quickly and cheaply. Provided the agreement provides valuation rules, it may also allow for appropriation of the financial instruments by the Pledgee.

### **Rights of challenge for the debtor/ third parties**

- Following a realization a Pledgor or other interested party may go to court to challenge the conditions of realization of the security, the valuation process or the amount of the secured claim. If successful the court may require the Pledgee to pay damages to the Pledgor;
- In case of insolvency, additional grounds for challenging may be upheld by creditors and/ or third-parties – see below.

### **Cases of cancellation**

- See the cases listed under 11 above.

### 13. Secured creditors' position in insolvency

**We will limit our analysis to the bankruptcy (faillissement/ faillite).**

Please note that other procedures are provided by the Act on continuity of enterprises dated 31 January 2009.

**Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

Bankruptcy leads to general dispossession of the bankrupt and the appointment of a bankruptcy trustee.

Such trustee will initiate a process of claim verification, during which each creditor (secured or unsecured) of the bankrupt company should have its claim declared and verified by the bankruptcy trustee.

Upon bankruptcy, enforcement rights are, in most of the cases, suspended. For secured claims, rights of enforcement usually are suspended up until the closing of the verification of claims process by the bankruptcy trustee.

Please note however that these conditions do not apply to financial collateral pledged under the FCA.

**Secured creditors rights in influencing decisions in the creditors assembly**

N/A for bankruptcy

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# Bulgaria

## 1. Types of security available to creditors

- Mortgages (conventional and statutory) over real estate;
- Pledges over non-real estate (movable) assets and receivables;
- Special (non-possessory) pledges;
- Personal guarantees (including corporate guarantees);
- Other rights providing for preference by law over certain assets such as retention rights;
- Special security over financial instruments established under contract.

## 2. Types of assets which may be subject to security

- Mortgages may be set up over immovable property and rights *in rem*;
- Pledges may be set up over movable property and receivables;
- Special pledges may be set up over dematerialized securities, company shares, groups of receivables/ machines/ equipment/ goods, intellectual property rights, commercial enterprises;
- The difference between pledges and special pledges is that for the special pledge the pledger retains the asset and uses it;
- Security over ships and aircrafts has a special legal regime;
- The comments below apply to mortgages and special pledges as the most common types of security used in the business practice in Bulgaria.

## 3. Type of obligations that may be secured

Obligations of any kind, including future obligations may be secured.

The mortgage secures with the same ranking the principal registered amount of the debt, fees for enforcement, novation, execution of the mortgage and court fees. If there is an interest for the debt that is registered, then the mortgage also secures the interest for the two years preceding the year of serving the writ of execution for voluntary execution as well as for the current year and for all the following years until the property's date of sale.

## 4. Validity requirements for security documents

- In order to be valid the mortgage should clearly identify the creditor, the debtor (for conventional mortgages it is possible that the owner of the property and the debtor are different persons, in that case the owner has to be identified as well), the property for which the mortgage is established; the secured claim, as well as the amount for which the mortgage has been created;
- Pledge agreement identifies the pledger, the pledgee, the date, the receivable/ the claim;
- Form of the agreements:
  - Conventional mortgage agreement is concluded in the form of notary deed;
  - Statutory mortgage – established with an application of the mortgager containing the elements of the mortgage agreement;
  - Special pledges agreements are always concluded in writing, for special pledges over commercial enterprise – in writing in front of a notary public.

## 5. Publicity requirements

Mortgages: registration with the land registry. Order of registration determines ranking.  
Special pledges: registration with the special pledges register or other register depending on the type of the asset (e.g., pledges over commercial enterprises are registered with the commercial register).

## 6. Other perfection requirements

There are no perfection requirements other than the requirements for registration of the mortgage/ special pledge with the respective register.

## 7. Costs of set up and publicity of security

Mortgages trigger two types of costs:

- Notary fees: calculated as a percentage of the value of the deed but no more than EUR 3,000;
- Land registry fees: approx. 0.01% of the value of the secured amount (not less than EUR 5).

Special pledges:

- Special pledges register fees are EUR 20 for the first page of the application for the registration of the special pledge and EUR 5 for each subsequent page;
- Commercial register fees: pledges on company shares (EUR 25); pledges on commercial enterprise (EUR 50).

## 8. Timing for publicity/perfection requirements

Registration procedures are swift and usually completed within the same day.

## 9. What types of rights does a secured creditor acquire?

- To satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors;
- The mortgage/ pledge follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- Higher ranked creditors have priority in terms of exercise of enforcement rights and, in case of enforcement started by a lower ranking creditor, as long as the asset has not been sold, the higher ranking creditor may continue the enforcement or start a new enforcement procedure.

## 10. Governing law issues

Regulation (EC) No 593/2008 (Rome I Regulation)

In terms of Bulgarian private international law rules, the following apply:

- Contracts are governed by the governing law chosen by the parties. In case the parties have not chosen the applicable law - the legal international relationships are governed by the law of the country with which they are most closely connected;
- For immovable property contracts the mandatory legal provisions regarding form established in the country where the property is located have to be respected regardless of the place of conclusion of the contract/ its governing law.

## 11. Legal concerns/prohibitions related to granting/taking security

Financial assistance: a joint stock company cannot lend money or set up security for the purpose of the acquisition by a third party of that company's shares.

Corporate assets abuse: the Bulgarian Penal Code regulates a number of cases where the abuse of company's assets, such as failure to devote sufficient care to the guidance, control, management, keeping or preservation of entrusted company property, resulting in considerable damages/ losses for the company or failure to control persons performing such activities can represent a criminal offence.

Nullity of the security for lack of causa: under Bulgarian law, a contract lacking a valid causa (i.e., a valid reason of the person giving the security to establish the security) is null and void.

Actio pauliana risk: the creditors of a person may exercise a legal action for the cancellation of any deed or act entered into by their debtor which is fraudulent towards them.

Insolvency risks: the liquidator (or creditors in certain cases) may request the cancellation of fraudulent acts entered into by the insolvent company for a certain period prior to the opening of the insolvency procedure or the initial insolvency date determined by the court (including transactions at undervalue, deeds concluded with the intention of all parties to damage creditors' rights, set up of security for unsecured claims etc.).

Nullity of a mortgage due to any inaccurate data mentioned in the mortgage agreement (i.e., not describing the mortgaged property as precise as possible).

Mitigation: the mitigation of the risk for the above legal concerns/ prohibitions can be sought on a case-by-case basis and may include: provision of multiple securities, specialised consultations in case of establishing complex types of securities, initial and recurring checks on the debtor's solvency status, requesting market evaluation of assets, etc.

## 12. Enforcement

### **Court involvement required?**

Mortgages: approval for initiation of enforcement is granted by the court (without judging on the substance of the matter, the court only verifies existence of a writ of execution).  
Special pledges: out of court enforcement is possible.

### **Average timing**

In case of no challenges the timing of the procedure depends on how quickly the asset can be realized (sold). Currently real estate assets are realized with difficulty.

### **Rights of challenge for the debtor/ third parties**

Yes:

Mortgages: any interested party may file a challenge against the forced execution. Suspension of the enforcement actions may also be requested but the suspension has to be thoroughly justified and the court is not obliged to grant it.

Special pledges: the debtor may file a claim to the respective court in order to challenge the execution.

Interested third parties may challenge the execution over mortgages/ pledges if the property does not belong to the debtor.

### **Cases of cancellation/ reversal of enforcement**

The writ of execution or the enforcement procedure itself may be challenged by the interested party. Generally, filing of an opposition does not suspend by law the enforcement. Inobservance of the legal provisions for carrying out the enforcement procedure itself or for any enforcement act triggers cancellation of the unlawful act.

## 13. Secured creditors' position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

As of the date of opening the insolvency proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets are suspended by law. Generally, enforcement procedures are also stopped but the court may allow an action in favour of a secured creditor for realization of the security if there is a danger that the creditor's interest could be damaged. Secured creditors rights in influencing decisions in the creditors assembly

### **Secured creditors rights in influencing decisions in the creditors assembly**

- Creditors holding one-third of the secured receivables participate in proposing the reorganization plan and vote in a separate class for its approval;
- Creditors' committee or one-fifth of all creditors may request an early convention of the creditors' assembly. The court convenes it in a seven-day term;
- The syndic is elected by the creditors' assembly and appointed by the court;
- The creditors' committee is appointed by the creditors' assembly and consists of three to nine persons representing creditors chosen among the secured and unsecured creditors.

### **Secured creditors ranking in the distribution of liquidation proceeds**

When cashed in property is distributed, secured creditors' receivables (for mortgages and pledges) are ranked first.

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## 1. Types of security available to creditors

- Personal guarantees and securities;
- Certificate of deposit and letters of guarantee;
- Interbank Support Letters;
- Bills of exchange/ IOUs;
- Mortgages (security over real estate);
- Pledges (security over a movable corporeal asset); these can be of different types: civil, industrial, agricultural property and pledge without displacement;
- Legal right to hold (faculty granted to the holder of a thing to legitimately refuse the delivery or restitution, until he meets the amount associated with it);
- Assimilated operations: Not to sell clauses and repurchase agreements.

The comments below apply to mortgages (over real estate) and pledges (non-real estate assets) as the most common type of securities used in practice.

## 2. Types of security available to creditors

- Securities can be established over:
- Real estate;
  - Movable goods (including financial instruments).

## 3. Type of obligations that may be secured

- All obligations could be subject to a mortgage or other guarantee, whatever their origin;
- In banking practice it is often stipulated a general mortgage guarantee clause to guarantee certain obligations and, besides, those that will be contracted in the future with the Bank;
- The different types of pledges apply depending on the type of the obligation, e.g., civilian pledge (any kind of obligation), trading pledge (commercial obligations), agricultural property pledge (obligations in agriculture, livestock and other related industries), industrial pledge (obligations for industrial activities), etc.

## 4. Validity requirements for security documents

- Mortgage: a) It must be granted by public deed, and b) It must be registered in the Register of Mortgages of the Real Estate Registrar of the commune where the property is located;
- As for the pledges they vary according to the type, i.e., in the civil pledge it is perfected through giving the thing to the creditor, in the trading pledge it is perfected among the parties through giving the thing, while for third parties it must be stated in a public deed or a private document authorized by a Notary.

## 5. Publicity requirements

Real estate mortgages: Registration with the land registry is a validity requirement.  
Non-real estate pledge: Varies according to the pledge, i.e., pledge without displacement requires inscription at the Pledge Without Displacement Registrar.

## 6. Other perfection requirements

They can vary according to the type of security being used.

## 7. Costs of set up and publicity of security

Real estate mortgages  
 They trigger two types of costs: notary fees and land registry fees (these are fully related to the value of the secured claim or of the asset).

- Land registry fees: CLP\$ 2 per each CLP\$ 1,000 of the total amount of the credit/ loan, with a maximum fee of CLP\$259,300;
- Notary fees: CLP\$ 1 per each CLP\$ 1,000 of the total amount of the credit/ loan, to a loan limit of CLP\$ 128,000,000 for that charge.

In order to apply this regarding mortgage contracts with a general warranty clause, the fiscal value of real estate will be considered. In the cases of pledges with a general warranty clause, the amount considered will be the value given to the levied goods. In the case of notaries outside Santiago, the charge will be double of what has been specified before.

Pledge Without Displacement

- Inscription at the Pledge Without Displacement Registrar: € 48;
- Cancellation in the Pledge Without Displacement Registrar: € 48;
- Modifications to the pledge agreement: € 12. In this case, is not related to the value of the secured claim nor of the asset.

## 8. Timing for publicity/perfection requirements

- The pledge without displacement: The pledge agreement must be signed before a public notary who is the one that finally requests the registration of the contract in the Pledges Registrar. As an electronic registry, notaries must require electronic applications, with advanced electronic signature, within three days of the public deed;
- Land registry registrations: It must be registered in the Register of Mortgages of the Real Estate Registrar of the commune where the property is located. Registration is completed in approx. 10 days.

## 9. What types of rights does a secured creditor acquire?

- The mortgage and pledge will be entitled to be paid preferentially, according to the ranking stated in point 13. Therefore, it would satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors, but after a creditor with higher ranking;
- The mortgage follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage.

## 10. Governing law issues

- The Chilean legislation applies to all kind of securities;
- Mortgage contracts signed abroad will be subject to mortgage on property located in Chile, as long as they are registered with the competent registry, depending on the location of the property.

## 11. Legal concerns/prohibitions related to granting/taking security

In the case of the pledge without displacement, it is a crime in the case the pledger and whoever is in possession of the thing constituted in pledge and pursuant to this law, deceiving the pledgee, alters, hides, moves or disposes of the thing. An additional offence is to deceive another person disposing of a thing constituted in pledge pursuant to this law, without indicating the tax that affects them or constituting pledge of others' property as their own. Finally he that deceives a pledger commits an offense, causing the loss or impairment of the rights granted under warranty.

Actio pauliana risk: the creditors of a person may exercise a legal action for the cancellation of any deed or act entered into by their debtor which is fraudulent towards them. Such action might only be successful in case of substantiation of the creditor's awareness that the set-up of such security would trigger a state of insolvency for the security provider.

Insolvency risks: the liquidator (or creditors committee, in certain cases) may request the cancellation of fraudulent acts entered into by the insolvent company prior to the opening of the insolvency procedure (including transactions at undervalue, deeds concluded with the intention of all parties to damage creditors' rights, set up of security for unsecured claims, etc.)

## 12. Enforcement

### Court involvement required?

For real estate mortgages, approval for initiation of enforcement is granted by the court (without judging on the substance of the matter, the court only verifies existence of a writ of execution). Non-real estate mortgages, like pledge without displacement, will be enforceable without prior recognition of a public deed or an authorized copy of a private instrument stating the pledge agreement. In this way, the court only verifies existence of a writ of execution.

### Average timing

Real estate mortgages: at minimum 2 months.

Non-real estate pledges: at minimum 2 months.

### Rights of challenge for the debtor/ third parties

Yes:

Real estate mortgages: the debtor and the third party can file a challenge to the forced execution. Legal exceptions can be opposed.

Non-real estate pledges: the pledger and the constituent of the pledge can oppose it, if the latter is different, and the court will resolve, having the possibility to demand that the creditor previously cautions the result of the trial.

### Cases of cancellation/ reversal of enforcement

Real estate mortgages: inobservance of the legal provisions for carrying out the enforcement procedure itself or for any enforcement act triggers cancellation of the unlawful act.

Non-real estate pledges: in the case the court establishes that the enforcement would have proceeded with inobservance of the provisions, the enforcement will be cancelled.

### 13. Secured creditors' position in insolvency

#### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

Bankruptcy suspends the right of creditors to individually execute the bankrupted, but the mortgagee and pledge can initiate or carry out their actions in relation to the goods subject to the security of their respective credits. The formation of a special mortgage bankruptcy proceeding regarding a taxable estate also suspends the right of each of them to pursue it separately. Despite this, the syndic or two or more creditors can request the effective continuations of the legal purpose of the bankrupted at any opportunity. In the event that it includes property constituted in pledge or mortgage, or subject to the legal right of retention, the right will not be suspended for the creditors to enforce their respective rights over the property subject to the security of their claims, unless they expressly consent to that continuation.

The syndic, either provisional or definitive, can sell at any time, by auction or private sale, the goods exposed to a soon-to-be wastage or an imminent devaluation and those that demand an expensive conservation.

#### **Secured creditors rights in influencing decisions in the creditors assembly**

The continuation of the legal purpose can be expressly approved, but the rights are suspended for pledgees and mortgagees who approved to start or continue their actions separately in order to get the realization of the assets included and subject to the security of their respective credits.

#### **Secured creditors ranking in the distribution of liquidation proceeds**

Mortgages and Pledges have third and second order of preference, respectively, being paid after covering the liquidation related costs and expenses. Besides, they are paid after the first order of preference.

The regulation regarding priority of payment establishes four categories:

1<sup>st</sup> Category: among others, the costs of bankruptcy, which can be exercised over all the assets that are held by the debtor (movable or immovable), this kind of loans have precedence over the 2<sup>nd</sup> and 3<sup>rd</sup> category credits, pledge and mortgage, respectively, but such preference will only be effective if said assets are insufficient to pay the preferential 1<sup>st</sup> category credits.

2<sup>nd</sup> Category: the pledge, this kind of credit is paid only on the property over which the privilege is held, so if they are insufficient to pay the respective credit, its default deficit becomes common credit.

3<sup>rd</sup> Category: mortgages, (credits that can only be executed on the mortgaged property). As in the previous case, if the mortgaged property is insufficient to pay the respective credit, its default deficit becomes common credit.

Regarding the pledge and mortgage, as they cover different types of assets (movable and immovable property respectively), it is very rare that both categories collide with each other.

4<sup>th</sup> Category: general credits, i.e., they affect all debtor's assets with the exception of indefeasible goods and those with a specific security, such as pledges or mortgages.

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# Colombia

## 1. Types of security available to creditors

**Personal guarantees:** obligation of a third party to pay debtor's obligation in the event the debtor defaults.

- a. Bail: one or more people respond to an outside obligation by agreeing with the creditor to comply, in whole or part, if the debtor defaults.
- b. Solidarity: creditor may require any debtor to fulfil the entire obligation.
- c. Endorsement: For asset titles, assures in whole or part, asset title payment.

**Real guarantees:** affect specific goods and grant preference (in consideration of the quality of a certain claim) and persecution rights to creditor.

- a. Mortgage: security over an immovable asset, when a lien is placed on a property;
- b. Antichreses: debtor grants creditor possession of a real estate property to be paid off with its fruits;
- c. Pledge: security over a movable corporeal asset;
- d. Pledged bonds: is an asset title with credit content that grants the legitimate holder the payment of the obligation represented in the lien pledge;
- e. Deposit certificate: is an asset title that represents depositor rights over deposited goods.

**Contractual guarantees:** grant the compliance of contractual obligations and shall be issued to an insurance company of good repute in accordance with Colombian law, and in favour of the contractor.

- a. Advanced payment/ down payment guarantee: ensures the advance and shall be issued in the full amount of the contract's value (up to 100% of the total value) and shall be valid until completion;
- b. Completion/ performance bond: ensures the compliance of all terms and conditions specified in the contract. It can be granted in the amount of 10% - 30% of the total value and shall be valid until completion;
- c. Quality guarantee/ certificate: ensures the quality of services provided. It can be granted in the amount of 10% - 20% of the total value and shall be valid until completion.
- d. Insurances

**Other guarantees:**

- a. Trust guarantee: owner of the property transfers it to another person to fulfil obligations and debts towards a third party;
- b. Borrowing contracts with collateral income: public credit operation through which resources are provided to a government entity to be repaid in foreign or national currencies;
- c. Deposit guarantee: backboard credit given to legal and natural persons;
- d. Bank guarantee: Bank acts as guarantor of customers' obligations towards their creditors.
  - Stand-by credit letters: Bank may pay at the beneficiary's request;
  - Endorsement: Bank guarantees, in whole or part, a contractual obligation.
- e. Abroad goods guarantees: for credit operations with persons domiciled abroad;
- f. Guarantees provided by the National Guarantee Fund for Credit Institutions.

## 2. Types of assets which may be subject to security

**Real guarantees:**

- a. Mortgage:
  - Mortgage over real estate assets.
    - Closed mortgage: guarantees obligations agreed in the contract.
    - Open mortgage: guarantees any obligation of the debtor in favour of the creditor.
    - With maximum limit: set at a determined amount.
    - Non limited amount: amount is not determined.
  - Civil and Commercial codes accept mortgages over ships and aircrafts.
- b. Antichreses:
  - Civil Antichreses: over real estate assets.
  - Commercial Antichreses: over any kind of asset such as commercial business or usufruct rights.
- c. Pledge: over movable corporeal assets, shares, current assets, commercial business, credit rights or movable assets subject to registrations such as ships, aircrafts and vehicles:
  - Civil pledge: requires the supply of the pledged asset.
  - Commercial pledge: creditor allows debtor to retain possession of the goods.
  - Pledge over shares requires registration in the share registry books.
  - In both cases, it will be issued as follows:
    - o With possession: enter into force with parties' agreement, and does not support establishment of successive liens over the same corporeal asset;
    - o Without possession: enter into force with private or public document and supports establishment of successive liens over the same corporeal asset;
    - o Closed pledge: subject to stamp tax;
    - o Open pledge: requires the determination of the value and term of the contract.
- d. Pledged bonds: is an asset title with credit content;
- e. Deposit certificate: is an asset title that represents depositor rights over deposited goods.

### 3. Type of obligations that may be secured

Obligations of any kind, including future obligations.

### 4. Validity requirements for security documents

#### Real guarantees:

- a. Mortgage over real estate assets:
  - Requires public deed and registration at the Office of Public Instruments within 90 days of its granting;
  - It can only be granted by the owner of the real estate asset.
- b. Mortgage over ships and aircrafts:
  - Requires public deed and registration at the Office of Public Instruments within 30 days of its granting, and 90 days if granted abroad. This registration must contain: (i) number and date of the public deed, (ii) notary where it was given, and (iii) characteristics and distinctive signs of the ships or aircrafts.
- c. Antichreses:
  - Civil Antichreses: over real estate assets. Does not require public deed and registration at the Office of Public Instruments;
  - Commercial Antichreses: over any kind of asset such as commercial business or usufruct rights. Must be constituted by public or private document;
  - In both cases, the contract enters into force with the supply of the goods.
- d. Pledge: over movable corporeal assets.
  - Civil pledge: requires the supply of the pledged asset;
  - Commercial pledge: the creditor allows the debtor to retain possession of the goods.
- e. Pledged bonds: must contain all requirements of an asset title.
- f. Deposit certificate: is an asset title that represents depositor rights over goods deposited. Must contain all requirements of an asset title.

#### Contractual guarantees:

- Insurance can only be granted by an insurance company that is registered and under surveillance of the Colombian Superintendence of Finance. The insurance policy requires up to date premium payments.

### 5. Publicity requirements

#### Real guarantees:

- a. Mortgage over real estate assets:
    - Requires public deed and registration at the Office of Public Instruments within 90 days of its granting.
  - b. Mortgage over ships and aircrafts:
    - Requires public deed and registry at the Office of Public Instruments within 30 days of its grant, and 90 days if granted abroad. This registry must contain: (i) number and date of the public deed, (ii) notary where it was given, and (iii) characteristics and distinctive signs of the ships or aircrafts.
- Registration is made for enforceability towards third parties. The order of registration determines ranking.
- c. Antichreses:
    - Commercial Antichreses: requires public deed if it is constituted by public document.
  - d. Pledge over movable subject to registration:
    - Requires registration at the Mobility Integral Services Office.

### 6. Other perfection requirements

#### Real guarantees:

- a. Mortgage: enters into force from the day following its registration at the Office of Public Instruments;
- b. Pledge: over movable assets enters into force from the day following its registration at the Mobility Integral Services Office;
- c. Contractual guarantees: enter into force from the first day of the premium payment.

### 7. Costs of set up and publicity of security

#### Real guarantees:

- a. Mortgage over real estate assets:
  - Closed mortgage:
    - o Public deed costs comprise notary fees (0.3% of the secured claim) plus certain fixed costs for issuance of photocopies, diligences, charitable receipt, and VAT;
    - o Registration at the Office of Public Instruments costs 0.5% of the secured claim.
  - Open mortgage:
    - o Public deed and registration costs are based on the letter of credit approval.
- b. Pledge over movable assets subject to registration:
  - Depending on the type of car, costs amount to approx. COP USD 60,000.

#### Contractual guarantees:

- Its value depends on the percentage insured and the total value of the contract, according to the insurance fees.

## 8. Timing for publicity/perfection requirements

### Real guarantees:

- a. Mortgage over real estate assets:
  - Requires public deed and registration at the Office of Public Instruments within 90 days of its grant.
- b. Mortgage over ships and aircrafts:
  - Requires public deed and registration at the Office of Public Instruments within 30 days of its grant, and 90 days if granted abroad.
- c. Pledge over movable subject to registration:
  - Requires registration at the Mobility Integral Services Office. There is no timing requirement for performing the registration as the registration is a requirement for the existence of the pledge.

## 9. What types of rights does a secured creditor acquire?

Pursuit rights: gives the right to pursue the real estate asset without taking into account who owns the property.

Preference rights: gives right to satisfy its claim before any subsequent ranking creditors and before any unsecured creditors.

Credit rights: debtor's assets will be used for paying the creditors' account.

## 10. Governing law issues

Colombian civil and commercial law, as follows:

### a. Personal guarantees:

- Bail and solidarity are governed by civil law (arts. 2361, 1568);
- Endorsement is governed by commercial law (art. 633).

### b. Real guarantees:

- Mortgages over real estate assets are governed by civil law (arts 2432 – 2439);
- Mortgage over ships and aircrafts are governed by commercial law;
- Antichreses are governed by civil and commercial law depending on the type of secured asset (art.2458);
- Pledge is governed by civil (arts. 2409, 2414) and commercial (arts. 411, 1200) law, depending on given rights;
- Pledged bonds and deposit certificates are governed by commercial law.

### c. Contractual guarantees:

- Civil or commercial law depends on the type of contract.

### d. Other guaranties:

- Trust guarantee, deposit guarantee and bank guarantees are governed by commercial law (arts.1173, 1234);
- Borrowing contracts with collateral income and guarantees provided by the national guarantee fund are governed by civil law;
- Abroad goods guarantees are governed by civil or commercial law depending on the type of secured asset.

The following Colombian private law rules apply:

Mortgages over real assets are governed by the law of the place where the assets are located. If there are multiple real assets located in different jurisdictions, it will be at the choice of the claimant.

Mortgages over ships and aircrafts are governed by the law of the place where the aircraft registry has been made.

In case of dematerialized assets and in other exceptional circumstances, the law of the place where the debtor is located applies, in order to guarantee its right of defense.

## 11. Legal concerns/ prohibitions related to granting/taking security

### Real guarantees:

- a. Mortgage:
  - It can only ensure immovable assets, ships or aircrafts;
  - Requires public deed and registry at the Office of Public Instruments;
  - It can only be granted by the owner of the real estate asset;
  - It is recommended to verify the status of previously registered mortgages to determine ranking.
- b. Antichreses:
  - It can only be granted by the owner of the real estate asset;
  - Commercial Antichreses: requires public deed.
- c. Pledge:
  - It can only grant movable corporeal assets;
  - Pledge over movable subject to registration: Requires registry at the Mobility Integral Services Office.

### Contractual guarantees:

- It can only be granted by an insurance company;
- Requires issuance of a guarantee and its premium payment, depending on the value insured.

### Other guarantees:

- a. Trust guarantee:
  - It can only be granted by the owner of the property subject to transfer and performed by a trust company under observance of the Superintendence of Finance.

### Limitations related with capacity/ ability:

- Securities shall be given to natural and legal persons. In the case of legal persons, legal representative must have legal capacity to contract and to issue securities.

## 12. Enforcement

### Court involvement required?

For real and non-real estate guarantees, if a debtor defaults, creditor must bring legal action to enforce the guarantee before the Court where the real estate asset is located. This process is called Real guarantee claim litigation (in Spanish "Proceso Ejecutivo con Garantía Real").

### Average timing

Real guarantee claim litigation: at minimum 6 to 8 months in the case that no challenges and minimum terms set by law are observed; otherwise it may take significantly longer, depending on the challenges filed.

Rights of challenge for the debtor/ third parties

In a real guarantee claim litigation, debtor and third parties may file the follow challenges, (within 10 days from the payment order):

- Pay;
- Compensation;
- Ambiguity;
- Novation;
- Remission;
- Prescription;
- Nullity.

### Cases of cancellation/ reversal of enforcement

#### Real guarantees:

- a. Mortgage termination causes:
  - Loan payment;
  - Prescription (10 years from when the obligation has been made payable);
  - Court order.
- b. Pledge termination causes:
  - Loan payment;
  - Destruction or damage of the moveable assets;
  - Title transfers to the creditor.

In both cases the interested party may request restoration to the original condition.

#### Contractual guarantees:

- Expiration of the guarantee term;
- Anticipatory expiration of the guarantee term.

### 13. Secured creditors' position in insolvency

#### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

During the insolvency procedure the enforceability of all debtors' guarantees is suspended, unless its enforcement is approved by unanimous decision of the creditors' assembly.

The liquidator will update credits recognized and inventory properties and incorporated qualified rights and claims in the reorganization agreement.

If debtor defaults on the reorganization agreement, the creditor may initiate the payment process through its security.

If the asset which is the object of the guarantee is sold during the process, the creditor will have a preferential right to be paid with the money generated by the sale.

#### **Secured creditor rights in influencing decisions in the creditors' assembly**

##### Voting rights:

Must be determined based on one vote per COP of total credit, without taking into account interests and penalties.

Submitting a reorganization plan: creditors who hold at least 60% of the total value of the receivables against the insolvent company are entitled to appoint or change the liquidators at any time and propose the reorganization plan. The creditors' assembly is the one that approves the reorganization plan.

Confirmation of a certain reorganization plan: voting on the reorganization plan is made based on categories of creditors and not based on the value of the claims. At least three categories of creditors must approve the plan and if there are categories less favoured, at least two categories must approve the plan. Within a certain category of claim the plan shall be approved by the absolute majority of the value of the claims within the respective category. In the case where there are only two categories of claims, the plan shall be considered accepted in the case where the category of claims having the 75% accepted the plan.

#### **Secured creditors ranking in the distribution of liquidation proceeds**

Insolvency law provides 5 creditor categories, as follows:

1. Holders of labour credits;
2. Public entities;
3. Financial institutions;
4. Company partners;
5. External creditors.

The decisions on the creditors assembly must be taken by the votes of 3 of the 5 categories available.

No special rankings are granted to secured creditor. These insolvency categories are only for decision making purposes.

However, during a restructuring process, the credit ranking system established in the Colombian Civil Code determines the order in which creditors are paid, under which pledge creditors are a second class creditors and mortgage creditors a third class creditors. Overall, there are six classes of creditors, all with preference among each other to be paid during the liquidation/ restructuring process.

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## 1. Types of security available to creditors

The number of securities is not prescribed by the law i.e., creditor and debtor can agree upon any kind of security which can fulfil its purpose. The below mentioned are the most common ones, especially the mortgage over the immovable assets.

**Mortgage** over immovable (real estates), over movable asset and over certain rights, ex lege mortgages over assets (e.g., sailors for unpaid salaries, lessor over the movable assets of lessee for unpaid rent, the promissory buyer for the return of the amounts paid, freight forwarder over the goods in consideration for the unpaid fee, etc.) the possession over the asset is being retained by the debtor.

**Pledge** over a movable asset; the possession over the asset is being handed over to the creditor.

**Fiduciary ownership** - the ownership over the asset is being transferred to the creditor until the debt is settled.

**Guarantee** - personal guarantee, letters of guarantee, bank guarantee, etc.

**Contractual penalty** – creditor's right to claim up front agreed amount of damages if other party does not fulfil its contractual obligation. Creditor has the right to cumulatively claim the obligation fulfilment together with the contractual penalty after the contract is breached.

### Retention right

**Other types** – deposit of assets, cash or securities (Court deposit or Public Notary deposit), prohibition of disposal of assets, prohibition of encumbrance of assets, bank order to withhold reimbursement, repurchase agreements, ownership right reservation clauses, etc.).

Along with general comments we will include also the comments for mortgages since they are the most common type of security used in practice.

## 2. Types of assets which may be subject to security

All types of assets may be subject to security.

## 3. Type of obligations that may be secured

Any kind of obligations may be secured. Future obligations may be secured also.

The mortgage can be established only for cash claims i.e., for claims that can be expressed in money value (the debt). The mortgage established for certain debt also secures the interest, fees, penalties, enforcement and other costs that are related to payment of secured debt.

## 4. Validity requirements for security documents

General rule is that there is no prescribed form for security establishment.

Exceptions are mortgage and bank guarantees which have to be established by an agreement made in writing. Mortgages over real estate assets have to be executed in front of a Public Notary.

The mortgage agreement must identify the person establishing the mortgage, the creditor, the cause of the secured obligation, the value of secured obligation and asset subject to security.

## 5. Publicity requirements

Real estate mortgages are registered with the land registry. The moment of registration has constitutive effect and publicity effect is triggered from that moment. Order of registration determines the ranking of mortgages.

All other mortgages established in front of the court or Public Notary (over movables, securities and financial instruments and other rights) are registered with the FINA (main Croatian financial regulatory body) registry. The moment of registration triggers the publicity effect for third parties.

## 6. Other perfection requirements

Security is perfected when all prescribed conditions have been met. In general, the moment the security establishment coincides with the moment of agreement conclusion.

Real estate mortgages are an exception and for their establishment formal entry (registration) in the Land Registry is required.

### 7. Costs of set up and publicity of security

Costs of non-real estate mortgages established in front of the court or Public Notary that are registered in the FINA Registry are approx. EUR 55 and are not related to the value of the secured claim or asset. Real estate mortgages (registered in the Land Registry) consist of 2 types of costs:

- Notary fees: depending on the value of the real estate (on average ranging from 0.5% to 1%). Notary fees are related to the value of the asset if the asset value is lower than the value of the secured claim. If the asset has greater value than the secured claim than the calculation of notary fees is related to the value of the secured claim;
- Land registry fees: fixed fee of approx. EUR 33 per registration (if the mortgage agreement is made in a form of a notarial deed there is no fee).

### 8. Timing for publicity/perfection requirements

In normal circumstances the procedure should be completed within the following deadlines:

- FINA Registry procedure: within 8 days;
- Land Registry procedure: within 15 days.

### 9. What types of rights does a secured creditor acquire?

- To satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors;
- The mortgage follows the asset – it is maintained irrespective of the disposals having as subject matter the asset, and
- The secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- The mortgage may be assigned/ transferred to another person after its establishment but only together with the secured claim;
- Higher ranking creditors have priority in terms of exercise of enforcement rights and, in the case of enforcement started by a lower ranking creditor, as long as the asset has not been sold, the higher ranking creditor may continue the enforcement or start a new enforcement procedure.

### 10. Governing law issues

International private law is regulated in Croatia by Private Law Act and accordingly the mentioned Act applies to respective legal matters. Please note that Croatia will accede to the EU on July 1<sup>st</sup> 2013 – fixed date. After accession international private law regulations should be harmonized with EU legislation and certain changes are expected. Till then following rules applies:

- Proprietary issues over assets are governed by the law of the place where the assets are located (there are no exceptions for this rule);
- Obligation issues (contract validity, form, etc.), are primarily subject to the law of the contractual parties choice. The exception is real estate assets where the exclusive applicable law is the law of the respective asset's location.

If parties have not chosen the governing law there are many subsidiary rules which determine the governing law – depending on object of security or other circumstances (mortgage over immovable assets - place where the asset is located at the time the movable mortgage agreement is concluded; bank guarantees - the place of guarantee issuer, mortgage over shares – the law of the place of the company whose shares are object of security, etc.).

### 11. Legal concerns/prohibitions related to granting/taking security

Financial assistance, criminal offenses for dealing against the best interest of the company, right of other creditors to cancel a transaction if fraudulent to them (independent of or during insolvency of the security provider), under prescribed circumstances, can lead to nullity or at least voidance of the security agreement.



## 12. Enforcement

### **Court involvement required?**

For mortgages, approval for initiation of enforcement is granted by the court or Public Notary (without judging on the substance of the matter, the court or Public Notary only verifies the existence of an execution writ).

For non-real estate mortgages non-court or non-Public Notary enforcement is possible if the creditor holds the possession over the security object.

### **Average timing**

There are many circumstances that can influence the enforcement and the duration can be observed on a case to case basis. The enforcement can take from a few days (pledge) up to a few years (complex real estate mortgage enforcement procedures).

### **Rights of challenge for the debtor/ third parties**

The mortgage can be challenged by the debtor or any third party that has interest to challenge the respective mortgage.

Filing an opposition will in most cases suspend the enforcement procedure.

### **Cases of cancellation/ reversal of enforcement**

If prescribed requirements have been met the enforcement can be cancelled. Some of the typical reasons for enforcement cancellation are: invalidity of the security or enforcement writ, debt settlement, pledge destruction, claim waive, etc.

## 13. Secured creditors' position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

As of the date of opening of the insolvency proceedings all enforcements are ceased by law. All other legal procedures or other proceedings for recovery of claims against the debtor or its assets are also suspended by law but can be continued once the bankruptcy administrator takes over the respective proceeding.

The Bankruptcy Act provides the possibility for a creditor that has claim against the debtor, secured by the mortgage, to satisfy its claim separately i.e., the object of mortgage will be excluded from the bankruptcy procedure. In that sense secured creditors are in a much better position in the bankruptcy procedure than other creditors. Such creditors have to start the separate enforcement procedure in order to settle the claim from the value of mortgage object.

### **Secured creditors rights in influencing decisions in the creditors assembly**

Secured creditors have the same rights as all other creditors who are members of the creditor's assembly. They can be also, exceptionally, appointed as members of the creditor's committee.

As members of the assembly they have right to vote and in that sense can influence the following decisions:

- Appointment of the bankruptcy administrator;
- Issuance of a reorganization plan;
- Appointment of members Creditors' Committee;
- Any other issue related to insolvency procedure.

### **Secured creditors ranking in the distribution of liquidation proceeds**

The liquidation related costs and expenses (liquidator's fees, preservation costs, levies and administration costs etc.) have to be covered first. Afterwards, secured creditors are next in the priority ranking and after them all other creditors.

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# Czech Republic

## 1. Types of security available to creditors

The most usual types of available securities include, inter alia:

- Mortgages (in respect of immovable assets);
- Pledges (in respect of movable assets);
- Guarantees provided by natural or legal entity;
- Bank guarantees;
- Contractual penalties;
- Retention rights;
- Provisions under sale and purchase agreements (ownership right reservation, pre-emption right, options).

Apart from an agreement, the mortgage and/ or pledge may emerge

- Via a decision of administrative organ (e.g., a court);
- By virtue of law (e.g., in favour of landlord over moveable things of tenant brought into rented flat for securing the rent).

The comments below apply to mortgages and pledges - the most common type of security.

## 2. Types of assets which may be subject to security

Mortgages and/ or pledges may (in line with the nature of the security – as specified above) be set up over any type of convenient property value, inter alia:

- Moveable and immovable assets or any group thereof;
- Enterprises or any other group assets;
- Receivables;
- Business shares;
- Commercial papers (bonds, securities, etc.);
- Industrial property rights.

## 3. Type of obligations that may be secured

Mortgages and/ or pledges may secure monetary and non-monetary receivables, including future obligations. Any receivable is secured along with appurtenances.

## 4. Validity requirements for security documents

- Mortgage and/ or Pledge Agreement must identify the secured obligation and the asset subject to security;
- Any mortgage and/ or pledge agreement must be in written form (a form of a notary deed is required in certain cases, inter alia, if the asset subject to mortgage is real estate not registered in the Cadastral Register, or if a movable asset is pledged without being handed over to the creditor);
- Publicity requirements must be met (please see answer No. 5).

## 5. Publicity requirements

- Real Estate (registered in the Cadastral Registry): Registration with the Cadastral Register is required. Order of registration determines ranking;
- Real Estate (not registered in the Cadastral Registry): Registration with the Registry of Mortgages and Pledges held by the Notarial Chamber is required;
- Non-real estate mortgages: Registration with the Registry of Mortgages held by the Notarial Chamber is required if a movable asset is pledged without being handed over to the creditor. Order of registration determines ranking;
- Business shares: Registration in the Commercial Register is required;
- Industrial property rights: Registration with the respective register held by the Industrial Property Office is required.

6. Costs of set up and publicity of security

- Cadastral Register: CZK 1000 per registration (approx. EUR 40);
- Register of Mortgages held by the Notarial Chamber:

The fee is determined by the tariff value which is a value of the mortgage accordingly

|  |                        |
|--|------------------------|
| For the amount CZK 0 - CZK 100,000 of the tariff value       | 1 % (at least CZK 800) |
| For the amount exceeding CZK 100,000 up to CZK 500,000       | 0,5 %                  |
| For the amount exceeding CZK 500,000 up to CZK 1,000,000     | 0,3 %                  |
| For the amount exceeding CZK 1,000,000 up to CZK 10,000,000  | 0,1 %                  |
| For the amount exceeding CZK 10,000,000 up to CZK 40,000,000 | 0,05 %                 |

- Commercial Register: CZK 2000 per registration (approx. EUR 80).

7. Timing for publicity/perfection requirements

- Cadastral Register: statutory period is 30 days (in the case of a complicated situation the office may postpone it to 60 days);
- Commercial Register: statutory period is 5 working days.

8. What types of rights does a secured creditor acquire?

- If the property value is subject to the mortgage or pledge right, the creditor is entitled to keep it at his disposal (however, the creditor is not entitled to keep any proceeds arising from the property value without the consent of the owner of the property value);
- Require realisation of the property value (e.g., selling in line with statutory requirements) which is subject to mortgage/ pledge, if the (secured) receivable is not repaid in a timely manner;
- Satisfy its (secured) receivable from the proceeds of the realized property value (e.g., sold in line with statutory requirements) which is subject to mortgage/ pledge, if the (secured) receivable is not repaid in a timely manner.

9. Governing law issues

Rules of Rome I Regulation are applicable in this case, i.e.:

- Agreements are governed by the law chosen by the parties; in the absence of choice of law;
- Mortgage agreements, i.e., relating to a real estate (including questions of validity) are governed by the law of the place where the real estate is located; otherwise;
- Law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

10. Legal concerns/prohibitions related to granting/taking security

Financial assistance: A company may provide a financial assistance in order to facilitate a third person to acquire its own (business) shares only based on fulfilment the following conditions:

- Founding document must allow provision of financial assistance;
- Financial assistance must be provided on an arms' length basis and must not cause the bankruptcy of a company;
- Company's BoD/ Executive prepares a written report on provision of financial assistance summarizing the reasons and conditions for provisions of financial assistance;
- General Meeting approved the provision of financial assistance based on the BoD/ Executive's report (please see above).

(Selected) rules against corporate assets abuse: A company may provide security in relation to loan agreement with certain types of related persons only following consent of its General Meeting.

## 11. Enforcement

### **Court involvement required?**

For enforcement of mortgage/ pledge rights, an enforcement order issued by the court or enforcement via a court proceedings is typically required.

### **Average timing**

According to our experience, the time limit ranges from 6 to 12 months (if execution order is granted and the property value could be easily sold).

### **Rights of challenge for the debtor/ third parties**

Yes. Any third party contending that the enforcement is not permissible may file a petition with the respective court against the creditor and the auctioneer (in case the enforcement is provided via a public auction).

### **Cases of cancellation/ reversal of enforcement**

Violation of rules for conducting the enforcement proceedings may trigger cancellation of the unlawful act. In case the enforcement order is cancelled, the interested party may request restoration to the original condition.

## 12. Secured creditors' position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

Within the insolvency proceedings, a secured creditor is entitled, inter alia, to

- Instruct the insolvency administrator in relation to administration of property values secured in favour of such secured creditor (the insolvency administrator is bound by these instructions); and
- Instruct the insolvency administrator in relation to realisation of property values secured in favour of such secured creditor (the insolvency administrator is bound by these instructions).

### **Secured creditors rights in influencing decisions in the creditors assembly**

The creditors are organized in separate groups within the creditors' assembly. For certain types of decisions, a majority of all creditors is required whereas for other types of decisions, the majority must be achieved in each of the groups separately.

### **Secured creditors ranking in the distribution of liquidation proceeds**

Secured creditors have a right for settlement of its receivable from the liquidation proceeds arising out of the realisation of property values secured in favour of such secured creditor within the insolvency proceedings. However, administration and realisation costs as well as the insolvency administrator's remuneration shall be deducted from the proceeds; moreover, part of the expert's (if nominated) remuneration must also be recovered in advance.

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# England & Wales

## 1. Types of Security Available to Creditors

There are four primary categories of security under English law as follows.

### 1. Mortgage

This form of security involves the transfer of title to an asset in order to secure obligations, typically debt. The assets secured can be tangible or intangible and physical possession of the mortgaged asset is not a requirement.

Under an equitable mortgage, only a beneficial interest will pass to the mortgagee, while legal title will pass under a legal mortgage.

The transfer of title under a legal mortgage operates to prevent the mortgagor from disposing of the asset and assist in the creditor's ability to realise the security if required.

Depending on whether the necessary formalities are complied with, a mortgage can be legal or equitable.

A legal mortgage is the most secure form of security interest and cannot (unlike an equitable mortgage) be taken over future property.

Mortgages over choses in action, such as rights under contracts or debts, are typically taken by an assignment by way of security, which again can be legal or equitable depending on what formalities are adhered to. An assignment by way of security transfers certain rights from the assignor to the assignee as security for the discharge of the obligations of the assignor or a third party.

### 2. Charge

While under a mortgage, title to the asset will pass to the mortgagee, under a charge, the chargee only obtains rights over the security provider's assets, for example the right to restrict the security provider in dealing with the asset freely or a right to the proceeds of sale.

Charges can be fixed or floating. A fixed charge will attach immediately to the (definite and identifiable) charged asset while a floating charge hovers over a pool of assets (present and/ or future) until conversion or "crystallisation" (when it becomes a fixed charge over assets). The distinguishing feature of a fixed charge is that the chargor is not free to deal with the charged asset in the ordinary course of its business. A floating charge on the other hand is a charge over a class of assets with which the chargor is free to deal and so permits continuation of the business operations of, for example, a trading company.

Over certain assets, for example stock, only a floating charge can be granted. It would be impractical for a debtor not to be able to deal freely with its stock as this might create cash-flow problems. Therefore a floating charge is normally a catch-all provision for assets not specifically charged, and will typically be granted over the chargor's whole undertaking.

The distinction between fixed and floating charges is significant upon the insolvency of the person or entity providing the relevant charges as the holder of a fixed charge is paid out of distributions to creditors prior to all other creditors (please see number 13 below).

### 3. Pledge

A pledge is the delivery of possession of an asset to the pledgee by way of security. However, ownership of the asset remains with the pledgor (unlike a mortgage).

The pledged can sell the pledgee asset with due notice to the pledgor under a default of the pledgor.

### 4. Lien

Liens generally arise by operation of law and are more common in commercial transactions, typically when goods are being supplied, repaired or transported. They are, therefore, more likely to be of benefit to trade creditors rather than financial creditors, for example a creditor has a lien over goods until they have been paid for by the security provider. However, creditors do need to consider due diligence in respect of any existing liens affecting assets that they may take security over.

### 5. Quasi-security

Quasi-security relates to methods by which a creditor may try to enhance its position on insolvency of the borrower without taking a full security interest. Quasi-security includes, for example, a guarantee (corporate or individual), retention of title (whereby goods are provided to a buyer on the basis that title only passes to the buyer upon payment for the goods) or negative pledge (a restriction on the security provider's ability to deal).

2. Types of Asset which may be subject to security

**Mortgage** - Includes securities, chattels and rights under a contract (via assignment by way of security). Note that a legal mortgage can generally not be taken over most types of intangible property with the exception of (i) documents that transfer title to intangible property (for example, bills of exchange) and (ii) intangibles that can be transferred into the name of the mortgagee and registered in that mortgagees' name (for example, shares).

**Charge** - Includes land (usually expressed to be a charge by way of legal mortgage but a charge nonetheless), contracts, book debts, plant and machinery, goodwill, IP rights and licences.

**Pledge** - Includes items of tangible property capable of being delivered (including documents of title to property such as bearer securities).

**Lien** - Any asset.

3. Type of obligations that may be secured

Under English law, security may secure obligations of any kind, including future obligations.

4. Validity requirements for security documents

**Charge** - Charges over land must be created by way of a deed. Similarly, charges over for example securities, bank accounts etc. must be created by way of a deed.

A charge by way of first legal mortgage over land must be executed as a deed, which means it must state that it is a deed and be signed, witnessed and delivered as a deed. A deed is a written instrument that requires more than a simple signature to be enforceable. A deed is distinct from a simple contract for two main reasons: (i) the limitation period for actions brought under a simple contract is six years from the date of accrual of action whereas the period is generally twelve years for a deed; and (ii) deeds do not require consideration (for example payment by the party receiving the benefit of certain rights under the deed to the counterparty) to be enforceable.

For an assignment by way of security of debts or other choses in action, or an equitable mortgage, the assignment must be in writing and be absolute.

**Pledge** - In order for a pledge to be valid, the creditor must be in actual or constructive possession of the asset. A pledge can only be granted over a tangible chattel, excluding real property. No documentation is required but it is preferable that the pledgor and the pledge enter into a letter of pledge to set out the terms of the pledge, for example under which circumstances the pledge would be entitled to sell the pledged asset.

**Lien** - No validity requirements as these can arise by operation of law.

**Quasi-security** - Guarantees and indemnities must be in writing and signed by the guarantor.

5. Publicity requirements

All security granted by companies and LLPs must be registered at Companies House. Companies House is the central registry for companies in England & Wales and, amongst other functions, deals with the registration of documents that must be filed under company legislation (for example, the Companies Act 2006) and makes certain information publicly available.

In addition, charges by way of legal mortgage over land must be registered at the Land Registry, regardless of whether it is a corporate entity or an individual granting the charge. The Land Registry is the body responsible for registering land and property ownership and interests in England & Wales.

Various other types of asset have their own registration requirements under different regimes, for example, intellectual property rights, ships, aircraft and bills of sale.



6. Other perfection requirements

An assignment is perfected when notice of the assignment is given to the other relevant contracting party.  
For pledges and liens, these are perfected merely by the creditor holding and continuing to hold the secured asset.

7. Costs of set up and publicity of security

Any security to be registered at Companies House costs £13 to register. Different fees apply if security is registered by online methods.  
The fee to register a charge at the Land Registry is calculated by reference to the amount secured by the charge. The Land Registry fee will be between £0 and £250 for each title charged.

8. Timing for publicity/perfection requirements

Security to be registered at Companies House must be registered within 21 days of its creation. It is very important to do this, particularly as any failure can require a court order to rectify.  
While there is no specific deadline for registering security at the Land Registry, it is preferable to do so within the priority period afforded by the pre-completion searches. Registering security within this period will ensure priority over subsequent charges.  
The time between submitting the registrations and obtaining proof of registration depends on how busy each of Companies House or the Land Registry (as relevant) is. With Companies House, we would expect to receive the certificates of registration between one to two weeks from submitting the registration request. With the Land Registry, the time period is approx. two weeks.

9. What types of right does a secured creditor have?

Before enforcing its security, the holder must make a formal demand for payment on the security provider. The effect of a demand is to make the sums due under the loan facility payable. This is particularly important in the context of some of the enforcement rights implied under common law and statute which do not arise until the secured liabilities become payable (expressly granted enforcement rights will usually be exercisable on an event of default under the loan document).

In relation to each type of security, the following enforcement rights are available:

**Legal Mortgage** - Foreclosure (a process whereby a mortgagor can obtain a court order for possession of the mortgaged land); Taking Possession; Power of Sale (provided the security document contains an express power to that effect or is made by deed, in which case the power is implied); and Appointment of a Receiver (available provided the security document contains an express power to that effect or is made by deed, in which case the power is implied).

**Equitable Mortgage** - Foreclosure (available provided the security document contains an agreement to create a legal mortgage and the asset in question is capable of being subject to a legal mortgage); Taking possession (available provided the security document contains an obligation to create a legal mortgage and a contractual right to possession); Power of Sale (available provided the circumstances above in relation to legal mortgages exist); and Appointment of Administrator (available provided the circumstances above in relation to legal mortgages exist).  
For assignments by way of security where the secured property are choses in actions (for example, contractual rights), the assignee may exercise its power of sale (provided the security document contains an express power to that effect or is made by deed, in which case the power is implied) and/ or appoint a receiver (available provided the security document contains an express power to that effect or is made by deed, in which case the power is implied).

**Charge** - Taking Possession (available provided the security document contains an express power to that effect); Power of Sale (available provided the circumstances above for legal mortgage exist); Appointment of an Administrative Receiver (available only to the holder of a floating charge created before 15 September 2003 over all or substantially all of the chargor's assets); Appointment of Receiver (available provided the circumstances above in relation to legal mortgages exist); Appointment of administrator (available only to holders of a qualifying floating charges (QFCHs)). A qualifying floating charge is a charge created by an instrument that states that paragraph 14 of schedule 1B to the Insolvency Act 1986 applies to it or that purports to appoint an administrator or an administrative receiver. A QFCH is generally a holder of a qualifying charge which relates to the whole or substantially the whole of the company's property.

**Pledge** - Power of Sale (available where the power is given either expressly in the security document or impliedly where the pledgor is in default and reasonable notice has been given to him).

**Lien** - Power of Sale (a secured creditor may apply to court for an order of sale where: i) the lien is equitable or ii) there is a reason why a quick sale of the secured assets is preferable (e.g., assets are perishable)); Appointment of Receiver (available to holders an equitable liens, who may apply to court for an order to appoint a receiver).

**Compulsory liquidation** - A secured creditor can seek to have the company wound-up if it has served a statutory demand for a debt in excess of £750 and the debtor has failed to pay, or if it can show that the debtor is insolvent.

## 10. Governing law issues

The UK being part of the European Union, Rome I Regulation applies to the jurisdiction of England & Wales.

Generally speaking, any security must be created under, and be valid in accordance with, the law of the jurisdiction where the secured asset is located, notwithstanding that this may be different to the jurisdiction in which the security provider is incorporated.

**Mortgages** - To create a valid legal mortgage over real property located in England and/ or Wales, the mortgage has to be created under the law of England & Wales.

## 11. Legal concerns/prohibitions related to granting/taking security

**Financial assistance** - Under statute, unless certain exceptions apply, it is unlawful for public companies to give financial assistance directly or indirectly (which includes the provision of security) for the acquisition of shares in either themselves or their parent companies or for private companies to do so for the acquisition of shares in their public parent companies.

**Corporate benefit** - Where security is given by a company in relation to the obligations of another (third party) company, the security provider, in its board minutes approving the transaction, must be able to confirm that it is in the company's interests to enter the transaction. It is common for such third party security to be approved by an ordinary resolution of the shareholders of the company in order to avoid the risk of the shareholders challenging the grant of the security.

**Security for loans to directors** - Certain restrictions apply to the making of loans, and to related dealings such as the provision of security for those loans, by a company either to its directors, or to the directors of its holding company or to persons connected with those directors.

**Structural subordination** - If a lender lends to a parent entity which owns a subsidiary, and the lender only takes security from the parent, it is at a disadvantage in relation to secured, and even unsecured, creditors of the subsidiary. This can be an issue if the lender is lending on the basis of the assets in the subsidiary. This is because, on the subsidiary's insolvency, its creditors can claim for their debts against the subsidiary's assets. A lender to the parent can only claim for its debt out of the parent's assets, unless the subsidiary has given a guarantee. The parent's assets will include its shares in the subsidiary, but the subsidiary's assets will only be distributable to the parent (and therefore the parent's lender) after all of the debts claimed against the subsidiary have been fully satisfied. The parent's lender, therefore, ranks as a shareholder in the order of priority (see 13 below) as far as the subsidiary's assets are concerned, and the subsidiary's creditors have a higher-ranking claim to the subsidiary's assets than the parent's lender. This means that the parent's lender is effectively subordinated to the creditors of the subsidiary. In such circumstances, a guarantee/ third-party security should be taken.

## 12. Enforcement

### Court involvement required?

**Foreclosure** - Yes. This is a lengthy, two stage court process that is rarely used in practice. First an order for foreclosure must be obtained by the mortgagee. The mortgagor is then given a chance to pay the debt. If payment is not forthcoming, an order for sale can be sought.

**Taking Possession** - In most cases. Where a secured creditor is entitled to take possession, he can do so either: i) by taking physical possession of the secured property (this does not require court involvement, but is only available where possession is granted voluntarily by the occupant(s) or, more commonly, ii) by bringing a court action for a possession order.

A mortgagee in possession may incur unforeseen liabilities to third parties (for example for the cost of environmental remediation) and owes duties to third parties (for example to the borrower to account for any income and profit received). For these reasons the appointment of insolvency practitioners are more commonly used enforcement methods.

**Power of Sale** - It may be. If the circumstances set out in 9 above do not exist, a court order for sale will be required. If they do exist there is no need to apply to court.

**Appointment of Administrative Receiver & Receiver** - No. These are out of court processes.

**Appointment of Administrator** - Some court involvement is always necessary. Administrators can be appointed in two ways, either by simply filing documents at court (the out of court route) or by making a formal application for, and obtaining, a court order (the court route).

The out of court route is only available to QFCHs (holders of qualifying floating charges); the court route is available to all other creditors.

**Compulsory Liquidation** - Yes. Liquidation is a court sanctioned process.

**Average timing**

**Foreclosure** - The staggered nature of the process, and the involvement of the court makes this a very time-consuming process.

**Taking Possession** - Where property is vacant, or the action is uncontested, possession can be taken quickly, in a matter of days. Where court action is necessary, proceedings can take anything from two to nine months, depending on a number of factors.

**Appointment of Administrative Receiver & Receiver** - These can be appointed quickly by notice to, and acceptance by, the Administrative Receiver/ Receiver.

**Appointment of Administrator (court route)** - The appointing creditor must first issue the application at the court, where a hearing date will be set, the timing of which will vary depending on the court calendar. Notice must then be given to a number of interested parties not less than five business days before the hearing. If appointed, the administrator's appointment may commence at the time of the hearing.

**Appointment of Administrator (out of court route)** - If there are no prior-ranking QFCHs, the appointing creditor can simply file the appointment documents at court and the appointment will commence at the time of filing. If there are prior-ranking QFCHs, the appointing creditor must serve a notice of intention to appoint on the prior-ranking QFCHs two business days before the appointment. If this period expires, or the prior-ranking QFCH consents, the appointing creditor can then appoint by filing the necessary documents at court.

**Compulsory Liquidation** - The creditor issues a petition at court to commence the process. A date for a hearing is fixed at this point. Notice then must be given to the creditor at least five business days before the hearing. It is possible to obtain a winding up order within about six weeks of issuing the petition.

**Rights of challenge for the security provider/ third parties**

**General** - The security provider might contest the debt, or contend that the debt was not due and owing (i.e., that the holder of the security had not properly demanded), or that the security was invalid or improperly perfected, or that the relevant appointment documents were invalid, or that the relevant notice requirements were not followed.

**Financial Collateral Arrangements (FCAs)** - the Financial Collateral Regulations 2003 (the **Regulations**) were brought into force to implement Directive 2002/47/EC of the European Parliament and Council and modify existing UK insolvency law in relation to FCAs, to give parties to FCAs certain rights in priority to other parties on the insolvency of the collateral giver.

Under the Regulations, the collateral taker can enforce an FCA even where an administrator is in place, and without having to account to (the ordinarily prioritised) preferential creditors and unsecured creditors. The rights of administrators and liquidators in relation to FCAs are much more limited, for example, they have no right to dispose of the collateral, disclaim the FCA, avoid the FCA if it occurred after the commencement of winding-up or to remove an administrative receiver of the financial collateral. In addition, if the FCA allows, the collateral taker can appropriate the collateral without having to obtain a court order for foreclosure,

**Cases of cancellation/ reversal of enforcement**

**Limitation** - A limitation period of 12 years from the cause of action applies where the security documents is by deed. This is reduced to 6 years where the security document is not by deed.

**Conflicting arrangements** - Security may not be enforceable if there is an Intercreditor or Standstill Deed in place governing the enforcement of security which prohibits or delays enforcement.

**Challengeable transactions** - A liquidator and an administrator can, in certain circumstances, challenge and have security arrangements set aside, making the security unenforceable. Reviewable transactions include security arrangements that constitute: i) a preference, ii) a transaction at an undervalue; or iii) a (wholly or partly) invalid floating charge.

**Undue Influence** - Where the security provider can show that he entered the security document whilst under the undue influence of another, the security will be unenforceable.

**Lien** - Statute provides that liens over the books, papers and records of a borrower are unenforceable to the extent that enforcement would deny their possession to a liquidator and administrator.

### 13. Secured creditors' position in insolvency

#### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

Perfection (as described above) is necessary to ensure that the security has the intended priority over the other creditors of the security provider, although perfection does not guarantee validity and priority in all circumstances (for example where a transaction is challengeable by an insolvency practitioner).

Further, when the chargor enters either administration or liquidation, creditors must lodge formal notice of the debt owed to them, called a proof of debt, to the administrator or liquidator.

**Administration** - An automatic moratorium is imposed at the start of the administration which prevents creditors from enforcing security without consent of administrator or the permission of court. A secured creditor is however, generally speaking, entitled to be repaid from the proceeds of sale of the secured assets. He may then claim as an unsecured creditor (who will receive a share of the assets proportionate to the size of the company's debt to them) for any balance. Note that a company can not enter administration if an administrative receiver is in office.

**Compulsory Liquidation** - Compulsory liquidation provides a moratorium preventing creditors from enforcing security without the permission of court. A liquidator acts primarily in the interests of unsecured creditors and shareholders, but must distribute the assets in accordance with the order of priority set out below.

#### Secured creditors rights in influencing decisions in the creditors assembly

**Receivership** - The receiver only owes duties to the secured creditor who appointed him, there is no meeting of creditors.

**Administration** - The views of a secured creditor may be taken into consideration by the court when considering the appointment of the administrator, however an administrator owes a duty to act in the best interests of the creditors as a whole.

**Compulsory Liquidation** - A secured creditor may be able to exert some influence over the choice of liquidator by voting at creditors meetings, or if appointed to the liquidation committee, may take some limited further control over the liquidator's actions.

#### Secured creditors ranking in the distribution of liquidation proceeds

The priority of creditors for the distribution of assets in a liquidation is as follows: 1) Fixed charge holders; 2) Liquidators (for the expenses of the winding up); 3) Preferential debts (e.g., employees); 4) Floating charge holders; 5) Ordinary unsecured creditors (pro-rata) and 6) Shareholders (receive any surplus).

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## 1. Types of security available to creditors

- Personal guarantees (including corporate guarantees);
- Autonomous guarantees: letters of guarantee and comfort letters;
- Mortgages: over real estate;
- Assimilated operations: assignments for security purposes, ownership right reservation clauses, repurchase agreements;
- Pledges: security over a movable (registered security over movables, possessory pledge) or real security;
- Other rights providing for preference by law over certain assets:
  - Privileges: preferences granted by law to a creditor in consideration of the quality of a certain claim (such as: the seller's claim for the unpaid price of an asset, retention rights, others – as per the civil procedure code)
  - Mortgages over immovable assets:
    - The seller for the unpaid price;
    - The promissory buyer for the return of the amounts paid, in case of inobservance by the promissory seller of the promissory agreement;
    - The lender in case of amounts granted to finance the acquisition of an immovable asset;
    - Others – applicable in case of co-ownership, inheritance, caretaking agreements etc.
- Retention rights: any person who must return an asset to its owner may retain such asset until it receives reimbursement for the necessary and useful expenses covered related to the asset or, as the case may be, indemnification for the prejudices caused by the asset.

## 2. Types of security available to creditors

Things and proprietary rights the pledging of which is not prohibited by law may be pledged (object of pledge).

Movables may be encumbered with possessory pledge. A patent, trade mark, industrial design, utility model, variety, layout-design of an integrated circuit, motor vehicle or aircraft which is entered in a register the data of which are public and maintenance of which is regulated pursuant to the procedure provided by law may be encumbered with a registered security over movables

Mortgages may be set up over immovable.

## 3. Type of obligations that may be secured

All types of obligations can be secured, including future obligations. The obligations secured with the same ranking as the principal debt, interest, fees, penalties, enforcement and preservation costs.

## 4. Validity requirements for security documents

- The mortgage agreement must identify the person establishing the mortgage, the creditor, the cause of the secured obligation and must describe the asset subject to security;
- The secured obligation must be reasonably determinable on the basis of the mortgage agreement;
- Form of the agreement:
  - Mortgages over real estate assets must be signed in front of a public notary (authenticated form);
  - All other security documents: in writing.
- Mortgages over financial instruments are established according to the rules of the market where such instruments are traded.

## 5. Publicity requirements

Immovable mortgages: registration with the land registry. Importantly, upon completion of the cadastral works for each administrative unit, registration with the land registry shall have constitutive effect for real estate mortgages. Currently, registration with the land book is made for enforceability towards third parties only. Order of registration determines ranking.

Movable mortgages: registration with the Ship Register for example.

Any contract whose effect is the preservation or establishment of a right over an asset in order to ensure fulfilment of an obligation must follow the publicity rules for mortgages in order to ensure enforceability towards third parties of such contracts.

## 6. Other perfection requirements

In the case of bank accounts, the mortgage of a creditor who has control over the bank account is preferred over the mortgage of the creditor who does not have control over such account.

## 7. Costs of set up and publicity of security

Real estate mortgages trigger two types of costs:

- Notary fees: the sum depends on the value of the secured amount;
- Land registry fees: the sum depends on the value of the secured amount plus certain fixed costs for issuance of authentication excerpts – (approx. EUR 100 per cadastral number).

8. Timing for publicity/perfection requirements

- Land registers, ship registers are maintained by land registry departments of county courts; registration may take up to 15 working days as of the date the notary submits the registration request to the land registry. Registrations are made by authorized operators almost instantly upon filling in of registration forms (containing detailed description of the assets subject to security, secured claim, creditors etc.)

9. What types of rights does a secured creditor acquire?

- To satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors;
- The mortgage follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- The mortgage or its ranking may be assigned separately from the secured claim;
- Higher ranking creditors have priority in terms of exercise of enforcement rights and, in case of enforcement started by a lower ranking creditor, as long as the asset has not been sold, the higher ranking creditor may continue the enforcement or start a new enforcement procedure.

10. Governing law issues

- Estonia being part of the European Union, Rome I Regulation applies. Otherwise, the following private international law rules apply:
- Mortgages over assets are governed by the law of the place where the assets are located;
  - The conditions for validity, publicity and effects of movable mortgages are subject to the law of the place where the asset is located at the time the movable mortgage agreement is concluded; in case of dematerialized assets and in other exceptional circumstances, the law of the place where the debtor is located applies; for shares and bonds, the national law of the issuer applies; for natural resources and claims resulting from trading thereof: the law of the place where the exploitation is located applies.

11. Enforcement

**Court involvement required?**

Usually there is no need for court involvement to enforce the security. In the case of the immovables, ships and immovables/ rights subject to registration (e.g., trademarks), the enforcement of the security shall be done by the bailiff. Regarding other objects, usually the public auction is necessary to enforce the security (i.e., to sell the object under security).

12. Secured creditors' position in insolvency

**Secured creditors ranking in the distribution of liquidation proceeds**

First, but after covering the liquidation or bankruptcy proceedings related costs and expenses (which importantly, include liquidator's or bankruptcy trustee's fees, preservation and administration costs for the asset etc.).

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# Finland

## 1. Types of security available to creditors

The most common types of security available under Finnish law or practice can be listed as follows:

- Pledge over real or immovable property (Mortgage);
- Pledge of movable property (including shares and intellectual property);
- Floating charge;
- Mortgage over an aircraft, vehicle, or vessel;
- Sale and leaseback;
- Hire purchase and financial lease;
- Factoring;
- Retention of title;
- Contractual commitments, such as covenants and letters of comfort.

## 2. Types of assets which may be subject to security

Practically almost any kind of asset can be subject to security, provided that it:

- Can be identified;
- Is assignable; and
- Can be a subject of enforcement procedure and has value as a subject of exchange.

## 3. Type of obligations that may be secured

- The obligation may be specified or alternatively it is possible to give a general security over all present and future obligations;
- For the avoidance of doubt it is recommended to agree that in addition to the principal debt, the security covers also interest and collection costs.

## 4. Validity requirements for security documents

- A pledge of movable property should in principle be agreed in writing or in presence of two witnesses. Even if these requirements are not mandatory and it is consequently possible to orally conclude a valid pledge agreement, pledges are however usually concluded in writing;
- Any pledge of a share in a housing company made during construction that has not been made in writing is invalid;
- Real estate mortgage agreements do not have to be in writing, although in practice they are made in writing; The deed of pledge that is handed over to the pledgee when perfecting a real estate mortgage must, however, be in writing.

## 5. Publicity requirements

Making a pledge publicly known may take place in a number of ways, depending on the pledge object:

- A pledge of movable property is made publicly known by moving away the property from the possession of the pledgor, either to the pledgee or to a third person holding the property for the account of pledgee;
- If the pledged object is already in the possession of a third person (for example, a higher priority pledgee), a junior pledge is to be made publicly known by notifying the person in whose possession the pledged object is;
- A real estate mortgage is registered with the land register authority at the district survey office in the jurisdiction in which the property is located;
- A pledge of an intellectual property right is registered at the National Board of Patents and Registration of Finland;
- A pledge of an aircraft, a vehicle, and a vessel is registered at the Finnish Transport Safety Agency;
- Floating charges are registered at the National Board of Patents and Registration;
- Securities registered in the book-entry system (such as publicly traded shares) can be pledged by pledging the relevant book entry account. The registration of the pledge is made at the request of the pledgee by an operator, such as a bank, that has been granted the right to make registrations in the book-entry system.

## 6. Other perfection requirements

- A pledge of an aircraft, vehicle, and a vessel pledge, as well as floating charges are perfected by delivering to the pledgee the promissory note(s) issued by the relevant registration authority;
- Real estate mortgages are perfected by delivering the deed of pledge to the pledgee;
- Receivable pledges are perfected by sending a notice of pledge to the debtor to the effect that the debtor should pay either to the pledgee or to a bank account that has been pledged to the pledgee;
- Bank account pledges are perfected by notifying the account bank about the pledge;
- When pledging company shares that are not in the book-entry system, the pledgee should ensure that the pledge is recorded in the company's share register. That is an additional safeguard in cases when the company has issued share certificates that are delivered as a part of the pledge transaction. If the company has not issued any share certificates, the recording in the company's share register is the only way to perfect the pledge.

### 7. Costs of set up and publicity of security

- Service and registration fees for Finnish public authorities are non-substantial and they are not dependent on the value of the transaction or of the secured amount;
- There are no notary fees;
- The fees of the professional advisers in practice constitute the biggest part of the costs.

### 8. Timing for publicity/perfection requirements

- Real estate: A mortgage application should be made at the local district survey office of the National Land Survey i.e., the location of the property is decisive. Confirmation of a mortgage can take approx. 2 – 5 business days, although the process can be expedited so that the mortgage will be granted on the following business day after submitting the application;
- Other: Depending on the type of pledge (floating charge, aircraft, vessel or vehicle pledge registration) and the workload of the registration authority in question, the time required for registration varies, but it is reasonable to assume that registration will be completed approx. in a week.

### 9. What types of rights does a secured creditor acquire?

A pledge/ mortgage grants its holder a number of rights:

- A pledge remains in force regardless of the possible change of ownership of the pledged assets (an important exception being sale of a trading stock of products that are subject to a floating charge);
- A pledgee/ secured creditor has a priority over unsecured creditors in execution procedure leading to a higher ranking pledgee over lower ranking pledgees;
- A pledgee enjoys a preferential position in the pledgor's bankruptcy;
- A pledgee of a movable asset may privately enforce the pledge by selling the pledged property after default of underlying obligation.

### 10. Governing law issues

The principal applicable private international law instrument is Rome I Regulation, applicable to agreements concluded since 12 December 2009.

### 11. Legal concerns/prohibitions related to granting/taking security

- Financial assistance: It is prohibited for a company to lend money or assets or grant a security for the purposes that a third person could acquire the company's or its mother company's shares;
- Corporate benefit: Members of the board and other directors of a limited liability company must always act in the best interests of the company. It is illegal to make decisions or take measures that would bring an unjustified benefit for certain shareholders at the expense of the others. A company may only distribute its assets to its shareholders in the ways described in the Companies Act (such as distribution of dividends). Other transaction that would decrease company's assets or increase its liabilities, without any justified commercial reasons, are deemed illegal distribution of assets. Therefore, when a company decides for example on giving a security, it must ensure that it is commercially justified and within the interest of the company;
- Insolvency risks: Pledge or other security that was granted by debtor within three months from insolvency can be set aside if the pledge or security was not agreed at the time when the debt was created, or, if the possession of the security was not delivered or other measures needed for the perfection of the pledge were not done without undue delay since the creation of the debt. If the security was given to a debtor's insider within two years from insolvency, it can be set aside, unless it is proved that the debtor was not insolvent and did not become insolvent because of the security transaction in question;
- There is also a more general ground for setting aside security (or other) transaction, that inappropriately favours one creditor at the expense of others, transfers assets away from the reach of creditors, or increases debts to the detriment of creditors – provided that the debtor was insolvent or that the transaction in its part contributed to the debtor's insolvency. Under this ground a security or other transaction concluded within five years before insolvency can be set aside. Should the transaction be concluded with inner circle of debtor, the rule is applicable without time limits.



## 12. Enforcement

### Court involvement required?

- In case of pledge of movable property, private enforcement of the pledge is possible, either by following the procedure and formalities set by law, or, should the parties have agreed otherwise, following the terms and conditions of the agreement (see below);
- In case of real estate mortgage, floating charge, a mortgage over an aircraft, vehicle, or vessel, pledgee must either obtain enforceable judgment against the debtor or submit a claim in an insolvency procedure.

### Average timing

- Movable property: Unless the parties have agreed otherwise, if the debt has become due and is not paid, the creditor/ pledgee has a right to sell the pledged property, provided that he has given a notice at least one month prior to selling, and provided that the debt remains unpaid after the lapse of said notice period;

In cases when pledged property consists of shares in a housing company that entitles their owner to possess living premises where the owner lives, the owner must be given minimum two months' prior notice. Agreement that decreases the shareholder's rights will be deemed as invalid.

- Other: A pledgee under a real estate mortgage, a floating charge, a mortgage over an aircraft, vehicle, or vessel has no right to sell the secured assets without an enforceable (court or arbitral tribunal) judgment. It is a reasonable assumption to reserve at least 1 – 2 years to such a procedure.

### Rights of challenge for the debtor/ third parties

A party that wishes to challenge enforcement should have some legitimate reason for doing that, for example a rival pledgee may claim that it has a higher priority to the pledged property. In connection with proceedings the claimant may request the court to apply various protective and/ or interim measures.

### Cases of cancellation/ reversal of enforcement

Carrying out enforcement in breach of law or valid agreement may entitle the interested parties to request restoration of the original condition.

## 13. Secured creditors' position in insolvency

### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

- Real estate mortgage remains in force in pledgor's bankruptcy and pledgee may enforce its rights regardless of bankruptcy. Unlike pledgee of movable property, pledgee under real estate mortgage may not sell the pledged property himself but needs to obtain a valid court judgment;
- Pledge of movable property remains in force in pledgor's bankruptcy and as a main rule the pledgee may enforce the pledged property regardless of bankruptcy, provided, however, that the pledgee duly notifies its claims to the bankruptcy administration.

The pledgee must also notify the details of the enforcement to the bankruptcy administration prior to selling the pledged property. The bankruptcy administration may prevent the enforcement up to two months. Upon receiving court's permission, the bankruptcy administration may even sell the pledged property itself.

Initiation of corporate restructuring forms in practice an obstacle for enforcement of security, unless court permission is received.

### Secured creditors rights in influencing decisions in the creditors assembly

- Appointment of the bankruptcy estate administrator: The court appoints the bankruptcy estate administrator, after providing an opportunity to be heard, amongst others, to the most significant creditors;
- Creditor's votes in the creditors' assembly: Each creditor's amount of votes is equal to the size of its claim compared to the total amount of claims. Creditor's priority does not affect the amount of votes.

### Secured creditors ranking in the distribution of liquidation proceeds

- The creditors whose receivables are secured by a pledge of movable property, real estate mortgage, a mortgage over an aircraft, vehicle, or vessel have the highest ranking;
- The second ranking is granted to certain debts created during corporate restructuring process;
- Certain alimony payments enjoy the third ranking;
- Pledgees in whose favour has been created a floating charge are just below alimony payments in the ranking. The priority, however, extends only to 50% of the value of the assets subject to floating charge.

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# France

## 1. Types of security available to creditors

**Personal guarantees** (including corporate guarantees) ("*cautionnements*")

**Autonomous guarantees** ("*garanties autonomes*"), **comfort letters** ("*lettres d'intention*" ou "*lettres de confort*")

**Mortgages** ("*hypothèques conventionnelles*"): Over real estate

**Assimilated operations**: Assignments for security purposes

**Retention of title clause** ("*clause de réserve de propriété*")

**Pledges**: Security (i) over a movable material asset or materialized negotiable instruments (possessory or non-possessory pledges "*gages avec ou sans dépossession*") and (ii) over a financial instrument such as shares, bank account, insurance proceeds, rent receivables, etc. ("*nantissements*").

**Pledge over business** ("*nantissement de fonds de commerce*"): Over the business

Other rights providing for preference by law over certain assets:

- Privileges ("*privilèges*"): Statutory security benefiting to certain creditors (eg. the French tax administration benefits from a general privilege over the assets of taxpayers);
- Legal mortgages ("*hypothèques légales*").

**Retention rights**: A person who must return an asset to its owner can retain the asset until he receives reimbursement for the necessary and useful expenses related to such asset or, as the case may be, indemnification for the prejudices caused by the asset.

**Trust by way of security** ("*fiducie-sûreté*"): over titles or assets, property is held by the creditor as a guarantee of the debtor's repayment. The creditor shall return the property once he has been fully reimbursed by the debtor.

## 2. Types of assets which may be subject to security

**Personal guarantees** ("*cautionnements*") and **autonomous guarantees** ("*garanties autonomes*"): This security is set up over a person. Accordingly no asset may be subject to this security.

**Possessory or non-possessory pledges** ("*gages avec ou sans dépossession*"): Set up over movable material asset or materialized negotiable instruments asset (eg. stocks, vehicle, pledge over tools and equipment "*nantissement de l'outillage et du matériel d'équipement*").

**Pledges on financial instrument**: Set up over shares ("*nantissements de parts sociales ou d'actions*") and over financial accounts ("*gage de comptes d'instruments financiers*").

**Pledges over business** ("*nantissements de fonds de commerce*"): Such security is set up on the business (which notably includes intellectual property rights, stocks, lease and tools).

**Retention of title clause** ("*clause de réserve de propriété*"): thanks to the retention of title, a seller can retain the title to assets delivered to the buyer until the buyer pays the price in full.

**Mortgages** ("*hypothèques conventionnelles*") and **legal mortgages** ("*hypothèques légales*"): Mortgages are set up over a real estate asset.

The following fall under the definition of real estate:

- Immovable property, such as land or buildings on land;
- Movables attached to immovable property:

A mortgage may also be set up on the following:

- Any constructions, improvements or other accessories of the mortgaged immovable asset;
- Natural and industrial proceeds as well as lease proceeds of the assets as of the notation in the land registry of the start of enforcement or opening of the insolvency proceedings.

**Trust by way of security** ("*fiducie-sûreté*"): over titles, assets or property. Security over ships and aircraft benefit from special legal regime.

## 3. Type of obligations that may be secured

Mortgages, pledges, personal guarantees, pledges of business may secure obligations of any kind, including future obligations provided it may be determinable.

The mortgage secures with the same ranking the principal debt, interest, fees, penalties, enforcement and preservation costs.

#### 4. Validity requirements for security documents

**Possessory or non-possessory pledges** ("*gages avec ou sans dépossession*"): Must be in writing and specify the amount of the secured debt.

**Pledges over shares** ("*nantissements d'actions*"): Must be created in writing by a notarized act or by a private contract.

**Pledges over financial securities accounts** ("*gages de comptes d'instruments financiers*"): shares are transferred by a written act to a special account, opened in the debtor's name (this account must be opened in the corporate books held by an authorized intermediary, depository or the issuing company itself).

**Pledges over business** ("*nantissements de fonds de commerce*"): Must be executed in writing by a notarized act or by private contract.

**Retention of title clause** ("*clause de réserve de propriété*"): Must be in writing.

**Mortgages** ("*hypothèques conventionnelles*"): Must be executed by a notarized deed ("*acte authentique*"). The notarized deed must also state a maximum secured amount. The deed must be drafted in French.

**Trust by way of security** ("*fiducie-sûreté*"): Must be in writing and specify the transferred assets; the duration of the transfer, the details of the parties (settlor, trustee, and beneficiary) and the trustee's prerogatives and obligations. The trustee shall either be an attorney-at-law, a credit institution, an insurance institution, the Treasury, the Bank of France etc.

#### 5. Publicity requirements

**Possessory or non-possessory pledges** ("*gages avec ou sans dépossession*"): Only non-possessory pledges must be registered on a specific register held by the clerk of the competent court's office.

**Pledges over shares** ("*gages sur parts sociales et actions*"): Registration of the pledge over "*parts sociales*" of SARL with the the clerk of the competent commercial court. Recording of the pledge over shares in the corporate books of the company ("*registre de mouvements de titres*" and "*comptes individuels d'actionnaires*").

**Pledges over business** ("*nantissements de fonds de commerce*"): Must be registered within 15 days of the execution of the pledge with the French tax authorities and with the Trade and Companies Registry ("*Registre du Commerce et des Sociétés*"). If IP rights are concerned, the pledge shall also be published in the Official Gazette of Industrial Property ("*Bulletin Officiel de la Propriété Industrielle*" or "*BOPI*").

**Retention of title clause** ("*clause de réserve de propriété*"): No publicity requirements, but it is recommended to publish it.

**Mortgages** ("*hypothèques conventionnelles*"): Registration to be made with the land registry ("*conservation des hypothèques*"), which, upon completion of the cadastral works for each administrative unit, gives legal effect to mortgages. The purpose of registration with the land book is the enforceability towards third parties. Rankings will depend on the orders of registration.

**Trust by way of security** ("*fiducie-sûreté*"): Registration shall be made within a month from its setting-up with the French tax authorities (and with the land registry if any real property is transferred). The setting-up of this trust by way of security shall be notified to TRACFIN ("*Traitement du Renseignement et Action contre les Circuits FINANCIERS*").

#### 6. Other perfection requirements

A security is perfected when, cumulatively, it produces on one hand full legal effects between the parties and on the other publicity formalities prescribed by law have been fulfilled. Between the parties, the security produces full legal effects when:

- The secured obligation comes into effect (e.g., in case of a loan agreement, the funds have been fully or partially disbursed, giving rise to the borrower's obligation to repay those funds); and
- The creditor acquires the rights over the mortgaged assets.

Regarding bank accounts, the security of a creditor having control over the bank account is preferred to the security of a creditor not having control over it.

## 7. Costs of set up and publicity of security

**(Non)-possessory pledges** ("*gages avec ou sans dépossession*"), **pledges on businesses** ("*nantissements de fonds de commerce*") or **pledges on shares** ("*nantissements de parts sociales*"):

Registration fees with the register held by the clerk of the competent court's office.

For (non)-possessory pledges on debts amounting to:

- Less than EUR 7,800: EUR 13.62
- Between EUR 7,800 and EUR 20,800: EUR 26.06
- Greater than EUR 20,800: EUR 72.70

For pledges on businesses or pledges on shares on debts amounting to:

- Less than EUR 80,800: EUR 27.62
- Between EUR 20,800 and EUR 41,600: EUR 102.25
- Greater than EUR 41,600: EUR 150.44

**Mortgages** ("*hypothèques conventionnelles*") trigger three types of costs:

- Real-estate security tax ("*contribution de sécurité immobilière*"): 0.05% of the value of the principal amount and incidental amounts;
- Land registration tax ("*taxe de publicité foncière*"): 0.715% of the registered amount;
- Notary fees: approx. EUR 300 to EUR 400 (out-of-pocket expenses not included).

## 8. Timing for publicity/perfection requirements

**Mortgages** ("*hypothèques conventionnelles*"): Land registry registrations are carried out by the public notaries; registration can take up to 2 months as of the date the notary submits the registration request to the land registry.

## 9. What types of rights does a secured creditor acquire?

To satisfy his claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors.

Security follows the asset – the security remains regardless of the provisions pertaining to the disposal of the asset. Moreover, the secured creditor may enforce his security regardless of the asset's ownership changes or of the rights established or registered subsequently to the setting-up of the mortgage.

The mortgage or its ranking may be assigned separately from the secured claim.

Higher ranking creditors have priority in terms of exercise of enforcement rights and in the case of enforcement started by a lower ranking creditor.

## 10. Governing law issues

France being part of the European Union, Rome I Regulation applies.

Otherwise, the following France private international law rules apply: security over assets (either movable or immovable) are governed by the law of the place where the assets are located.

## 11. Legal concerns/prohibitions related to granting/taking security

**Financial assistance:** A company cannot lend money or set up security for the purpose of the acquisition by a third party of such company's shares.

- **Mitigation:** Express applicability of such restrictions expressly to joint stock companies. The wording of the law not explicit in respect of its applicability to refinancing structures.

**Corporate assets abuse:** The use, by the company's founder, administrator, director or legal representative, in bad faith, of the assets or credit worthiness of that company, for a purpose that is contrary to that company's interests, or for his/ her own interest or for the purpose of favoring another company in which he/ she holds a direct or indirect interest is a criminal offence.

- **Mitigation:** Good faith presumed under the law; bad faith and fraud must be proved. Cross collateral, co-borrower structures. The Civil Code expressly clarified that a person may grant security over its asset to secure debts of a third party.

**Nullity of the mortgage for lack of causa:** Under French law, a contract lacking a valid causa (i.e., a valid reason of the debtor to establish the security) is null and void.

- **Mitigation:** Cross collateral, co-borrower structures. The Civil Code expressly clarified that a person may grant security over its asset to secure debts of a third party.

11. Legal concerns prohibitions related to granting/taking security

**Actio pauliana risk:** The creditors of a person may exercise a legal action for the cancellation of any deed or act entered into by their debtor which is fraudulent towards them.

- **Mitigation:** Such action might only be successful in case of substantiation of the creditor's awareness that the set-up of such security would trigger a state of insolvency for the security provider.

**Insolvency risks:** The creditors' representative ("*Mandataire judiciaire*"), the Receiver ("*Administrateur judiciaire*"), the Liquidator ("*Liquidateur*") and the Bankruptcy Judge ("*Juge Commissaire*") may request the cancellation of fraudulent acts entered into by the insolvent company two years prior to the opening of the insolvency procedure (including transactions at undervalue, deeds concluded with the intention of all parties to damage creditors' rights, set up of security for unsecured claims etc.).

- **Mitigation:** Independently determined market value; other mitigating factors outlined under Nullity of the mortgage for lack of *causa* apply.

12. Enforcement

**Court involvement required?**

For mortgages, approval for initiation of enforcement is granted by the court. For other securities out of court enforcement is possible; however, in the case of challenges these are tried in court.

**Average timing**

**Mortgages** ("*hypothèques conventionnelles*"): At minimum 2.5 to 3 months in the case of no challenges and minimum terms set by law are observed; otherwise it may take significantly longer, depending on challenges filed.

**Other securities:** If out of court procedure is used and is unopposed it may be completed within less than one month. If opposed, the procedure takes significantly longer.

**Rights to challenge for the debtor/ third parties**

**Mortgages** ("*hypothèques conventionnelles*"): Debtor and third party acquirers may file a claim to obtain the forced execution.

**Other securities:** Allowed by law to the debtor, personal guarantors and co-debtors, any creditor having security over such asset, any other person who notified to the creditor a right or a claim with respect to the asset, any other interested person or other person to whom the enforcement causes a damage.

**Cases of cancellation/ reversal of enforcement**

**Mortgages** ("*hypothèques conventionnelles*"): Inobservance of the legal provisions for carrying out the enforcement procedure itself or for any enforcement act triggers cancellation of the unlawful act. If the writ of execution or the enforcement itself is cancelled, the interested party may request restoration to the original condition.

**Other securities:** In case the court establishes that the enforcement would have lead to inobservance of the provisions of the Civil Code, the court will set the conditions and rules for disposing of the asset.

13. Secured creditors' position in insolvency

**Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

During the observation period (i.e., between the opening of the insolvency procedure and its outcome) which is limited to a maximum period of 18 months, legal actions of all creditors aimed at obtaining an order against the debtor to pay a sum of money, the rescission of a contract on the grounds of non-payment of a sum of money as well as all proceedings for enforcement filed by the creditors in respect of movable and immovable properties are either stayed or prohibited.

For creditors benefiting from a right of retention of title, a specific process must be respected. The main steps of this specific process are the following:

1. The creditor must lodge a retention of title claim ("*Demande de revendication de propriété*"):
  - In case of Safeguard ("*Sauvegarde*") or Receivership ("*Redressement Judiciaire*") procedure opened against the debtor:
    - o For the attention of the Receiver ("*Administrateur Judiciaire*") appointed by the Commercial court;
    - o OR for the attention of the debtor in case no Receiver has been appointed;
    - o With a copy for the creditor representative appointed by the Court ("*Mandataire Judiciaire*").
  - In case of judicial liquidation procedure against the debtor ("*Liquidation Judiciaire*"):
    - o For the attention of the Liquidator ("*Liquidateur Judiciaire*") appointed by the Commercial Court.
  - By registered letter ("*lettre recommandée*")
  - Delay: Within a three-month period from the publication of the judgment opening the procedure.

### 13. Secured creditors' position in insolvency

2. Then, the Receiver, the debtor or the Liquidator (depending on the procedure opened by the Court) must answer YES or NO within a one-month period after the receipt of the claim.
3. Should the Receiver, the debtor or the Liquidator answer **YES**, the creditor is entitled to recover:
  - His "*normal*" retention of title clause: the goods remaining unpaid. But the judge can authorize the Receiver, the debtor or the Liquidator to pay the remaining price to the creditor in the case the goods are useful for the activity of the debtor;
  - OR his "*extended*" retention of title clause: the price of the machines have been sold by the debtor before the opening of the Bankruptcy procedure - sale price not already paid by the sub-purchaser to the debtor.
4. Should the receiver or the Liquidator answer **NO** or does not answer within the required period, the creditor must bring its claim (through a judicial request named "*Requête*") before the Bankruptcy Judge ("*Juge Commissaire*") within a new one-month period from the answer (**NO**) or the expiration date of the answer period (one month). Otherwise, the sanction for creditor is the lapse of rights ("*forclusion*").
5. Then the Bankruptcy Judge issues an order ("*ordonnance*"), approving or refusing the judicial request. If the judge says NO, it is possible to bring an appeal against his order before the Commercial Court.
  - This specific process is easier in the case where the sale contract mentioning a retention of title clause is published; No delay for lodging the retention of title claim: the above mentioned three month delay is not applicable;
  - No obligation to prove the ownership on the goods;
  - The above mentioned one month delay for bringing the retention of title claim before the Bankruptcy Judge is not applicable;
  - Validity of the retention of title clause: the retention of title clause must be stipulated in all kinds of written documents (it can be a contract between the creditor and the debtor, General Terms and Conditions, an order form, an invoice, a delivery order...) established and agreed (A written approval by the debtor is required - the document must be signed by the debtor) by the parties at the latest at the moment of the delivery of the goods (This is why this document must be dated).

The Bankruptcy Judge can authorize the debtor to settle past due debt in order to recover pledged goods or goods retained by a creditor benefiting from a retention right ("*droit de retention*").

#### **Secured creditors rights in influencing decisions in the creditors assembly**

Secured and unsecured creditors are placed on the same ground: secured creditors have no specific rights for influencing decisions in the creditor's committees.

The reorganization plan is approved by the creditor's committees by two-thirds of the value of the claims (no difference between secured and unsecured claims) and then by the competent Commercial Court (Judgment). Otherwise (no approval), all creditors are individually consulted.

All creditors (secured or unsecured) are entitled to propose a draft reorganization plan.

#### **Secured creditors ranking in the distribution of liquidation proceeds**

On liquidation proceeds, the order of repayment is the following:

- Employees' claims under super privilege;
- Legal expenses incurred for conducting insolvency proceedings (fees of the Receiver, the Liquidator);
- Retention rights over movable property;
- In case of previous conciliation procedure (pre-insolvency procedure): debts secured by the privilege of "new money";
- Security interests over immovable property (for example, mortgage) and pledges over professional equipment and machinery;
- Preferential debts for specific and limited purposes, undertaken after the order commencing the insolvency proceedings Privileged claims of Tax Authorities and Social Authorities;
- Pledge over business;
- Unsecured creditors.

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# Germany

## 1. Types of security available to creditors

### Personal security (apart from the secured claim an additional contractual claim is given)

- Diverse possibilities to create an additional contractual claim against the debtor;
- Additional contractual claim against a third party:
  - Surety (§§ 765 ff. German Civil Code (BGB); § 350 German Commercial Code (HGB));
  - Collateral promise;
  - Comfort letter/ guarantee.

### Real security (recipient of security receives a real right, a right in an asset, material asset or right)

- Physical collateral:
  - Charge on property (mortgage, § 1113 BGB; land charge, § 1191 BGB);
  - Lien on movable chattels;
  - Chattel mortgage (security for a debt by a lien on personal property of which the debtor retains possession).
- Security in rights:
  - Lien on rights;
  - Assignment for security.

The following questions cannot be answered generally for all possible securities. The answers vary depending on the respective security. To give a clearly arranged presentation, the following explanations will be made exemplary on the basis of the securities of the most practical relevance, namely land charge, chattel mortgage and assignment for security.

## 2. Types of assets which may be subject to security

### Material assets

- Movable chattels
- Immovable property (real estate, premises)

### Rights

The possible types of assets which may be subject to security vary depending on the respective security:

- Assignment for security: rights
- Chattel mortgage: movable chattels
- Land charge: real estate

## 3. Type of obligations that may be secured

Obligations of any kind, including future obligations.

## 4. Validity requirements for security documents

Each contract regarding the creation of a security interest has to contain at least information about the essential parts of the contract (so called essentialia negotii), such as contracting parties, type of subject to security, etc. The essential information differs from security to security.

- Assignment for security: in principle informal agreement; in exceptional cases a specific form can be required (e.g., notarial form required for GmbH shares, § 15 GmbHG)
- Chattel mortgage: in principle informal agreement
- Land charge:
  1. agreement of contracting parties
  2. registration of land charge in the land register, § 873 BGB
  3. handing over of land charge certificate (certificated land charge) or exclusion of granting land charge certificate (uncertificated land charge)

## 5. Publicity requirements

The requirements for a registration of charges on property (mortgage, land charge etc.) in land register depend on the security.

- Requirements for the registration of a land charge:
  1. application to land register, § 13 GBO
  2. notarial declaration of allowance, §§ 19, 29 GBO
  3. presentation of land charge certificate, § 42 GBO

## 6. Other perfection requirements

According to the type of security, there can be further requirements.

## 7. Costs of set up and publicity of security

The question of whether costs are raised and the amount of costs depend on the type of security.

1. Assignment for security: costs of drafting of contracts; no further costs
2. Chattel mortgage: costs of drafting of contracts; no further costs
3. Land charge: for a land charge with a value of EUR 100,000,00
4. Notary fees: approx. EUR 430,00
5. Land register fees: approx. EUR 640,00

The costs apply to the value of the secured amount. There is a fixed scale of charges (Kostenordnung), both for the notary fees and for the land register fees. The scale includes fees for goodwill up to EUR 60,000,000.00. The current fee for goodwill of EUR 60,000,000.00 is EUR 26,137.00. This does not mean that the total costs will be EUR 26,137.00 at the most. Since the total costs not only include the fees but divers other positions (e.g., notarial expenses, value-added tax) the total amount can exceed EUR 26,137.00 depending on the single case.

## 8. Timing for publicity/perfection requirements

The registration of a land charge takes approx. 1 week as of processing of notary.

## 9. What types of rights does a secured creditor acquire?

It depends on the type of security.

- Assignment for security:
  1. real proprietorship (usually no disclosure of proprietorship towards third party; third party is able to pay benefits with legal effect to the former proprietor)
  2. authorization to collect the security as of the occurrence of conditions as stated in surety contract
- Chattel mortgage: recipient of security receives equitable lien
  1. at first no actual possession/ transfer of ownership by constructive possession of chattels based on agreement
  2. equitable lien is realized according to security agreement
  3. with abolition of security purpose security collateral returns to the person providing security
- Land charge: satisfaction of the recipient of security by execution in the property subject of the land charge (claim of acquiescence execution, § 1147 BGB)

## 10. Governing law issues

In principle application of German law.

Choice of law as far as possible in consideration of international private law:

Choice of law in terms of law of contractual obligations, Art. 3 Rom I-VO, as long as there are no obligations to the contrary.

According to prevailing opinion, there is no choice of law in terms of property law. Because of disclosure requirements, which are typical for property law, and the underlying transactional interests, the relevant contact is the location of asset (so called *lex rei sitae*).

## 11. Legal concerns/prohibitions related to granting/taking security

- Legal concerns exist in connection with the granting of financial resources out of company assets that is not compliant with the company's interest or able to cause harm to the company.
- If a third party gives a security for the principal debtor, there is some risk that the granting of security is made because of an emotional relation, although the third person would be financially overstrained in case of liability. If the creditor takes conscious advantage of this situation, it might be considered as transaction contrary to public policy.

## 12. Enforcement

### Court involvement required?

Depends on type of security.

- Assignment for security: in principle no court involvement required; exploitation right is usually determined by security agreement
- Chattel mortgage: in principle no court involvement required; exploitation right is usually determined by security agreement
- Land charge: yes,
  1. executor title regarding claim of acquiescence execution, § 1147 BGB; In most cases the security agreement contains a consent to immediate execution of the person providing security (registered in land register);
  2. execution clause is given by the court in case of judicial deed, in case of notarial deed usually by the notary;
  3. compulsory auction as well as compulsory administration are done by the court having jurisdiction over enforcement.

### Average timing

- Land charge: at least 6 months

### Rights of challenge for the debtor/ third parties

Against the enforcement mainly the following appeals can be filed:

- Debtor:
  1. the way of enforcement is appealable by special appeal, § 766 ZPO
  2. action raising an objection to the judgment claim, § 767 ZPO
- Third party: action in opposition to execution of a judgment brought by a third party who claims title to the attached property, § 771 ZPO

### Cases of cancellation/ reversal of enforcement

The stay or restriction of enforcement takes place in the cases mentioned in § 775 ZPO, for example

1. Enforceable judgment was set aside;
2. Enforcement was declared inadmissible;
3. Public document or a private document given by creditor proves that the creditor has been satisfied after the enforceable judgment has been given.

## 13. Secured creditors' position in insolvency

### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

As of opening of insolvency proceedings all compulsory enforcement measures and other execution measures for the recovery of claims against the debtor or its assets are suspended. All further rights of the creditor are subject to insolvency law.

German insolvency law distinguishes between "Aussonderungsrechten" and "Absonderungsrechten". In the case of an "Aussonderungsrecht" the relevant subject to security is not part of the assets in the insolvency. The insolvency administrator can separate assets which do not belong to the insolvent from the insolvent's assets and transfer them to their rightful owner (the creditor). "Absonderung" means allocation of real and personal property in the insolvent assets to preferential satisfaction of creditors holding security interests (e.g., a land charge) in such property. Any excess above the secured claim belongs to the insolvent assets.

- Assignment for security: "Absonderungsrecht", §§ 50, 51 Nr. 1 InsO
- Chattel mortgage: "Absonderungsrecht", §§ 50, 51 Nr. 1 InsO
- Land charge: Creditor can receive preferential payment ("abgesonderte Befriedigung") by compulsory auction or compulsory administration of the property, §§ 49, 165 InsO

### Secured creditors rights in influencing decisions in the creditors' assembly

- Competences of creditors' assembly:
  - o Creditors' assembly is responsible for the economically important decisions of procedure organization and course of procedure
  - o Further decisions of considerable relevance are made by creditors' assembly in the form of consent with legal acts of prime importance of the insolvency administrator, if there is no creditors' committee
  - o Creditors' assembly decides whether a liquidation or a corporate restructuring shall be part of the insolvency plan

### 13. Secured creditors' position in insolvency

- Right to request convening of creditors' assembly:  
A creditors' assembly shall be convened if requested by:
  - At least five creditors with a right to separate satisfaction or non-lower-ranking insolvency creditors whose rights to separate satisfaction and claims together are assessed by the insolvency court to represent one-fifth of the sum resulting from the value of all rights to separate satisfaction and of the claims of all non-lower-ranking insolvency creditors;
  - One or more creditors with a right to separate satisfaction or non-lower-ranking insolvency creditors whose rights to separate satisfaction and claims together are assessed by the insolvency court to represent two-fifths of the sum resulting from the value of all rights to separate satisfaction and of the claims of all non-lower-ranking insolvency creditors.
- Decisions of creditors' assembly:  
A decision of the creditors' assembly shall be valid if the sum of the claims held by backing creditors exceeds one-half of the sum of claims held by the creditors with voting rights; for creditors with a right to separate satisfaction to whom the debtor is not personally liable, the claim shall be replaced by the value of such right.
- Election of insolvency administrator:  
During the first meeting of creditors' assembly subsequent to the appointment of the insolvency administrator by the insolvency court, the creditors may elect a different person to replace him. The different person shall be elected if a majority of the voting creditors voted for him and if the sum of the claims held by backing creditors exceeds one-half of the sum of claims held by the creditors with voting rights (so called "Summen- und Kopfmehrheit").
- Election of creditors' committee:  
The creditors' assembly shall decide on the establishment of a creditors' committee. If the insolvency court has already established a creditors' committee, the creditors' assembly shall decide whether it is to be maintained in office.

#### Secured creditors ranking in the distribution of liquidation proceeds

Creditors with "Aussonderungsrechten" and "Absonderungsrechten" are principally of equal rank but of different quality. Apart from that ranking depends on each individual case.

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## 1. Types of security available to creditors

**Guarantee:** where guarantee is to be provided under contract or legal regulation for the faultless performance of a contract, the guarantor shall be released from liability during the guarantee period if he is able to prove that the cause of the defect occurred after performance.

**Bank guarantee:** banks shall be entitled to assume obligations to effect payment to a beneficiary up to a specific amount within a predetermined time limit under certain conditions, such as the occurrence or absence of a certain event or the submission of documents.

### Liens:

- Mortgage: over real estate and non-real estate (movable) assets;
- Possessory lien: security over a movable corporeal asset or materialized negotiable instruments, physically delivered to the creditor for security purposes;
- Pledge on rights and receivables;
- Asset pledge;
- Independent lien.

**Deposit:** financial collateral may be provided under a financial collateral arrangement to secure a claim in the form of cash, money on account, security and other financial instruments and credit claims defined in specific other legislation, upon delivery of the collateral.

**Suretyship:** the surety assumes the obligation of performance to the creditor in the event of nonperformance by the principal debtor.

**Repurchase right:** the right to repurchase a thing sold shall be put in writing simultaneously with the sales contract, for a maximum of 5 years.

**Option right:** if an owner grants a right of purchase (option) to another person, the beneficiary shall be entitled to buy the thing with a unilateral statement (maximum for 5 years).

Other rights providing for preference by law over certain assets:

- Legal mortgages over movable assets:
  - The lender in case of amounts granted to finance the acquisition of an immovable asset;
  - Contractors for payment of their fees, on the assets of the client in their possession;
  - The lessor for unpaid rent on the lessee's assets situated in the territory of the leased premises;
  - (Autonomous guarantees: letters of guarantee and comfort letters);
  - (Assimilated operations: assignments for security purposes, ownership right reservation clauses, repurchase agreements).

The comments below apply to liens as the most common type of security used in practice.

## 2. Types of assets which may be subject to security

Lien may be set up over all things that can be appropriated and any transferable right or receivables

In case the same claim is secured by more than one pledged asset, either of the pledged assets may serve as security. In case the pledged assets are owned by more than one person, the owners in general bear liability in proportion of the value of their pledged asset. Whoever is obliged to satisfy the claim in excess of his proportion is entitled to demand reimbursement from the other owners.

### Special rules

#### *A mortgage over a real estate asset:*

- extends by law and without additional formalities over any constructions, improvements or other accessories of the mortgaged immovable asset,
- extends over the natural and industrial proceeds as well as lease proceeds of the assets as of the notation in the land registry of the start of enforcement or opening of the insolvency proceedings if so agreed by the parties,
- real estate may only be subject to lien in the form of mortgage,
- a mortgage may only cover the entire property that is registered in the real estate register or the full title of ownership of the obligor,
- as the pledged property remains in the possession of the obligor, the mortgagee is not entitled to the separated proceeds, unless the enforcement commenced prior to the separation.

#### *A mortgage on movable asset:*

- extends to the proceeds of the mortgaged asset if so agreed by the parties,
- may be set up over the full ownership held by the obligor in a joint property,
- as the pledged property remains in the possession of the obligor, the mortgagee is not entitled to the separated proceeds, unless the enforcement commenced prior to the separation.

#### *A possessory lien:*

- may only be set up over the whole of the asset.

## 2. Types of assets which may be subject to security

*A pledge on assets:* on the whole of the assets of a legal person or a business association without legal personality; or a strategic business unit thereof without the specific description of the things, rights and receivables contained therein; also on those assets that are acquired after the establishment of the pledge.

*Pledge on quota:* the quota embodies the share of the owner of the pledged quota in the assets of a limited liability company and the rights and obligations attached thereto

*A pledge on rights and receivables:* transferable right, claim which can be prospective or a specific part of a divisible claim.

*Pledge on bank account receivables*

## 3. Type of obligations that may be secured

Claims that are or can be stipulated in monetary terms and are judicially enforceable. May be prospective or conditional.

The mortgage secures with the same ranking the principal debt, interest, fees, penalties, enforcement and preservation costs.

## 4. Validity requirements for security documents

All liens shall be set up in a written agreement.

The agreement must identify the person establishing the mortgage, the creditor, the cause of the secured obligation and must describe the asset subject to security (it is possible to describe the pledged property by type and quantity or by elaborate description).

The secured obligation must be reasonably determinable on the basis of the mortgage agreement.

Form of the agreement:

- *Mortgage contracts over real estate assets:* for the registration, they must be:
  - o Issued by a public notary, or
  - o Countersigned by an attorney, or
  - o Issued officially by the credit institute.
- *Mortgage on movable assets:* in writing signed in front of a public notary (authenticated form);
- *Pledge on assets:* in writing signed in front of a public notary (authenticated form);
- *Pledge on rights and receivables:* no further requirements;
- *Limited security mortgage:* the written agreement must specify the legal relationship or title from which the secured claim derives or will derive and the maximum amount to which satisfaction can be received from the pledged assets;
- *Possessory lien:* written contract + transfer of asset (also to a 3<sup>rd</sup> person).

For mortgages over printed securities the rules on non-real estate assets apply, i.e., notarized contracts are needed.

## 5. Publicity requirements

Mortgages on real estate: registration with the land registry. Registration with the land registry has constitutive effect for real estate mortgages. Order of registration determines ranking.

Non-real estate mortgages: registration with the electronic register maintained by the Hungarian Chamber of Notaries Public (Lien Register). Ranking is determined by the order of registration or of perfection.

Until otherwise proven, the Register proves the existence of the registered right.

Pledge on assets: registration with the Lien Register, without describing the specific things, rights etc.

Quota pledge: must be registered in the company register at the registry of the company whose quota has been pledged; the consent of the member(s) of the company must be attached to the request for registration.

Pledge on rights and receivables: in principle no registration is needed, but if the right or claim is registered in a public registry, the pledge shall be set up with the registration therein.

- Pledges on Bank account receivables: only the conclusion of the pledge contract and no registration is required. If it is expressly stipulated in the contract, the obligor may only make a legal statement to terminate or adversely alter the basis of satisfaction for the pledgee with the consent of the pledgee. The notification of the bank is required only if the pledgee wishes to realize the aforementioned restriction on the obligor's right of disposition over the account.

Special regime:

*Financial instruments:* the dematerialized securities pledged to a third person shall be transferred to a subsidiary account, indicating the grounds for attachment, i.e., the pledge, and the person named as the beneficiary. The account statement on a subsidiary account shall be sent to the account holder and to the person under whose name the attachment is registered.

## 6. Other perfection requirements

Possession (control) of the pledged asset is a requirement only with regard to possessory lien.

## 7. Costs of set up and publicity of security

Mortgages on movable assets: between HUF 5,000 and HUF 39,000 (approx. EUR 16 and EUR 130) per registration with the Lien Register; these are related to the value of the secured claim and the fee of the notary.

Real estate mortgages trigger three types of costs:

- Notary fees: depending on the value of the secured amount, max. HUF 200,000,000 (approx. EUR 660,000):
  - o in case of mortgages set up by credit institutions, one quarter of the above fee is to be paid.
- Attorney fees: upon agreement;
- Land registry fees: HUF 12,600 (EUR 40) per real estate.

## 8. Timing for publicity/perfection requirements

Procedures are swift:

- Lien Register registrations are made by the public notaries within 2 working hours of the filling in of registration forms;
- Land registry registrations are carried out by the land registry authorities; registration is completed within 30 days of the date of submission of the registration request to the land registry authority;
- The request for registration shall be filed within 30 days of the conclusion of the mortgage agreement on real estate assets;
- The registration of a quota pledge in the company registry is to be executed within 15 working days of the filing of the request.

## 9. What types of rights does a secured creditor acquire?

- To satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors;
- The lien follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- The lien or its ranking may only be assigned separately from the secured claim if provided so by the law;
- Higher ranking creditors have priority in terms of exercise of enforcement rights and, in case of enforcement started by a lower ranking creditor, as long as the asset has not been sold, the higher ranking creditor may join the enforcement or start a new enforcement procedure;
- The mortgagee is entitled to request the prohibition of actions threatening the pledged asset safety or request actions to be taken in order to avert danger;
- The mortgagee is entitled to request the repair of the asset or an equivalent security in its stead if the deterioration of the pledged asset puts the satisfaction in jeopardy; in case the obligor does not fulfil these requests, the mortgagee may commence the enforcement;
- In case of a possessory lien, the holder of the lien is not entitled to use or utilize the pledged asset but is entitled and obliged to harvest its natural proceeds;
- The obligor can only make a legal statement to terminate or adversely alter the basis of the pledge holder's satisfaction with the consent of the pledge holder; this rule applies to bank account receivables only if expressly stipulated by the parties in the pledge on claim agreement;
- The holder of the pledge on assets is entitled to convert the pledge into a possessory lien or a mortgage on specified assets once the secured claim becomes due.

## 10. Governing law issues

Hungary being part of the European Union, Rome I Regulation applies.

Otherwise, the following Hungarian private international law rules apply:

- Liens are governed by the law of the place where the assets are located;
- In case of dematerialized securities, the law of the place where the security account on which the mortgage was registered shall be applied;
- Exclusive jurisdiction for the Hungarian authorities in actions pertaining to some substantive right in connection with real estate that is located in Hungary and in proceedings concerning lease and usufruct agreements.

## 11. Legal concerns/ prohibitions related to granting/taking security

Financial assistance: Private limited companies may not undertake security if the sole purpose of such operations is to assist any third person in the acquisition of shares issued by the private limited company.

Criminal offences committable by the executives of a business association:

- Deceiving the members of the business association by disclosing or broadcasting false information concerning the financial position of an economic operator or the executive officer of such economic operator in connection with his office, or concerning financial instruments in relation to the economic operator, or by concealing information or by concluding any fictitious transaction relating to financial instruments;
- Illegally concealing any part of the company's equity capital (impairment of equity capital);
- Embezzlement.

Nullity of the mortgage: The mortgage securing receivables that are not judicially enforceable are null and void.

Risk of terminating or detrimentally altering the basis of satisfaction of a claim: A contract by which the basis for satisfying a third person's claim has been deprived entirely or in part shall have no legal force in respect of such third person if the other party acted in bad faith or had a gratuitous advantage originating from the contract.

Insolvency risks:

The creditor, and on behalf of the debtor, the liquidator may file for legal action before the court within ninety days from the time of gaining knowledge or within a one-year forfeit deadline from the date of publication of the notice of liquidation to contest:

- Contracts concluded by the debtor within five years preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his other commitments, resulting in the diminishing of the debtor's assets, if intended to defraud any one creditor or the creditors, and the other party had or should have had knowledge of such intent;
- Contracts concluded by the debtor within two years preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his other commitments, if intended to transfer the debtor's assets without any compensation or to undertake any commitment for the encumbrance of any part of the debtor's assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party;
- Contracts concluded by the debtor within ninety days preceding the date when the court received the petition for opening liquidation proceedings or thereafter, or his other commitments, if intended to give preference and privileges to any one creditor, such as the amendment of an existing contract to the benefit of a creditor, or to provide financial collateral to a creditor that does not have any.

The liquidator, on behalf of the debtor, shall be entitled to reclaim within the time limit referred to above any service the debtor has provided within a sixty-day period preceding the date when the court received the petition for opening liquidation proceedings or thereafter, if it was provided to give preference to any one creditor and if such service is not usually provided under normal circumstances. Prepayment of a debt is, in particular, considered as giving preference or privileges to any one creditor.

If the debtor enters into an agreement with an economic operator that is under its majority control, or with a shareholder or executive officer of such economic operator, or with their relatives, bad faith and/ or gratuitous promise shall be presumed. Furthermore, bad faith and/ or gratuitous promise shall also be presumed when a contract is concluded between economic operators that are not directly or indirectly connected by way of affiliation, but are controlled by the same person or the same economic operator.

## 12. Enforcement

### Court involvement required?

Based on the court or public notary enforcement order (enforcement clause) the individual court bailiff proceeds.

In principle, the enforcement is carried out on the basis of judicial order by an individual court bailiff. Exceptions:

- The parties may agree that the pledge holder acquires the ownership of the asset after the secured claim becomes due;
- The parties may agree upon selling the asset together before the secured claim is due;
- If the asset has an official market price or the pledge holder is engaged in providing loan against security (pledge) commercially, the parties may agree before the secured claim is due that the pledge holder sells the asset, thus excluding judicial enforcement;
- The parties may also agree that the obligor appoints a person who is commercially or ex officio engaged in providing loans against security or organizing auctions to sell the asset.

Prior to the selling, the obligor shall be notified of the mode, place and time of sale.



## 12. Enforcement

### Average timing

Mortgages on real estate assets: the bailiff seizes the real property within 3 working days of advancing his costs. The land registry registers the enforcement right on the real property and the sale may only be initiated after a 45 day period after the registration. The electronic auction shall be initiated within 30 days after the value of the real estate is appraised by publishing the auction notice in the register of electronic auction notices and shall end on the 60th day following such publication. The unsuccessful first auction shall be succeeded by a second auction within 3 months.

Mortgages on movables assets: The bailiff may seize the movable property within 30 days of the advanced payment of the enforcement costs or within 45 days of the delivery of the enforcement order. The bailiff shall arrange for the sale of the movable property after 30 days following its seizure in the course of a public auction. The unsuccessful first auction shall be succeeded by a second auction within 3 months. There is possibility for electronic auction, however, sale by electronic auction is mandatory for business quotas and for securities, if such securities are sold by auction.

Bank accounts: if the bank account of the obligor is known, the enforcement shall be executed by an authority collection order within 15 days of the delivery of the enforcement order to the obligor.

Simplified enforcement: the possibility to request a simplified enforcement procedure arises if the parties agreed upon it or if they agreed upon an enforcement with the exclusion of the court and the deadline for the sale of the pledged asset has not passed yet. The main differences are:

- The satisfaction means the price of the pledged asset, the take-over of the pledged asset, the clearing of the sold real estate or the fulfilment of the secured claim and the costs of enforcement; no further assets are searched for,
- The procedure is shortened by the lack of seizure and estimating the price of the pledged asset. Instead of the latter, the estimated price is to be the minimum price agreed upon by the parties or a price calculated according to the formula agreed upon by the parties,
- The auction is fixed at the personal delivery of the enforcement order or after 15 days of delivery by post if the obligor does not perform.

### Rights of challenge for the debtor/ third parties

Yes: the pledge holder as the person seeking enforcement, the obligor or any other interested person.

Appeal against the decision on the commencement of enforcement if its content is different from the enforcement request.

Opposition against the acts and omissions of the bailiff that are contrary to the provisions on enforcement and violating the interests of the person seeking enforcement.

Appeal against the decisions and acts of the court in the course of the enforcement.

Suspension of the enforcement actions may also be requested.

- Filing an opposition may suspend the enforcement depending on the decision of the court.

The same right to oppose (with the same potential effect – suspension of enforcement) the distribution plan after the sale of a real estate is available to the lower ranking creditor in case of takeover by the creditor of the asset subject to security.

### Cases of cancellation/ reversal of enforcement

In case the writ of execution or the enforcement itself is cancelled because it was issued contrary to the law, the interested party may request restoration to the original condition (restitutio in integrum).

The obligor may file a law suit in order to cease the enforcement procedure. A third person who lays claim to seized assets asserting ownership right or any other right with the capacity to block the sale of the asset in the process of enforcement, may lodge an action of replevin (claim of exemption) to recover the asset from seizure. If the court decides in favour of this third person, it orders the asset to be released. These rules apply if the non-obligor bank account owner sues the enforcer for repayment.

## 13. Secured creditors' position in insolvency

### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

As of the date of opening of the insolvency proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets are either to be suspended or ceased.

The insolvency law provides for the possibility of a creditor whose enforcement actions have been suspended due to the bankruptcy procedure to ask the judge to resume the foreclosure with respect to its receivables in the insolvency procedure only in case a bankruptcy agreement has been achieved.

In the insolvency procedure, there is no possibility to continue enforcement.

### 13. Secured creditors' position in insolvency

The pledge holder receives satisfaction as the result of the insolvency procedure on the 2<sup>nd</sup> place, after the payment of liquidation-related costs and expenses, including the fee of the liquidator.

In case the sale of the pledged asset (auction, tender) was unsuccessful for the second time, the liquidator sells the asset to the person holding the pledge on it.

In case the pledge was set up before the commencement of the insolvency procedure and the holder of the pledge registers his claim within 40 days of the announcement of the procedure, the purchase price of the pledged asset reduced only by the costs of maintenance and of the sale shall be used for satisfying the secured claim.

With regard to pledge on assets, 50% of the reduced purchase price shall be used for satisfying the secured claim. In case the holder of the pledge registers his claim in more than 40 days of the announcement, the asset may be sold but the purchase price is to be separated and paid only if all other claims have been satisfied.

#### Secured creditors rights in influencing decisions in the creditors assembly

No specific privileges in the Committee. The following rules apply with regard to creditors' rights in general.

Request to dismiss the liquidator: the court shall move to dismiss the liquidator, irrespective of whether a complaint is lodged or not, if it determines in its ruling based on the particulars of the procedure that the liquidator seriously or repeatedly violates the law. In this ruling the court shall appoint a replacement liquidator as well. Dismissal of the liquidator may be requested on the same grounds by the creditors' select committee as well (or by the representative of creditors in the absence of a select committee). The court shall deliver its decision on such request within eight working days of receipt, and shall appoint a replacement liquidator if its ruling is in favour of the request.

Possibility to challenge the liquidation step-plan: for any creditor.

Consenting to agreement, moratorium: The Creditors' Committee votes (it is established by a third of the registered creditors, in insolvency procedures additionally the founders have to hold the third of the value of the registered claims). Voting is made by categories of creditors (secured and not secured) and on the value of the claims and in each category the majority has to vote in favour. Absolute majority is required for extended moratorium and conclusion of the agreement.

Requesting information on the financial status of debtor: the Creditors' Committee or the Creditors' Representative or creditors holding 10% of the total of the registered claims.

#### Secured creditors ranking in the distribution of liquidation proceeds

Second, after covering the liquidation related costs and expenses (which, importantly, include liquidator's fees, preservation and administration costs for the asset, etc.), if it is registered.

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## 1. Types of security available to creditors

- **Personal guarantees** (Articles 1936 and following of the Italian Civil Code):
  - a. guaranty (*fidejussione*);
  - b. credit mandate (*mandato di credito*);
  - c. antichresis (*anticresi*);
  - d. guarantee (*avallo*);
- **Real guarantees** (Articles 2784 and following of the Italian Civil Code):
  - a. pledge (*pegno*);
  - b. mortgage (*ipoteca*);
- **Autonomous guarantees:** letters of guarantee, comfort letters mortgages; assimilated operations, i.e., assignments for security purposes, ownership right reservation clauses, repurchase agreements;

The comments below refer to mortgage and pledge, as they are the most common types of security adopted in the Italian practice.

## 2. Types of assets which may be subject to security

Security may be set up over all types of assets. In particular:

- The pledge may be set up over the following assets:
  - Moveable assets;
  - Universality of moveable assets;
  - Credits and other rights over moveable assets.
- The mortgage may be set up over the following assets:
  - The real estate assets and their pertinent assets;
  - The real rights:
    - i. The usufruct of the real estate assets (*usufrutto di beni immobili*);
    - ii. The surface rights, leasehold basis (***diritti di superficie***);
    - iii. The right of emphytheusis (*diritto di enfiteusi*);
  - The moveable assets enrolled in public registers and Public Revenues (*rendite dello stato*),

The mortgage over ships and aircrafts is subject to a special legal regime set forth in the Italian Navigation Code.

## 3. Type of obligations that may be secured

The security may secure any kind of obligations, including future obligations.

The security secures with the same ranking the principal debt, interests, fees, penalties, enforcement and preservation costs.

## 4. Validity requirements for security documents

The pledge is validly established through the delivery of assets or of relevant ownership certificate (i.e., the documents ascertaining ownership over such asset)

The mortgage is validly established when it is registered in the relevant public register. The mortgage can be registered upon the condition that it arises from:

- Public deed;
- Private deed certified by a notary public;
- Judgement;
- Foreign deed duly legalized in Italy.

Such documents shall identify the entity establishing the mortgage, the creditor, the cause of the secured obligation and shall describe the assets that are subject to security.

## 5. Publicity requirements

Mortgage: for real estate assets and real rights over real estate assets the registration with the Land Register ("*Conservatoria dei Registri Immobiliari*") is required; for other assets registration with the relevant register (e.g., Italian ships public register, cars Italian public register) is required.

Please note that the registration with the relevant register has constitutive effect. It means that the registration is required to give legal validity to the guarantee (i.e., not only for the purpose of rendering it effective *vis-à-vis* third parties).

It should be pointed out that, in case of discrepancies between the contents of the aforementioned public registers and those of the security documents, the evidences of the public registers prevail.

Pledge: generally, a publicity regime is not required for pledge, except for the cases in which the pledge is established over certain specific assets, such as, for example, shares (formal annotation on the ownership certificate and registration on stockholder ledger are required) or financial instruments traded on regulated markets, where the rules of the market in which the instruments are traded shall be followed.

6. Other perfection requirements

Between the parties, the mortgage produces full legal effects when the secured obligation comes into effect (e.g., in case of a loan agreement, the funds have been fully or partially disbursed, giving rise to the borrower's obligation to repay those funds).

7. Costs of set up and publicity of security

The mortgages trigger two types of costs:

- Notary fees: approx. 2% of the value of the secured amount; this amount is not capped, however, The notary may reduce it at its discretion;
- Stamp tax: approx. 200 - 300 EUR.

In principle, the establishment of a pledge is free of charge (no tax or registration fees), except for any fees due to professionals (i.e., notary or legal fees).

8. Timing for publicity/perfection requirements

The mortgage registration procedure is swift:

- The mortgage registration over real estate assets and real rights is carried out by the notaries public; the registration is completed approx. within 15 days as of the date of the registration's request of the public notary to the Land Register or to the relevant register in the case of mortgages over the moveable assets enrolled in public registers and Public Revenue.

9. What types of rights does a secured creditor acquire?

- To satisfy its claim out of the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors;
- The mortgage follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- The mortgage or its ranking may be assigned separately from the secured claim;
- Higher ranking creditors have priority in terms of exercise of enforcement rights and, in the case of enforcement started by a lower ranking creditor, the higher ranking creditor may continue the enforcement or start a new enforcement procedure, as long as the asset has not been sold.

10. Governing law issues

Rome I Regulation pertaining to law applicable to contractual obligations shall apply.

With specific reference to mortgages, the following Italian law private international rules shall apply:

- The mortgages over the real estate assets or the real rights are governed by the law of the place where the assets are located;
- The mortgages over the moveable assets enrolled in public register and Public Revenue are governed by the law of the place where the assets are enrolled;
- Specific rules for publicity requirements, including preservation of ranking.

11. Legal concerns/prohibitions related to granting/taking security

Financial assistance: a company cannot lend money or set up security for the purpose of the acquisition by a third party of that company's shares.

- Mitigation: the Italian law considers such restrictions expressly to limited liability company (s.r.l.) as set forth by the Article 2474 of the Italian Civil Code.

Corporate assets abuse: the use, by the company's founder, administrator, director or legal representative, in bad faith, of the assets or credit worthiness of that company, for a purpose that is contrary to that company's interests, or for his/ her own interest or for the purpose of favouring another company in which he/ she holds a direct or indirect interest is a criminal offence.

- Mitigation: good faith presumed under the law; bad faith and fraud must be proved.

Nullity of the mortgage for lack of causa: under the Italian law, a contract lacking a valid cause (i.e., a valid reason of the mortgagor to establish the security) is null and void.

*"Actio pauliana"* or claw-back action risk: the creditors of a person may exercise a legal action for the cancellation of any deed or act entered into by their debtor which is fraudulent towards them.

- Mitigation: such action might only be successful if the following conditions are verified:
  - The debtor is aware of the prejudice that the act gives to the creditor;
  - In case of onerous title acts, the third party is aware of the prejudice caused to the debtor.

11. Legal concerns/  
prohibitions  
related to  
granting/taking  
security

Insolvency risks: the liquidator (or creditors committee, in certain cases) may request the cancellation of fraudulent acts entered into by the insolvent company five years prior to the opening of the insolvency procedure (including transactions at undervalue, deeds concluded with the intention of all parties to damage creditors' rights, set up of security for unsecured claims etc.).

12. Enforcement

**Court involvement required?**

Any enforcement proceedings shall be effected before the Court.

**Average timing**

The average timing generally depends on the territorial court in which the enforcement proceeding is introduced.

Enforcement over real estate assets: at minimum three to five years if there are no challenges and minimum terms set by law are observed; otherwise it may take significantly longer, depending on challenges filed.

Enforcement over moveable assets: at minimum one to two years if there are no challenges and minimum terms set by law are observed; otherwise it may take significantly longer, depending on challenges filed.

**Rights of challenge for the debtor/ third parties**

Any party having an interest is entitled to enter in the judicial enforcement proceedings, whether it is furnished with an enforcement title ("titolo esecutivo") or not, by filing with the Court an instance of intervention in order to participate to the capital distribution.

In the case that an opposition is filed, the Court may suspend the enforcement proceedings.

**Cases of cancellation/ reversal of enforcement**

The enforcement proceedings can be terminated upon the satisfaction of the creditors or if the proceeding creditor drops the fulfilments required by law.

13. Secured  
creditors' position  
in insolvency

**Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

As of the date of the opening of the insolvency proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets cannot be initiated or continued.

**Secured creditors rights in influencing decisions in the creditors assembly**

- Appointment as members of Creditors' Committee: The insolvency judge ("*giudice delegato*") shall appoint, upon prior consultation with the creditors and the receiver ("*curatore fallimentare*"), a committee of 3 – 5 creditors chosen among the several classes of creditors;
- Rights of the creditors: the creditors, through the Creditor's Committee, shall authorize the acts of the receiver, monitor and give their opinions over the activities of the receiver.

**Secured creditors ranking in the distribution of liquidation proceeds**

First creditor's class within the ranking as set forth by the Italian Civil Code, but after covering the liquidation related costs and expenses (which importantly, include liquidator's fees, preservation and administration costs for the asset etc.)

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## 1. Types of security available to creditors

- Personal guarantees (including corporate guarantees)
- Pledges:
  - o Possessory pledge – over movable assets, except real estate. Asset is given into possession of pledgee;
  - o Commercial pledge – over movable assets, except real estate and financial instruments;
  - o Mortgage – over real estate and ships;
  - o Financial collateral – over financial assets, financial instruments and claims on loans.
- Retention rights: any person who must return an asset to its owner may retain such asset until it receives payment that arises out of obligation of owner towards person retaining assets.

The comments below apply to mortgages and commercial pledges as the most common type of security used in practice.

## 2. Types of assets which may be subject to security

Mortgages may be set over real estate and ships.

Possessory pledge may be established over movable assets, except real estate.

Commercial pledge may be established over:

1. Movable tangible or intangible asset that is owned by commercial entity;
2. Pool of assets mentioned above;
3. Floating charge on all assets of commercial entity.

Registered assets (for instance: vehicles) may be the object of the commercial pledge regardless of whether the owner is a commercial entity of other entity or individual.

Financial collateral may be established over financial assets, financial instruments and claims on loans.

## 3. Type of obligations that may be secured

Pledges may secure obligations of any kind, including future obligations.

The mortgage secures with the same ranking the principal debt, interest, penalties, etc.

## 4. Validity requirements for security documents

The pledge agreement must contain:

- The person establishing the pledge, the debtor, the creditor, the cause of the secured obligation, maximum value of claim covered by pledge and must describe the asset subject to security.

Mortgages over real estate and commercial pledges must be signed in front of a notary public and registered in Land book (mortgage) or Register of commercial pledges (commercial pledge).

## 5. Publicity requirements

Mortgages: registration with the Land book. Registration with the Land book is made for enforceability towards third parties.

Commercial pledges: registration with the Commercial pledge register.

For both mortgages and commercial pledges, ranking is determined by the order of registration.

## 6. Other perfection requirements

Commercial pledge: is perfected when it is registered with commercial pledge register. Until such time it is not unenforceable against third parties. However pledgee has a claim against the pledgor for registration of the commercial pledge.

Mortgage: mortgage is perfected only after it is registered with the Land book.

## 7. Costs of set up and publicity of security

Commercial pledge – EUR 36.

Mortgage:

- Land book fees - state duty in amount of 0.1% of value of the obligation, but not exceeding EUR 1, 425 and chancery duty in amount of EUR 15;
- Public notary fees - EUR 71.

8. Timing for publicity/perfection requirements

Commercial pledge – registered within 5 business days from the day when application was received.  
Mortgage – registered within 10 days from the day when application was received (term may be extended to one month).

9. What types of rights does a secured creditor acquire?

Secured creditor has a right to foreclose the assets subject to security before any other creditors having a subsequent rank and before any unsecured creditors.

10. Governing law issues

Latvia being part of the European Union, Rome I Regulation applies.  
Otherwise, the following Latvian private international law rules apply - mortgages and pledges over assets are governed by the law of the place where the assets are located.

11. Legal concerns/prohibitions related to granting/taking security

Financial assistance: a joint stock company cannot lend money or set up security for the purpose of the acquisition by a third party of that company's shares.

Insolvency risks: the insolvency administrator is entitled to challenge transactions commenced three years prior to the proclamation of insolvency proceedings, in case such transactions caused losses to the insolvent company and other party was aware of it.

12. Enforcement

**Court involvement required?**

Mortgage - approval for sale of real estate in auction is granted by the court (without judging on the substance of the matter).

Commercial pledge - out of court enforcement is possible by selling assets with or without auction.

**Average timing**

Mortgage: at minimum 1.5 to 2 months in case of no challenges and minimum terms set by law are observed.

Commercial pledge: at least one month regardless of whether the assets are sold with or without auction due to the notifications.

**Rights of challenge for the debtor/ third parties**

Yes:

Commercial pledge: in case assets may be sold without auction, pledgor may challenge the notification for realization of the pledge right.

Mortgage: auction deed must be approved by the court within 15 days from the day when it was filed in court by bailiff. Court also decides on any complaints regarding auction. Such complaints may be filed by persons having interest in auction within 10 days from the day of the auction.

**Cases of cancellation/ reversal of enforcement**

Mortgage: in case challenged auction is cancelled there will be new auction on the same terms and conditions.

Commercial pledge: in case notification for realization of the pledge right is challenged within 30 days from the day of notification, realization of commercial pledge is suspended.



### 13. Secured creditors' position in insolvency

#### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

As of the date when court has proclaimed insolvency proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets are suspended by law regardless of the type of procedure (reorganization or liquidation) .

Secured creditor may not request the foreclosure of security within two months from the day when liquidation was proclaimed. After two-month term has passed secured creditor is entitled to request that insolvency administrator sells the security with auction.

Creditor's rights to require foreclosure are limited in reorganization. But the secured creditor is entitled to obtain appropriate compensation for the limitation of the foreclosure rights.

#### **Secured creditors rights in influencing decisions in the creditors assembly**

- Approval of reorganization plan: two thirds of secured creditors must approve legal protection plan for it to be executable;
- Voting rights in liquidation: secured creditors have a voting right in creditors' assembly only in amount of unsecured claims;
- Exception is the removal of administrator of liquidation: secured creditors have a voting rights in full amount of their claims in vote on removal of insolvency administrator.

#### **Secured creditors ranking in the distribution of liquidation proceeds**

Secured creditor receives all proceeds from foreclosure of the security in the amount of his claim.

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# Lithuania

## 1. Types of security available to creditors

- Forfeit;
- Suretyship;
- Letters of guarantee;
- Deposit;
- Mortgages (over real estate as well as movable assets when such assets are mortgaged together with real estate);
- Pledges (security over a movable corporeal assets ((physically delivered to the creditor or to the third person for Security purposes or not delivered to the creditor)) or property rights);
- Retention rights: a lawful possessor who has the right of claim in respect of the owner of assets belonging to another person is entitled to retain such assets until his claim is satisfied.

The comments below mainly apply to mortgages and pledges as the most common type of security used in practice.

## 2. Types of assets which may be subject to security

According to the general rule, mortgages may be set up over all types of immovable assets (and their constituent parts) when the assets are not physically delivered to the creditor.

Security over ships benefit from special legal regime.

Pledges may be set up over all types of movable assets (physically delivered to the creditor or to the third person for security purposes or not delivered to the creditor) or property rights.

There is no commercial pledge in Lithuania.

## 3. Type of obligations that may be secured

Conventional mortgages/ pledges may secure obligations of any kind, including future obligations.

The mortgage secures fulfilment of the principal claim and interests. It is also possible to agree that the creditor may recover damages for non-fulfilment of the obligations by the debtor up to the value of the maximum amount secured by the mortgage.

The pledge secures fulfilment of the principal claim and interests. It is also possible to agree that the creditor may recover damages for non-fulfilment of the obligations by the debtor up to the value of the maximum amount secured by the pledge.

## 4. Validity requirements for security documents

### The mortgage:

- The mortgage agreement must identify the venue, date and time of the agreement, the debtor, the creditor, the collateral provider, their residence addresses, object of the mortgage, obligation secured by the mortgage, the exact or maximum amount of the obligation, fulfilment term of the obligation, number of original copies of the mortgage agreement, subjects to whom the original copies of the mortgage agreement are being submitted at the time of conclusion of the agreement;
- Form of the agreement: the mortgage agreement shall be signed in front of a notary public.

### The pledge:

- The pledge agreement must identify the venue and date of the agreement, collateral provider, the debtor, the creditor, the person to whom the pledged assets are delivered, their residence addresses, description of the object of the pledge, obligation secured by the pledge, the exact or maximum amount of the obligation, fulfilment term of the obligation;
- Form of the agreement:
  - o Pledge agreement or unilateral statement of the collateral provider for pledge of the object of pledge shall be concluded in writing and approved by the notary public when the object of the pledge is delivered to the third person or kept by the collateral provider;
  - o Pledge agreement in writing shall be concluded when the object of the pledge is delivered to the creditor.

## 5. Publicity requirements

The mortgage: the notary public shall submit necessary information to the Mortgage Register for registration of the mortgage agreement. The mortgage in respect of the parties comes into force as of the conclusion of the mortgage agreement (except other date is established in the agreement). The mortgage may be used towards third persons after it is registered within the Mortgage Register.

The pledge: the pledge agreement and unilateral statement of the collateral provider to pledge the pledge object shall be registered within the Mortgage Register. The pledge in respect of the parties comes into force as of the conclusion of the pledge agreement (except other date is established in the agreement). If the pledge object is delivered to the third person or is kept by the collateral provider, the pledge may be used towards third persons after it is registered within the Mortgage Register.

## 7. Costs of set up and publicity of security

The total costs of set up and publicity of the mortgage (pledge) consists of fees payable to notary public and to the Mortgage Register. The fee to notary public shall be 0.2 – 0.3% of value of the mortgaged (pledged) property and in any case shall not exceed LTL 500 (approx. EUR 144.81); in case of the mortgage of a company as a whole - 0.3 – 0.4% of value of the company and in any case shall not exceed LTL 1,000 (approx. EUR 289.62). The registration fee to the Mortgage Register shall be LTL 108 (approx. EUR 31.28); for registration of any further additional (supporting) mortgage (pledge) – LTL 100 (approx. EUR 28.96).

## 8. Timing for publicity/perfection requirements

The notary public shall submit necessary information to the Mortgage Register for registration of the mortgage/ pledge agreement not later than within the next working day after the verification of the mortgage/ pledge agreement. The mortgage/ pledge shall be registered within the Mortgage Register not later than within the next working day after the receipt of all necessary information from the notary public.

## 9. What types of rights does a secured creditor acquire?

### The mortgage:

- To satisfy its claim out of the asset subject to security before any other secured creditors having a subsequent rank and before any unsecured creditors;
- The mortgage follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- To assign the claim secured by the mortgage or a part of it to another person, if the mortgage agreement or applicable laws do not establish different provisions. Under the general rule, together with the assignment of the claim secured by the mortgage, the mortgage rights are also assigned. In certain cases, it is also possible to assign the mortgage rights apart from the claim secured by the mortgage;
- To assign the ranking of the mortgage to another secured creditor if the asset is subject to several mortgages;
- To pledge the mortgage claim if the mortgage agreement does not establish different provisions;
- Higher ranking secured creditors have priority in terms of exercise of enforcement rights over lower ranking secured creditors.

### The pledge:

- To satisfy its claim out of the asset subject to security before any other secured creditors having a subsequent rank and before any unsecured creditors;
- The pledge follows the asset – it is maintained irrespective of the disposals having as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its pledge;
- To assign the claim secured by the pledge;
- Higher ranking secured creditors have priority in terms of exercise of enforcement rights over lower ranking secured creditors.

## 10. Governing law issues

Lithuania being part of the European Union, Rome I Regulation applies.

Otherwise, the following Lithuanian private international law rules apply:

- Mortgages over immovable assets are governed by the law of the place where the assets are located;
- The conditions for pledge are subject to the law of the place where the movable asset is located at the time the pledge agreement is concluded; the law of the place where creditor's residence or business place is located shall be applicable for the pledge of claim rights and securities; in case of the pledge of other rights, the law applicable for such rights applies.

## 11. Legal concerns/prohibitions related to granting/taking security

Financial assistance: a company cannot make direct or indirect advance payments, grant loans or offer security for the obligations to third parties, if such actions aim to enable other persons to acquire shares of that company.

Corporate assets abuse: the use, by the company's founder, administrator, director or the representative, in bad faith, of the assets or credit worthiness of that company, for a purpose that is contrary to that company's interests, or for his/ her own interest or for the purpose of favouring another company in which he/ she holds a direct or indirect interest is a criminal offence.

- Mitigation: good faith presumed under the law; bad faith and fraud must be proved. Cross collateral, co-borrower structures. Lithuanian laws allow a person to grant security over its asset to secure debts of a third party.

## 11. Legal concerns/ prohibitions related to granting/taking security

Nullity of the mortgage for lack of *causa*: under Lithuanian law, a contract lacking a valid *causa* (i.e., a valid reason of the mortgagor to establish the security) is null and void.

- Mitigation: Cross collateral, co-borrower structures. Lithuanian laws allow a person to grant security over its asset to secure debts of a third party.

Actio Pauliana risk: the creditors may exercise a legal action for the cancellation of any transaction entered into by their debtor which violates the rights of the creditors and the debtor knew or ought to have known that.

- Mitigation: such action might be successful only in cases when due to the transaction the debtor becomes insolvent, or, being in the insolvency situation, the debtor gives the priority to one creditor or in other cases when the rights of the creditor are infringed.

Bankruptcy risks: the bankruptcy trustee may request the cancellation of fraudulent acts entered into by the insolvent company three years (in case of intentional bankruptcy – five years) prior to the opening of the bankruptcy procedure (including transactions at undervalue, deeds concluded with the intention of all parties to damage creditors' rights, etc.).

- Mitigation: independently determined market value; other mitigating factors outlined under Nullity of the mortgage for lack of *causa* apply.

## 12. Enforcement

### Court involvement required?

The mortgage: the court enforcement shall not be required. Executive record shall be issued by the notary public.

The pledge: the court enforcement shall not be required. Executive record shall be issued by the notary public in cases when the object of the pledge is delivered to the third person, kept with the collateral provider or the forced pledge is established. If the object of the pledge is delivered to the creditor, the enforcement shall be executed as per provisions of pledge agreement.

### Average timing

At minimum 4 to 5 months in case of no challenges and minimum terms set by law are observed; otherwise it may take significantly longer, depending on challenges filed. For challenges to be filed the laws provide for quite short procedural terms (20 days for submission the complaint to the court, 7 days for filing an appeal against the decision).

### Rights of challenge for the debtor/ third parties

Yes:

The mortgage/ pledge: in case the creditor starts the forced execution without a reasonable ground or presents the unfounded claims, the debtor (collateral provider) may file a challenge to the forced execution. Suspension of the enforcement actions shall be applied only if the respective interim measures are applied by the court.

### Cases of cancellation/ reversal of enforcement

The mortgage/ pledge: in case of unlawful enforcement, the debtor (collateral provider) shall have the right to demand from the creditor the losses suffered due to the unlawful enforcement, unlawful administration of the mortgage object or unlawful storage of the pledge object by the creditor or unlawful forced sale of the mortgage/ pledge object.

### 13. Secured creditors' position in insolvency

#### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

As of the date of opening of the bankruptcy proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets are suspended by law. The decisions on the sale of (through the auction) and the sale price of the mortgaged/ pledged property of the company under the bankruptcy shall be adopted by the creditors' meeting, having coordinated this with the secured creditor.

#### Secured creditors rights in influencing decisions in the creditors assembly

Generally, the bankruptcy law provides no special rights for the secured creditors regarding influencing the decisions in the creditors' meeting. Creditors' influence in the creditors' meetings mainly depends on the value (amount) of the claim which belongs to the particular creditor.

In addition, the pledge/ mortgage creditors are entitled to, not later than within 20 days from the auction, apply to the creditors meeting with a proposal to take over the unsold mortgaged/ pledged assets for the initial sale price fixed at the auction where the auction has failed due to the fact that the buyer has not paid the total amount within the set time limit, or for the buying price of the assets at the auction which was announced as failed.

There have been initiatives in the Parliament of Lithuania to amend the laws restricting voting rights for the secured creditors in creditors' meeting of the company in bankruptcy, but the laws have not been amended.

#### Secured creditors ranking in the distribution of liquidation proceeds

First, but after covering the expenses related to bankruptcy administration (which include remuneration for the bankruptcy trustee and his assistant, audit expenses, etc.).

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# Luxembourg

## 1. Types of security available to creditors

The main types of security available to creditors in Luxembourg are:

- Personal guarantees (*cautionnement*);
- Autonomous guarantees (*garantie indépendante*);
- Contractual mortgage (*hypothèque conventionnelle*): a right in rem over immovable property granted in favour of a creditor (mortgagee) in order to secure the obligations of a debtor and allowing him to sell the property upon default of the debtor and to use by preference the proceeds to repay the outstanding debt;
- Lien of an unpaid vendor or lender (*privilège du vendeur, privilège du prêteur de deniers*): special real estate privileges of an unpaid seller or a lender who finances the acquisition of real estate; such privileges take priority over registered mortgages if they are registered with the Mortgage Registry (*Bureau de conservation des hypothèques*);
- Pledge (*gage*): a contract whereby a debtor or a third party (pledgor) transfers the possession of the movable property to the creditor (pledgee) in order to secure the obligations of the debtor;
- Financial collateral arrangements (*garanties financières*): securities granted on financial instruments and claims, including securities such as pledge and transfer of ownership as security, to which specific rules set out in the Luxembourg collateral law of August 5, 2005 (as amended) apply (the "Luxembourg Collateral Law");
- Transfer of ownership as security: a contract whereby a debtor or a third party (transferor) transfers ownership of the assets to a creditor in order to secure the obligations of the debtor; such security usually includes an obligation of the transferee to re-transfer such assets (or equivalent) back to the original transferor upon the satisfaction of his obligations;
- Pledge on general business (*gage sur fonds de commerce*): a non-possessory right of pledge over all of the business assets (customers, trademarks, patents, tools, equipment, the right to the lease, and part of a stock up to 50% of the value) to the extent defined in the pledge agreement and which can be granted to authorized credit institutions and breweries;
- Right of retention: a right of a creditor to remain the owner of the asset until full satisfaction of his claim by a debtor and, upon the default of such debtor, a right to retain the asset without competition with any other creditors.

The comments below apply to contractual mortgages (over immovable property) and pledges (over movable property), including financial collateral arrangements, as the most common types of securities used in Luxembourg practice.

## 2. Types of assets which may be subject to security

### Mortgage:

- Immovable property may be subject to mortgage;
- Only existing property may be subject to mortgage due to the mortgage registration and recording requirements; hence, in principle, mortgage may not be granted over future assets;
- Aircraft and vessels are subject to a specific regime of mortgage (which is not included in the scope of this guide).

### Pledge:

- Pledge may be granted over most categories of movable assets, including among others:
  - a) Shares or other financial instruments;
  - b) Bank accounts;
  - c) Receivables;
  - d) Intellectual property rights;
  - e) Goodwill, inventory, equipment, etc.,where, a) to c) could be governed by the Luxembourg Collateral Law.
- Both future and present assets may be subject to pledge;
- Pledge may also be granted over general business (fonds de commerce) of the pledgor and which includes, in principle, all assets of the company, such as inventory, trademarks, customers, etc.

## 3. Type of obligations that may be secured

Mortgage and pledge may secure all types of debts and obligations owed by a pledgor or a third party.

## 4. Validity requirements for security documents

### Mortgage:

- Mortgage must be formalized in a notarial deed;
- Mortgage must be registered with the Administration Registry (*Administration de l'Enregistrement et des Domaines*).

### Pledge:

- Pledges (commercial pledges and pledges over financial instruments and claims) are validly created by a private deed or a notarial deed between the parties. In practice, pledges are most commonly created by a private deed;
- Pledge on general business must be in writing and may only be granted to authorized credit institutions or breweries.

## 5. Publicity requirements

### Mortgage:

- Mortgage must be recorded in the Mortgage Registry (*Bureau de conservation des hypothèques*) of the judicial district in which the real property is located;
- Mortgage registration is valid for 10 years and must be renewed before the end of this period to be valid for another period of 10 years;

### Pledge:

- No compulsory registration or recording requirements with public registry/ authority apply with the main exceptions of:
  - Pledge over the general business which has to be registered with the Administration Registry and recorded in the Mortgage Registry (alike to the registration of mortgage);
  - Pledge over registered intellectual property rights which has to be registered with the relevant IP registry.

## 6. Other perfection requirements

### Mortgage: n.a.

### Pledge:

- Generally, the perfection of the pledge requires the transfer of possession, actually or constructively, of the pledged assets to the creditor, while the ownership of the assets remains with the pledgor or debtor. Such dispossession of the pledgor has to be notified to the debtor or accepted by him. The method of transferring the possession varies according to the type of pledged asset:
  - Receivables: notification of the debtor or acknowledgement by the debtor;
  - Shares: registration of the pledge (or transfer of shares in case of transfer of ownership as security) in the shareholders' register;
  - Bank accounts: notification of the bank which holds the bank accounts or acknowledgment by the bank.
- Further to the recent amendments to the Luxembourg Collateral Law, the additional novel perfection methods were introduced for pledges over:
  - a) Credit claims: by the mere execution of a pledge agreement;
  - b) Financial instruments in book entry form:
    - If the depository is also the collateral taker, by the mere execution of a pledge agreement;
    - By way of a tripartite agreement that includes the depository or a bipartite agreement which does not include the depository but requires a notification to the depository and whereby depository will act in accordance with the instructions of the collateral taker only and without any further approval of the collateral provider;
    - By registration of the pledged assets in the collateral taker's account;
    - By registration of the financial instruments in a special account opened with a depository in the name of the collateral provider or in the name of a third party, provided that the existence of the pledge is specifically noted.

## 7. Costs of set up and publicity of security

### Mortgage:

- Notary fees: calculated on the sliding scale based on the value of the mortgaged property;
- Registration fees (droit d'enregistrement): duty of 0.24% on the total amount of the secured debts;
- Mortgage tax (droit d'inscription): levy of 0.05% due on the first recording and any renewal of the mortgage (every 10 years).

### Pledge:

- Pledge on any type of assets could be created under the private seal and therefore no registration or notary fees apply;
- Pledge on general business: registration duty of 0.24% on the total amount of the secured debts (or a fixed duty of EUR 12 if the underlying credit agreement has a sufficient connection with a foreign jurisdiction) and a tax of 0.05% on the total amount of the secured debt for the first registration and any renewal.

## 8. Timing for publicity/perfection requirements

### Mortgage:

- Luxembourg law requires to perfect the mortgage at the latest within 45 days as from the execution of the relevant transaction;
- Mortgage registration is performed by the Luxembourg public notaries; in practice, the execution of the notarial deed and its registration with the Administration Registry and the Mortgage Registry may be completed within 10 business days.

### Pledge:

- In general, for pledges being entered into by a private deed, no publicity is required and there is no waiting time for perfection (except for pledge over general business and pledge on registered IP rights).



9. What types of rights does a secured creditor acquire?

Mortgage:

- There is no transfer of the ownership or possession of the immovable property to the mortgagee or an agreed third party during the lifetime of the mortgage;
- Upon the default of a debtor, a mortgagee obtains a right to enforce the mortgage.

Pledge:

- The ownership of the pledged asset remains with the pledgor during the lifetime of the pledgor, yet its possession has to be transferred to the pledgee or an agreed party;
- The parties may agree that the pledgee has a right of use over the financial instruments and the monetary claims pledged in his favor;
- Upon an event of default, the pledge may be enforced by the pledgee;
- For transfer of ownership as security, the creditor may have the rights as set forth in the agreement.

10. Governing law issues

Most of the time, credit agreements and/ or guarantee agreement are often governed by foreign law while the security interest agreements of assets located in Luxembourg and/ or held by Luxembourg entities are governed by Luxembourg law.

- Under Luxembourg law, it is *lex rei sitae* (the laws of the jurisdiction where the property is situated) which governs the rights in mortgages over the immovable property;
- Principle of *lex rei sitae* also governs certain aspects of the pledge, and in particular the *rights in rem* attached to the movable assets, i.e., legal issues concerning the existence of pledged assets, conditions and regime of pledge enforcement;
- As Luxembourg is party to the Rome Convention on the law applicable to contractual obligations and pursuant to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the "Rome I Regulation"), the contract parties are free to choose a non-Luxembourg law to govern their contractual relationships. Yet, certain other rights (i.e., rights in rem, as mentioned above) will nevertheless be governed by Luxembourg law if the pledged assets are located in Luxembourg;
- Specific conflict of law rules apply to financial collateral securities under the Luxembourg Collateral Law: certain questions with respect the book entry securities collateral shall be governed by the law of the country in which the relevant account is located.

11. Legal concerns/ prohibitions related to granting/taking security

Insolvency risks:

- All security arrangements made after the bankruptcy adjudication are void;
- Security arrangements concluded during the suspect period (which cannot be more than six months starting, in general, from the moment the company stops paying its debts ((*cessation de paiement*)) or during the ten days preceding the suspect period), can be affected and declared void;
- If securities are void or declared void, they may not be enforced against the bankruptcy receiver (*curateur*);
- As an exception, financial collateral arrangements under the Luxembourg Collateral Law are enforceable even in insolvency situations, thus offering greater certainty to financial market participants;
- Regardless of the suspect period, all transactions that have been made in fraud of the creditors' rights are null and voidable.

Financial assistance:

- Public limited companies (*sociétés anonymes*) in Luxembourg (and other companies generally governed by rules applicable to public companies) for the purpose of acquiring their own shares by a third party may only grant securities or provide guarantee subject to the satisfaction of certain conditions set out in Luxembourg law;
- Unlawful financial assistance may result in the security arrangement being void and unenforceable.

Corporate benefit and corporate specialty rules:

- All transactions of the company (including providing security) must (i) fall within the company's purposes as set out in the articles of the company and (ii) be made in the best corporate interest of the company;
- Generally, the companies could grant securities in favor of third parties (including group companies), provided that they derive direct or indirect benefits. If the collateral to secure the debt of a third party or of other group company has been granted for arm's length consideration, the company should generally conform to the corporate benefit rules.

Corporate approval:

- The granting of the security should be approved by the company's management body.

### Court involvement required?

#### Mortgage:

- Upon the default of a debtor, a mortgagee should obtain an enforceable title (*titre exécutoire*), whose condition will be met in the case of contractual mortgage since the notarial deed constitutes such a title. Thereafter, in a nutshell, the procedure will be as follows:
  - o Service of a summons to pay (*commandement*) by a bailiff (*huissier de justice*) to the debtor;
  - o After 15 days of the summons to pay, service of a writ to attach (*exploit de saisi*) the real estate by a bailiff to the debtor, and registration of such writ with the Mortgage Registry;
  - o Filing of a formal application with the clerk's office of the relevant court must be done by the mortgagee and the application must be served by a bailiff to the debtor;
  - o Review of the validity of the attachment by the relevant court and appointment of a public notary who will organize the public auction of the real estate;
  - o Once sold, payment of proceeds to the mortgagee after disbursement of the notary's fees and other high ranked creditors by operation of law.
- If the mortgage is a first ranking mortgage (*hypothèque de premier rang*), and if the notarial deed contains a specific clause (*clause de voie parée*) allowing the mortgagee to sell the real estate through a notary without complying with the legal requirements for the attachment procedure, the enforcement procedure is more straight-forward and therefore the public sale of the assets may be completed more swiftly.

#### Pledge:

- The enforcement methods vary depending on the type of the pledged assets:
  - o For commercial pledges, they may be enforced by the pledgee, who is already in possession of the pledged asset, and after serving a summons to pay (*commandement*) upon the pledgor, by seeking a court decision fixing the conditions of the sale of the pledged asset by public auction;
  - o For pledges over financial instruments and claims, the Luxembourg Collateral Law provides for novel enforcement methods, such as the private sale of the pledged assets or the appropriation of the assets by either the collateral taker itself or by a third party at the price determined by a valuation method agreed between the parties. A creditor may directly appropriate pledged assets without obtaining a court order;
  - o For pledges over general business, upon the default of the debtor, the pledgee must notify (*mise en demeure*) the pledgor and attach the pledged assets without a judicial order. Then, the pledgee must request an authorization from the President of the relevant District Court to sell the pledged assets, in whole or in part. The sale will be done by an official appointed by the President of the District Court. The court order will be enforceable against the pledgor upon its service by a bailiff.
- As regards the transfer of ownership as security, upon the default of the debtor, the creditor (transferee) shall be released from its obligation to transfer back the transferred assets to the transferor, until full satisfaction of the secured obligation. The transferee will have the right to exercise all rights in respect of the transferred assets. The transferee may set off the remaining debt of the transferor against the transferred assets, without further notice. After the set off, the transferor should return any remaining transferred assets to the transferee.

If the debtor is a Luxembourg regulated entity, such as a credit institution, regulatory consent will be required if the collateral consists of shares of such entity.

### Average timing

#### Mortgage:

- The enforcement of a real estate is generally a very lengthy procedure and the attachment procedure is full of challenges. This could take approx. 3 to 4 months at minimum if there are no challenges and minimum terms set by law are observed; otherwise, and in practice, it could be significantly longer. If the mortgage deed contained a specific clause (*clause de voie parée*) allowing the mortgagee to sell the real estate through a notary without complying with the legal requirements for the attachment procedure, the public auction may occur approx. one month after the summons to pay.

#### Pledge:

- If a court order is required, the enforcement procedure could take approx. 6 months if the defendant fails to appear in court proceedings and to defend itself and has no legal defence. There are no challenges and minimum terms set by law are observed. If the defendant appears to the court, it could take approx. 1 year, provided that it has no legal defence;
- In case of pledge over financial instruments and claims, no court order might be required and the timing could be shortened (less than one month).

## 12. Enforcement

### Rights of challenge for the debtor/ third parties

#### Mortgage:

- Enforcement procedure of a mortgage could be subject to multiple challenges from the debtor and third parties.

#### Pledges:

- Commercial pledges: a third party who claims to be the owner of the attached asset could oppose to the public auction, for which the court of the location of the attachment will decide, or creditors of the seized asset could oppose only up to the proceeds of public auction against the debtor;
- Pledges over general business: a third party purchaser (acting in good faith) of a seized pledged asset may oppose to the attachment.

### Cases of cancellation/ reversal of enforcement

#### Mortgage and Pledge:

- If the formalities and delays of the enforcement procedure as set by the relevant law are not complied with, the procedure could be declared as null and void.

## 13. Secured creditors' position in insolvency

### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

In principle, creditors of a debtor in bankruptcy compete in the bankruptcy since all enforcement or proceedings for recovery of claims against the debtor or its assets are suspended. However, creditors having security interests will not compete with unsecured creditors and may enforce their security interests despite the bankruptcy, as the case may be. Only bankruptcy and controlled management will be dealt herewith:

#### Bankruptcy (*faillite*):

- The beneficiaries of security interests (mortgagee, pledgee) are entitled to enforce their secured obligations notwithstanding the bankruptcy;
- Any mortgage registered within the 10 days preceding the suspect period (*période suspecte*) or during the suspect period may be declared null and void if the mortgage was not registered within 15 days of the mortgage deed creating the mortgage;
- For pledges over financial instruments and claims under the Luxembourg Collateral Law, the enforcement in accordance with the provisions of the pledge agreements will be valid and enforceable towards third parties, including the bankruptcy receiver (*curateur*);
- For pledges over general business, the pledgee may enforce the security interest regardless of the bankruptcy procedure of the pledgor. The proceeds from the sale of the pledged asset will be used by priority to satisfy the pledgee's claims. Any remaining surplus will be paid to the bankruptcy receiver;
- For the pledges other than those governed by the Luxembourg Collateral Law, the bankruptcy receiver may, with the prior authorization of the supervising judge (*juge-commissaire*), recover the pledged asset before its sale by paying the debt owed to the pledgee.

#### Controlled management (*gestion contrôlée*):

- The beneficiaries of security interests (mortgagee, pledgee) are precluded from enforcing their security interests in case the debtor is placed under the controlled management;
- For pledges over financial instruments and claims which fall under the Luxembourg Collateral Law, their beneficiaries will be entitled to enforce their security interest despite the debtor being placed under the controlled management.

### Secured creditors rights in influencing decisions in the creditors assembly

- Once the bankruptcy is declared, one or several bankruptcy receivers will be appointed by the court and who will be in charge of the administration of the bankruptcy estate and realization of assets to satisfy creditors pursuant to their respective ranks. At the beginning of the bankruptcy procedure, all creditors of the insolvent debtors will declare their claims;
- In general, when creditors are requested to decide on certain issues in certain insolvency procedures, the secured creditors will not have any special right to influence the creditors' assembly's decision:
  - o Under a bankruptcy procedure (*faillite*), the supervising judge (*juge-commissaire*) could form a committee of creditors (having an advisory function), comprising at least three of the most important ordinary unsecured creditors;
  - o Under a composition procedure (*concordat*), a majority of creditors representing three-fourths of the outstanding unchallenged claims will be asked to approve of the composition proposal. In this context, secured creditors will, in principle, be deprived of their voting rights regarding the composition, unless they waive their right to the security interests;
  - o Under a controlled management procedure (*gestion contrôlée*), a majority of creditors (regardless secured or unsecured) representing more than 50% of the total unchallenged claims must approve the rescue plan, prior to its approval by the court.

### 13. Secured creditors' position in insolvency

#### Secured creditors ranking in the distribution of liquidation proceeds

Creditors benefiting from a first ranking mortgage or pledge are considered “out of the mass” as they may enforce such security and therefore do not compete with the other creditors. Apart from that, certain claims shall have a preferential status, such as the court costs, preferential rights of employees, certain social security claims or claims by the tax authorities, as well as specific privileges.

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# The Netherlands

## 1. Types of security available to creditors

### Property-law security rights (*goederenrechtelijke zekerheden*):

- Rights of mortgage (*hypothekrechten*);
- Rights of pledge (*pandrechten*); and
- Retention of title (*eigendomsvoorbehoud*).

### Personal security rights (*persoonlijke zekerheden*):

- Several liability (*hoofdelijkheid*);
- Suretyship (*borgtocht*);
- Guarantee (*garantie*); and
- Subordination (*achterstelling*).

## 2. Types of assets which may be subject to security

- Rights of mortgage can be created over property subject to registration (*registergoederen*), such as immovable property and registered ships and aircrafts;
- Rights of pledge can be created over movable property (*roerende zaken*) and all property rights (*vermogensrechten*) such as receivables (*vorderingsrechten*). Which specific right of pledge can be created depends on the type of pledged asset. Please see question 6 with respect to the different types of rights of pledge;
- The retention of title can be created in relation to a property delivered without immediate payment;
- Personal security rights are not created over assets, but are characterized by the fact that a third party is jointly liable for the performance of the obligation.

## 3. Type of obligations that may be secured

- Rights of mortgage and rights of pledge can be used to secure monetary claims only;
- The retention of title can only be used to secure supplier's credit (delivery without immediate payment);
- Personal security rights can be used to secure all kinds of obligations arising from agreements. However, please note that the surety (*borg*) is only obliged to pay alternative (monetary) compensation in case of an obligation of the debtor other than a monetary payment.

## 4. Validity requirements for security documents

- Validity requirements for the deed of mortgage (which is a notarial deed) can be found in the Notaries Act (*Wet op het notarisambt*), the parts 3.1.2, 3.4.2 and 3.9.4 of the Dutch Civil Code (*Burgerlijk Wetboek*) and the Land Registry Act (*Kadasterwet*). Examples of such requirements are:
  - o The title of establishment (i.e., security for a claim arising from a loan agreement);
  - o The property-law agreement of establishment;
  - o An indication of the claim secured by the right of mortgage; and
  - o The amount for which the mortgage is granted.
- The validity requirements for documents in connection with rights of pledge differ per type of pledge. In general a right of pledge is created by means of a notarial deed (*authentieke akte*), a private instrument (*onderhandse akte*) or a registered private instrument, all of which have to be drafted in accordance with the relevant provisions of the Dutch Civil Code;
- It is strictly speaking not necessary to draw up a written document in order to create a retention of title or a personal security right. However, in practice parties always draw up a written agreement to prevent evidence issues and to record the exact terms and conditions.

## 5. Publicity requirements

- A deed of mortgage is registered with the designated register such as (in case of an immovable property) the Land Registry (*Kadaster*). These designated registers are publicly accessible;
- Whether a deed of pledge needs to be registered depends on the type of pledge. As explained under question 6, in some cases a private instrument needs to be registered with the Tax Authorities (*Belastingdienst*) in order to make the pledge valid and legally binding. This register is not publicly accessible. Only the parties mentioned in the deed and their heirs, successors or assignees are allowed to inspect this register;
- The retention of title and the personal security rights are not subjected to any publicity or registration requirements.

In the overview below all requirements for the perfection of each security right are briefly stated.

In principle a right of mortgage is established if the following requirements are fulfilled:

- (i) A valid title (*geldige titel*), e.g., an agreement;
- (ii) The mortgagor (*hypotheekgever*) has the right to dispose (*beschikkingsbevoegd*) of the property subject to registration; and
- (iii) Creation of the mortgage:
  - a. A property-law agreement of creation; and
  - b. Acts of establishment (*vestigingshandelingen*):
    - i. A notarial deed between parties (deed of mortgage); and
    - ii. Registration of the notarial deed in the designated register maintained by the Land Registry Office.

#### 6. Other perfection requirements

In principle a right of pledge is established if the following requirements are fulfilled:

- (i) The object or right intended to be pledged is transferable (*overdraagbaar*);
- (ii) A valid title (*geldige titel*), e.g., an agreement;
- (iii) The pledgor has the right of disposal; and
- (iv) Creation of the pledge. This depends on the type of right of pledge. In case of:
  - a. A possessory right of pledge (*vuistpand*): delivery of the property to the pledgee (*pandhouder*);
  - b. A non-possessory right of pledge (*bezitloos pandrecht*): a notarial deed or a registered privately executed instrument (*geregistreerde onderhandse akte*);
  - c. A disclosed right of pledge (*openbaar pandrecht*): a notarial deed or a privately executed instrument, and a notification to the debtor; or
  - d. An undisclosed right of pledge (*stil pandrecht*): a notarial deed or a registered privately executed instrument;
- (v) The movable property or property right to be secured has to be sufficiently identifiable (*met voldoende bepaaldheid omschreven*) in the deed of pledge; and
- (vi) The secured obligations are sufficiently determinable (*voldoende bepaalbaar*).

In principle, the retention of title and the personal security rights have no specific perfection requirements (other than an agreement between parties in accordance with the relevant provisions of the Dutch Civil Code).

#### 7. Costs of set up and publicity of security

- The costs of creation and publication of a security right highly depend on the type of security, whether or not a notarial deed is required, the number of deeds or agreements necessary to create the envisaged security package and other the specific circumstances of the case;
- The costs of registration with the Land Registry of a deed of mortgage are €73.- up to and including €132.- as of January 2013. Registration of a deed of pledge with the Tax Authorities is free of charge.

#### 8. Timing for publicity/perfection requirements

- The timing for publicity and/ or perfection highly depends on the type of security (mortgage vs. pledge, disclosed pledge vs. undisclosed pledge). Personal security rights are perfected as soon as the parties have come to an agreement. However, a notarial deed for example has to be executed and powers of attorney have to be prepared in order for a civil-law notary to sign the notarial deed;
- There are no deadlines for registration with the Land Registry or Tax Authorities. However, please note that registration with the Land Registry is required in order to create a right of mortgage. The requirement of registration (with the Tax Authorities) also applies to registered privately executed instruments with respect to the creation of rights of pledge.

#### 9. What types of rights does a secured creditor acquire?

##### Property-law security rights

##### Ranking order

- The ranking order of rights of mortgage is determined at the time of registration of the mortgage deed (*hypotheekakte*);
- The oldest security right ranks above the younger security right;
- The Dutch law provides for switches in priority of rights of mortgage.

## 9. What types of rights does a secured creditor acquire?

### Ancillary rights and dependent rights

- Rights of mortgage and rights of pledge are ancillary rights (*nevenrechten*): they are transferred by operation of law together with the secured claim to the new creditor;
- Rights of mortgage and rights of pledge are also dependent rights (*afhankelijke rechten*): they are extinguished (*gaan teniet*) by operation of law on the moment the secured claim ceases to exist.

### Satisfaction from revenues

- Satisfaction of the claim out of the revenue of the encumbered asset. The general rule is public auction of the encumbered asset;
- Priority over other creditors having a subordinated security right and unsecured creditors.

### Personal security rights

Personal security rights are not created over assets, but are characterized by the fact that a third party is jointly liable for the performance of the obligation. Therefore, the secured creditor acquires an obligation of a third party.

## 10. Governing law issues

The Rome I Regulation applies in the Netherlands. Therefore, contractual obligations are governed by the law following from the Rome I Regulation. The contents of section 14 of this Regulation are implemented in Title 10 of Book 10 of the Dutch Civil Code (*Burgerlijk Wetboek*).

Property rights (*vermogensrechten*) are governed by the law of the jurisdiction where the property rights are located. It is possible to choose the property-law of a specific jurisdiction with respect to registered claims (*vorderingsrechten op naam*).

For the sake of completeness we mention that the Dutch Civil Code and the Dutch Bankruptcy Act (*Faillissementswet*) apply to security rights.

## 11. Legal concerns/prohibitions related to granting/taking security

The most important legal concerns and prohibitions in the Netherlands are:

- Prohibition on ownership of collateral (*fiduciaverbod*): Dutch law prohibits a transfer of property for the purpose of securing obligations;
- Actio pauliana: if a debtor, in the performance of a voluntary legal act, knew or ought to have known that his act would prejudice one or more other debtors, the legal act can be annulled. Any debtor whose possibility of recourse has been prejudiced by the aforementioned voluntary legal act may invoke this ground for annulment, irrespective whether his claim arose before or after the legal act. In the event of insolvency the receiver is allowed to annul such fraudulent legal act;
- Ultra vires: a legal act performed by a company can be annulled if, as a result, its object was transgressed and the other party was aware thereof or, without personal investigation, should have been aware. Only the company itself can annul such legal act.

## 12. Enforcement

### Court involvement required?

In principle there is no court involvement required for the enforcement of security rights. However, if, for instance, the creditor wishes to sell the encumbered asset privately (*onderhands*) a court authorization is required. Also, please note that the enforcement of a right of mortgage by means of a public sale requires the involvement of a civil-law notary.

### Average timing

In general, security rights can be enforced immediately. However, in the event of a cooling-off period the enforcement of security rights may be suspended by court order.

### Rights of objection for the debtor/ third parties

A debtor has no rights of challenge in respect of property-law security rights. However, bona fide third parties are protected as well as creditors with a higher ranking security right over the encumbered asset. It is possible for a debtor to challenge personal security rights, which are in essence contractual obligations. Therefore, it is possible to initiate a regular court proceeding.

### Cases of cancellation/ reversal of enforcement

Apart from technicalities (*vormfouten*) regarding the creation of property-law or personal security rights, there are no cases of cancellation or reversal of enforcement.

### 13. Secured creditors' position in insolvency

#### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

Rights of mortgage and rights of pledge are considered to be the strongest security rights a creditor can have in the event of insolvency of a debtor. Holders of a right of pledge or a right of mortgage can execute their security rights as if there was no bankruptcy of the debtor. A Dutch court may suspend the enforcement of security rights against the debtor, which has been declared bankrupt or is granted a suspension of payment for a period of two months (extendable by another two months).

The retention of title can also be enforced in case of bankruptcy. As mentioned above, a Dutch court may suspend the enforcement of security rights against the debtor.

The above does not apply to personal security rights. Holders of a personal security right are no more than ordinary creditors (*concurrent schuldeisers*) in case of bankruptcy of the debtor and/ or the third party securing the debts of the debtor.

#### Secured creditors rights in influencing decisions in the creditors assembly

The following applies to all creditors.

- If the insolvent debtor offers a composition (*akkoord aanbieden*) to all the (*ordinary*) creditors, a right to vote on this composition exists for all the creditors. A majority of the votes is sufficient to come to an agreement regarding the composition;
- Creditors can request the court to appoint a creditors committee (*schuldeiserscommissie*). A creditors committee is allowed to advise the receiver and to inspect the records of the bankrupt company;
- Creditors can file a petition (*verzoekschrift*) with the delegated judge (*rechter-commissaris*) requesting him to order that the receiver has to perform a certain act or to omit an act.

#### Secured creditors ranking in the distribution of liquidation proceeds

- Holders of a right of pledge or a right of mortgage can execute their security rights as if there was no bankruptcy of the debtor. In principle these types of security creditors rank first. In case of bankruptcy, the receiver can request the holder of a right of mortgage or pledge to exercise its right of immediate execution, failing which within a reasonable period of time, the receiver shall be entitled to sell the encumbered asset by means of a public sale where after the receiver shall have the obligation to transfer the proceeds of the public sale to the secured creditor after deducting an amount equaling his liquidation costs;
- The retention of title can also be enforced in case of bankruptcy. The secured creditor is allowed to revendicate the delivered goods regardless of any other (secured) creditors;
- Holders of a personal security right are no more than ordinary creditors in case of bankruptcy of the debtor and/ or the third party securing the debts of the debtor. Their rights are subordinated to the rights of the receiver, the tax authorities and the Employee Insurance Agency (UWV).

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\*AKD and Deloitte are separate and independent from each other pursuant to the criteria of the US SEC.



# Poland

## 1. Types of security available to creditors

Established under the agreement between the debtor and the creditor or with participation of a third party (e.g., bank, guarantor):

- Mortgages;
- Pledges (including registered pledges);
- Surety agreement;
- Collateral transfer of ownership;
- Collateral assignment of receivables;
- Repurchase agreements;
- Ownership right reservation clauses;
- Guarantee deposit;
- Blocking of bank/ investment accounts;
- Escrow accounts;
- Bills of exchange/ promissory notes issued as a collateral;
- Bank/ insurance guarantees;
- Letters of credit;
- Declaration on submission to enforcement proceedings (allows to speed up the enforcement proceedings).

Arising by virtue of law (example):

- Pledge on the assets of the lessee located on the leased real estate;
- Right of a person, obliged to hand over a thing belonging to a third party, to retain the possession of such a thing until satisfaction or security of the claims of such a person for reimbursement of expenses and compensation for damages caused by such a thing.

The answers below refer only to the forms of securities most commonly used in Polish practice, i.e., mortgages, pledges, registered pledges and surety agreements.

## 2. Types of assets which may be subject to security

Mortgages:

All types of real estate, perpetual usufruct right, title to a cooperative flat, receivables secured by a mortgage.

Pledges:

Movables and transferable rights (except those that can be secured by mortgages and receivables over which a mortgage was established).

Security over ships benefit from special legal regime.

## 3. Type of obligations that may be secured

As a rule - all types of obligations (including future and conditional obligations).

In case of surety agreement, surety for future debt should be made up to a specific amount.

## 4. Validity requirements for security documents

Mortgages:

Notary deed or in writing if the mortgage is established as a security of receivables of the bank.

Pledges:

In case of movables - as a rule no special form is required; however agreement on establishment of a pledge is effective towards the creditors of the pledgor if it is executed in writing with a certified date. In case of pledge on right, the pledge is established in the same form as required for the transfer of such a right or in writing with a certified date if the transfer of such a right does not require a special form. If the establishment of pledge on receivable is not executed by handover of the document or endorsement, establishment of the pledge requires a written notification of the receivables debtor by the pledgor.

Registered pledges:

In writing otherwise null and void

Surety agreement:

Declaration of the guarantor – in writing otherwise null and void.

## 5. Publicity requirements

Mortgages: are established upon the entry in the mortgage register kept by the regional courts

Registered pledges: are established upon the entry in the register of pledges kept by the registry courts

6. Other perfection requirements

Pledges:

In the case of movables - possession of the subject of the pledge should be, unless otherwise provided by the law, transferred to the creditor (not required in case of registered pledge).

7. Costs of set up and publicity of security

Mortgages:

Notary fee – depending on the amount of the mortgage - maximum PLN 5,000.00, civil law transaction tax – 0.1 % of the amount of the secured receivable.

Registered pledge:

Court fee of PLN 200.00 for the entry in the register of registered pledges.

8. Timing for publicity/perfection requirements

Mortgages:

Approx. 3 – 16 weeks as of submitting of the application for registration of the mortgage (depending on the court).

Registered pledges:

Approx. 1 – 4 weeks as of submitting of the application for registration of the pledge (depending on the court).

9. What types of rights does a secured creditor acquire?

Mortgage:

To claim satisfaction from the real estate, regardless of who became the owner of the real estate and with priority over the personal creditors of the owner of the real estate.

Pledge:

To claim satisfaction from the movables, regardless of who became the owner of the movables and with priority over the personal creditors of the owner of the movables except those creditors who by virtue of law have specific priority.

Surety agreement:

To pursuit satisfaction of claims from the guarantor (who, unless otherwise provided in the agreement, is jointly and severally liable for the obligation of the debtor).

10. Governing law issues

Poland being part of the European Union, Rome I Regulation applies.

Otherwise, the following Polish private international law rules apply: ownership and other property rights are governed by law of the state in which the subject of such right is located. Acquisition and loss of ownership, as well as acquisition, loss and amendment of the scope or priority of other property rights are governed by the law of the state in which the subject of such rights was located at the moment of the occurrence of the fact which resulted in the above legal consequences.

11. Legal concerns/prohibitions related to granting/taking security

Financial assistance:

Certain requirements have to be met in order for a joint stock company to finance (and/ or set up security) acquisition of stocks in such a company (e.g., a relevant resolution of shareholders has to be adopted and the acquisition has to be made at arm's length conditions).

Corporate assets abuse:

Providing gratuitous security by a company can be in certain cases treated as action to the detriment of the company, which may expose the members of governing bodies of the company to risk of civil and/ or penal liability.

• Mitigation:

The securities should be structured in such a manner that the companies providing securities have a business justification to provide such securities.

Actio pauliana risk:

Creditor may request to deem any action of the debtor detrimental to the creditor ineffective towards the creditor, if the debtor acted with the awareness of detriment of creditors, and a party to the action also knew about the detriment or acting with due diligence could find out about the detriment.

• Mitigation:

Such action might only be successful in case of substantiation of the creditor's awareness that the set-up of such security would make the security provider insolvent or insolvent in a greater degree than before the security.

## 11. Legal concerns/ prohibitions related to granting/taking security

### Insolvency risks:

Legal actions (including concerning establishment of securities) executed by the bankrupt entity within one year prior to the date of submitting the application for declaration of bankruptcy are ineffective towards the bankruptcy estate if they were gratuitous or non-gratuitous; however the value of the performance of the bankrupt entity exceeds to a gross extent the value of the performance received or reserved for the bankrupt entity or a third party. Moreover, securities and payments for debt which was not yet due, granted or made by the bankrupt entity within two months prior to the date of submitting the application for declaration of bankruptcy are ineffective towards the bankruptcy estate, unless a person who received a payment or the security was not aware about the grounds for declaration of bankruptcy and claims effectiveness of such actions. The above restrictions do not apply to certain transactions regarding financial instruments.

Furthermore, non-gratuitous legal actions of the bankrupt entity made within six months prior to the date of submitting the application for declaration of bankruptcy with companies from the capital group of the bankrupt entity or with its shareholders are ineffective towards the bankruptcy estate.

Establishment of a mortgage, pledge or registered pledge over the assets of the bankrupt entity can be deemed ineffective towards the bankruptcy estate if the bankrupt entity was not a personal debtor of the secured creditor and the encumbrance was established within a year prior to the date of submitting the application for the declaration of bankruptcy, and the bankrupt entity did not receive any performance in connection with the establishment of the security or the security was set up in exchange for the performance of a value disproportionately low concerning the value of the security. Moreover, the above securities can be deemed ineffective regardless of the value of performance received by the bankrupt entity, in particular if the encumbrances secure the debt of companies from the capital group of the bankrupt entity or the shareholders of the bankrupt entity.

- Mitigation: in some cases independently determined market value of the performance of the bankrupt entity.

## 12. Enforcement

### **Court involvement required?**

Unless a declaration on submission to enforcement was signed by the debtor or an agreement on establishment of the registered pledge provided that the satisfaction of the creditor is executed by acquisition of ownership of the subject of the registered pledge or sale of the subject of the registered pledge, a court verdict is needed to start the enforcement proceedings.

### **Average timing**

The time needed for the court verdict is difficult to estimate. The enforcement proceedings last approx. 3-6 months.

### **Rights of challenge for the debtor/ third parties**

During the enforcement proceedings the debtor is entitled to raise claims against the enforcement in cases provided by the law. Third party is entitled to raise claims against the enforcement towards certain assets, in case such enforcement violates its rights. Upon submission of such claims, the court may suspend the enforcement proceedings.

### **Cases of cancellation/ reversal of enforcement**

The law provides for number of grounds for suspension or discontinuation of the enforcement proceedings. The enforcement proceedings are discontinued in particular in case the enforcement title (e.g., court verdict) which constitutes grounds for the enforcement was cancelled by the court.

## 13. Secured creditors' position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

Bankruptcy with the possibility of arrangement: Enforcement proceedings regarding receivables covered by bankruptcy arrangement by virtue of law initiated before the declaration of bankruptcy are suspended by virtue of law as of the day of declaration of bankruptcy. The money gathered during the suspended proceedings (not yet transferred to creditors) is transferred to the bankruptcy estate after the court decision on the declaration of bankruptcy becomes final and valid. Enforcement proceedings regarding receivables not covered by bankruptcy arrangement by virtue of law may be suspended, if the enforcement concerns assets indispensable for operations of the enterprise of the bankrupt entity.

### 13. Secured creditors' position in insolvency

**Bankruptcy with liquidation of the bankruptcy estate:** Enforcement proceedings concerning receivables subject to notification to the bankruptcy estate, initiated before the declaration of bankruptcy, are suspended by virtue of law and discontinued once the court decision on the declaration of bankruptcy becomes final and valid. The money gathered during the suspended proceedings (not yet transferred to creditors) is transferred to the bankruptcy estate after the court decision on the declaration of bankruptcy becomes final and valid. After the declaration of bankruptcy it is not allowed to initiate enforcement proceedings regarding money receivables against the bankruptcy estate.

#### **Secured creditors rights in influencing decisions in the creditors assembly**

##### Creditor's assembly:

Creditors have the right to vote on the creditor's assembly. Consent of the creditors' assembly is required for certain actions of the bankrupt entity.

##### Board of creditors:

Board of creditors has to be appointed in case creditors representing at least 20% of the total amount of probable or accepted receivables submit a relevant application to the bankruptcy court. Members of the board of creditors are appointed from the creditors of the bankrupt entity. Consent of the board of creditors is required for certain actions of the bankrupt entity.

##### Submitting bankruptcy arrangement proposal:

In case of liquidation bankruptcy, board of creditors is authorized to submit a proposal of bankruptcy arrangement.

##### Approval of the bankruptcy arrangement:

The bankruptcy arrangement has to be approved by the creditor's assembly. The arrangement is approved if the majority of creditors authorized to vote, having at least 2/3 of the total amount of receivables entitling to vote, vote in favor of the arrangement.

If the voting concerning the arrangement is made within groups of creditors covering each category of receivables, the arrangement is approved, if in each of the group, majority of the creditors, having at least 2/3 of the total amount of receivables covered by a separate list of creditors authorized to vote in a given group, vote in favor of the arrangement.

If the required majority in some groups of creditors is not obtained, the arrangement would be approved if the majority of creditors from other groups, having at least 2/3 of the total amount of receivables entitling to vote, granted consent for the arrangement and the creditors from the group(s) which opposed the approval of the arrangement are satisfied that the arrangement is no less favorable than if bankruptcy covered liquidation of the assets of the bankrupt entity.

#### **Secured creditors ranking in the distribution of liquidation proceeds**

**Bankruptcy with the possibility of arrangement:** The arrangement does not cover receivables secured with the mortgage, pledge or registered pledge established over the assets of the bankrupt entity in the part covered by the value of the subject of the security, unless the creditor granted consent that such receivables are covered by the arrangement.

**Bankruptcy with liquidation of the bankruptcy estate:** Unless otherwise provided by law, receivables secured by mortgage, pledge or registered pledge are satisfied from the money obtained from the liquidation of the subject of such securities, decreased by the liquidation costs concerning these subjects and other bankruptcy proceedings costs in the amount not exceeding 1/10 of the sum obtained from the liquidation, no more than the part of the bankruptcy costs resulting from the proportion of the value of the subject of the security towards the total value of the bankruptcy estate.

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# Romania

## 1. Types of security available to creditors

- Personal guarantees (including corporate guarantees);
- Autonomous guarantees: letters of guarantee and comfort letters;
- Mortgages: over real estate and non-real estate (movable) assets;
- Assimilated operations: assignments for security purposes, ownership right reservation clauses, repurchase agreements;
- Pledges: security over a movable corporeal asset or materialized negotiable instruments, physically delivered to the creditor for security purposes;
- Other rights providing for preference by law over certain assets:
  - Privileges: preferences granted by law to a creditor in consideration of the quality of a certain claim (such as: the seller's claim for the unpaid price of an asset, retention rights, others – as per the civil procedure code);
  - Legal mortgages over immovable assets:
    - The seller for the unpaid price;
    - The promissory buyer for the return of the amounts paid, in the case of non-observance by the promissory seller of the promissory agreement;
    - The lender in the case of amounts granted to finance the acquisition of an immovable asset;
    - Architects and contractors for payment of their fees, but limited to the increase in value;
    - Others – applicable in the case of co-ownership, inheritance, caretaking agreements, etc.;
    - Retention rights: any person who must return an asset to its owner may retain such asset until it receives reimbursement for the necessary and useful expenses relating to the asset or, as the case may be, indemnification for the prejudices caused by the asset.

The comments below apply to mortgages (over real estate and non-real estate assets) as the most common type of security used in practice.

## 2. Types of assets which may be subject to security

Mortgages may be established over all types of assets.

Extension of a mortgage: mortgages are extended by law as follows:

- A mortgage over a real estate asset:
  - Extends by law and without additional formalities over any constructions, improvements or other accessories of the mortgaged immovable asset;
  - Extends over the natural and industrial proceeds as well as lease proceeds of the assets as of the notation in the land registry of the start of enforcement or opening of the insolvency proceedings.
- For non – real estate assets, the mortgage extends to the proceeds of the mortgaged asset.

Security over ships and aircraft benefit from a special legal regime.

## 3. Type of obligations that may be secured

Conventional mortgages may secure obligations of any kind, including future obligations.

The mortgage secures with the same ranking the principal debt, interest, fees, penalties, enforcement and preservation costs.

## 4. Validity requirements for security documents

- The mortgage agreement must identify the person establishing the mortgage, the creditor, the cause of the secured obligation and must describe the asset that is subject to security;
- The secured obligation must be reasonably determinable on the basis of the mortgage agreement;
- Form of the agreement:
  - Mortgages over real estate assets must be signed in front of a notary public (authenticated form);
  - All other security documents: in writing;
  - Mortgage receivables: on the basis of the provisions of the New Civil Code, corroborated with the provisions of the real estate publicity law, in view of ensuring the transfer of the mortgage securing the mortgage claim to the acquirer of the claim upon enforcement, it appears to be recommendable that security interest over a mortgage claim is made by way of an authenticated agreement.
- Mortgages over financial instruments are established according to the rules of the market where such instruments are traded.

## 5. Publicity requirements

**Real estate mortgages:** registration with the land registry. Importantly, upon completion of the cadastral works for each administrative unit, registration with the land registry shall have constitutive effect for real estate mortgages. Currently, registration with the land book is made for enforceability towards third parties only. Order of registration determines ranking.

## 6. Publicity requirements

Non-real estate mortgages: registration with the Electronic Archive for Secured Transactions ("Electronic Archive"). Ranking is determined by the order of registration or of perfection. Importantly, in case of discrepancies between the contents of the Electronic Archive registration and of the security agreement, the content of the registration prevails towards third parties.

Special regime for mortgages over:

- Receivables secured with immovable mortgages: registration with the Electronic Archive and notation in the land registry;
- Lease receivables related to an immovable asset and insurance receivables related to the payment of such lease receivables: registration with the Electronic Archive and land registry;
- Bank accounts: registration with the Electronic Archive or having control over the bank account. Control over a bank account is acquired by:
  - o A creditor who is the bank where the account is open; or
  - o The debtor, the mortgage creditor and the bank where the account is open enter into an agreement whereby the bank, without having to seek prior consent from the debtor, undertakes to follow the instructions received from the creditor for disposing of the amounts in the accounts; or
  - o The mortgage creditor becomes owner or co-owner of the bank account.
- Financial instruments: according to the rules of the market where such instruments are traded.

Any contract whose effect is the preservation or establishment of a right over an asset in order to ensure fulfilment of an obligation must follow the publicity rules for mortgages in order to ensure enforceability towards third parties of such contracts.

## 7. Other perfection requirements

A non – real estate mortgage is perfected when, cumulatively, it produces full legal effects between the parties and publicity formalities prescribed by law have been fulfilled. Between the parties, the mortgage produces full legal effects when:

- The secured obligation comes into effect (e.g., in the case of a loan agreement, the funds have been fully or partially disbursed, giving rise to the borrower's obligation to repay those funds); and
- The mortgagor acquires the rights over the mortgaged assets.

A perfected mortgage is preferred over a non-perfected mortgage. In the case of bank accounts, the mortgage of a creditor who has control over the bank account is preferred over the mortgage of the creditor who does not have control over such account.

## 8. Costs of set up and publicity of security

Non-real estate mortgages: between approx. EUR 20 and EUR 80 per registration with the Electronic Archive; these are related neither to the value of the secured claim nor of the asset.

Real estate mortgages trigger two types of costs:

- Notary fees: approx. 0.07% of the value of the secured amount;
- Land registry fees: approx. 0.1% of the value of the secured amount plus certain fixed costs for issuance of authentication excerpts – between EUR 10 and EUR 50 per cadastral number.

## 9. Timing for publicity/perfection requirements

Procedures are swift:

- Electronic Archive registrations are made by authorized operators almost instantly upon filling in of the registration forms (containing detailed description of the assets subject to security, secured claim, creditors etc.) – in practice these are performed on the same day or on the business days immediately following the signing of the security documentation;
- Land registry registrations are carried out by the public notaries; registration is completed between 1 and [15] days as of the date the notary submits the registration request to the land registry.

## 9. What types of rights does a secured creditor acquire?

- To satisfy its claim before any other creditors that have a subsequent rank and before any unsecured creditors;
- The mortgage follows the asset – it is maintained irrespective of the disposals that have as subject matter the asset and the secured creditor may enforce against the asset irrespective of the ownership changes over the asset or the subsequent rights established or registered subsequently to its mortgage;
- The mortgage or its ranking may be assigned separately from the secured claim;
- Higher ranking creditors have priority in terms of exercise of enforcement rights and, in the case of enforcement started by a lower ranking creditor, the higher ranking creditor may continue the enforcement or start a new enforcement procedure as long as the asset has not been sold;
- In the case of a mortgage over receivables – the right of the secured creditor to directly collect the receivables from the third party debtor, even if the secured obligation is not yet outstanding.

## 10. Governing law issues

For Romania, being part of the European Union, Rome I Regulation applies.

Otherwise, the following Romanian private international law rules apply:

- Mortgages over assets are governed by the law of the place where the assets are located;
- The conditions for validity, publicity and effects of movable mortgages are subject to the law of the place where the asset is located at the time the movable mortgage agreement is concluded; in the case of dematerialized assets and in other exceptional circumstances, the law of the place where the debtor is located applies; for shares and bonds, the national law of the issuer applies except if traded – in which case the laws of the state where the market functions apply; for natural resources and claims resulting from trading thereof: the law of the place where the exploitation is located applies;
- Other specific rules for publicity requirements including preservation of ranking.

## 11. Legal concerns/prohibitions related to granting/taking security

**Financial assistance:** A company cannot lend money or set up a security for the purpose of a third party acquiring that company's shares.

**Mitigation:** Express applicability of such restrictions to joint stock companies. The wording of the law is not explicit in respect of its applicability to refinancing structures.

**Corporate assets abuse:** The use by the company's founder, administrator, director or legal representative in bad faith of the assets or credit worthiness of that company, for a purpose that is contrary to that company's interests, or for his/her own interest or for the purpose of favouring another company in which he/ she holds a direct or indirect interest is a criminal offence.

**Mitigation:** Good faith presumed under the law; bad faith and fraud must be proved. Cross collateral, co-borrower structures. The New Civil Code expressly clarifies that a person may grant security over its asset to secure debts of a third party.

**Nullity of the mortgage for lack of causa:** Under Romanian law, a contract lacking a valid causa (i.e., a valid reason of the mortgagor to establish the security) is null and void.

**Mitigation:** Cross collateral, co-borrower structures. The New Civil Code expressly clarifies that a person may grant security over its asset to secure debts of a third party.

**Actio pauliana risk:** The creditors of a person may exercise a legal action for the cancellation of any deed or act entered into by their debtor which is fraudulent towards them.

**Mitigation:** Such action may only be successful in the case of substantiation of the creditor's awareness that the set-up of such security would trigger a state of insolvency for the security provider.

**Insolvency risks:** The liquidator (or creditors committee, in certain cases) may request the cancellation of fraudulent acts entered into by the insolvent company three years prior to the opening of the insolvency procedure (including transactions at an undervalue, deeds concluded with the intention of all parties to damage creditors' rights, set up of security for unsecured claims, etc.).

**Mitigation:** Independently determined market value; other mitigating factors outlined under Nullity of the mortgage for lack of causa apply.

## 12. Enforcement

### Court involvement required?

For real estate mortgages, approval for initiation of enforcement is granted by the court (without judging on the substance of the matter, the court only verifies existence of a writ of execution). For non-real estate mortgages out-of-court enforcement is possible in certain cases; however, challenges (opposition to the enforcement) are tried in court.

### Average timing

**Real estate mortgages:** At minimum 2.5 to 3 months if there are no challenges and minimum terms established by law are observed; otherwise it may take significantly longer, depending on challenges filed.

**Non-real estate mortgages:** If out-of-court procedure is used and is unopposed, it may be completed within less than one month. If opposed, the New Civil Code provides for very short procedural terms (5 days for the court to judge the opposition and another 5 for filing an appeal against the decision, the appeal being subsequently tried with urgency); however, in our experience, due to the high workload of the courts, such terms are not observed in practice and the procedure takes significantly longer.

### Rights of challenge for the debtor/ third parties

Yes.

**Real estate mortgages:** Any interested party may file a challenge to the forced execution. Suspension of the enforcement actions may also be requested but it requires payment of a bail (a percentage of the value of asset subject to enforcement).

## 12. Enforcement

**Non-real estate mortgages:** Allowed by law to the debtor, personal guarantors and co-debtors, any creditor having security over such asset, any other person who notified to the creditor a right or a claim with respect to the asset, any other interested person or other person to whom the enforcement causes a damage.

Filing an opposition suspends by law the enforcement.

The same right to oppose (with the same effect – suspension of enforcement) is available to the lower ranking creditor if the creditor takes over the asset subject to security.

### Cases of cancellation/ reversal of enforcement

**Real estate mortgages:** Non-observance of the legal provisions for carrying out the enforcement procedure itself or for any enforcement act triggers cancellation of the unlawful act. In the event the writ of execution or the enforcement itself is cancelled, the interested party may request restoration to the original condition (*restitutio in integrum*).

**Non-real estate mortgages:** If the court establishes that the enforcement would have proceeded in a manner contrary to the provisions of the New Civil Code, the court will set the conditions and rules for disposing of the asset.

## 13. Secured creditors' position in insolvency

### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

As of the date of opening of the insolvency proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets, are suspended by law. The insolvency law provides for the possibility of a creditor whose enforcement actions have been suspended to ask the syndic judge to resume the foreclosure with respect to its receivables as well as immediate capitalization of the asset in the insolvency procedure.

The legal grounds for such request are: the lack of appropriate protection of the secured receivable in relation to the object of the security due to the decrease of the value of the object of the security or the existence of a real threat that it might suffer a significant decrease, or otherwise if the asset subject to security is not material for the success of a reorganization plan or is part of a functional ensemble and removal thereof does not diminish the value of the remaining assets or in case of lack of proper insurance against deterioration or loss of the asset.

### Secured creditors rights in influencing decisions in the creditors assembly

- Appointment of the judicial administrator: a creditor who holds at least 50% of the total value of the claims may decide, without consulting the assembly of creditors (or several creditors holding together at least 50% of the value of the claims, within the creditors' assembly), to appoint a judicial administrator or liquidator or may confirm the temporary judicial administrator or, as applicable, the temporary liquidator and establish his remuneration;
- Submitting a reorganization plan: a creditor who holds at least 20% of the total value of the receivables against the insolvent company is entitled to propose a reorganization plan;
- Possibility to influence the confirmation of a certain reorganization plan: voting on the reorganization plan is made based on categories of creditors and not based on the value of the claims. At least half plus one of the categories of claims should approve the plan and if there are categories less favoured, at least one such category must approve the plan. Within a certain category of claim the plan shall be approved by the absolute majority of the value of the claims within the respective category. In the case where there are only two categories of claims, the plan shall be considered accepted if the category of claims that have the bigger value accept the plan;
- Appointment as members of Creditors' Committee: the syndic-judge may appoint, depending on the number of creditors, a committee of 3 – 5 creditors chosen from among the secured, budgetary or unsecured creditors, by value. Also, during the first assembly of the creditors, a new creditors' committee may be set up on a volunteer basis, replacing the one appointed by the syndic judge.

### Secured creditors ranking in the distribution of liquidation proceeds

First, but after covering the liquidation-related costs and expenses (which, importantly, include liquidator's fees, preservation and administration costs for the insolvent debtor's assets, etc.)

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## 1. Types of security available to creditors

Russian legislation provides the following types of security:

- Penalty
  - o Certain amount of money that the debtor must pay to the creditor in case of non-performance or improper performance of obligations, in particular in case of delay in execution;
  - o Often forms a part of the main agreement.
- Pledge and mortgage
  - o Pledge of movable assets and mortgage of immovable property;
  - o The creditor has the right to obtain satisfaction from the value of the pledged/ mortgaged property prior to other creditors.
- Surety (guarantee)
  - o Surety provided by individuals and surety provided by legal entities;
  - o Guarantor is liable to the creditor for the execution of debtor's obligations in full or in part;
  - o May be used to ensure future obligations.
- Bank guarantee
  - o Bank, other credit institution or insurance company (the guarantor) gives, at the request of another person (the principal) a written undertaking to pay the principal's creditor (the beneficiary) a sum of money upon presentation by the beneficiary of a written demand for such payment.
- Retention rights
  - o In case the debtor does not fulfil his obligations under agreement the creditor has the right to hold the assets of debtor (that are temporally possessed by the creditor) until the debtor fulfils his obligations;
  - o Creditor's claim can be satisfied from the assets' value in the amount and manner provided for the satisfaction of claims secured by the pledge.
- Deposit
  - o Amount of money paid by one party to another as a part of the payment under the agreement;
  - o If the agreement is cancelled upon the agreement of the parties or the obligations under this agreement cannot be performed at all the deposit shall be returned;
  - o If the agreement is cancelled because of the party that provided the deposit the other party can hold the deposit;
  - o If the agreement is cancelled because of the party that received the deposit such party shall provide the other one double the amount of the deposit.

Those are the main features of different types of obligations' security.

UNLESS OTHERWISE SPECIFICALLY PRESCRIBED, THE COMMENTS BELOW APPLY MOSTLY TO PLEDGES (INCLUDING MORTGAGE) AS THE MOST COMMON TYPE OF SECURITY USED IN PRACTICE.

## 2. Types of assets which may be subject to security

Pledges (including mortgages) may be set over all types of assets, including things and property rights, except for the following:

- Property excluded from market circulation;
- Property rights linked to the personality of the creditor (e.g., alimony claims, compensation for harm to life or health, etc.);
- Minimum list of private property that cannot be taken away from the individuals (the only living premises the person has, professional equipment of the individual that he/ she needs for work, domestic utilities, etc.).

The same requirements are applicable for the retention rights' subjects. The subject of surety is the fulfilment of the principal's obligation by the guarantor in case the principal fails to perform it.

For such types of obligations' security as penalty, bank guarantee and deposit it is only the monetary funds that may be subject to security.

## 3. Type of obligations that may be secured

As a general rule, any type of obligation may be secured. Surety may be applied to the future obligations.

4. Validity requirements for security documents

Agreement on the following security types shall be made in writing, regardless the principal obligation:

- Penalty;
- Surety;
- Pledge;
- Bank guarantee;
- Deposit.

Failure to comply with the written form shall entail the invalidity of the security agreement.

Pledge agreement shall obligatory prescribe:

- Subject of pledge;
- Valuation of the subject of pledge;
- Main details of the secured obligation (subject, amount, terms of validity, all obligatory payments, etc.).

Special requirements for pledge of certain objects (e.g., financial instruments) may be specified by the law.

5. Publicity requirements

Real estate mortgages: Registration with the Federal Service on State Registration, Cadastre, and Cartography.

Pledge of shares: Shall be registered with tax registration service (for limited liability companies) or with depositary (for joint stock companies).

As a general rule, notarization of security agreements is not mandatory. However, there are some exceptions: for example, the pledge of shares of a limited liability company shall be performed in the notary presence. Also, should the main agreement be subject to notarization, the surety agreement shall also be concluded in notary presence.

- Main details of the secured obligation (subject, amount, terms of validity, all obligatory payments, etc.)

Special requirements for pledge of certain objects (e.g., financial instruments) may be specified by the law.

6. Costs of set up and publicity of security

State fee for registration of mortgage with the Federal Service on State Registration, Cadastre, and Cartography amount to:

- RUB 1,000 (approx. \$33) for individuals;
- RUB 4,000 (approx. \$133) for legal entities.

7. Timing for publicity/perfection requirements

Normative term for registration of the mortgage with the Federal Service on State Registration, Cadastre, and Cartography is 30 calendar days. This term may be prolonged should any additional documents and/ or information be required.

The term of state registration of mortgage with the Federal Service on State Registration, Cadastre, and Cartography is as follows:

- For land plots, buildings, non-residential premises – 15 business days from the date of receipt of the application and documents required for state registration;
- For residential premises – 5 business days;
- If the mortgage agreement is notarized – 5 business days.

8. What types of rights does a secured creditor acquire?

Penalty:

To receive certain amount of money in case the debtor breaches his obligations.

Pledge (mortgage):

To obtain satisfaction from the value of the pledged/ mortgaged property prior to other creditors.

Surety: To ask the guarantor to perform the part of obligations that have not been fulfilled by the debtor.

Bank guarantee:

To ask the bank (guarantor) to perform the debtor's obligations regardless of the fulfilment of the obligation by the debtor.

Deposit:

To hold the deposit or to receive double the amount of the deposit (depending on who provided the deposit).

Retention rights:

To hold the assets of debtor or to receive satisfaction from the assets' value.

## 9. Governing law issues

The law, applicable to the agreements regarding real estate objects, is the law of the country where such object is registered.  
Unless other governing law is prescribed by the parties in the agreement, the security agreement is regulated by the law of the country of pledger's domicile (those who provides the security).  
There can be special requirements for specific types of assets (shares, financial instruments, etc.).

## 10. Legal concerns/ prohibitions related to granting/taking security

### Corporate approvals (general)

- The law and/ or the charter of a legal entity may require the preliminary approval of major transactions, connected with alienation or possible alienation of assets of the entity;
- As a general rule, the major transaction is the transaction on alienation of more than 25% of all of company's assets and requires the approval of General meeting of shareholders/ Board of Directors;
- If the major transaction is not approved properly, it may be considered as void.

### Corporate approvals (shares as subject of security)

- The shares may be subject to security if it is not prohibited by the company's charter;
- If the charter of the company prescribes the approval of transfer of shares to the third party by the General meeting of shareholders the obligations' security transaction must be approved by the General meeting.

### Restrictions/ limitations for foreign entities and/ or individuals

- Russian law prescribes some restrictions/ limitations for the foreign companies/ individuals to have the ownership rights for certain types of property (e.g., agricultural land plots, strategic objects, objects of public services and supply systems, etc.);
- Such limitations shall be taken into consideration, especially when the pledge agreement prescribes such type of enforcement as obtaining ownership rights for the subject of pledge.

## 11. Enforcement

Enforcement may be performed in case of nonperformance or improper performance of the secured obligation by the debtor.

As a general rule the enforcement can be performed under the decision of the court. Out of court enforcement is allowed under the written agreement between the mortgagor and mortgagee (may be included in the mortgage agreement), unless otherwise provided by law.

As a general rule, the enforcement is performed only under the decision of the court in the following cases:

- Subject of mortgage is residential premises of the individual;
- Subject of pledge is property that has significant historical, artistic or other cultural value for society;
- Pledgor is an individual recognized as absent by the court;
- Pledged property is subject to the prior and subsequent pledges, which apply different types of enforcement;
- Pledged property is to secure various obligations of more than one pledgor.

### Movable property

If the enforcement of the pledged property is performed under the decision of the court, the sale of such property shall be made at public tender held in accordance with the laws of the Russian Federation on Enforcement.

If the enforcement of the pledge property is performed out of court, the sale of the subject of pledge may be done through the auction organized by the parties in accordance with their agreement.

If the pledge agreement concluded between legal entities and (or) individual entrepreneurs provides the out of court enforcement, the parties may indicate one or several ways of sale of the pledged property:

- Transfer of the ownership for the pledged property to the pledgee;
- Sale of the pledged property by the pledgee or a third person through the commission agreement.

### Real estate

If the enforcement of the pledged property is performed under the decision of the court, the sale of such property shall be made at public tender held in accordance with the laws of the Russian Federation on Enforcement.

If the enforcement of the pledge property is performed out of court, the sale of the subject of pledge may be done through the open auction.

## 12. Secured creditors' position in insolvency

Pledge creditors' position in the list of creditors in case of insolvency:

The requirements of the bankruptcy creditors for the obligations secured by pledge of the debtor's property, recorded in the register of creditors' claims, are satisfied at the third stage (turn). However, creditor secured by a pledge is entitled to obtain satisfaction from the value of the pledged property prior to all other creditors of the mortgagor. If the amount received from sale of the pledged property is insufficient to meet the requirements of the mortgagee, he shall be entitled (unless otherwise specified by law or contract) to receive the remaining amount of the debtor's other property without an advantage based on the pledge.

Depending on the stage of insolvency the following requirements are applied to the pledged assets:

- At the stage of monitoring, the enforcement over the mortgaged property (including out of court procedure) is not allowed;
- At the stage of financial recovery and external management, the enforcement is possible unless the debtor proves that such enforcement will make it impossible to restore his solvency;
- The possibility of enforcement over the mortgaged property of the debtor is decided by the court considering the bankruptcy case.

After the enforcement over the pledged property is performed:

- 70% of received amount goes to pay the creditor's claims under the obligation secured by the sold pledge object (but not more than the principal amount of debt secured by the pledge and respective interest);
- Remaining funds are transferred to a special debtor's bank account in the following order: 20% - to pay to creditors of first and second stages (turns) unless they have been already paid; remaining funds - to pay court costs, costs of the liquidator's remuneration and payment of persons involved in the arbitration administrator;
- If the enforcement is performed over the property pledged under the credit agreement the percentage is as follows: 80% to the pledgee, 15% to the creditors of 1<sup>st</sup> and 2<sup>nd</sup> turns and remaining funds - to court's and liquidator's costs.

Bankruptcy creditors whose claims are secured by the pledge are entitled to vote at creditors' meetings:

- At the monitoring stage;
- At the stage of financial recovery and external management in case the decision on enforcement over the pledged property was declined.

Bankruptcy creditors whose claims are secured by the pledge shall be entitled to participate in the creditors' meeting without voting rights, including the right to discuss the agenda of a meeting of creditors.

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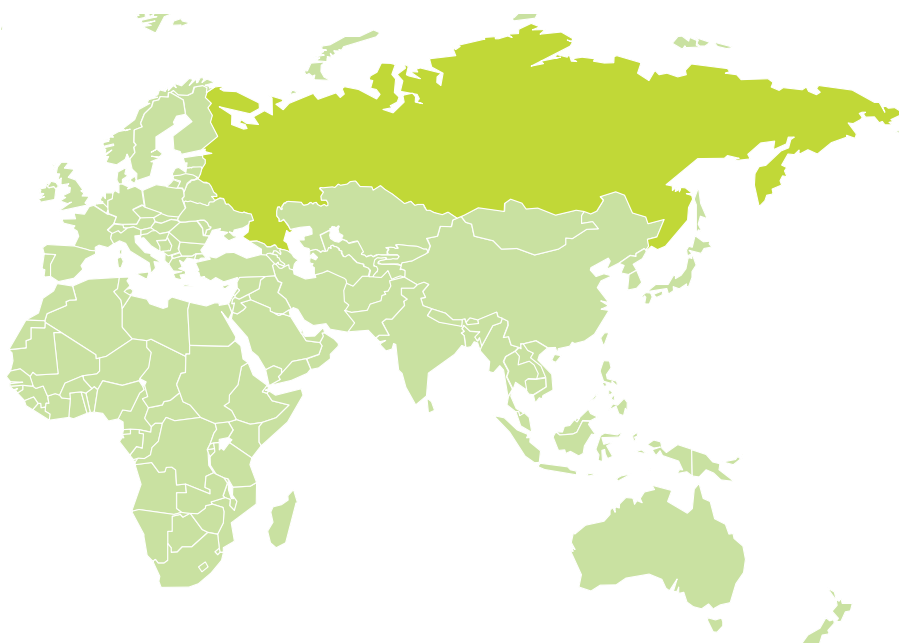
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## 1. Types of security available to creditors

- Mortgage: immovable assets;
- Contractual pledge: movable assets;
- Registered pledge: movable assets;
- Personal guarantees (including corporate guarantees);
- Letters of credit;
- Securities: whereas an issuer assumes a duty to fulfil the obligation inscribed in a security to its legal owner. Predominant form of a security used for securing transaction is promissory note;
- Other rights providing for preference by law over certain assets:
  - Retention right: A creditor who holds the debtor's asset based on retention right is entitled to settle its claim from the value of asset in the same way as the secured creditor, provided it notifies the debtor on intended settlement;
  - Right to repossess owned assets used by company subject to bankruptcy procedure.
- The comments below apply to mortgages and registered pledge as the most common means for transaction securing in practice.

## 2. Types of assets which may be subject to security

Mortgages may be established over immovable assets such as:

- Land, buildings, construction facility, etc.;
- Part of the immovable asset;
- Part of a building (apartment, garage, parking place, business premises and similar);
- Object under construction (existing or future provided valid construction permit is obtained).

Registered pledge may be established over movable assets and rights.

## 3. Type of obligations that may be secured

Mortgages and pledges may secure obligations of any kind, including future and conditional obligations, as well as obligations expressed in foreign currency. The mortgage secures with the same ranking the principal debt, interest, fees, penalties and collection costs.

## 4. Validity requirements for security documents

Mortgage Agreement must be concluded in written form with certified signatures of the contracting parties.

Mortgage Agreement has to contain following elements:

- Identify the creditor, owner of immovable property subject to mortgage and the debtor (if different);
- Contain clausula intabulandi, i.e., owner's unconditional consent for a creditor to inscribe the mortgage over Immovable property;
- Provide information on secured obligation including: terms, place, method and currency of payment, maturity date, interest rate, and similar;
- Provide information on the immovable property subject to mortgage including property title, decision on division (if any).

Mortgage Agreement must be registered with competent land registry i.e., Cadastre.

Pledge Agreement must be concluded in writing and registered with competent register. It has to contain: date of the agreement, name, seat/ residence of the pledger/ debtor, pledgee, information on the pledged object and details of claim secured by the pledge.

## 5. Publicity requirements

Mortgages:

Registration with the land registry i.e., Cadastre has constitutive effect. Order of registration determines ranking of creditors.

Registered Pledge:

Pledge is constituted as of the moment of the registration with the Pledge registry.

## 6. Other perfection requirements

Both mortgage and pledge are perfected and produce effect between the parties once formal and publicity requirements prescribed by law are fulfilled.

### 7. Costs of set up and publicity of security

For the registration of a mortgage with competent land registry, administrative tax and registration fee must be paid. Administrative tax amounts to RSD 680.00 (approx. EUR 6.00), whereas registration fee is composed of a fixed part of RSD 8,652.00 (approx. EUR 80.00), and variable part amounting to 0.2% of the value of secured transaction. However registration fee cannot be higher than RSD 144,200.00 (approx. EUR 1,400.00).

Registered pledges are registered with the Pledge register held by Serbian Business Registers Agency. Registration fee depends on the value of registered good and may amount to:

- RSD 1,000.00 (approx. EUR 10.00) for the goods with a value lower than EUR 6,000.00;
- RSD 3,000.00 (approx. EUR 30.00) for the goods with a value higher than EUR 6,000.00 and lower than EUR 100,000.00;
- RSD 6,000.00 (approx. EUR 60.00) for the goods with a value higher than EUR 100,000.00.

In respect of court certification of the signatures in the Pledge Agreement, additional certification fees may apply.

### 8. Timing for publicity/perfection requirements

Procedure for mortgage registration may take up to 6 months, depending on the internal procedures of the competent land registry. However priority arising from timing of submission of application applies.

Registration of a pledge involves a swift procedure. Following the submission of the request for the registration with Serbian Business Registers Agency, the Agency is under the legal obligation to decide within 5 working days.

### 9. What types of rights does a secured creditor acquire?

Procedure for mortgage registration may take up to 6 months, depending on the internal procedures of the competent land registry. However priority arising from timing of submission of application applies.

Registration of a pledge involves a swift procedure. Following the submission of the request for the registration with Serbian Business Registers Agency, the Agency is under the legal obligation to decide within 5 working days.

### 10. Governing law issues

In Serbia main regulations governing secured transactions include:

- The Law on Contracts and Torts ("Official Gazette of FRY", nos. 29/78, 39/85, 45/89, 57/89, "Official Gazette of FRY", no. 31/93 and " Official Gazette of Serbia and Montenegro", no. 1/2003);
- The Law on mortgages ("Official Gazette of RS" no.115/2005);
- The Law on enforcement and security ("Official Gazette of RS" nos.31/2011 and 99/2011);
- Law on pledge over registered movable assets ("Official Gazette of RS" no.57/2003);
- Law on promissory note ("Official Gazette of FRY" nos. 104/46, 16/65, 54/70 and 57/89 and "Official Gazette of FRY" no. 46/96);
- Law on insolvency ("Official Gazette of RS" nos. 104/2009, 99/2011 and 71/2012);
- Law on resolving conflicts with provisions of laws of other countries ("Official gazette of SFRJ", nos. 43/82 i 72/82 – changed in, "Official Gazette. SRJ", nos. 46/96 and "Official Gazette RS", nos. 46/2006);
- Other regulations and bylaws.

The Serbian provisions of the private international law apply as follows:

- The contracts regulating immovable assets are governed by the law of the place where the assets are located;
- The contracts regulating movable assets are subject to the law of the place where the asset is located at the time the relevant agreement is concluded.

11. Legal concerns/prohibitions related to granting/taking security

Financial assistance:

A company cannot provide financial assistance and especially lend money, set up security or warranty for the purpose of the acquisition of that company's shares by its employees, shareholders or a third party. Any legal transaction having for its object provision of financial assistance on behalf of a company for acquisition of its shares is considered null and void. Companies Law ("Official gazette of RS" nos. 36/2011 and 99/2011) applies this principle to both limited liability companies and to joint stock companies.

Disposal over high value property:

Granting a corporate guarantee, mortgage or pledge having for its object a company's asset representing at least 30% of the total value of company's assets is treated as a disposal of high value assets and the Law requires approval of such transaction by company's assembly. Inobservance of the procedure for the disposal with the assets of high value gives the right to the shareholders, holding at least a 5% stake in the company, to seek from the competent court the annulment of relevant act. Granting of any security may be further limited by explicit approval by company's assembly. Legally prescribed duty for management and shareholders to avoid transactions which represent the conflict of interest to the company. The directors and shareholders cannot for their own benefit or for the benefit of party connected to them use company's assets (e.g., as security for personal debt etc.).

Actio pauliana risk:

The creditors may exercise a legal action for the cancellation of any deed or act entered into by their debtor (i.e., including establishment of security in favour of third party) which causes damage to creditors, provided the occurrence of such damage was foreseeable by debtor and third party.

Insolvency risks:

The bankruptcy administrator or creditors may request the annulment of acts entered into by the insolvent company six or 12 months prior to the opening of the insolvency procedure if certain criteria relating to knowledge and bona fide are met.

12. Enforcement

**Court involvement required**

Parties may determine that the enforcement is subject to the court governed procedure - by auction or direct sale, or is executed as an out of court procedure governed by creditor(s) in line with the Law.

**Average timing**

Depends and varies on the agreed method of the enforcement, but also on the current market demand for the object of the mortgage/ pledge.

**Rights of challenge for the debtor/ third parties**

Yes: Depends on the agreed method of the enforcement.

Out-of-court procedure: Within 15 days from delivery of the decision on execution by a competent registry, the owner of the object of mortgage, debtor or creditor may appeal the decision of the register to the competent Ministry which must decide in following 15 days.

Court governed procedure: Decision on execution may be appealed within 5 days from its delivery to the debtor whereas competent court must decide within 5 days from the appeal. Third party claiming its interest regarding the object of execution may appeal the decision on execution by termination of the enforcement procedure.

**Case of cancellation/ Reversal of enforcement**

If Mortgage or Pledge Agreement are declared null, void or without effect, all legal consequences of such legal transaction shall be null, void or without effect.

13. Secured  
creditors'  
position in  
insolvency

**Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

As of the date of opening of the insolvency proceedings, any and all enforcement, legal or other proceedings for recovery of claims against the debtor or its assets are suspended by law. Moreover the court competent for the insolvency may suspend all ongoing enforcement proceedings. However, insolvency law provides for the possibility of a creditor whose enforcement actions have been suspended to ask the competent court to resume the foreclosure with respect to its receivables. The legal grounds for such request are: the lack of appropriate protection of the secured receivable in relation to the object of the security; the decrease of the value of the object of the security; or if the value of the claim is higher than total value of debtor's assets, whereas those assets are not crucial for the insolvency proceedings.

In case of insolvency, a pledgee may retain the object of pledge even if the maturity of a claim has not occurred.

**Secured creditor rights in influencing**

Appointment as members of Creditors' Committee: Secured creditors are not insolvency creditors but may acquire that status and participate in Creditors' Committee for the amount of their claim(s) which is not secured.

Submitting a reorganization plan: a creditor who holds at least 30% of the total value of the receivables against the insolvent company is entitled to propose a reorganization plan.

Possibility to influence the adoption of a reorganization plan: The plan is deemed to be adopted when approved by all classes of creditors, including secured creditors, by simple majority vote in each class.

**Decisions in the creditor assembly**

Secured creditors settle their claim from the value of secured assets before other creditors. If the value of assets is not sufficient, the remaining claims are settled from liquidation mass proportionately with other unsecured creditors and in line with the law.

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## 1. Types of security available to creditors

The most common types of security available to creditors are:

- Mortgages (lien over real estate);
- Lien over non-real estate (movable assets);
- Bank guarantee;
- Personal guarantees;
- Insurance against business risk with insurance company;
- Agreement on liquidated damages (not for securing monetary claims);
- Bill of exchange;
- Ownership right reservation clauses;
- Repurchase agreements;
- Leasing;
- Fiduciary transfer of ownership;
- Assignment for security purposes;
- New sui generis security similar to bill of exchange - "enforcement note":
  - o Non-transferable note issued by the debtor (not an individual) with elements required by law (indication of debtor, creditor, money liability, due date, place and date of the issue, legal basis for the liability, certified signature of the debtor);
  - o Two ways of repayment:
    - Repayment from all monetary funds of the debtor in banks and savings banks in one year from submission of the "enforcement note" to the first bank or savings bank;
    - Repayment through the enforcement procedure from assets of the debtor (including real estate, movable assets, receivables, shares);
      - "enforcement note" is an execution title and therefore the debtor has limited objections in the enforcement procedure.
  - o Strong instrument of security; however its true effectiveness will be shown in practice.

The subject of a lien can be things (real estate or assets), rights and securities, provided they can be disposed of and have a pecuniary value - our legislation recognizes: mortgage, lien on movable assets (possessory and non-possessory), lien on rights (on claims/ receivables, securities or other property rights).

## 2. Types of assets which may be subject to security

The subject of a lien can be things (real estate or assets), rights and securities, provided they can be disposed of and have a pecuniary value - our legislation recognizes: mortgage, lien on movable assets (possessory and non-possessory), lien on rights (on claims/ receivables, securities or other property rights).

## 3. Type of obligations that may be secured

Lien may secure obligations of any kind, including future or contingent obligations.

Lienor/ pledger may secure his own debt or a debt of a third person.

Lien secures (with the same ranking) the principal debt and derived lateral claims such as interest and costs (of recovery, procedural costs).

#### 4. Validity requirements for security documents

A lien may be established on the basis of a:

1. legal transaction;
2. court decision;
3. law.

1. Lien may be created by legal transaction as follows:

- The pledge agreement (a pledge agreement or a provision in a credit agreement, sales agreement) entails the obligation of a pledger to establish a lien on the agreed asset (subject of lien) in the benefit of the creditor:
  - o The pledger must have the right to dispose with the subject of lien;
  - o Pledge agreement regarding mortgage must be concluded in written form;
  - o No particular form is required for the conclusion of a pledge agreement regarding lien on movable assets;
  - o Pledge agreement can be concluded in a form of a executable notarial protocol/ signed in front of a notary public (authenticated form);
  - o To establish a lien on the basis of a legal transaction a disposition transaction (agreement on establishing the lien) is also required;
  - o To establish a mortgage a document containing a land registry permission is required - the land registry permission must identify the lien creditor, the lien debtor and the pledger (if the pledger is not a lien debtor), the cause of the secured obligation (agreement from which the claim arises), registry identification of the real estate – subject of the mortgage and the value and the maturity of the claim, the signature of the pledger on the land registry permission must be certified, the pledge agreement can be combined in a single private document with the land registry permission;
  - o To establish a directly executable mortgage the agreement on establishing the mortgage must be concluded in a form of a executable notarial protocol in which the pledger agrees to establish the insurance of a claim with the entry of a mortgage on his real estate (land registry permission) and that the mature/ past due receivables/ claims will be paid from purchase price by selling the mortgaged real estate and that the mortgaged real estate will be emptied and handed – over within a month after the sale, the pledge agreement and disposition transaction can be combined in single agreement in a form of a executable notarial protocol;
  - o To establish a possessory lien on movable assets, a pledger must hand-over the pledged asset into the property of the lienor/ pledgee (or into the property of a third person, if the pledgee is the only one who can demand the handing over of the pledged asset) – it is deemed that by that act the pledger and pledgee agree to establish the lien on the handed – over asset;
  - o To establish a non-possessory lien on movable assets, the agreement on establishing the lien must be concluded in a form of a executable notarial protocol, which must identify the lien creditor, the lien debtor and the pledger (if the pledger is not a lien debtor), the cause of the secured obligation (agreement from which the claim arises), describe the movable asset subject to security and contain prescribed unique identification of the asset, information about the value and the maturity of the claim and the consent of the pledger to establish the lien on the subject matter and to satisfy the pledgee's matured claim out of the asset subject to security;
  - o To establish lien on receivables the pledger must notify the debtor of the claim pledged - the lien is established when the debtor receives the notification (publicity requirement);
  - o Lien on bearer security is established on its delivery to the pledgee;
  - o Lien on securities, transferred by endorsement, is established with endorsement stating that the security is pledged and with the delivery of the security to the pledgee (publicity requirement);
  - o Lien on registered security is established, when the debtor of security receives notification that the security is pledged (publicity requirement);
  - o Lien on other property rights is established in a matter required for the transfer of the concerning right, if not otherwise specified.

2. Lien may be created by court decision (involuntary lien) as follows:

- Lien created on the basis of an executable title regarding creditor's claim (final court judgement, settlement, arbitration decision):
  - o Mortgage, possessory lien, lien on receivables – may be established with court decision issued in execution procedure (distress);
  - o Mortgage, possessory lien, lien on receivables – may be established with court decision issued in security procedure (distress).
- Lien created on the basis of a non-executable authority decision regarding the creditor's claim:
  - o Mortgage, possessory lien, lien on receivables – may be established with preliminary injunction – conditional lien, mortgage is established with a preliminary entry into land register securing the rank of the mortgage.

3. Legal lien

- Legal mortgage is established at the moment the legal conditions for it are met, entry into land registry has a declaratory and publicity effect - applicable in case of co-ownership, inheritance;
- Lien on movable assets is established at the moment the legal conditions for it are met – the Obligations Code applies legal lien on movable assets in favour of a contractor, carrier, mandate recipient, commission agent, agent (commercial agency contract), agent (shipping contract), controller (contract on control of goods and services).

Creditor's rank – order of full repayment (full principal debt, interest and costs) from pledged property is determined by the moment of establishment of the lien.

## 5. Publicity requirements

Publicity in a form of registration has a constitutive effect:

- Mortgage created on the grounds of legal transaction or court decision is established on its entry in the land register; the entry/ registration takes effect at the moment the land registry court receives the proposal for entry, order of registration determines the ranking, the proposal is filed through the electronic system;
- Non-possessory lien over movable assets to which unique identification of the property can be assigned (motor and rail vehicles, motorcycles and trailers, stock, equipment, bovine animals, equine animals) is established on its entry in the Register of liens on movable property; order of registration is determined at the moment the Agency (AJPES) receives the request for the entry.

Special regime for registration for lien over:

- Mortgages over vessels;
- mortgages over aircraft;
- Lien over un-certificated securities.

## 6. Costs of set up and publicity of security

Cost of registration of a mortgage:

- Court fee for the registration of the mortgage: EUR 50.00;
- Notary fee for proposal of entry of the mortgage in the land registry: EUR 37.00 if the value of the subject does not exceed EUR 137,700.00, otherwise EUR 92.00 (if the mortgage is concluded in form of a executable notarial protocol additional notary costs are incurred depending on the value of the subject).

Cost of a registration of a non – possessory lien:

- Fee for entry of information about new secured claim and information about the asset, pledger, creditor, debtor regarding the claim, if the proposal is given by a notary: EUR 41.73 (100 points – point per EUR 0.4173);
- Fee for entry of information about new secured claim and information about the asset, pledger, creditor, debtor regarding the claim, if the proposal is given by other authorised person: EUR 8.35 (20 points – point per EUR 0.4173);
- Fee for entry of information regarding the already entered claim, if the proposal is given by a notary: EUR 20.87 (50 points – point per EUR 0.4173);
- Fee for entry of information regarding the already entered claim, if the proposal is given by other authorised person: EUR 4.17 (10 points - point per EUR 0.4173);
- Notary fee for proposal of entry of the non-possessory lien into registry: EUR 37.00 if the value of the subject does not exceed EUR 137,700.00, otherwise EUR 92.00.

## 7. Timing for publicity/perfection requirements

Procedures are generally swift:

- Mortgages: land registry registrations are carried out by the notaries public or other authorised persons – in a few days if the proposal is completed;
- Non-possessory lien: registrations in AJPES are carried out by the notaries public, enforcement agent, court or other public authority – in a few days.

## 8. What types of rights does a secured creditor acquire?

- In the event of the non-payment of a secured claim upon maturity, a lienor has the right to receive payment of the claim together with interest and costs from the value of the pledged property ahead of all other creditors having a subsequent rank and before any unsecured creditors;
- If the lienor notifies his secured claim in the insolvency proceeding of the debtor-pledger in required time and his claim and separation right are recognized, the lienor has the right to receive payment of his claim from the value of the pledged property (presenting the separate bankruptcy estate) ahead of all other lienors of the concerning property having a subsequent rank and before any unsecured creditors.

## 9. Governing law issues

- Slovenia being part of the European Union, Rome I Regulation applies;
- Otherwise, the Slovenia legislation applies: Private International Law and Procedure Act.

## 10. Legal concerns/prohibitions related to granting/taking security

### Financial assistance:

A legal transaction by means of which a company (joint-stock company) secures an advance or a loan to a third person for the acquisition of shares shall be null and void.

### Corporate assets abuse:

The abuse of the position or of the trust placed in him, the activity beyond the limits of the rights inherent in his position or the failure to perform any of his duties regarding the disposal of another's property or benefits, its management or representation with a view to procure an unlawful property benefit for himself or for a third person or to cause damage to the property of another, while performing economic activity, is a criminal offence.

- Regarding security of transaction also the following criminal offences are relevant: "False Bankruptcy"; "Defrauding Creditors"; "Business Fraud"; "Fraud in Obtaining Loans or Benefits". Concerning lien also "Damaging the Rights of Other Persons" is relevant, as damaging a thing with intentional prevention of another person satisfying his claim upon a thing with alienation, destruction, damage or taking of his own thing to which that person has the right of mortgage or of usufruct, is a criminal offence;
- Regarding liability of the members of the company for the liabilities of the company, the institute of disregard of the legal person applies;
- Members of the management or supervisory body shall be jointly and severally liable to the company for damage arising as a consequence of a violation of their tasks, unless they demonstrate that they fulfilled their duties fairly and conscientiously.

### Nullity of the mortgage for lack of causa:

Under the Slovene law, a contract shall be null and void, if there is no basis or the basis is impermissible (valid causa). As lien is an accessory right, null or repealed agreement, from which the claim arises, causes invalidity of the lien.

### Actio pauliana risk:

Any creditor whose claim has fallen due for payment may, irrespective of when it arose, challenge a legal act by the debtor, if because of the act the debtor does not have sufficient assets to fulfill the creditor's claim.

- Lucrative disposal may be challenged if during disposal the debtor knew or should have known that creditors were hereby being damaged and if the third person with whom or for whose benefit the legal act was done knew or should have known of such; for challenging gratuitous disposal and equivalent legal acts no such requirements are needed;
- A challenging action against such lucrative disposal may be filed within a year from the day the challenged legal act was done or from the day it was necessary to do the omitted act; challenging action against other disposals may be filed within three years.

### Insolvency risks:

Creditor or in his name the liquidator may challenge transaction or other legal act of the debtor in bankruptcy done in the period starting last twelve months before the initiation of the procedure in bankruptcy and ending with the start of the bankruptcy procedure. The challenging action may be filed six months after the notice of the commencement of bankruptcy proceedings.

## 11. Enforcement

### Court involvement required

Yes, the lienor can be repaid only through judicial channels. He can request the repayment in the enforcement procedure with the sale of the pledged asset, namely, on the basis of a document which is an executable title – final court judgement, settlement, arbitration decision, etc. - in the case of directly executable mortgage and non-possessory lien the executable title is the notarial protocol.

Special features:

- In the case of lien of claims the lienor is eligible to recover the claims that are the subject of the lien by himself;
- In the case of possessory lien on movable assets an agreement on out-of-court sale is possible, whereas in some cases such agreement is presumed.

### Average timing

In the execution proceedings the court is obliged to act swiftly.

According to Joint Annual report of the Attorney General of the year 2008 there are important differences in the duration of the enforcement procedures (the District court in Ljubljana and the District Court in Domžale need the longest time to serve an objection/ appeal to the creditor and to decide on the objection/ appeal.) If the procedure is unopposed the enforcement order usually becomes final within two months from the filing of the proposal for the execution. According to the Protection of Right to Trial without Undue Delay Act the creditor can file a supervisory appeal. The length of procedures of the execution varies, however, in average considering the appeals we would say that the enforcement on real estate takes between one to two years.

### Rights of challenge for the debtor/ third parties

Mortgage: any interested party may file a challenge to the forced execution.

Lien over movable assets: allowed by law to the debtor, personal guarantors and co-debtors, any creditor having security over such asset, any other person who notified to the creditor a right or a claim with respect to the asset, any other interested person or other person to whom the enforcement causes a damage.

### Case of cancellation/ Reversal of enforcement

The cancellation of the enforcement is possible whenever the creditor proposes it. The creditor can withdraw a proposal in whole or partly without the debtor's consent during the procedure. After the withdrawal the creditor can submit a new proposal for enforcement.

Objection (opposition) and/ or appeal may be filed against the enforcement order, extraordinary remedies are limited: revision is not granted, reopening is granted under certain conditions. Objection against enforcement order may be filed by a third party, if the party proves presumptively that it has the right to prevent the enforcement on the subject of the execution.

- The enforcement agent is responsible for damages incurred in the performance of enforcement due to his act or omission of duty;
- In execution proceedings, re-establishment (restitution in integrum) shall only be allowed in the event of a failure to meet the deadline for lodging an appeal or plea.

## 12. Secured creditors' position in insolvency

### Rights to and conditions required in order to continue/ initiate security enforcement during insolvency

In principle, the execution and security procedures that were started before the beginning of the procedure due to insolvency are terminated with the start of the procedure due to insolvency. The start of the bankruptcy procedure has the following influence on the execution and security procedure started against the insolvent debtor before the start of the bankruptcy procedure:

- If in the execution or security procedure the creditor has not yet obtained the right to separate settlement, the execution or security procedure is stopped with the beginning of the bankruptcy procedure;
- If in the execution or security procedure the creditor has obtained the right to separate settlement, however the sale of the assets was not yet performed, the execution or security procedure is suspended with the beginning of the bankruptcy procedure; if the creditor has registered his claim and the right to separate settlement in the bankruptcy procedure in due time, the gained right to separate settlement in the execution or security procedure remains valid - the claim is repaid from the special bankruptcy estate which consists of the distressed property;
- If in the execution or security procedure the creditor has obtained the right to separate settlement and the sale of the assets was performed, the beginning of the bankruptcy procedure does not influence the course of execution and security procedure.

(Please see also Articles 131 and 132 in connection to Articles 280 and 281 of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act).

## 12. Secured creditors' position in insolvency

### Secured creditor rights in influencing

- Contest the claim of another creditor;
- Possibility to influence the confirmation of a certain reorganization plan: voting of the reorganization plan;
- Appointment as members of Creditors' Committee: The judge may appoint the creditor's committee between (min.) 3 and (max.) 11 creditors.

### Decisions in the creditor assembly

First, but after covering the liquidation related costs and expenses (which importantly, include liquidator's fees, preservation and administration costs for the asset, etc.).

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## 1. Types of security available to creditors

The security interests that may be granted in a transactional framework can be structured in two main categories:

In rem security interests (garantías reales)

- Real-estate mortgage;
- Chattel mortgage (over moveable assets);
- Ordinary Pledge;
- Non-dispossessory pledge;
- Financing guarantees: According to Special Act Royal Decree-Law 5/2005, these are only applicable when at least one of the counterparties is a financing entity and the other is also a financing entity or a legal person, and are only applicable to financial collateral arrangements and financial collateral, and the underlying obligation has to be a principal financing obligation. In this section there only two types of guarantees:
  - o Transfer of property as guarantee;
  - o Ordinary pledge of the aforesaid property with the particularities set forth in the said Special Act.
- Retention of title agreement (“pacto de reserva de dominio”): by which the creditor, in sale and purchases of moveable goods in which the payment of the price has been deferred, holds the naked ownership of the goods sold, transferring only their possession to the buyer until the price is totally and completely paid, at which time the naked ownership will also be transferred.

These securities may be granted by the owner of the burdened assets, regardless of whether they are real-estate assets or moveable goods (debtor and mortgagor/ pledger/ transferor) or by the owner but not debtor in the relevant transaction, assuming a third party’s debt (non-debtor and mortgagor/ pledger/ transferor).

In personam security interests (garantías personales)

These types of securities include all those in which a third party (linked or not to the debtor), duly fulfills the secured obligations in case of breach by the debtor. There is no numerus clausus list of in personam securities interests in Spanish law, but the most common are:

- Joint and Several guarantees, including corporate guarantees. At this point there are two main categories:
  - (i) Bond (fianza under the Spanish Civil Code): personal guarantee, ancillary to the main obligation, by means of a third party assuming the payment in case of non-payment by the debtor;
  - (ii) Guarantee upon first request: personal guarantee, independent from the main obligation, by means of a third party assuming the payment in case of non-payment by the debtor. In this case, the guarantee is not meant to secure a debtor, but the indemnity of the secured party.
- Earnest money.

## 2. Types of assets which may be subject to security

- Real-estate mortgage: All kinds of real-estate assets (unless special and extraordinary prohibition). Rights such as surface rights, usufruct rights and administrative concessions, among others, are deemed as real-estate assets, and can also be object of a real-estate mortgage;
- Chattel mortgage (over moveable assets): Only business establishments (on the understanding that only the business developed in it will be burdened), motor vehicles, airplanes, industrial machinery and intellectual and industrial property can be mortgaged by this type of mortgage according to Spanish regulations;
- Ordinary Pledge: All kinds of moveable assets in trade as long as they are susceptible of possession, and excluding those assets that are object of non-dispossessory pledge;
- Non-dispossessory pledge: Natural fruits from agricultural farms, as well as over the animals and machinery at the farms ; property of artistic value regardless of whether they are part of an artistic collection, credit rights (including future rights).

It is common business practice to grant the following pledges:

- Pledge over units or shares;
- Pledge over receivables (current or future);
- Pledge over bank accounts.

## 3. Type of obligations that may be secured

- According to Spanish regulations, obligations of all kind can be secured by means of the guarantees listed herein, current and future, and including those subject to precedent or subsequent condition;
- Guarantees granted to secure future obligations are allowed as long as the secured obligation is likely to be accurately determined at a later point in time (i.e., mortgage over credit bank accounts). Therefore, the main requirement for this kind of security interest is the absence of any doubt about the existence of the secured obligation, although certain particulars of the warranty coverage are not defined when the guarantee is granted.

#### 4. Validity requirements for security documents

Mortgage and pledge requirements:

General Requirements:

- Consent of the parties;
- Parties must comply with capacity requirements to grant the relevant guarantees;
- Clear identification of the main particulars of the obligation(s) secured;
- Legitimate cause (the cause of the agreement must not be prohibited by law or contrary to morals and public order and it must not be the same as the cause of the initial contract);
- Security granted by an individual: potential restrictions and limitations on securities derived from marital status;
- Security granted by a legal entity: authorization by the competent bodies, conformity with corporate interest, no infraction on specific restrictions (e.g., financial assistance rules, etc.).

Specific Requirements, according to the nature of the guarantee:

**MORTGAGE:** All types of mortgage securities (real-estate and chattel) have to be executed as a public deed before a Spanish notary, and additionally must be filed for registration with the Property Registry of the place where the property is located as explained in point 5. The lack of any of these two essential requirements will imply that the mortgage is not duly constituted.

**PLEDGE:**

Ordinary: Documentary certainty of the date in which the pledge was granted, which requires execution as a public deed for the transfer of possession before a Spanish notary or commercial agreement intervened by Spanish notary (*póliza mercantil*).

*Non-dispossessory:* public deed before a Spanish notary and duly registered as explained in point 5.

**PERSONAL GUARANTEES (INCLUDING CORPORATE GUARANTEES):** Private or public document indistinctively, without prejudice of the advantages against third parties of the latter.

#### 5. Publicity requirements

**MORTGAGES:**

- Real-estate: The mortgage agreement must be filed for registration with the Land Registry at the place where the property is located;
- Chattel: The mortgage agreement must be filed for registration with the Moveable Assets Registry, under or dependent of the Commercial and Land Registries. The criteria to determinate the competent Registry depend on the nature of the act that must be registered.

**PLEDGE:**

Only non-dispossessory: The mortgage agreement must be filed for registration with the Moveable Assets Registry.

#### 6. Other perfection requirements

There are no other perfection requirements regarding the mortgages and pledges other than the execution as public deed and its registration in the cases where this is required.

However, the financing guarantees granted under the Special Act Royal Decree-Law 5/2005 require the following formalities, taking into account the specificity of these guarantees: (i) the financing guarantee agreement must be executed in writing (there is no other requirement for its constitution, validity, enforceability against third parties or proof); (ii) valid transfer of the collateral (object of the guarantee) in writing.

#### 7. Costs of set up and publicity of security

- (i) Notary fees: Public notaries calculate their fees according to the rules established by the Royal Decree 1426/1989 of November 17. In the case of securities and guarantees, this Royal Decree states that notary fees have to be calculated according to the total secured liabilities. The fees applied by the notary will be a percentage of the secured liability (principal, ordinary and default interest and any related costs). In addition, if the secured liability exceeds 6,010,121.04 €, the applicable percentage will be agreed between the counterparties and the public notary.
- (ii) Registry and Tax fees: It is compulsory to enter some types of securities in public registries for effectiveness and perfection, such as the land registry ("Registro de la Propiedad") (e.g., real-estate mortgage) or the Chattel Registry ("Registro de Bienes Muebles") (e.g., pledge over inventory or mortgage over machinery); while such registration is not required for other guarantees (e.g., pledge of unlisted shares). Securities requiring entry in public registries are more costly, given that, in addition to notary and registry fees, stamp duty tax (Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados) has to also be paid.



7. Costs of set up and publicity of security

Registry fees would be approx. 0.02% of the secured liability; but this may significantly vary depending on the number of plots or real-estate properties that are mortgaged and whether these properties are located in different cities or places as well as on the number of competent public registries involved.

The stamp duty tax is around 0.5% to 1.5% of the secured liability, depending on the region ("*Comunidad Autónoma*") where the collateral is located.

(iii) Agent-servicer: In addition to these costs, it is common practice for mortgages to be filed with the competent Land Registries and related paperwork to be carried out by a specialized agent-servicer or handler's office ("*gestor*") that the lenders customarily appoint, although the borrowers also bear these costs. Although these costs also mainly depend on the number of mortgaged real-estate properties and Land Registries involved, they should not be significant and may average between 150 € and 200 € for each security to be filed.

8. Timing For Publicity/ Perfection Requirements

The registration of Real-Estate and Chattel Mortgages, as well as Non-possessory pledges, will take place within 4-8 weeks from the execution of the public deed. In fact, it is a matter of evaluation or qualification by the Land/ Chattel Register to consider whether the relevant document complies with all legal requirements to be registered. If he considers it has rectifiable or not-rectifiable defect, the registration would be suspended until the rectifiable defects are corrected. In any case, the term legally set forth for the evaluation is 15 days from the date of filing for registration, with out prejudice of the potential aforementioned issues.

Please note that the final qualification by the relevant Register has retroactive effects from the date of filing for registration.

9. What type of rights does a secured creditor acquire?

Depending on the type of guarantee, the secured creditor acquires the following rights:

- (i) In personam securities: the right to claim payment to the initial debtor, and, in case of non-fulfilment, to the third party in its capacity as guarantor, and under the conditions set forth in the relevant bilateral agreement. This structure implies the corresponding risk of insolvency of both payers, the principal and the subsidiary.
- (ii) In rem securities:
  - Registration implies that the guarantee can be opposed by any third party which may buy or register a new burden or encumbrance on the mortgaged/ pledge asset, warning of the existence of a prior creditor with special rights over the said asset. That is, the transfer of the asset object of an in rem right will not affect the creditor;
  - A better or higher ranking of the mortgages or pledges is directly linked to the prior date of the registration; Preference or priority over all other creditors of the debtor for the collection of his debt up to the value of the mortgaged/ pledged asset (this privileged position is especially valuable in case of insolvency of the debtor, according to Spanish Insolvency Act);
  - Right to enforce the relevant securities in case of non-fulfilment by the debtor, which implies the right to be reimbursed with the amount obtained in a public auction or subsidiary proceedings, as applicable.

10. Governing law issues

- In personam security interests are subject to *lex contractus*;
- In rem security interests are governed by the law of the jurisdiction where the collateral is duly registered (*lex rei sitae*). This is also important taking into account that in Spain there are certain regions with their own regional law, which might imply certain legal particularities. Notwithstanding the foregoing, special rules might apply in specific cases (i.e., pledge over shares or units, *lex societatis*);
- In case of conflicts of law, these will be solved pursuant to Rome I Regulation, establishing uniform rules for determining the law applicable to contractual obligations in the European Union (EU).

11. Legal concerns/ prohibitions related to granting/taking security

FINANCIAL ASSISTANCE

Limited liability companies:

With a few and punctual exceptions, they cannot accept any pledges or any other type of securities in their favor over their own shares, or over the shares of a company of the group to which it belongs. Likewise, the company is not allowed to anticipate funds, grant credits or loans, grant any kind of guarantee, or to grant financial assistance for the acquisition of their own shares, or over the shares of a company of the group to which it belongs.

11. Legal concerns/  
prohibitions  
related to  
granting/taking  
security

FINANCIAL ASSISTANCE

Limited companies: They are only allowed to accept any pledges or any other type of securities in their favor over their own shares, or over the shares of a company of the group to which it belongs with the limits and with the same requirements legally set forth for their acquisition, according to the Spanish Companies Act. Likewise, the company is not allowed to anticipate funds, grant credits or loans, grant any kind of guarantee, or to grant financial assistance for the acquisition of their own shares, or over the shares of a company of the group to which it belongs through a third party.

ACTIO PAULIANA RISK

Pursuant to section 1,111 of the Spanish Civil Code, the creditor "is allowed to challenge and rescind the acts or transactions carried out by the debtor in fraud of his rights". Pursuant to this, a previous creditor or another person (e.g., liquidator) may invoke the legal remedy of *actio pauliana* for the cancellation of any deed or act previously granted in favor of the relevant creditor.

Please bear in mind that the application of this remedy has been widely discussed, and it will only be applicable in case the creditor has no other legal recourse to be duly repaid (subsidiary application).

CLAWBACK IN THE EVENT OF INSOLVENCY

Once the insolvency proceedings are declared open, acts that are detrimental to the aggregate assets performed by the debtor within the two years prior to the date of declaration may be revoked, even though a fraudulent intention did not exist.

To this regard, the ruling admitting the appropriateness of the action shall declare the ineffectiveness of the act contested and shall condemn the parties to return the service or goods which were the object thereof, together with their fruits and interests.

12. Enforcement

**a. Court involvement required?**

Mortgage: Court involvement is not compulsory. The mortgagor is entitled to choose among two main alternatives: (i) out-of-court proceeding before a Spanish notary, by means of a public auction (although its admission has been discussed in the past, nowadays there is no doubt about its validity); (ii) among different court proceedings, according to the Spanish Civil Procedure Act.

Pledge: As in the foregoing case, court involvement is not compulsory. The pledger is entitled to choose among three alternatives: (i) out-of-court proceeding before a Spanish notary, by means of a public auction; (ii) ordinary enforcement court proceeding and (iii) special enforcement court proceeding (these two according to Spanish Civil Procedure Act).

In personam guarantees: once the guarantor has been requested for payment, and he has not complied with his total payment obligations, the creditor is entitled to request before the competent Court the fulfilment of the secured obligations.

**b. Average timing**

In neither situation is there a legally predefined deadline for carrying out the enforcement proceeding, neither in the event of mortgaged property nor in pledge or in personam guarantees.

The duration of the proceeding would depend firstly on the type of proceeding chosen, that is, for example, in the case of a mortgage it would depend on whether the chosen proceeding is a notarial or judicial auction.

It is probable that a notarial auction articulated in the mortgage constitution public deed is faster than a judicial auction. Judicial auction requires a series of formalities that can delay the proceeding.

**c. Rights of challenge to the debtor/ third parties**

**The debtor:**

In the case of the mortgagor, he has the right to cease the auction of the asset as long as he requests the competent judicial body to issue a decision decreeing the sale of the asset to be inappropriate owing to the existence of unfair terms.

The mortgagor may also plead that he is a vulnerable subject to avoid the eviction from the property allotted to the executant.

**Third parties:**

Third parties may challenge the enforcement proceeding in case of third party domain or third parties with superior rights.

## 12. Enforcement

### d. Cases of cancellation/ reversal of enforcement

The executed may oppose the enforcement, arguing:

#### Procedural matters:

- Absence of extrajudicial requirement, if necessary;
- The absenteeism of notification of the enforcement proceeding;
- Non-fulfilment of the legal requirements needed to initiate enforcement proceedings;
- The invalidity of the enforcement titles or default of the needed requirements.
- The expiration of the enforcement action.

#### Material issues:

- Payment or performance of the judgment (must be justified by document);
- The agreements and pacts carried out to avoid enforcement.

## 13. Secured Creditors' Position in Insolvency

- Rights to and conditions required in order to continue/ initiate security enforcement during insolvency  
The enforceability of previous favorable sentences, previous mortgage/ pledge enforcement procedures and the possibility of bringing new enforcement procedures are affected by the declaration of insolvency because after such declaration, creditors with security over assets used in the business activity of the debtor may not initiate or continue any enforcement proceedings, even in the case of a breach of the principal agreement. The suspension period extends from the declaration of insolvency until (i) the earlier of the approval of an agreement that does not affect the enforcement of such security and (ii) unless liquidation of the debtor has been initiated one year after the declaration of insolvency.
- Secured creditors rights in influencing decisions in the creditors assembly  
See point below.
- Secured creditors ranking in the distribution of liquidation proceedings  
Credits secured with mortgages and pledges are ranked between the insolvency claims ("*créditos concursales*") as special privileged credits (first rank category of insolvency claims) over the mortgaged/ pledged assets. Please bear in mind that once opened the insolvency procedure credits should be duly communicated by creditors to the insolvency procedure administration.

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# Switzerland

## 1. Types of security available to creditors

Contract to the charge of a third person (guarantees) according to the Swiss Code of Obligations (Art. 111 SCO).  
The right of lien (pledge). Security over a movable corporeal asset or materialized negotiable instruments, physically delivered to the creditor for security purposes required (in a few cases, registration in a special register) (Art. 888ss Swiss Civil Code, SCC).

Mortgages: Over real estate.

Assimilated operations: Assignments for security purposes, ownership right reservation clauses, repurchase agreements.

Other rights providing for preference by law over certain assets:

- Special protection granted by law to a creditor in consideration of the quality of a certain claim (such as: the seller's claim for the unpaid price of an asset, retention rights, others – as per the civil procedure code and the Debt Collection and Bankruptcy Code);
- The promissory buyer for the return of the amounts paid, in case of inobservance by the promissory seller of the promissory agreement;
- The lender in case of amounts granted to finance the acquisition of an immovable asset;
- Statutory lien (Art. 837 Swiss Civil Code) for vendor's claim to the sale price; the claims of co-heirs and other co-owners in undivided shares arising from the division of immovable property which belonged to the community; claims of tradesmen and building contractors who have supplied labour and material, or labour alone, for construction or other works on the property.

Retention rights: A creditor has the right to retain chattels and securities which have come into his possession with the debtor's consent until his claim has been satisfied, provided such claim is due and intrinsically connected with the retained objects. Between persons engaged in commerce, such intrinsic connection exists where both the claim and the retained objects relate to their commercial dealings (Art. 895 Swiss Civil Code, SCC).

The comments below apply to mortgages (over real estate and non-real estate assets) as the most common type of security used in practice.

## 2. Types of assets which may be subject to security

Mortgages may be set up only over real estate but not chattels (estate).

Extension of a mortgage: Mortgages are extended by law as follows:

- A mortgage over a real estate asset:
  - o Extends by law and without additional formalities over any constructions, improvements or other accessories of the mortgaged immovable asset;
  - o Extends over the natural and industrial proceeds as well as lease proceeds of the assets as of the notation in the land registry of the start of enforcement or opening of the insolvency proceedings.
- For non – real estate assets, the mortgage is not possible. The lien is not established as long as the pledgor retains exclusive possession of the chattel, what is normally the case (Art. 884 para. 3 SCC).

Security over ships and aircraft benefit from special legal regime. The registration of the security in a specific register is sufficient; to satisfy daily business, possession over the assets is not required (as well as for livestock, Art. 885 SCC).

## 3. Type of obligations that may be secured

If the debtor is in default, the creditor has the right to satisfy his claim out of the proceeds of the asset subject to security. The right of lien provide the creditor with securities for his claim including contractual interests, debt enforcement costs and default interests (Art. 891 SCC).

Not covered are however court fees, claim for compensation, reimbursement for expenses, conventional penalty etc.

## 4. Validity requirements for security documents

The mortgage agreement must identify the person establishing the mortgage, the creditor, the cause of the secured obligation and must describe the asset subject to security (Art. 884 SCC).

- The secured obligation must be reasonably determinable on the basis of the mortgage agreement;
- Form of the agreement:
  - o Mortgages over real estate assets must be signed in front of a notary public (authenticated form);
  - o Pledge for other assets: no legal requirements but normally in writing.
- Mortgages over financial instruments are established according to the rules of the market where such instruments are traded.

## 5. Publicity requirements

Real estate mortgages: Registration with the land registry. Importantly, upon completion of the cadastral works for each administrative unit, registration with the land registry shall have constitutive effect for real estate mortgaging.

An agreement to establish a lien on immovable property is valid only if executed as a public deed (Art. 799 SCC).

Agriculture Law: The Federal Law on Agriculture Land Rights applies to the mortgaging of agricultural properties (Art. 798 SCC).

Non-real estate mortgages: No registration (exception: planes, ships, cattle).

Importantly, in case of discrepancies between the contents of the registration and of the security agreement, the content of the registration prevails towards third parties.

Special regime for mortgages over:

- Lease receivables related to an immovable asset and insurance receivables related to the payment of such lease receivables: Public deed and registration in the land registry;
- Bank accounts: registration with the Electronic Archive or having control over the bank account.
- Control over a bank account is acquired by:
  - o A creditor who is the bank where the account is open; or
  - o The debtor, the mortgage creditor and the bank where the account is open enter into an agreement whereby the bank, without having to seek prior consent from the debtor, undertakes to follow the instructions received from the creditor for disposing of the amounts in the accounts; or
  - o The mortgage creditor becomes owner or co-owner of the bank account.
- Financial instruments: according to the rules of the market where such instruments are traded.

Any contract whose effect is the preservation or establishment of a right over an immovable property in order to ensure fulfilment of an obligation must follow the publicity rules for mortgages in order to ensure enforceability towards third parties of such contracts (Art. 799 SCC).

## 6. Other perfection requirements

A non – real estate mortgage is perfected when possession of the chattel has been transferred to the pledgee.

Any person who in good faith takes a chattel in pledge acquires a right of lien over it, provided that third parties do not have rights over such chattel as a result of prior possession, even if the pledgor had no authority to alienate it (Art. 884 SCC).

## 7. Costs of set up and publicity of security

The fees are cantonal fees (26 cantons). In some Cantons, the notary public is an official, in some other cases a notary public is a private notary firm. Therefore, the costs remain the responsibility of the Cantons and – if applicable – the private notary firm up to a certain amount (cantonal law establishes some formulas).

## 8. What types of rights does a secured creditor acquire?

If the debtor is in default, the creditor has the right to satisfy his claim out of the proceeds of the asset subject to security. The rights of lien provide the creditor with security for his claim, including contractual interest, debt enforcement costs and default interest (Art. 891 SCC).

## 9. What types of rights does a secured creditor acquire?

If the debtor is in default, the creditor has the right to satisfy his claim out of the proceeds of the asset subject to security. The rights of lien provide the creditor with security for his claim, including contractual interest, debt enforcement costs and default interest (Art. 891 SCC).

## 10. Governing law issues

Switzerland is a member the Rome I Regulation. Otherwise, the following Swiss private international law rules apply:

- Mortgages over assets are governed by the law of the place where the assets are located;
- The conditions for validity, publicity and effects of movable mortgages are subject to the law of the place where the asset is located at the time the movable mortgage agreement is concluded; in case of dematerialized assets and in other exceptional circumstances, the law of the place where the debtor is located applies; for shares and bonds, the national law of the issuer applies except if traded – in which case the laws of the state where the market functions applies; for natural resources and claims resulting from trading thereof: the law of the place where the exploitation is located applies;
- Other specific rules for publicity requirements including preservation of ranking.

## 11. Legal concerns/ prohibitions related to granting/taking security

The following acts can be voided if the company executed them within one year before the seizure of assets, the opening of bankruptcy proceedings or the granting of a debt restructuring moratorium and while it was already insolvent:

- Granting collateral for existing obligations which the company was not bound to secure;
- Settling a money debt other than by cash or other normal means of payment;
- Paying an unmatured debt.

However, the transaction is not voidable if the recipient proves that it was unaware of, and need not have been aware of, the company's insolvency.

- Furthermore, a creditor may exercise a legal action for the cancellation of any deed or act entered into by his debtor within the last 5 years after the declaration of insolvency if the beneficiary was aware of the fraudulent intention.

## 12. Enforcement

### **Court involvement required**

If provided for in the pledge agreement, movable property can be realised by private sale without formal debt enforcement proceedings or obtaining a prior enforceable judgment. If the debtor objects, the creditor must start legal proceedings against the creditor.

For real estate mortgages, the filing of an enforcement request with the competent debt enforcement authority and asking for issuance of a payment summons to the debtor is needed.

### **Average timing**

In case of a private sale of movable property, there are no deadlines to consider.

If a movable property needs to be sold with involvement of the debt enforcement authority, the request for a sale of the mortgage can be requested no earlier than 1 month after the summons for payment.

For real estate mortgages, the request for sale of a real estate mortgage could be requested no earlier than 6 months after the summons for payment.

### **Rights of challenge for the debtor/ third parties**

Any third party can challenge the sale of the movable property and/ or real estate alleging to have a better right (e.g., property) on the assets.

### **Case of cancellation/ Reversal of enforcement**

None

## 13. Secured creditor position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

There are 2 types of enforcement proceedings: the special execution and the general execution.

Special execution proceedings are generally directed against private individual debtors. A creditor can obtain the sale of the debtor's seizable assets to the extent necessary in order to cover the prosecuted claim. Creditors who participate in the special execution proceedings against the same debtor are satisfied in chronological order.

General execution proceedings are generally directed against companies. With the opening of bankruptcy proceedings by the competent judge, the debtor loses his authority to dispose of his assets and all business operations in general come to an immediate and final standstill. All known creditors jointly participate in the realization of the debtor's assets according to a hierarchy defined in the law. Creditors of an inferior class only participate in the distribution of the proceeds once creditors of a superior class or classes have been paid entirely. If the proceeds are not sufficient to satisfy all creditors in one class, the available amount will be distributed equally among them in proportion to the amount of their respective claims as a so-called dividend payment.

### **Secured creditor rights in influencing**

In the case of insolvency proceedings, each creditor is entitled to one vote irrespective of the value of the claims owned.

### **Decisions in the creditor assembly**

Creditors with secured claims are satisfied in a first place out of the proceeds from the realization of the respective collaterals. If several security interests exist in the same property, they are ranked in the chronological order of establishment, or in the case of immovable property, as indicated in the Register.

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# Thailand

## 1. Types of security available to creditors

Mortgage of immovable property and certain types of movable property (such as registered machinery and vessels)

- Only certain type of property can be mortgaged - i.e., immovable property and certain types of movable property as specified by laws, e.g., vessels, floating houses, registered machinery and equipment. Generally, machinery which can be mortgaged is those used and installed at factory site and have been registered with the Central Office for Machinery Registration according to the applicable laws;
- The lease right of the land for commercial or industrial purposes can be mortgaged if it is registered as per the Commercial and Industrial Lease of Immovable Property Act B.E. 2542.

Pledge of movable property

- The pledged property must be movable property or the right represented by a written instrument. Such pledged property or written instrument must be delivered into and kept in the possession and control of the pledgee or a third person (i.e., a security keeper) throughout the period of the pledge.

Corporate and personal guarantee

- A guarantee by an individual or juristic entity can be given for valid obligations;
- A future or conditional obligation may also be secured by a guarantee for the event in which it would have effect.

In case the security/ collateral in the form described above is not feasible, assignment/ conditional assignment of rights relative to a claim, such as a claim over account receivables, could also be used as an alternative and are generally enforceable.

## 2. Types of assets which may be subject to security

- **Animals, crops and timber** - Animals used as transportation such as elephant, horse and buffalo which have been registered with the competent authorities according to the applicable laws can be mortgaged. Other animals, crops and timber can be pledged only to the extent that the possession thereof can be passed to the pledgee or the pledgee's security keeper.
- **Equipment** - Certain types of machinery, equipment can be mortgaged after having been registered in accordance with the Registration of Machinery Act 1971 upon the issuance of a registration certificate. Machinery which can be mortgaged is the type of machinery which is immovable and installed at a factory site.
- **Intellectual property** cannot be mortgaged or pledged
- **Inventory** - The pledge may be effected if the possession of inventory is passed to/ controlled by the pledgee or the pledgee's security keeper.
- **Leases** cannot be mortgaged or pledged unless the lease right is of land for commercial or industrial purposes which can be mortgaged if it is registered as per the Commercial and Industrial Lease of Immovable Property Act B.E. 2542.
- **Promissory Note and Others** - Promissory notes, bill of exchange, cheque, instrument evidencing title of assets such as warehouse warrant, bill of lading are regarded as the right represented by written instruments which can be pledged.
- **Real Estate** can be mortgaged except real estate which does not have proper documents evidencing title or other real right attached to the property.
- **Receivables** cannot be mortgaged or pledged but can be assigned.
- **Rights under contracts** cannot be mortgaged or pledged. See lease right above.
- **Shares/ securities** in certificate form can be pledged, shares without written certificate (script less) can be pledged under/ according to certain conditions/ requirements as prescribed under applicable laws.
- **Vessels** - Vessels of five tons and over may be mortgaged. Vessels under five tons which could not be mortgaged may be pledged.
- **Vehicles** cannot be mortgaged but the vehicles' registration book can be pledged.
- **Business** as an on-going concern cannot be mortgaged.

### 3. Type of obligations that may be secured

- Mortgaged may secure principle debt, interest, compensation in the case of non-performance of the obligation, cost of enforcement of the mortgage;
- Pledge may secure interest, compensation in the case of non-performance of an obligation, cost of enforcement of pledge, expense for the preservation of the pledged property, compensation for injury caused by non-apparent defect of the pledged property.

### 4. Validity requirements for security documents

- A mortgage agreement must be made in writing and registered with the relevant government authorities (i.e., Land Office in the case of a mortgage of land, building and/ or condominium unit);
- The pledged property must be delivered into the possession and control of the pledgee throughout the period of the pledge. For the pledge of the right represent by a written instrument such as promissory note, bill of exchange etc., the instrument must be delivered to the pledgee and the pledge is notified in writing to the debtor of right or endorsed upon the instrument as the case may be;
- Corporate and personal guarantee must be made in writing and signed by the guarantor to be enforceable by legal action.

### 5. Publicity requirements

- Land mortgaged must be registered at the Land Office;
- Machinery mortgaged must be registered at the Central Office for Machinery Registration.

### 6. Other perfection requirements

- If the mortgage agreement is made in writing and registered with the government authority, otherwise it shall be void. The mortgage provides full force of effect when:
- the secured obligation comes into effect;
  - the mortgagor acquires the right over the mortgaged assets.

### 7. Costs of set up and publicity of security

- The land mortgage registration fee is 1% of the estimated price, maximum of Baht 200,000;
- Machinery mortgaged registration fee is 1 Baht of every 1,000 Baht of the mortgaged amount, maximum of Baht 100,000.

### 8. Timing for publicity/perfection requirements

- Land mortgage registration takes 1 day;
- Machinery mortgage registration takes 1 day.

### 9. What types of right does a secured creditor acquire?

The creditor who holds a mortgage or pledge shall have preferential rights to the secured asset.

### 10. Governing law issues

- Security over Thai assets is mandatory governed by the laws of Thailand. The laws applicable are:
- Civil and Commercial Code of Thailand;
  - Commercial and Industrial Lease of Immovable Property Act B.E. 2542.

## 11. Local concerns/ prohibition related to granting/ taking security

- No property can be mortgaged except by the owner;
- A limited company may not take its shares in pledge.

## 12. Enforcement

### **Court involvement required**

- Mortgage – The creditor must file a lawsuit to the court on the ground of mortgage enforcement. The court will grant the writ of execution for sale by auction of the mortgaged property;
- Pledge – If such pledged property is movable property without any registration, the enforcement can be done by the creditor itself. If the pledged property has registration documents - i.e., shares, machinery - the creditor should file a lawsuit to the court requesting for enforcement of the pledge.

### **Average timing**

The court procedures generally take more than 1 year.

### **Rights of challenge for the debtor/ third parties**

Mortgage:

- Any interested party may file an application to the court to challenge the execution against the mortgaged property. Payment of security is required;
- If a person is entitled to an enforceable mortgage, such person may file an application to the court requesting payment of the debt owed to him out of the said proceeds in preference to other creditor.

### **Case of cancellation/ Reversal of enforcement**

- The cessation is affected by the executing officer of his own accord or upon the court order as the case may be;
- The judgment creditor has notified the executing officer in writing that he renounces the right to execution;
- The judgment under which execution has been sought, has been finally reversed or the writ of execution has been finally set aside, upon service, by the court which has issued the writ of execution, of an order to that effect, provided that, if such judgment has been reversed only in part, execution may be continued until the proceeds collected are sufficient to satisfy the judgment creditor.

## 13. Secured creditor position in insolvency

### **Rights to and conditions required in order to continue/ initiate security enforcement during insolvency**

The secured creditor may set up a bankruptcy charge against the debtor only when:

- He is not a person prohibited from the enforcement for the settlement of debts from the debtor's asset in excess of that placed as a security;
- It is stated in the plaint that if the debtor becomes bankrupt, he is willing to waive the security for the benefit of all creditors.

### **Secured creditor rights in influencing**

- Creditor who may apply for repayment of debts and who have filed such claim prior to the date of meeting have the right to vote at a creditor's meeting.

### **Decisions in the creditor assembly**

- Consideration of the debtor's request for debt settlement or to proceed with the bankruptcy case;
- Consideration on the appointment of a planner;
- Consideration on rehabilitation plan;
- Consideration on revision of rehabilitation plan.

### 13. Secured creditor position in insolvency

#### Secured creditor ranking in the distribution of liquidation process

In distributing the assets amongst creditors, the expenses and debts shall be paid in the following order:

##### For individuals

- Expenses of administration of a deceased debtor's estate;
- Expenses of the receiver in managing the debtor's assets;
- Funeral expenses of a deceased debtor proper to his status;
- Fee for collecting the assets;
- Fee of the petitioning creditor and counsel's fee;
- Taxes;
- Other debts.

##### For legal entities

- Expenses of the receiver in managing the debtor's assets;
- Fee for collecting the assets;
- Fee of the petitioning creditor and counsel's fee;
- Taxes;
- Other debts.

Secured creditor's claim falls under "Other debts". Secured creditors have priority over others, unsecured creditors; the secured creditor naturally has right over the asset which is security afforded to him by his debtor prior to the order of receivership of such debtor's asset and need not file a claim for repayment of the debt. However, the secured creditor must allow the receiver to inspect such asset.

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# Ukraine

## 1. Types of security available to creditors

- Pledges over a movable corporeal assets or property rights;
- Mortgages: over real estate, construction in progress, property rights thereto;
- Guarantees issued by banks or other financial institutions;
- Suretyships;
- Retention rights: contractual right to retain property owned by the debtor until the creditor has been compensated for the ordinary and necessary expenses related to the property.
- Pledge/ mortgage by statute:
  - o Seller of goods – pledge/ mortgage over the goods being sold in instalments;
  - o Holder of cover bonds – pledge over the cover pool;
  - o The mortgagee of the building – mortgage over the underlying land plot.

The comments below apply to mortgages (over real estate and non-real estate assets) as the most common type of security used in practice.

## 2. Types of assets which may be subject to security

Mortgages may be established over the following assets:

- Real estate and property rights thereto;
- Construction in progress and property rights thereto;
- Right to lease real estate;
- Ships and aircrafts (the regime of real estate assets extends to these objects).

Mortgages are extended by law and without additional formalities over any constructions or other accessories of the mortgaged immovable asset unless otherwise provided by the mortgage agreement.

## 3. Type of obligations that may be secured

Conventional mortgages may secure obligations of any kind, including future obligations.

The mortgage secures the principal debt, interest, fees, penalties, enforcement, insurance, preservation costs and damages incurred due to violation of the underlying obligation – unless otherwise provided for by the mortgage agreement or specific law.

## 4. Validity requirements for security documents

Essential terms of a mortgage agreement. The mortgage agreement shall include:

- Details of a mortgagor and a mortgagee (name, legal address and ID code);
- Underlying (secured) obligation, its term and amount;
- Details of an asset subject to security;
- Reference to issuance or absence of mortgage note.

Failure to include one of the mentioned clauses into the mortgage agreement may render such agreement null and void based on respective court decision. The mortgage agreement and any amendments thereto shall be notarized.

## 5. Publicity requirements

Effective from 1 January 2013 all property rights (including ownership title) to real estate are subject to public registration in the State register of property rights to immovable property.

All transactions with real estate (disposal, use, mortgage, etc.) may be executed provided that the ownership rights or other property rights thereto are registered in the State register of property rights to immovable property.

Rights to immovable property and encumbrances which are subject to state registration in accordance with this law arise from the moment of such registration.

Registration is performed by a specialized state registration authority, public and private notaries by notification of the mortgagee (authorized person) or on the basis of court decision.

All changes of essential information regarding encumbrance are also subject to public registration.

Increase of the principal amount and/ or interest of the secured obligation is possible only after public registration of such changes (unless such changes are explicitly envisaged by the mortgage agreement). In this case the mortgagee may lose the priority.

## 6. Other perfection requirements

Mortgage produces full legal effect as of the moment of its state registration.

The mortgagor is obliged to insure mortgaged asset against occasional destruction, damages or deterioration unless this obligation is assigned to the mortgagee by the mortgage agreement. The insurance agreement is concluded to the benefit of the mortgagee.

Asset owned jointly may be mortgaged only upon prior consent of all co-owners. Such consent shall be done in written form and shall be duly notarized.

The mortgagor is obliged to notify mortgagee beforehand of all known to him rights and claims of the third parties to the mortgaged asset, including those which are not registered. In the case the mortgagor fails to comply with this requirement, the mortgagee is entitled to require early termination of the secured obligation and compensation of damages.

## 7. Costs of set up and publicity of security

Real estate mortgages trigger the following costs:

- Notary fees for notarization of mortgage agreement: 0.01% of the value attached to the mortgage by the mortgage agreement;
- Registration fees: approx. EUR 5.1 plus EUR 12 for issuance of authentication excerpts;
- Insurance costs – depends on cost of mortgaged asset, can be negotiated with the insurer (standard insurance premium is 0.3% of the asset cost).

## 8. Timing for publicity/perfection requirements

Procedures are swift:

- Public registration of the encumbrance is made on the day of filing the notification (in any case, no longer than 1 business day after filing the notification). In practice the registration of the mortgage has to be made simultaneously with notarization;
- Notarization is performed on the day of signing the security documentation.

## 9. What types of rights does a secured creditor acquire?

- To foreclose on the asset subject to security before any other creditors having a subsequent rank and before any unsecured creditors;
- The mortgage follows the asset – it is maintained irrespective of the disposals of the asset by the initial mortgagor. The secured creditor may foreclose on the asset irrespective of the changes in ownership over the asset;
- Higher ranking creditors have priority in terms of exercise of enforcement rights and, in case of enforcement started by a lower ranking creditor, the higher ranking creditor is entitled to cease it if such enforcement will lead to insufficient satisfaction of the higher ranking creditor claim;
- To examine the mortgaged asset upon prior written notification of the mortgagor.

## 10. Governing law issues

Ukraine is not a member of EU though it has proclaimed its strategic goal to obtain a full member status of the EU.

The following private international law rules apply in Ukraine:

- Mortgages over assets are governed by the law of the place where the assets are located;
- The conditions for validity, publicity and effects of mortgages are subject to the law of the place where the asset is located at the time the mortgage agreement is concluded;
- Ownership and other property titles which are subject to public registration are governed by the law of the state of registration.

## 11. Legal concerns/ prohibitions related to granting/taking security

### Prohibitions/ limitations regarding mortgaged assets

- State-owned or municipal assets may be mortgaged only upon consent of the respective (state or municipal) authorities;
- The following objects are prohibited from being mortgaged:
  - State-owned assets which are prohibited from being privatized;
  - Objects of cultural heritage;
  - Right to use state-owned or municipal land plots.
- Only banks can be mortgagees in respect of the agricultural land plots;
- The land plot can be mortgaged under condition of assignment of cadastral number to it;
- The mortgagor is prohibited from alienation of the secured asset without prior consent of the mortgagee.

Financial assistance: A bank cannot lend money for the purpose of the acquisition by a third party of that bank's shares.

Nullity of the mortgage as a fictitious transaction: Under Ukrainian law, a contract executed without intention to create real legal consequences arising out of such contract can be recognized null and void by the court. In practice, related parties enter into transactions to encumber an asset by the mortgage with a view to prevent a foreclosure on the asset by the third party creditors.

## 12. Enforcement

### **Court involvement required?**

- Foreclosure is based on a court decision, or a notary writ, or an agreement on satisfaction of mortgagee's claims;
- Foreclosure on the asset 50% or more owned by state (municipal) enterprise is performed only within the court procedure;
- Notary writ is not used extensively in practice as there is no procedure for the notary to assure that the claim is indisputable.

### **Average timing**

- Court procedure. In practice, due to weak and bureaucratic court system in Ukraine, it takes approx. 2-3 years from the date of filing a claim to the court to completion of enforcement;
- Since notary writs and agreements on satisfaction of mortgagee's claims are not used extensively in practice, it is difficult to estimate time frames for enforcement.

### **Rights of objection for the debtor/ third parties**

Any interested party may file an objection to the enforcement. Suspension of the enforcement actions may also be requested based on the grounds prescribed by the law (in case of enforcement within the court procedure).

### **Cases of cancellation/ reversal of enforcement**

- In the case the appellate or the higher court cancels the decision which has been already enforced it delivers a ruling on reversal of enforcement. The procedure is set forth by respective procedural codes of Ukraine.
- The court is entitled to resolve on adjournment of enforcement (except for the cases when the bankruptcy procedure is initiated against the mortgagor or the mortgagee, or such an adjournment will significantly affect the financial position of the mortgagee).

## 13. Secured creditors' position in insolvency

### **Rights to and conditions required in order to continue/initiate security enforcement during insolvency**

In the case of instigation of insolvency procedure against mortgagor or in case of its liquidation, the mortgagee acquires the right to foreclose on the mortgaged assets irrespective of the terms of secured obligation execution (unless mortgagee and the legal successor of the mortgagor agree otherwise).

### Special procedure for registration of the secured creditors' claims

According to general rule, after instigation of insolvency procedure the creditor shall file application to the commercial court with his claims to the debtor within 30 days from the date of publication of notification on bankruptcy procedure. Secured creditors are obliged to file the application to the court only regarding its unsecured claims or in case of refusal on the security.

Claims of secured creditors shall be recorded in the register of claims by the administrator of estate according to the applications of such creditors, and in the case of absence of applications – according to accounting data of the debtor. The administrator of estate shall also enter the information on the mortgaged asset into the register of claims based on the data extracted from the State register of property rights to immovable property.

### 13. Secured creditors' position in insolvency

#### Participation in the creditors' assembly

After approval of the register of claims by the commercial court, the administrator of estate convenes a creditors' assembly notifying each creditor of the date and place of the assembly. Schedule creditors have a number of votes in proportion to the amount of his claims. Secured creditors have the advisory capacity.

All the decisions are carried by the majority of voices.

The creditors' assembly elects the creditors' committee.

#### Right to convene creditors' assembly

Creditor who has at least 1/3 of the registered claims is entitled to initiate convocation of the creditors' assembly.

Sale of the debtor's assets is performed within the procedure of financial rehabilitation according to the plan approved by the creditors' committee.

#### **Secured creditors rights in influencing decisions in the creditors assembly**

The effective Ukrainian legislation does not envisage any special rights for the secured creditors in influencing decisions in the creditors' assembly.

#### **Secured creditors ranking in the distribution of liquidation proceeds**

Out of turn – secured creditors has the out of turn right of foreclosure at the expense of the mortgaged property. The first rank is established for reimbursement of liquidation related costs and expenses (which importantly, include costs related to court procedures, liquidator's fees, preservation and administration costs for the asset etc.)

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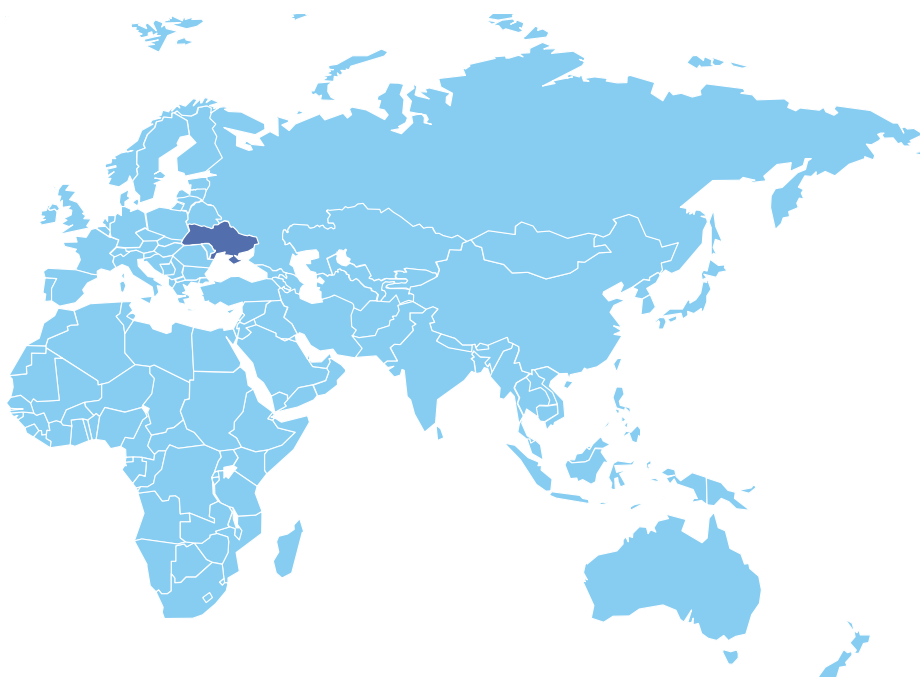
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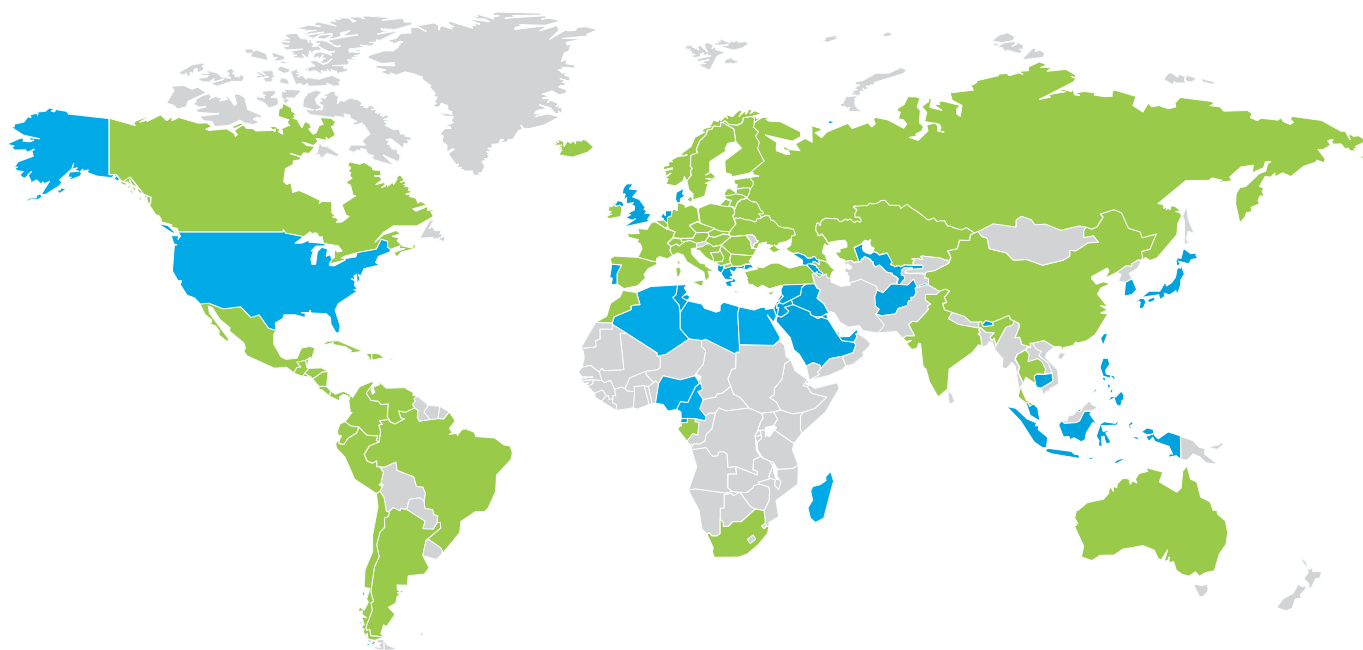
- Regulatory requirements
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