



Legal

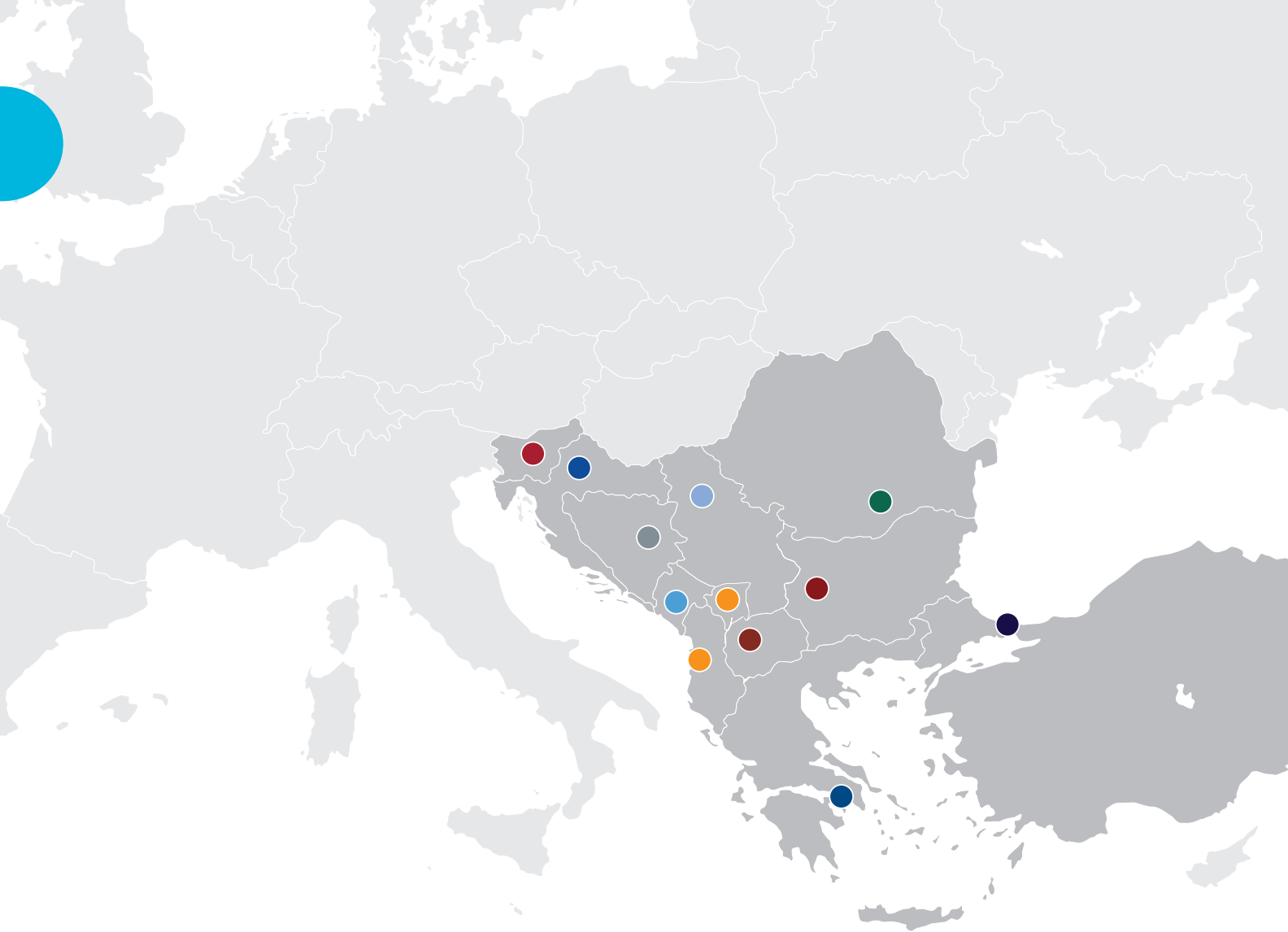
The **Southeast Europe**

Taking & Enforcing Security Handbook 2015

MONTENEGRO

CONTENTS

MEMBERS	4
PREFACE	6
GLOSSARY	8
ALBANIA	10
BOSNIA & HERZEGOVINA	20
BULGARIA	28
CROATIA	42
GREECE	48
KOSOVO	66
MONTENEGRO	74
REPUBLIC OF MACEDONIA	82
ROMANIA	96
SERBIA	110
SLOVENIA	120
TURKEY	134



“THE SOUTH EAST EUROPE LEGAL GROUP (SEE Legal) IS AN ORGANIZATION OF TEN LEADING NATIONAL LAW FIRMS FROM 12 SOUTH EAST EUROPEAN COUNTRIES AND IS THE LARGEST PROVIDER OF LEGAL SERVICES THROUGHOUT THE SEE REGION. OUR COMMITMENT REMAINS TO BE YOUR LEADING SOURCE FOR BUSINESS SUPPORT IN THE REGION.”

MEMBERS



Albania

KALO & ASSOCIATES

Kavaja Avenue
G-KAM Business Centre
4th Floor, Tirana, Albania
P.O. Box No. 235
T: +355 4 2233 532
info@kalo-attorneys.com
www.kalo-attorneys.com



Bosnia and Herzegovina

Maric & Co

Mehmeda Spahe 26
71000 Sarajevo
Bosnia and Herzegovina
T: +387 33 566 700
contact@mariclaw.com
www.mariclaw.com

MARIĆ & Co



Bulgaria

BOYANOV & Co. Attorneys at Law

82, Patriarch Evtimii Blvd.
Sofia 1463, Bulgaria
T: +359 2 8 055 055
mail@boyanov.com
www.boyanov.com

BOYANOV & Co. ATTORNEYS AT LAW



Croatia

Divjak, Topic & Bahtijarevic

EUROTOWER, 18th Floor
Ivana Lucica 2A
10000 Zagreb, Croatia
T: +385 1 5391 600
info@dtb.hr
www.dtb.hr



DIVJAK TOPIC BAHTIJAREVIC Law Firm



Greece

Kyriakides Georgopoulos Law Firm

28, Dimitriou Soutsou Str.
115 21 Athens
T: +30 210 817 1500
kg.law@kglawfirm.gr
www.kglawfirm.gr



KYRIAKIDES GEORGIOPOULOS
Law Firm



Kosovo

KALO & ASSOCIATES

Pejton, Mujo Ulqinaku 5/1 Str.
10000 Pristina, Kosovo
T: +381 38 609 181
pristina@kalo-attorneys.com
www.kalo-attorneys.com



Montenegro

BDK Advokati Attorneys at Law

51, Džordža Vašingtona Blvd.
81000 Podgorica, Montenegro
T: +382 20 230 396
office.cg@bdklegal.com
www.bdklegal.com



Advokati / Attorneys at Law
Belgrade • Podgorica • Banja Luka



Romania

Nestor Nestor Diculescu Kingston Petersen

Bucharest Business Park
1A Bucuresti-Ploiesti National Road
Entrance A, 4th Floor
1st District, Bucharest
013681 Romania
T: +40 31 225 3300
office@nndkp.ro
www.nndkp.ro



Nestor Nestor Diculescu Kingston Petersen
ATTORNEYS & COUNSELORS

Legal & Tax



Serbia

BDK Advokati Attorneys at Law

Majke Jevrosime 23
11000 Belgrade, Serbia
T: +381 11 3284 212
office@bdklegal.com
www.bdklegal.com



Advokati / Attorneys at Law
Belgrade • Podgorica • Banja Luka



Slovenia

Selih & Partners

Odvetniki Selih & Partnerji
Komenskega ulica 36
Ljubljana 1000, Slovenia
T: +386 1 300 76 50
selih@selih.si
www.selih.si

ODVETNIKI SELIH & PARTNERJI
Attorneys-at-Law



Turkey

Kolcuoğlu Demirkan Koçaklı

Sağlam Fikir Sokak
Kelebek Çıkmaşı No. 5
34394 Esentepe, Istanbul, Turkey
T: +90 212 355 99 00
info@kolcuoglu.av.tr
www.kolcuoglu.av.tr

KOLCUOĞLU DEMİRKAN KOÇAKLI

HUKUK BÜROSU • ATTORNEYS AT LAW



PREFACE

Dear Partners and Friends of SEE Legal,

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

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

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

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

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

Sincerely,

Alina Radu

Head of Banking and Finance Practice Group of SEE Legal



Borislav Boyanov

Co-Chair of SEE Legal



Disclaimer

This publication is intended to provide a general guide to taking and enforcing the most commonly used types of security interests in South East Europe. Each country section has been prepared by the relevant SEE Legal member firm covering the particular jurisdiction. This guide is not meant to be a treatise on any particular country's legislation that may be relevant to security taking and enforcing and is not exhaustive, but is meant to assist the reader in identifying the main issues that might be relevant to taking and enforcing security in the region and to provide helpful tips and guidance. Legal advice should always be sought before taking any action based on the information provided herein. The information contained herein is based on the respective legislation as of 31 August 2015. No part of this guide may be reproduced in any form without our prior written consent.



GLOSSARY

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

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

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

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

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

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

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

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

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

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

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

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



Advokati / Attorneys at Law
Belgrade • Podgorica • Banja Luka

ME

MONTENEGRO

1. SECURITY

.....

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

Corporate benefit

Under the general rules of the Companies Law¹ ("Companies Law"), the management of the company is obliged to act in the company's best interest, and may be liable to the company and its shareholders in case of breach of this duty. Breach of this duty when granting security does not trigger annulment of security.

1.2 Financial assistance

Under the Companies Law, joint-stock companies are prohibited from granting loans or providing security for acquisition of their shares. Prohibition of financial assistance does not apply to financial organizations or to subsidizing the acquisition of shares by employees of the issuer. The same prohibition applies to limited liability companies with the exception that the prohibition can be removed by a unanimous decision of the general assembly.

A company can take pledge on its own shares only if the amount of the secured claim does not exceed the amount of contribution paid for the pledged shares.

1.3 Types of security. Most often used type/s of security in practice

(a) Mortgage

Mortgage, i.e. pledge on immovable property, is regulated by the Law on Proprietary Legal Relations¹ ("Property Law"). A mortgage may be established over: (i) a building; (ii) a land; (iii) a separate part of a building, such as apartment, business premises, garage, etc.; and (iv) a construction permit. Mortgage can also be established on a co-ownership stake in the immovable.

Pledge on aircrafts or ships is regulated by the same rules as pledge on immovable, but shall not be further elaborated in this paper.

(b) Fiduciary transfer of ownership

Fiduciary transfer of ownership is regulated by the Property Law. Fiduciary transfer of ownership assumes transfer to the creditor of ownership on immovable assets or shares for the purpose of securing the creditor's claim. Upon settlement of the claim by the debtor, the creditor is obliged to restore ownership to the debtor and enable undisturbed exercise of ownership rights by the debtor. The encumbered asset remains in possession of the debtor unless otherwise agreed.

(c) Pledge on movables

Pledge on movables and rights, including book entry securities, is governed by the Law on Pledge as an Instrument for Securing Claims³ ("Pledge Law"). Pledge on book entry securities is additionally regulated by the Rules of the Montenegrin Central Depository Agency⁴. There are two types of pledge on movables in Montenegro: possessory pledge, perfected by actual or constructive delivery of the encumbered asset to the pledgee, and registered pledge, perfected by registration in the relevant public registry.

After the introduction of the registered pledge on movables into the Montenegrin legal system in 2002, the possessory pledge lost its commercial relevance. This type of pledge shall not be particularly addressed in this paper.

Registered pledge can be created on:

- movables;
- monetary and other receivables;
- shares;
- intellectual property rights.

It is also possible to create a floating charge on inventory.

(d) Financial Collateral

As of recently, financial collaterals⁵ are regulated by the Law on Financial Collaterals, which came into force on 16 August 2012 ("Financial Collateral Law").

¹ "Zakon o privrednim društvima", Official Gazette of Montenegro, Nos. 06/02, 17/07, 80/08, 40/10, 36/11 and 40/11

² "Zakon o svojinsko-pavnim odnosima", Official Gazette of Montenegro No. 19/09

³ "Zakon o zalozi kao sredstvu obezbjeđenja", Official Gazette of Montenegro, No. 38/02

⁴ "Pravila Centralne Depozitarne Agencije a.d. Podgorica", Official Gazette of Montenegro, No. 40/12

⁵ "Zakon o finansijskom obezbjeđenju", Official Gazette of Montenegro, No. 44/12

The Financial Collateral Law introduces into the Montenegrin legal system the possibility of granting and taking financial collaterals in accordance with the international market practice among financial institutions, such as the practice documented under the International Swaps and Derivatives Association credit support documentation (including both title transfer and security approach). MFinancial collateral assumes pledge or transfer of ownership on financial instruments, money deposits and account balances or credit claims for the purpose of securing financial obligations. This form of security is available to a restricted circle of users, which includes local and international public organizations and financial institutions.

Pledge on financial collateral other than credit claims entitles the secured party to hold and use the collateral as if it were the owner of the collateral.

1.4 Creation of security

Pledge is created based on a pledge agreement (or a court decision) as *iustus titulus*. Mortgage, i.e. pledge on immovables, may also be created based on a unilateral statement of the mortgagor. Mortgage agreement or, as the case may be, mortgagor's unilateral statement, has to be executed in the form of notarial deed prepared by a notary licensed at the location of the immovable. The same formal requirement applies to an agreement on fiduciary transfer of ownership over immovables. In line with the market practice, financial collateral can be created pursuant to an oral agreement, provided there is written evidence thereof.

1.5 Perfection and maintenance of security

(a) Mortgage, i.e. pledge on immovables

Mortgage, i.e. pledge on immovables, is perfected by registration in the Real Estate Registry maintained by the Real Property Directorate. Priority is determined based on the day, hour and minute of the filing of an application for inscription of mortgage. There are no further maintenance requirements.

An application for inscription of mortgage can be filed by either the mortgagor or the mortgagee, along with a notarized mortgage agreement or, as the case may be, a unilateral statement of the mortgagor. Documents in a foreign language have to be accompanied with a certified translation into Montenegrin.

Mortgage is deemed perfected when registered in the Real Estate Registry. Inscription can be made upon the finality of the resolution

allowing the inscription, after the expiry of eight days from delivery of such resolution to the mortgagor and the mortgagee, provided that no appeal has been submitted. The mortgagor and the mortgagee may waive their right to appeal the resolution, and thus shorten the abovementioned 8-day period.

(b) Fiduciary transfer of ownership

Fiduciary transfer of ownership on immovable assets is deemed perfected in the same manner as the mortgage (see above).

Fiduciary transfer of movables is also registered in the Real Estate Registry maintained by the Real Property Directorate. Fiduciary transfer of shares is perfected by inscription of the transfer in the Central Depository Agency.

(c) Pledge on movables

Pledge on movables, receivables and other claims, securities and intellectual property rights is perfected by filing of a pledge application with the Movables Pledge Register maintained by the Commercial Court in Podgorica. An application for registration of pledge can be filed by the pledgor or the pledgee with a power of attorney of the pledgor (a pledge agreement signed by the pledgor is deemed an authorization to the pledgee to file the pledge application).

In practice, the Movables Pledge Register may require additional documentation, not explicitly required by law, such as an excerpt from the Commercial Register for the pledgor or pledgee, etc. A pledge is valid for a period of three years and can be renewed by the pledgee filing a renewal request not later than within two years and nine months after the initial registration or, as the case may be, previous renewal.

A pledge on shares should be registered with the Central Depository Agency, in addition to the registration in the Movables Pledge Register. Such additional registration with the Central Depository Agency ensures priority over an earlier pledge that is registered solely in the Movables Pledge Register and ensures that pledge will continue to encumber the shares even after they are transferred to a third party. In addition to a pledge, one may register with the Central Depository Agency a blockade on pledged shares, which prevents the owner of pledged shares from trading with the shares.

A pledge on cash and instruments (such as bill of exchange or warehouse receipt) is perfected by physical delivery.

(d) Financial collateral

Perfection of security interest in financial collaterals depends on the type of collateral. Security interest in bookentry securities is perfected by registration with the Central Depository Agency. Security interest in money deposits or account balances is perfected by transfer to the account of the secured party. Security interest in credit claims is perfected at the moment of conclusion of the agreement on financial collateral.

1.6 Costs and expenses for creating, perfecting and maintaining security

The costs relating to registration depend on the type of encumbered asset. Apart from the registration fee, one has to take into account a notarisation fee, as well as the cost of translation of foreign language documents (EUR 10-13 per page).

The notarisation fee depends on the value of the agreement, but is capped at EUR 5,000. Notarisation of a unilateral mortgage statement is capped at EUR 1,000. The fee for registration of pledge or fiduciary transfer of immovables is EUR 65. The fee for registration and renewal of pledge on movables is capped at EUR 10 per pledged asset. The fee for registration of pledge or fiduciary transfer of book entry securities with the Central Depository Agency amounts to 0.05% of the higher of the nominal value and the market value of the relevant. The fee for registration of security interest in shares under the Financial Collateral Law amounts to 0.1% of the higher of the nominal value and the market value of the pledged securities.

1.7 Recognition of security governed by foreign law

Montenegrin law, other than the legislation on financial collateral, does not contain any special rules on the effect of foreign law governed security. Under the general conflict of law rules, the issue of whether a security interest has been validly created as a proprietary right would be, from the perspective of Montenegrin law, governed by *lex rei sitae*.

As regards the book entry securities or rights arising out of such securities granted as financial collaterals, the following matters are governed by the law of the country where the registry maintaining the account of such securities is located:

- (a) the legal nature and proprietary effects of book entry securities collateral;
- (b) the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book-entry securities collateral under such an arrangement;

- (c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred;
- (d) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

The general law on enforcement proceedings explicitly provides that mortgage agreement or, as the case may be, unilateral statement of mortgagor, represent a directly enforceable document. This means the mortgagee may proceed to directly enforce the mortgage in accordance with the law on enforcement proceedings. This enforcement route is pursued via private enforcement officers who have public authorities vested with them by law. Pledge on movables is enforced in accordance with the procedure under the Pledge Law, described in the section entitled "Private foreclosure".

(b) Enforcement grounds

Judicial enforcement of mortgage can be requested based on mortgage agreement or, as the case may be, unilateral statement of mortgagor, declared by the law on enforcement as directly enforceable instruments.

(c) Procedure

Enforcement proceedings are initiated by submission of a motion for enforcement along with mortgage agreement or, as the case may be, unilateral mortgage statement, to a certified public enforcement officer.

The public enforcement officer shall render a resolution granting a motion for enforcement within five days from the receipt of the motion. The debtor may challenge the resolution on enforcement within five days from the receipt thereof. The objection does not have a suspensive effect. The debtor may object to the resolution on enforcement on the following grounds:

- (i) the debt has been settled;
- (ii) the deadline for payment of the claim has yet not expired or the condition for payment stipulated in the agreement has not yet occurred; or

- (iii) the resolution granting the motion for enforcement has been rendered by an incompetent public enforcement officer. The decision of the court on the filed objection may be challenged in the second instance.

The creditor may respond to the objection within three days from the receipt thereof. The decision of the court on the objection may be appealed within five days from the receipt thereof. However, the appeal does not suspend enforcement. Upon obtaining a writ of execution, the pledgor proceeds with enforcement via a public enforcement officer. The enforcement officer will determine the value of the immovable, as market price adequately reduced in case there are surviving third party rights on the property. The asset will be then liquidated on a public auction or in direct sale, as determined by the enforcement officer. There are no rules on the price if the enforcement officer opts for direct sale.

If the enforcement officer decides to proceed with an auction, the pledgor and the pledgee may at any time during the sale agree to sell the pledged asset via direct sale. The initial price at the first auction cannot be less than the assessed value of the asset. If the first auction fails, the initial price at the second auction may not be less than 50% of the assessed value of the asset. In case the second auction fails, the pledgee may authorize the enforcement officer to sell the asset at any price on the third auction.

2.2 Private foreclosure

(a) Enforcement grounds

Enforcement can be initiated without any public enforcement officers' actions, solely based on the grounds defined as enforcement events in the pledge agreement.

(b) Procedure

Mortgage

Private enforcement starts with the pledgee filing a warning notice to the debtor (and the pledgor, if this is not the same person) informing him/them of its intention to initiate enforcement procedure if the secured obligation is not fulfilled within 15 days (or a longer period determined by the pledgee) from the registration of commencement of enforcement with the Real Estate Registry. The pledgor is not allowed to dispose of the property following the receipt of this notice without the pledgee's consent. The notice of the pledgee's intention to commence enforcement procedure has to be delivered to junior pledgees as well. The notice must contain the following elements: data on the underlying obligation secured

by the pledge, data on the pledgor and the pledgee, a statement that the debt is due, description of the pledged property, manner of enforcement and additional deadline for payment of the debt which cannot be shorter than 15 days from the registration of commencement of the enforcement. If the debtor does not pay its debt within the deadline determined by the pledgee, the pledgee may proceed with the sale of the mortgaged property.

Private sale is initiated by sending a notice of sale to the debtor (and the pledgor, if this is not the same person) informing him on the commencement of the sale. This notice has to be delivered to junior mortgagees as well. The notice has to contain the following: time and place of the sale, amount of the outstanding claim, description of the property, conditions of sale, assessment of the costs pertaining to the sale and contact information of the person conducting the sale. This notice has to be published once a week, during two consecutive weeks (whereby the first publication may not be later than 15 days before the designated sale date), in two daily newspapers in Montenegro as well as placed on the property itself.

The pledgee is entitled to sell the mortgaged property after the expiry of 30 days following the day of registration of the notice on the commencement of the sale in the Real Estate Registry. The sale is performed at an auction. The law provides that the pledgee may participate in the auction and offer as purchase price the amount of the secured obligation. The rules regulating public auction in judicial enforcement, i.e. enforcement pursued via enforcement officers, apply *mutatis mutandis* to the public auction in private enforcement procedure. Pledgee may authorize an enforcement officer, lawyer or real estate agent to perform the sale.

A good faith purchaser of the pledged property acquires the property encumbered with senior pledges but all junior pledges get deleted from the register. The provisions regulating sale in enforcement proceedings conducted by enforcement officers (see Section 2.1 on Judicial enforcement) find subsidiary application in out-of-court foreclosure process.

The pledgor may file a lawsuit within 15 days from the date of receipt of the notice on the commencement of the sale in order to challenge private foreclosure. According to the law, the challenge does not suspend enforcement unless the pledgor provides evidence that the secured obligation has been fulfilled or is not yet due, the pledge was not validly created or there is a breach of the rules applicable to private enforcement. It is unclear,

however, what is deemed as adequate evidence and at which point the court assesses evidence to determine that what is submitted is indeed evidence capable of suspending enforcement until final decision on the challenge is reached.

Fiduciary transfer of ownership

If the debtor does not settle its obligation when due, the transferee is authorized to sell the asset at auction or retain it at a price determined by an official appraiser. The public auction may take place not earlier than eight days after the notice on the intended sale is received by the debtor (or the transferor, if not the same person). The debtor and/or the transferor have to be notified at the time and the place of the sale. If the asset has a market or stock exchange price, the transferee may sell it at that price subject to the 8 day notice to the debtor and/or the third party transferor. If the debtor satisfies the creditor's claim before the asset transferred as a security is sold, ownership rights are automatically restored to the transferor. The creditor is entitled, subject to the debtor's approval, to sell the transferred asset before the claim is due and payable if there is a good offer. The proceeds of sale have to be deposited with court or public notary until the claim becomes due.

Pledge over movables assets

In case of breach of the secured obligation, the pledgee may request possession of the pledged asset and if the pledgor does not comply, the pledgee is authorized to initiate enforcement procedure via an enforcement officer for taking over the possession by filing a motion for enforcement based on the pledge agreement as directly enforceable instrument. The pledgor does not have the right to challenge the motion for enforcement. If the creditor is forced to file a motion for enforcement to seek possession of the pledged asset, a hearing shall be scheduled to resolve the following two issues: (i) whether the pledge has been perfected and (ii) whether the debtor is in default. Both grounds are presumed to exist but the pledgor may prove otherwise. A resolution on the motion for enforcement has to be rendered within three days from the filing of the motion. If the motion is granted, the enforcement officer takes possession of the pledged property and delivers it to the pledgee. The resolution granting enforcement can be appealed by the pledgor but the appeal does not have a suspensive effect. After taking possession of the assets, the pledgee may dispose of the asset at a public auction or in direct negotiations, subject to a notice to the debtor (and the pledgee, if not the same person) of the manner, the time and the place of the sale. The pledgee is not

entitled to request sale via an enforcement officer. The pledgee is entitled to purchase the pledged assets at the public auction. If the sale is organised as direct sale, the pledgee may purchase the pledged asset only if the asset has a market or stock exchange price. The pledgee may retain the pledged assets against its claim only with the pledgor's written consent or if the pledgor fails to object to the proposal of the pledgee for retention within eight days from the receipt thereof.

Pledge on receivables

Pledge on receivables is enforced by the pledgee giving notice to the pledgor's debtor to make payments directly to the pledgee.

Financial collaterals

In case of default, the collateral taker under a pledge arrangement is authorized to sell, retain or net the collateral. Retention of a financial instrument or set off of collateral taker's claim against the value of the credit claim given as collateral is permitted only if the pledge agreement provides for such retention/set off, as well as for the evaluation of the collateral.

(c) Ranking of claims

The proceeds obtained in private enforcement are distributed as follows:

- (i) cost of enforcement, including costs and fees of third parties;
 - (ii) secured claims;
 - (iii) secured claims of junior secured creditors (if any);
 - (iv) any surplus belongs to the owner of the asset.
- (d) Costs

The costs of private foreclosure will depend on various factors (manner of sale, number of external advisers engaged, etc.) and cannot be assessed in a general manner.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

Insolvency proceedings in Montenegro may be conducted against legal entities (with several exceptions relating to public bodies and organizations). Insolvency proceedings are initiated by a petition for the opening of insolvency proceedings. Thereafter, preliminary insolvency proceedings take place to determine the existence of one of the statutory grounds for the opening of insolvency proceedings. Upon the opening of insolvency proceedings, the procedure develops as bankruptcy, which assumes sale of assets or sale of debtor as legal entity free of debts, or as reorganization, which assumes re-definition of the debtor's obligations based on a reorganization plan.

(b) Status of the secured creditors in the initial stages of the bankruptcy proceedings

By the decision on the opening of preliminary insolvency proceedings, the insolvency judge may impose provisional measures at the request of the insolvency petitioner or ex officio, to prevent dissipation of insolvent's assets and/or destruction of business documentation, if there is a risk that the insolvent would transfer its property and/or destroy its business documentation before the opening of formal bankruptcy proceeding. Among others measures, the insolvency judge may prohibit or temporarily postpone enforcement against the debtor's property, including exercise of secured creditors' rights. The court may appoint a provisional insolvency administrator. Appeal on decision on the provisional measures will not postpone execution of measures order therein. The insolvency judge may at any time during the preliminary insolvency procedure revoke the imposed measures. A secured creditor may request for any provisional measure to be suspended if:

- the insolvency debtor or insolvency administrator has failed to adequately protect the secured assets;
- the value of assets in question is depreciating;
- the value of assets in question is lower than the amount of the secured claim of the secured creditor, while the assets are not material for reorganisation.

(c) Impact of the opening of insolvency proceedings on secured creditors

Upon the opening of insolvency proceedings, the court shall set a deadline for creditors to register their claims (both secured and unsecured). The claims have to be reported no later than 30 days after the opening of insolvency proceedings. A hearing for examination of registered claims is scheduled within 60 days from the expiry of the deadline for registration of claims. A final list of all registered claims is compiled at the hearing for examination of registered claims.

(d) Avoidance of security interest created within the suspect period

Any security interest acquired from the insolvency debtor (save from the financial collaterals) within 60 days before the date of opening of the insolvency proceedings is automatically avoided. In addition, the insolvency administrator or the creditors may contest a transaction representing a regular settlement (settlement of a creditor's claim or providing security to a creditor where the creditor has a pre existing entitlement to such claim or

security), which took place within 6 months before the filing of the petition for opening of the insolvency proceedings, if the insolvency debtor was insolvent at the time of the transaction and the creditor was or ought to have been aware of the debtor's insolvency. Any person, associated with the insolvency debtor at the time of the relevant transaction, is presumed to have known about the insolvency or the petition. The aforementioned transactions can be contested also when undertaken after the filing of the petition for opening of the insolvency proceedings, if the creditor was or ought to have been aware of the debtor's insolvency or was aware that the petition was filed.

The suspect period for an irregular settlement (settlement of a creditor's claim or providing security to a creditor where there was no preexisting entitlement of the receiving party to such claim or security) is 12 months before the petition is filed. No knowledge or constructive knowledge of insolvency on the part of the creditor is required in this case. Further, the insolvency administrator may contest a legal transaction of the insolvency debtor directly damaging the creditors if:

- the transaction was entered into within six months before the petition was filed, provided that the insolvency debtor was insolvent at the time and the creditor was aware of that;
- the transaction was entered into after the filing of the petition and the creditor was or ought to have been aware of the debtor's insolvency or was aware that the petition was filed;
- the contested action is a debtor's action or a failure to act that occurred within the period of six months prior to the filing of the petition for opening of the insolvency proceedings and such action or a failure to act has resulted in a loss or a preclusion of a debtor's right.

Legal transactions entered into with the intent of damaging one or more creditors may be challenged if undertaken within a period of five years prior to the petition being filed or thereafter, provided that the debtor's counterparty knew of the debtor's intent. Finally, a legal transaction undertaken at no value or at undervalue, may be contested if it was concluded or taken within the period of five years prior to filing of the petition.

(e) Enforcement of secured claims

Secured creditors form a separate class in any reorganisation plan. An adopted reorganization plan is considered a new agreement between the debtor and the respective creditors.

In case no reorganization plan has been submitted or approved or honored by the debtor or if the creditors so decide, the court will render the decision on bankruptcy. After the decision has been issued, the insolvency administrator shall commence and conduct the sale of the assets forming the bankruptcy estate. The sale of assets subject to pledge is also performed by an insolvency administrator. The assets are sold at public auction or by a public collection of offers or through a direct agreement. Sale by direct agreement may be conducted only with the prior approval of the Creditors' Committee. Before the sale of an asset subject to a pledge, the insolvency administrator has to notify the secured creditor on the conditions of the sale.

The secured creditor may, within ten days from the receipt of the notification, propose a more favourable method of sale. A secured creditor may request that security measures be imposed to protect the secured creditor from the loss of value of the pledged assets, such as payment of periodical compensation from the loss of value of pledged assets, granting of additional security, participation in the income generated from the asset, etc. An insolvency debtor may be offered for sale as a legal entity, with prior consent of the Creditors' Committee and notification to secured creditors.

2.4 Competition of bankruptcy proceedings with other enforcement proceedings

Once insolvency has been opened, no enforcement procedure may be initiated against the debtor's assets and any pending enforcement procedure is terminated.

The insolvency judge may, upon written request by a secured creditor, suspend this prohibition if with respect to the secured property:

- the insolvency debtor or insolvency administrator has failed to adequately protect the pledged assets;
- the value of the pledged assets in question is depreciating;
- the value of the pledged assets in question is lower than the amount of the secured claim of the creditor in question, while such assets are not material for reorganisation.

An exception from the above rule is made in connection to financial collaterals, which can be realized outside of the insolvency proceedings, in accordance with the terms of the agreement providing for the collateral. Initiation or opening of insolvency proceedings does not affect close-out netting under the agreement on financial collaterals.

2.5 Recourse of a secured creditor to self-help remedies

Self-help remedies in relation to security instruments are not allowed under Montenegrin law.

3. ROLE OF SECURITY

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

The concept of trust and security trustee is not recognized under the Montenegrin law. The parallel debt concept has never been tested in Montenegro. The risk associated with such arrangement is in that the agreement between the security agent and the borrower could be perceived as simulated agreement which is null and void under Montenegrin law. Additionally, such arrangement could be potentially challenged under the provisions of the Law on Obligations⁶, which require that a contract must have a proper causa (i.e. immediate reason for entering into an agreement) in order to be valid. One could argue that the causa in the agreement between the borrower and the security agent consists in achieving a purpose that is otherwise prohibited (this purpose being to grant security to a person who is not a creditor, which is not possible under Montenegrin law as it defines security as being accessory to the secured claim). However, if there is a genuine joint and several creditorship of the lenders, it is possible to have all lenders registered as *pari passu* pledgees or to have only one of those lenders registered as a pledgee for the entire debt. In case only one joint and several creditor is registered as a pledgee, such lender may initiate enforcement for the entire debt.

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

Not applicable.

3.3 Precedents

There is no case law in respect of the concept of parallel debt or recognition of security trustees in Montenegro.

⁶ "Zakon o obligacionim odnosima", Official Gazette of Montenegro, Nos. 47/08 and 4/11



SEE Legal

—
Your professional landmark

—
Athens • Belgrade • Bucharest • Istanbul • Ljubljana • Podgorica • Pristina • Sarajevo • Skopje • Sofia • Tirana • Zagreb
www.seelegal.org