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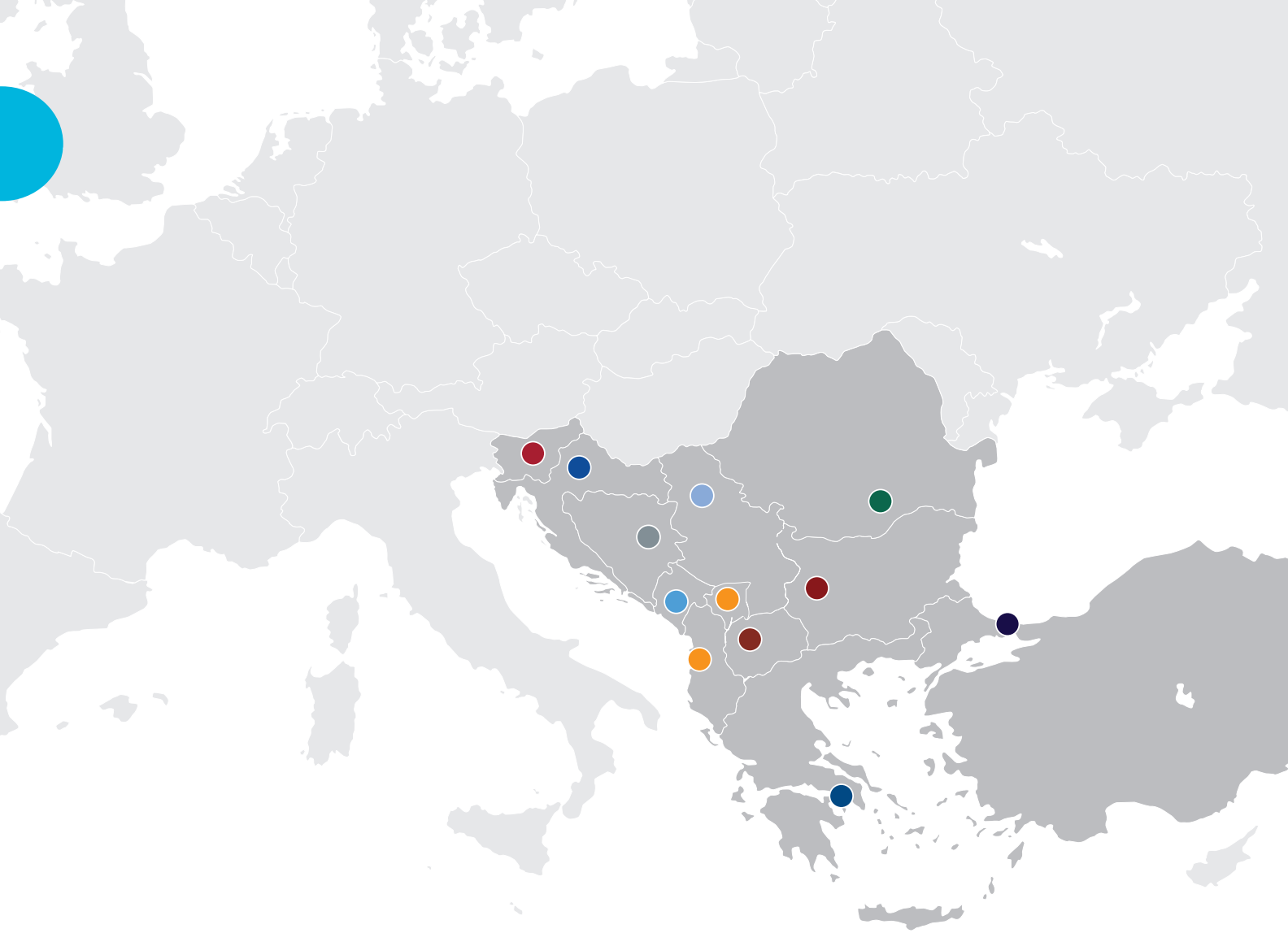
The **Southeast Europe**

Taking & Enforcing Security Handbook 2015

SERBIA

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



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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.



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1. SECURITY

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

The Serbian Foreign Exchange Act¹ imposes limitations on the possibility of granting security by Serbian residents other than banks for the obligations of non-resident entities. Serbian residents other than banks are not allowed to provide security for the obligations of a non-resident to another non-resident, subject to narrow exceptions of no general relevance.

In the domestic context, Serbian companies may grant security for the obligations of third parties. There is no explicit corporate benefit rule in the context of granting security for the obligations of third parties. However, under the general rules of the Companies Act² ("Companies Act"), the management is obliged to act in the company's best interest and is liable for damages to the company and the shareholders in case of a breach of this duty.

1.2 Financial assistance

Under the Companies Act, limited liability companies and joint-stock companies are prohibited from granting loans or providing security for acquisition of their shares. An agreement concluded contrary to this rule is null and void. There is no exception to financial assistance prohibition. In addition, limited liability companies and joint-stock companies are not allowed to take pledge over their issued shares.

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

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

The pledge on immovables, i.e. mortgage (hipoteka) is regulated by the Mortgage Act³ ("Mortgage Act"). The mortgage may be established over: (i) a building; (ii) a land parcel; (iii) a separate part of a building, such as an apartment, business premise, garage, etc.;

and (iv) building under construction (including separate part(s) of building under construction). A mortgage can also be established on a co-ownership stake in immovable property.

(b) Pledge on movables

The pledge (zaloga) on movables and rights (including IP rights and quotas in limited liability companies, but excluding securities) is governed by the Law on Pledge on Movable Assets Registered in the Movables Pledge Register⁴ ("Movables Pledge Law"). There are two types of pledges on movables in Serbia: 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 Serbian legal system in 2003, the possessory pledge lost its commercial relevance.

A registered pledge can be created on:

- (i) movables;
- (ii) receivables;
- (iii) shares in partnerships or limited liability companies;
- (iv) intellectual property rights;
- (v) book entry securities (shares or bonds).

The Movables Pledge Law explicitly allows that a pledge may be taken on a "group of movable assets, such as goods in a particular warehouse or store, inventory in the function of an ongoing business, etc". The current position of the Movables Pledge Register is that a pledge on monies in a bank account found from time to time cannot be registered. Only on a specific account balance in existence at the time the pledge application is filed can be registered. A pledge can also be established on a co-ownership stake in an asset.

1.4 Creation of security

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

Mortgage, i.e. pledge on immovables, is created based on either a

¹ Zakon o deviznom poslovanju, Official Gazette of the Republic of Serbia, Nos. 62/2006, 31/2011 and 119/2012

² Zakon o privrednim društvima, Official Gazette of the Republic of Serbia, Nos. 36/2011, 99/2011 and 83/2014 – other law 3

³ Zakon o hipoteci, Official Gazette of the Republic of Serbia, Nos. 115/2005, 60/2015 and 63/2015

⁴ Zakon o založnom pravu na pokretnim stvarima upisanim u registar, Official Gazette of the Republic of Serbia, Nos. 57/2003, 61/2005, 64/2006 and 99/2011

mortgage agreement or an unilateral statement of the mortgagor. Mortgage agreement (or, as the case may be, a unilateral mortgage statement) has to be prepared by a Serbian notary public in form of notarial deed (javnoteleznicki zapis). Alternatively, the parties may draft mortgage agreement/unilateral mortgage statement and have it solemnized by a Serbian notary public. However, unlike a notarial deed, a solemnized mortgage agreement/unilateral mortgage statement does not represent a directly enforceable document (see section 2.1 below).

(b) Pledge on movables

A pledge over movables or intangibles (rights) is created based on a pledge agreement or a court decision as *iustus titulus*. The pledgor must own the movable asset or the right over which it wishes to create a pledge. The pledgor may also undertake to pledge "future" rights or movables, provided that these rights or assets are sufficiently specified. Whether a future asset or right is sufficiently specified in the pledge agreement is often open to interpretations. There is therefore an inherent dose of uncertainty involved with pledge on future assets. Pledge on "future" asset is deemed created once the pledgor acquires the right or, as the case may be, the asset.

According to the Movables Pledge Law, the pledge agreement must be made in writing and contain specific elements such as the date of signing, the names and other identifying information of the contracting parties, as well as details about the object of pledge and the claim thereby secured. As a general rule, additional formalities, such as notarisation, are not required. However, an agreement on pledge on quota in a limited liability company or a partnership has to be legalized by a notary public. The same requirement applies to the agreement on pledge on shares on a non-listed joint-stock company. An apostille may be required if the notarisation of the pledge agreement takes place in a country with which Serbia does not have a bilateral treaty dispensing with this requirement.

(c) Pledge on book entry securities

This type of pledge is created based on a pledge agreement or a court decision as *iustus titulus*. Notarisation of the pledge agreement is not required.

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. Priority is determined based on the day,

hour and minute the application for inscription of mortgage was filed. There are no further maintenance requirements. An application for inscription of mortgage based on mortgage agreement can be filed by either the mortgagor or the mortgagee, while the application based on unilateral mortgage statement of the mortgagor may be filed only by the mortgagee. The following is required to be submitted to the Real Estate Registry along with the application:

- (i) a mortgage agreement or, as the case may be, a unilateral statement of the mortgagor in the form of notarial deed or solemnized instrument (see Section 1.4 above);
- (ii) a copy of the loan agreement or other underlying document containing the secured obligation;
- (iii) a copy of the construction permit in case mortgage is being established on a building under construction (or a part thereof).

Documents in a foreign language must be accompanied with a certified Serbian translation. A mortgage is deemed perfected when registered in the Real Estate Registry. Inscription can be made after the resolution allowing the inscription becomes final, which is after the expiry of 15 days from delivery of such resolution to the mortgagor and the mortgagee provided that no appeal has been submitted within this time period. The mortgagor and the mortgagee may waive their right to appeal the resolution and thus shorten the referenced 15-day period. Secured creditors may appoint one of them or a third person to act as security agent with the power to undertake, on behalf of the secured creditors, any legal act aimed at protecting and enforcing the mortgage.

(b) Pledge on movables

Pledge on movables, receivables, quotas in partnerships or limited liability companies and intellectual property rights is registered by inscription in the Movables Pledge Register, maintained by the Serbian Agency for Business Registers. An application for the registration of the pledge can be filed by either the pledgor or the pledgee. The following is required to be submitted to the Movables Pledge Register along with the application:

- (i) a pledge agreement (notarial legalization is required for a pledge on quotas in limited liability companies);
- (ii) an original or a certified copy of the loan agreement or other underlying document containing the secured obligation.

Documents in a foreign language must be accompanied with a certified Serbian translation. 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.

(c) Pledge on book entry securities

A pledge (zaloga) on book entry securities registered in the Central Registry of Shares, Depository and Clearing House ("CSDCH"), such as shares of listed companies, is regulated by the Rules of the CSDCH. A pledge on book entry securities is registered with the CSDCH via member broker or member-custody bank. Book entry securities are effectively pledged by transfer from the pledgor's proprietary account to the pledge subaccount of the proprietary account. Shares held in a custody account cannot be pledged. Pledged shares cannot be traded. The following has to be delivered to the broker or custody bank in order to have the pledge on book entry securities registered:

- (i) a pledge agreement;
- (ii) a loan agreement or other underlying agreement containing the secured obligation;
- (iii) if the pledgee is a non-resident lender and the pledgor - a resident entity, evidence that the loan agreement has been registered with the National Bank of Serbia;
- (iv) an excerpt from the Commercial Register for the pledgee.

Documents in a foreign language have to be accompanied with a certified Serbian translation. The broker, i.e. custody bank, may require additional documentation, such as an excerpt from the Commercial Register for the pledgor or the pledgee, etc.

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 notarisation fees, as well as the cost of translation of foreign language documents (EUR 10-13 per page). The notarisation fee for preparation of notarial deed depends on the value of the transaction, but is capped at approximately EUR 5,000 plus VAT. The fee for preparation of a unilateral mortgage statement is 60 per cent lower than the fee for preparation of mortgage agreement. The fee for registration of pledge on immovables depends on the value of the secured claim and may amount from approximately EUR 170 to a maximum of approximately EUR 1,250. The fee for registration of pledge on movables is capped at approximately EUR 50 per pledged asset. The fee for inscription of pledge on book entry securities depends

on the tariff of the chosen broker or custody bank and can be charged as a lump sum or as a percentage of the market value of pledged book entry securities.

1.7 Recognition of security governed by foreign law

Serbian law 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 Serbian law, governed by *lex rei sitae*.

2. ENFORCEMENT OF SECURITY

2.1 Judicial enforcement

(a) General

Judicial enforcement of security by filing a motion for enforcement and pursuing the procedure under the general law regulating enforcement proceedings is available with respect to a pledge on immovables and a pledge registered in the Movables Pledge Register. Judicial enforcement is not available with respect to a pledge on book entry securities.

(b) Enforcement grounds

With respect to a mortgage, i.e. pledge on immovables, a mortgage agreement or, as the case may be, a unilateral statement of a mortgagor, represents a directly enforceable document provided it is produced in the form of a notarial deed and further provided it contains specific statements of the mortgagee entitling the creditor to access the mortgaged immovable, enforce the mortgage out of court and confirming that the mortgagee is aware of the consequences of enforcement.

With respect to a pledge registered in the Movables Pledge Register, judicial enforcement is rarely pursued. It can be initiated based on an excerpt from that register. If the due date cannot be ascertained from the excerpt, the pledgee has to provide the court with written evidence that it has requested from the debtor to pay the claim (it is typically sufficient to send a delivery confirmation via registered mail).

(c) Procedure

Judicial enforcement of pledge is initiated by the submission of a motion for enforcement to the competent court (the Commercial Court if the pledgor is a commercial entity), along with the

mortgage agreement (statement) or, as the case may be, excerpt from the Movable Pledge Register. The court is supposed to decide on the motion for enforcement within five days from the receipt thereof, and to deliver the decision to the petitioner within further five days. The deadline for the debtor's objection is five days from the receipt of the decision, while the deadline for the decision on the objection is also five days. The objection does not have a suspensive effect. An objection can be raised on the following grounds:

- (i) the debt has been settled;
- (ii) the deadline for payment of debt 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 court.

The decision of the court on the objection may be appealed. However, the appeal does not suspend enforcement. Upon obtaining a resolution granting its motion for enforcement, the pledgor will proceed with enforcement via court appointed enforcement officer or private enforcement officer. The enforcement officer will evaluate the pledged property and organize its sale at a public auction or directly to a buyer. In case of immovables, the evaluation has to be on the market price on the date of evaluation, adequately reduced in case there are surviving third party rights on the property.

There are no rules on the price if the enforcement officer opts for direct sale. The statute only contains a rule that the auction shall be pursued if the asset to be sold is of greater value or if it is expected that the auction might generate higher proceeds than the direct sale. If the enforcement officer decides to proceed with the sale at auction, the pledgor and the pledgee may at any time during the sale agree to sell the pledged asset in a direct, bilateral, sale. The initial price at the first auction is no less than 60 per cent of the assessed value of the asset. If the first auction fails, the initial price at the second auction is 30 per cent of the assessed value of the asset.

If the second auction fails, the pledgee is entitled to either keep the pledged asset at 30 per cent of the assessed value or request that it be sold in direct sale for a price freely determined in agreement with the buyer. If the asset could not have been sold in direct sale, the pledgee is entitled to retain it at 30 per cent of its assessed value.

The above rules on judicial enforcement (except for the rules specific to immovables) also apply to the sale of quota in a limited liability company or IP rights. With respect to a pledge on quota in a limited liability company, it should be mentioned that the remaining shareholders may have the right of first refusal (such right exists unless excluded in the foundation act). If the foundation act of a limited liability company provides that the company has to approve any transfer of quotas, the Companies Act provides that the company may, instead of granting approval, designate a buyer of its own choice. It has not yet been tested whether this rule applies to the sale of a pledged quota and if it applies, how it works, given that the main principle of pledge law is to maximize the proceeds of the sale.

(d) Ranking of claims

Sale proceeds in a judicial enforcement procedure will be applied to the costs of enforcement and then to the claim of the secured creditor. The secured creditor has priority over junior secured creditors, as well as unsecured creditors.

(e) Costs

The costs of enforcement must be paid in advance by the pledgee and are compensated from the proceeds of the sale in priority to the secured claim. The administrative fee for obtaining a court resolution on enforcement depends on the value of the claim, and it ranges from the minimum fee of approximately EUR 35 to the maximum cap of approximately EUR 3,300. The costs of enforcement depend on whether enforcement is pursued via court appointed enforcement officer or a private enforcement officer.

The costs of a private enforcement officer depend on the value of the claim and include:

- (i) a fee for preparation of documents ranging from approximately EUR 25 to EUR 400 plus 0.1 per cent of the value of the claim that exceeds the amount of approximately EUR 100,000;
- (ii) a fee for each particular field action, in the amount ranging from approximately EUR 10 to EUR 200 plus 0.05 per cent of the value of the claim that exceeds the amount of approximately EUR 100,000;
- (iii) a fee for each particular written action (i.e. petition, letter, etc.), in the amount ranging from approximately EUR 5 to approximately EUR 80 plus 0.02 per cent of the value of the claim that exceeds the amount of approximately EUR 100,000;

- (iv) a success fee, in the amount ranging from approximately EUR 25 to approximately EUR 3,200 plus 0.1 per cent of the value of the claim that exceeds the amount of EUR 100,000.

Apart from the abovementioned direct costs of enforcement, there may be additional costs, such as costs of publication of sale notices, etc.

2.2 Private foreclosure

(a) General

Private foreclosure is available with respect to:

- (i) a pledge inscribed in the Movables Pledge Register (movables, IP rights, receivables, quotas in limited liability companies or partnerships);
- (ii) a mortgage, i.e. pledge on immovable;
- (iii) a pledge on book entry securities.

(b) Enforcement grounds

Enforcement can be initiated without any court order, solely based upon the grounds defined as enforcement events in the pledge agreement.

(c) Procedure

Mortgage, i.e. pledge on immovables

Private foreclosure of mortgage is available if the mortgage agreement or, as the case may be, a unilateral statement of a mortgagor is in the form and with the content described in Section 2.1(b) above. Private foreclosure is initiated by the mortgagee filing a warning notice to the debtor (and the mortgagor, if different from the debtor).

The notice must contain reference to the relevant mortgage agreement and the mortgaged asset; a description of the event of default; the activities that the debtor has to undertake in order to avoid the sale of the mortgaged asset, the deadlines for their performance and a warning that the mortgaged property will be sold if the debtor does not perform the said activities within the prescribed deadline; the data on the mortgagee's representative, if any. If the claim is not settled within 30 days from the receipt of the warning notice, the mortgagee is supposed to send a notice of sale to the debtor (and, as the case may be, the mortgagor), with the same content as described above with respect to the warning notice plus information on the manner of sale.

Simultaneously with the notice of sale, the mortgagee files a motion for registration of foreclosure with the Real Estate Registry, along with (i) a copy of the warning notice; (ii) a copy of the mortgage agreement or unilateral mortgage statement; (iii) a statement that the debtor has not settled its debt; and (iv) evidence that the warning notice and the notice of sale have been sent to debtor, mortgagor and other mortgagees). The Real Estate Registry shall render a decision on registration of foreclosure within seven days from the date of the filing of the motion. The debtor (and, as the case may be, the mortgagor) has the right to appeal the decision within 15 days from receipt thereof. The appeal can be filed on the following limited grounds: the claim does not exist; the mortgage does not exist; the claim has not become due; or the claim has been settled. A decision on the appeal is supposed to be rendered within 15 days from the date the appeal is filed, and is considered final and binding.

After 30 days from the final and binding decision on registration of foreclosure, the pledgee is entitled to sell the mortgaged property, either via public auction or in direct sale. Prior to the sale, the pledgee must obtain an evaluation of the property. In case the property is not sold within the period of 18 months from the date when the decision on registration of out-of-court foreclosure became final and binding, the decision on registration of out-of-court foreclosure shall be set aside. The mortgagee may thereafter initiate judicial enforcement procedure. A public announcement of the auction must be published in a daily newspaper at least 30 days prior to the auction. The mortgagee is obliged to send a notice of the auction to the debtor (and, as the case may be, the mortgagor) and any third party that may have any right to the mortgaged property.

The initial auction price is set at 75 per cent of the appraised value (60 per cent on the second auction). As an alternative to auction, following the period of 30 days from the date when the decision on registration of foreclosure becomes final and binding, and prior to initiating the public auction, the mortgagee is entitled to sell the property in direct sale at a price which cannot be lower than 90% of the property's appraised value. If the first auction is unsuccessful, the mortgagee is entitled to dispose with the property in direct sale, at no less than 60% of the valuation. In case of direct sale, 15 days prior to concluding a sale and purchase agreement, the mortgagee is obliged to send a notice to the debtor and, as the case may be, mortgagor and any other third party that may have any right to the mortgaged property, setting a deadline for payment of the debt.

The proceeds collected in the foreclosure process have to be deposited to an escrow account at a bank or a public notary. Such account is ringfenced from the creditors of the mortgage creditor. The proceeds are distributed as follows:

- (i) cost of enforcement, including costs and fees of third parties;
- (ii) secured claim(s) in order of their priority (i.e. the day, hour and minute of filing the application for inscription of mortgage);
- (iii) any surplus belongs to the mortgagor.

Pledge on movables

Private foreclosure is initiated by a notice to the debtor (and the pledgor, if not the same person as the debtor). Simultaneously, with sending a notice of foreclosure, the pledgee is obliged to register the commencement of foreclosure with the Movables Pledge Register.

As of receipt of the foreclosure notice, the debtor (or, as the case may be, the pledgor) cannot dispose of the pledged asset. Moreover, the debtor is obliged to handover the asset to the pledgee and cooperate with the pledgee in the conduct of the private foreclosure. If the pledgor refuses to allow the pledgee to take over the possession of the pledged asset, the pledgee may file a motion with the competent court to order the pledgor to deliver the pledged asset to the pledgee. Such motion can be filed based on the excerpt from the Movables Pledge Register evidencing the pledge. If the pledged asset is of such nature that physical possession thereof cannot be taken, or if the interest of the pledgee mandates that the asset is not handed over, the pledgee may request that the court appoint an administrator to take care of the pledged asset. The court shall decide on the motion to order delivery within three days from the receipt thereof and the resolution is supposed to be enforced within another three days. The pledgor may appeal the resolution granting the pledgee's motion within three days from the receipt thereof on grounds that the secured claim has not matured, that pledge does not exist, or that the debt has been settled. Any of these grounds must be substantiated. Objection does not suspend enforcement.

Irrespective of whether the pledgee has resorted to the court for assistance in obtaining possession, the pledgee is entitled to request from the court to organize a judicial sale. Judicial sale is the only available option when the pledgor does not have the status of commercial entity or private entrepreneur. Judicial sale

can be performed as auction sale or, if the asset has market or stock exchange price, as direct sale to a buyer. As part of the judicial sale process, the court may decide that the pledgee is entitled to retain the asset or sell it in a direct deal for the price determined by an expert in case the costs of public sale would be disproportionate to the value of the pledged assets.

Alternatively to the judicial sale, if the pledgor is a commercial entity or a private entrepreneur and the pledge agreement provides for out-of-court sale, the pledgee may pursue such private sale after the expiry of a 30-day period from the date when the commencement of foreclosure was registered with the Movables Pledge Register (the 30-day grace period does not apply if a judicial sale is requested).

If the pledged asset has market or exchange price, the pledgee may retain the pledged asset or sell it at that, if so provided in the pledge agreement. If the asset has no market or exchange price, the pledgee may sell the pledged asset in any manner which a reasonable and diligent person could choose, taking due care of the interests of the debtor (and, as the case may be, the pledgor). Finally, the pledgee may sell the asset at an auction, if this is specifically provided in the pledge agreement. The pledgee is obliged to give advance notification to the debtor (and, as the case may be, the pledgor) regarding the place and the time of the sale. If the debtor (and, as the case may be, the pledgor) did not participate in the sale, the pledgee is obliged to notify them of the circumstances relevant to the sale without delay, including the reached sale price and the cost of the sale. On specific aspects of enforcement of pledge on quota in a limited liability company, see Section 2.1 (c).

The pledgor may challenge private foreclosure of pledge on movables by filing a lawsuit with the court on the following grounds: (i) the secured claim or the pledge does not exist, (ii) the secured claim is not due and payable or (iii) the debt has already been settled. Such claim does not suspend unless the pledgor submits an official public document (javna isprava) or a notarized private instrument evidencing any of the abovementioned grounds. The court is required to act with urgency.

Pledge on receivables

A pledge on receivables is enforced by the pledgee providing notification to the pledgor's debtor that payments are to be made directly to the pledgee. Such notice has to be accompanied with

an excerpt from the Movables Pledge Register and can be sent to the debtor of the pledged receivable even before the enforcement of pledge is declared. In the latter case, the pledgee who has collected the pledged receivable is obliged to keep it in trust for the pledgor and can apply the collected receivable against the secured debt only once enforcement is initiated. The provisions on commencement of foreclosure and pledgee's right to challenge private enforcement, set out above in relation to pledge on movables, apply mutatis mutandis to enforcement of pledge on receivable.

Pledge on IP rights

The rules on private enforcement of pledge on movables apply mutatis mutandis to private enforcement of pledge on IP rights.

Pledge on book entry securities

The pledge agreement must explicitly provide for the creditor's right to initiate private foreclosure. Private foreclosure is initiated by the pledgee giving a warning notice to the debtor or the pledgor, if not the same person. The creditor may proceed with the sale of the pledged shares within eight days from the date of the warning notice, by sending to the debtor (and, as the case may be, the pledgor) a notice of the date of the intended sale and the manner of sale. The sale of pledged shares of a listed company is performed at the regular stock exchange trading session or in a special OTC transaction according to the rules governing a "block sale" (those rules prescribe a minimum volume that can be traded in one block and a maximum deviation from the average trading price in a reference period). The proceeds of the sale are paid to the pledgor's account held with its broker. The broker is obliged to immediately transfer the proceeds to a special purpose account of the pledgee, but not more than the amount of secured debt (the surplus, if any, is transferred to the debtor's account).

(d) Ranking of claims

The proceeds of enforcement are distributed as follows:

- (i) cost of enforcement, including costs and fees of third parties;
- (ii) secured claim;
- (iii) secured claims of junior pledgees;
- (iv) any surplus belongs to the pledgor.

A foreign pledgee must open a non resident bank account in Serbia for the receipt of enforcement proceeds and may repatriate those proceeds upon obtaining a certificate from the tax authority confirming that there are no outstanding taxes owed by the pledgee. If the pledgor is a foreign person and the pledged asset

consists of shares of a listed company, the pledgor may be subject to a capital gains tax, in which case the additional requirement for the issuance of the mentioned tax certificate will be that the pledgor has paid the capital gains tax accrued on the sale of pledged shares, if any.

There are also statutory liens under Serbian law, such as statutory lien of carrier, commission agent, forwarding agent and warehouse operator or construction contractor. A statutory lien has priority over pledge registered on the same asset. Where there is a possessory pledge and a registered pledge over the same movable asset, the possessory pledge has priority over a later registered pledge if the possessory pledge agreement is notarized.

(e) 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 uniform manner.

2.3 Bankruptcy and debt-restructuring proceedings

(a) General

Insolvency proceedings are initiated by a petition for the opening of insolvency proceedings. When the petition is filed by a creditor, preliminary insolvency proceedings take place to determine the existence of one of the statutory grounds for the opening of insolvency proceedings. Upon the formal opening of insolvency proceedings, the procedure develops as bankruptcy, which assumes the sale of assets or the sale of insolvency debtor as legal entity free of debts, or as reorganization, which assumes redefinition 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 a decision on the opening of preliminary insolvency proceedings, the insolvency judge may impose provisional measures at the request of the petitioner or ex officio, to prevent changes in the insolvent's assets and/or destruction of business documentation if there is a risk that the debtor would transfer its property and/or destroy its business documentation before the opening of insolvency proceedings. 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 preliminary insolvency administrator. No appeal is allowed to the decision on provisional measures. They remain in force until the conclusion of preliminary insolvency proceedings but may be revoked by the

insolvency judge at any time during the preliminary insolvency proceedings. A secured creditor may request that any provisional measure be suspended if:

- the insolvency debtor or the 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 (as evidenced by evaluation made by an authorised expert, which evaluation cannot be older than one year before the opening of the insolvency proceedings) and the assets are not material to reorganization.

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

Upon the opening of insolvency proceedings, the court shall set a deadline (from 30 to 120 days from the date of publication of the decision on the opening of insolvency proceedings in the Official Gazette of the Republic of Serbia) for creditors to register their claims (both secured and unsecured). The sale of assets subject to pledge is also performed by the insolvency administrator. The assets are sold at public auction or by 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 selling an encumbered asset, the insolvency administrator has to notify the secured creditor of the conditions of the sale. The secured creditor may, within ten days from the receipt of the notification, propose a more favorable method of sale. Exceptionally, the court may allow the secured creditor to perform a privately organized sale. Secured creditors must be paid within three days from the sale of the pledged asset. A secured creditor may request that security measures be imposed to protect the secured creditor from the loss of value of pledged assets, such as payment of periodical compensation for the loss of value of the assets, granting of additional security, participation in the income generated from the asset, etc.

An insolvency debtor may be offered for sale as legal entity, with prior consent of the Creditors' Committee and a notification to the secured creditors. If the secured creditors object, the court shall decide on such proposal within five days, taking into account whether the sale of the debtor as legal entity would evidently result in a less favourable recovery for the secured creditors. If it finds an objection justified, the court may, inter alia, postpone the sale and order that a new feasibility assessment be made or order that the pledged assets be sold separately.

Secured creditors form a separate class in a reorganisation plan.

An adopted reorganization plan is considered a new agreement between the debtor and the respective creditors.

(d) Avoidance of security taken during suspect period

Any security interest acquired within 60 days before the date of the opening of insolvency proceedings is automatically avoided. Based on the decision of the insolvency judge, the appropriate pledge registry where such right has been inscribed shall delete the security inscription from their records.

In addition, the insolvency administrator or the creditors may contest a transaction (including granting of security by insolvency debtor) 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 six months before the filing of the petition for the opening of 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. The suspect period for an irregular settlement (settlement of a creditor's claim or providing security to a creditor where there was no pre-existing 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:

- (i) the transaction was entered into within six months before the petition was filed if the insolvency debtor was insolvent at the time and the creditor was aware of that;
- (ii) 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;
- (iii) 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 the loss or a preclusion of the 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 a period of five years prior to the petition being filed.

Ranking of claims

When a pledged asset is sold, the costs of sale are settled as a priority. Thereafter, the proceeds are applied against the secured claim. Any surplus belongs to the bankruptcy estate.

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 is terminated. The insolvency judge may, upon a written request of a secured creditor, suspend this moratorium if, with respect to the pledged assets:

- (i) the insolvency debtor or the insolvency administrator has failed to adequately protect the pledged asset;
- (ii) the value of the pledged asset in question is depreciating;
- (iii) the value of the pledged asset in question is lower than the amount of the secured claim of the creditor in question (as evidenced by evaluation made by an authorised expert, which evaluation cannot be older than one year prior to the opening of the insolvency proceedings) and such assets are not material to reorganization.

2.5 Recourse of a secured creditor to self-help remedies

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

3. ROLE OF SECURITY TRUSTEE

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

Serbian law explicitly recognizes the role of security agent only in the context of pledges registered in the Movables Pledge Register (movables, receivables, quotas in limited liability companies). A security agent is authorized by law to undertake actions for the purpose of protection and collection of the secured claim. It should be noted that the Movables Pledge Register is of the position that the security agent inscribed in the Movables Pledge Register as pledgee is not entitled to issue a release statement or file an application to delete or modify a pledge without special authorization to do so from the pledgee. In cases where the use of security agent is not recognized, parties

may contemplate the use of parallel debt structures. However, the parallel debt concept has never been tested in Serbia. The risk associated with such an arrangement is in that the agreement between the security agent and the borrower could be perceived as a simulated agreement which is null and void under Serbian law. Additionally, such an arrangement could be potentially challenged under the provisions of the Obligations Act⁵ 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 *causa* in an agreement between a borrower and a security agent consists of 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 Serbian law as security is defined 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* mortgagees/pledgees or to have only one of those lenders registered as a mortgagee/pledgee for the entire debt. If only one joint and several creditor is registered as a mortgagee, such lender may initiate the foreclosure proceedings for the entire amount of debt. It is also possible to register a co-mortgage in favour of separate multiple lenders with equal rank. However, such mortgage can be enforced only if all separate claims are due and payable and only if all mortgagees act in a coordinated fashion.

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

Because of the narrow language of the relevant statute, the Movables Pledge Register has taken the position that the security agent registered as pledgee in this registry is not entitled to issue a release statement or file an application for deletion or modification of pledge as part of its general authority to act as security agent, but requires a special authorization from the secured creditor to do so. In insolvency proceedings, the security agent has the status of pledge creditor, i.e. a creditor holding security on the assets of the insolvency debtor for the debt of a third party. The rights of pledge creditors do not substantially differ from the rights of secured creditors, except that pledge creditors are not eligible for the creditors' assembly or the board of creditors.

3.3 Precedents

There is no case law on the use of a security agent or a parallel debt concept.

⁵ *Zakon o obligacionim odnosima*, Official Gazette of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89, and 57/89, Official Gazette of the Federal Republic of Yugoslavia, No. 31/93 and Official Gazette of Serbia and Montenegro, No. 1/2003



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