



# Judicial and non-judicial enforcement of receivables

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A different approach

# ENFORCEMENT OF RECEIVABLES

## OVERVIEW OF ENFORCEMENT OF RECEIVABLES ACCORDING TO TITLE VII OF LAW 99 / 1999 AND CIVIL PROCEDURAL CODE

# FORMS

- Non-judicial (movable security)
- Judicial (mortgage, movable security)

# I. NON-JUDICIAL FORECLOSURE - MOVABLES

## PRE-ENFORCEMENT

- Verify registration (Electronic Archive)
  - Validity (“5 years” rule)
- Verify specific formula (peaceful possession)

# PEACEFUL ENFORCEMENT

- Creditor's choice – specific formula
- Certain and due obligation (in Romanian, “*certă și exigibilă*”)
- Options:
  - Possession (secured asset; title)
    - no prior authorization/prior notification
    - no tax payable
  - Sale
    - held by the debtor (acquirer's protection)
    - payment until perfection of the sale – accepted

# ENFORCEMENT - USE OF “FORCE”

- Who: court bailiff; police (upon request)
- What: documentation
- How: possession/delivery
  - minutes
  - costs: creditor; recourse against the borrower

# ENFORCEMENT - USE OF “FORCE”

## Notification

- Whom: (i) borrower; (ii) other secured creditors (identity of asset); (iii) owner of the asset (if the case)
- When: 5 business day
- How:
  - sale details & conditions
  - formality: not regulated – proof of delivery
- Penalty: nullity & damages
- Exception: perishable goods

## Opposition

- Who: idem
- When: 5 days
- Where: competent court
- procedure
  - business days to settle the dispute (theory)
  - enforceable (in Romanian, “*executorie*”)
  - 3 days to appeal in one degree of jurisdiction (in Romanian, “*recurs*”)

# SALE (1)

## Options

- Parties' agreement
- “Best endeavor” rule
  - “principles of adequate commercial” rules
    - direct sale
    - sale by auction (publicity requirements)
    - sale on organized public markets & adequate commercial sale

## Duration

- No legal timeframe: commercially reasonable
- Applicable rules: type of asset; market rules

## SALE (2)

### Lender's/buyer's protection

- No liens attached
- Title: ownership documents & security contract & de-registration proof
- “No possession” rule
  - parties' agreement
  - borrower's possession = lessee: opposable to the buyer

### Adjudication by the lender

- Condition: prior offer to sell to third parties
- Exception: parties' agreement
- Preservation of rights (previous secured creditors)

# FORECLOSURE ON BANK ACCOUNTS

- Formalities
- Account bank due diligence
- Course of action
  - frozen accounts – payment of debt
  - no further withdraws or payments
- Protective provisions
  - account bank notification
  - obligation to de-block accounts

# SECURITY OVER RECEIVABLES

- **Lender's rights**

- Take peaceful possession
- Take over
- Assign

- **Assignment of receivables**

- Third party notification (formality & contents)

# DISTRIBUTION OF PROCEEDS

- Foreclosure costs
- Payment of interest and principal
- Other creditors
  - not due
  - “full repayment” rule
- Surplus (3 days)

# BANS

- ◆ Parties' agreement on destination of sale proceeds (nullity)
- ◆ Parties' agreement on the priority order: forbidden (no express sanction)

# LENDER'S LIABILITY

- Breach of legal provisions (peaceful possession)
  - penalty of 30% of the secured obligation
  - restitution of the asset (if possible)
  - damages (expert)
- Breach of legal provisions (sale)
  - penalty of the higher of 30% of the secured obligation or difference between the sale price and the market price
  - damages (expert)
  - lender keeps the sales proceeds; no recourse for difference
- Breach of de-registration provisions (damages)

## II. JUDICIAL FORECLOSURE

- Overview
- Enforcement (movable & immovable)

# OVERVIEW (1)

## General formalities

- Competent court: “assets location” rule/Constitutional Court
- Third parties – obligation to provide information and to support (fines & damages)
- Writ of execution
- Statutes of limitation (3 years – general rule; exception)
- Cessation of enforcement right by lapse of time (in Romanian, “*perimare*”)

## OVERVIEW (2)

### **Notification to borrower**

- Mandatory (exceptions) – nullity
- Deadline for compliance

### **Parties' agreement on enforcement**

- Bailiff supervision
- Permitted all the time
- Forms: (1) cash/bank accounts; (2) sale; (3) other agreed form of repayment

### **Enforcement costs**

- Bailiff decision (evidence)
- Writ of execution
- Advanced by the creditor & paid by the debtor

# OVERVIEW (3)

## Challenge of foreclosure

- Who: any interested or damaged persons
- What: notification; illegal foreclosure acts; writ of execution decision; aspects related to merits (validity)
- Where: foreclosure court
- When: 15 days; separate claim
- How:
  - court hearings (urgent proceedings)
  - right to challenge in one degree of jurisdiction (in Romanian, “*recurs*”)
  - suspension of foreclosure (bail)
  - provisional suspension of foreclosure

# ENFORCEMENT - MOVABLES

## Sequester

- When: failure to pay within 1 day (exceptions)
- How:
  - identification & valuation (expert report)
  - borrower's possession (exception: custodian)
- Consequence: impossibility to sell (fine)
- Suspension: bail

# SALE (1)

## Methods

- **Public auction**
  - 10% bail for participants
  - immediate payment (max. 5 days delay)
  - adjudication by the lender: (i) no less than 75% of the starting price; (ii) no other creditors (outstanding debt); (iii) no sale (outstanding debt)
- **Direct sale**
  - parties' approval & price
- **Other means**
  - sale by the borrower (creditor's approval)

# SALE (2)

## Methods

- **Duration**

- Minimum 2 weeks & maximum 2 months
- Parties' agreement
- Perishable goods

- **Ownership title**

- Evidence issued by bailiff
- Challenge:
  - protection of good faith buyer
  - creditor = buyer (possible - nullity grounds)

# ENFORCEMENT - IMMOVABLES

## Object

- Real property
  - “Entire property” rule
  - Apartments in residential projects (joint ownership)
  - Not mortgaged property
- Usufruct
- Access and surface right

# SALE (1)

## Methods

- **Public auction**
  - separate tender (each immovable)
  - land book registration
  - valuation (expert report)
  - 15 days for the borrower to pay
  - asset administrator
  - 10% bail (exception)
  - one postponement (60 days; 75%)
  - payment (max. 30 days)
  - adjudication by lender (75%; outstanding debt)
- **Direct sale**
  - parties' approval & price
- **Other means sale by the borrower**
  - creditor's approval

## Duration

- Minimum 30 days and maximum 2 months
- Parties' agreement (?)

# SALE (2)

## Ownership title

- Adjudication deed issued by bailiff – writ of execution (lender; buyer)
- Mortgages & liens upon adjudication
- Eviction (3 year rule)
- Challenge:
  - protection of good faith buyer
  - creditor = buyer (possible - nullity grounds)

## Priority order

- Enforcement costs
- Secured creditors
- Salaries & related
- Taxes
- Bank loans, products delivery, services rendering
- Fines

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