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Notes

- 1 Also known as 'Mortgage Credit Directive'.
- 2 In the form of: deferred payment, loan or other similar financial accommodation.
- 3 TUB, articles from 120 *quinques* to 120 *novesdecies*.
- 4 In relation to immovable property, provided under articles 555 *et seq* of the Code of Civil Procedure.
- 5 Prohibition of *pactum commissorium*, provided by articles 2744 and 1963 of the Italian Civil Code.

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Advantages in seeking preliminary security measures against a debtor in Bulgaria

Advantages in seeking preliminary security measures against a debtor in Bulgaria

When it comes to cross-border debt collection, a range of impediments of a juridical, organisational or financial nature may occur. The Bulgarian preliminary security procedure, however, is rather creditor-friendly.

In contrast to many foreign jurisdictions, a debtor's assets in Bulgaria can be blocked without any prior notice to the debtor. Such an approach undoubtedly puts the creditor in quite an advantageous position. Moreover, this blocking result can be reached by means of a prompt and relatively cheap procedure.

The importance of adequate legal research

First to be noted is that, when deciding whether a creditor shall invest time and money in suing a debtor, preliminary research into the debtor's financial situation by an experienced legal expert is very important. Bulgarian public sources can provide a vast trove of information regarding a legal entity or a natural person domiciled in Bulgaria. If the debtor is a company, it is useful to check whether there is a pending insolvency or liquidation procedure against that company. One could also browse the last published or submitted for publishing annual financial statement of the company containing general data on receivables, liabilities, immovable property and profit, as well as current and fixed tangible

and intangible assets. The existence of a registered pledge over the company's enterprise by another creditor can also be readily determined. A detailed description of every pledged asset may be obtained by any person by paying a required fee to the state. The amount of the fee depends on the length of the presented information.

In addition, for free, one can learn about any participation of the company in projects and programmes financed by the European Union, rights in trademarks, or participation in public procurement procedures, as well as stock exchange activities if public joint-stock companies are concerned. Information about any pending execution procedures against the company can also be provided at a low cost.

Regardless of whether the debtor is a company or a natural person, much of the debtor's rights in real estate in Bulgaria is a matter of public record and easily known. The Bulgarian Property Register contains information not only on ownership and rights of use, but also on foreclosures and injunctions on a debtor's real estate or in favour of the debtor, registered claims referring to real estate, some lease contracts and other information.

Online court systems provide information regarding pending and terminated lawsuits by and against the debtor. That information could be difficult to obtain, however, if the debtor's permanent address/seat is not in Sofia or in the venue of a court having a detailed online system. Even in that situation,

sometimes it is possible to find out whether the debtor is obliged under a court decision to pay a certain amount to a third party or can expect payment from a third party based on a court decision.

Possibilities for successful debt collection

When all of the above details on a debtor's financial status are analysed, one will have a clearer vision of the possibilities for successful debt collection.

The procedure for granting (admitting) and imposition (execution on) preliminary (pre-judgment) security measures provides further assistance to a creditor. As the name of the procedure indicates, it is conducted before any claim procedure against the debtor is initiated. In this way, the surprise element is almost always guaranteed: the debtor cannot predict if and when his assets could be blocked. This would be particularly useful if the debtor makes daily transactions through bank accounts which are to be blocked by the creditor.

In order to commence the preliminary asset blocking procedure, one files a request with the court. The request must contain precise legal argument on the merits of the claimed right and must be accompanied by all relevant written documents that support the existence and amount of the debt. The fact that the claimant is a foreign person/entity does not prevent it from requesting pre-judgment measures. The request can seek to affect non-monetary assets as well, for example, rights over real estate, movables and company shares, etc. Real estate can be secured by imposition of a foreclosure. Company shares can be blocked by registering an attachment over them in the Commercial Register. Receivables from third parties can also be attached (blocked). All of these assets can serve as security for the satisfaction of both monetary and non-monetary claims.

The state fee for the court's consideration of a preliminary security request is very small (€20), and the procedure is quite prompt. The court will usually issue its ruling within a day or two. The request will be granted if the court finds the claim is supported by convincing evidence, and refusal to grant the request would result in impossible or difficult realisation of the creditor's rights. If the request is not sustained, that ruling can be appealed. Another option is to file a new request once the time for appealing the first one has expired. The new request will

be considered by a different court panel that might decide that it is well grounded.

Obtaining the security is very likely to be subject to a requirement that the creditor deposit a guarantee. The amount is usually between ten and 15 per cent of the claim for which the asset sought to be attached/blocked will stand as security, and that amount is transferred to the court's bank account designated for deposits and guarantees. The guarantee serves as security for the debtor in case the creditor does not file the claim on the merits or in case the claim is dismissed. The guarantee will be released unless the debtor files a claim against the creditor, stating that the imposed security measures were unlawful and caused damages to the debtor. The guarantee will be released after completion of the security or claim procedure.

When the court grants the requested security measures, a security order against the debtor is issued reflecting the security measures. The most common measure is blocking (imposition of attachments on) all the debtor's bank accounts at banks located in Bulgaria, including branches of foreign banks. The blocked amount is equal to the claimed receivable.

The security order is enforced by a private bailiff (while a state bailiff could be used, as a practical matter, creditors prefer to use a private bailiff for reasons of efficiency). The bailiff collects fees for the execution actions. If the blocking of all bank accounts will be performed, the total amount of the fees will not exceed €300. Bulgarian law also has the advantage that the claimant is entitled to recover from the debtor most of the expenses incurred in the pre-judgment execution proceeding. If the underlying claim against the debtor is granted, the court will order the debtor to pay the state fees and attorney fees paid by the creditor to obtain the security measures. Nonetheless, security for these expenses is rarely given by the court as a part of the pre-judgment security granted.

Once assets are blocked, the debtor will be informed by the bailiff of the security granted to the creditor. That is the time when the debtor may appeal the court's ruling granting the security, as the debtor is considered to have been unaware of its existence until that time. Instead of appealing, the debtor may pay the debt or contact the creditor to negotiate.

When granting the security, the court determines a term within which the creditor

must file a claim against the debtor. The term cannot exceed one month from when the security was granted. If the claim is not filed within the specified term, the security measures will be repealed by the court. This is to ensure that the debtor's assets are not blocked for an unreasonably long period. It is expected that this one-month period is enough for settling the issue with the debtor or for preparation of the claim against the debtor. A security procedure can also be initiated within a pending claim procedure.

Once the security measures are imposed and a claim procedure is initiated against the debtor, the measures usually remain in force until the procedure is over. If the

court decision is in favour of the creditor, the creditor may commence an execution procedure, taking advantage of the already imposed measures in addition to any other available assets.

The pre-judgment security procedure against debtors in Bulgaria can be used by a foreign creditor as an efficient means for debt collection. The procedure could either reveal that the debtor does not have any assets and further actions against the debtor would be fruitless, or advance payment of the debt. Both outcomes make the procedure very attractive for foreign and domestic creditors seeking prompt and beneficial measures at low cost.

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D&O claims and bond performance in Spain

A recent order of February 2016, rendered by the Chamber of the Audiencia Nacional (a Spanish court with nationwide jurisdiction for certain criminal offences), acting as appeal court, confirmed the investigation court's opinion that while directors and officers liability (D&O) insurance policies may provide bonds and/or guarantee coverage in favour of insured persons during the investigation stage, such guarantees are not acceptable in the event that the prejudiced party is the corporate policyholder.

There were a number of relevant factual elements leading to this decision:

- Company A paid significant bonuses to the resigning CEO and chairman, despite its difficult financial situation.
- Subsequently, the two directors were accused of disloyal administration by some shareholders. Under the Spanish Criminal Code, this offence may only be committed wilfully.
- Setting aside the potential criminal consequences, the complaint requests the reimbursement to company A of the allegedly wrongly paid bonuses.
- Company A is the policyholder of a D&O policy covering all the members of the board, among other insureds.

- The Spanish Criminal Procedure Act provides that in those cases where there would be civil liability arising from a criminal offence, defendants are legally requested to provide a guarantee to secure future potential compensation for prejudiced parties in the event of a final conviction.

In the Spanish market, D&O policies generally include the obligation of the insurer to provide bonds as requested by a court to cover the potential civil liability derived from the claim, to be immediately payable to the victim of the criminal offence as a consequence of the final conviction. This cover generally also applies in the event that the criminal complaint is based on wilful criminal offences, that is, the insurer is temporarily waiving its right to rely on the fraud or wilful misconduct exclusion until there is a final judgment establishing the existence of wilful misconduct and conviction of the director(s). In such cases, since obviously the policy will not provide cover for fraud, the insured and/or the policyholder are obliged to reimburse the relevant amount to the insurer.

In the relevant case, on the understanding that the matter was covered, the insurer